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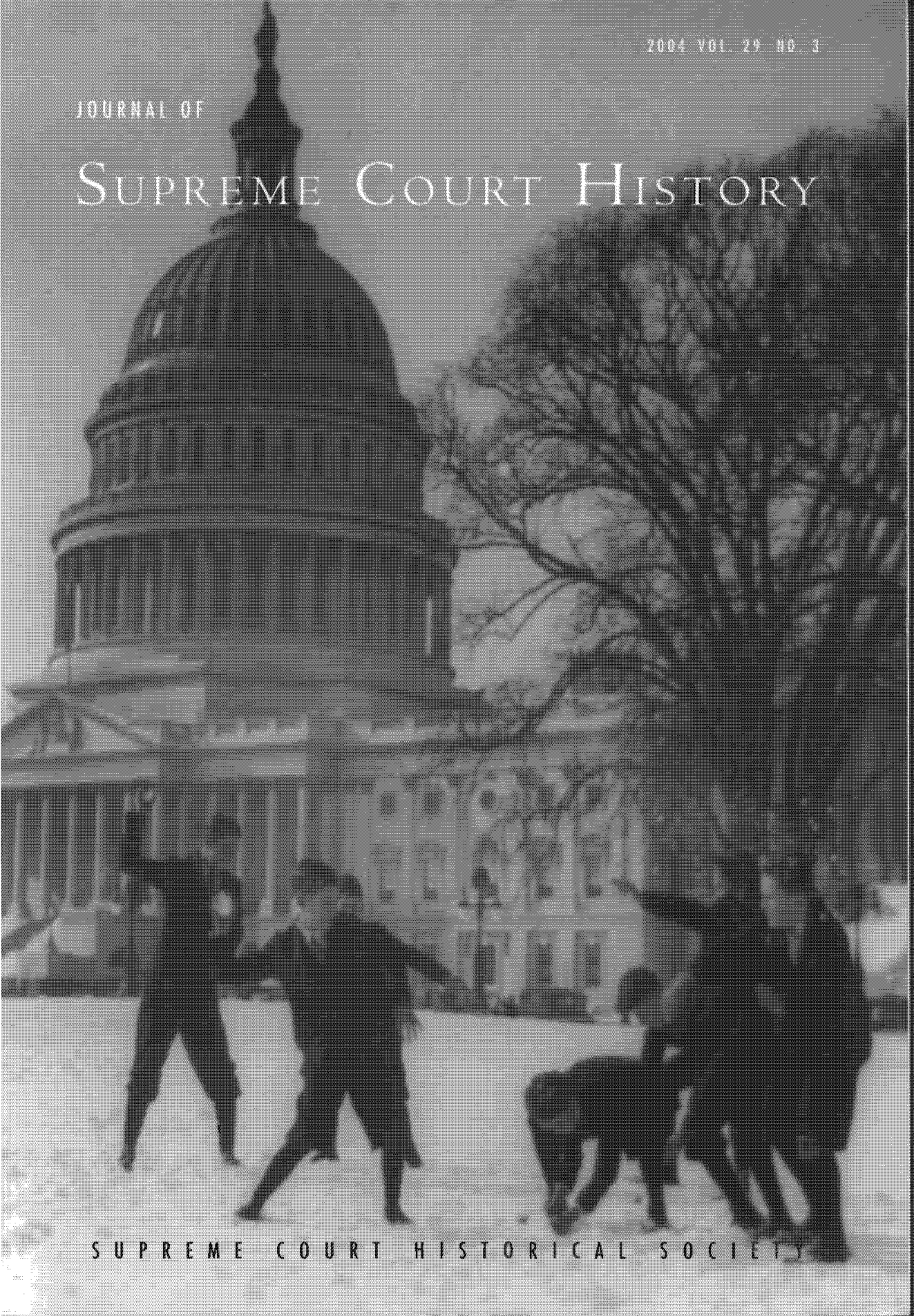

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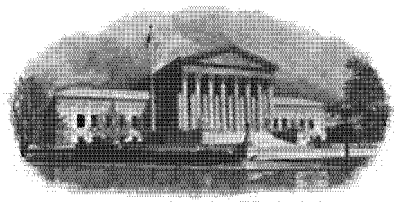

Supreme Court Historical Society

JOURNAL OF
SUPREME COURT HISTORY

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GENERAL STATEMENT

The Society, a private non-profit organization, is dedicated to the collection and preservation of the history of the Supreme Court of the United States. Incorporated in the District of Columbia in 1974, it was founded by Chief Justice Warren E. Burger, who served as its first honorary chairman.

The Society accomplishes its mission by conducting educational programs, supporting historical research, publishing books, journals, and electronic materials, and by collecting antiques and artifacts related to the Court's history. These activities and others increase the public's awareness of the Court's contributions to our nation's rich constitutional heritage.

The Society maintains an ongoing educational outreach program designed to expand Americans' understanding of the Supreme Court, the Constitution and the judiciary branch. The Society cosponsors Street Law Inc's summer institute, which trains secondary school teachers to educate their students about the Court and the Constitution. It also sponsors an annual lecture series at the Supreme Court as well as occasional public lectures around the country. The Society maintains its own educational website and cosponsors Landmarkcases.com, a website that provides curriculum support to teachers about important Supreme Court cases.

In terms of publications, the Society distributes a *Quarterly* newsletter to its members containing short historical pieces on the Court and articles describing the Society's programs and activities. It also publishes the **Journal of Supreme Court History**, a scholarly collection of articles and book reviews, which appears in March, July and November. The Society awards cash prizes to students and established scholars to promote scholarship.

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 project seeks to reconstruct an accurate record of the development of the federal judiciary in the formative decade between 1789 and 1800 because records from this period are often fragmentary, incomplete, or missing. The Supreme Court became a cosponsor in 1979; since then the project has completed seven out of the eight volumes. An oral history program in which former Solicitors General, former Attorneys General, and retired Justices are interviewed is another research project sponsored by the Society.

The Society maintains a publications program that has developed several general interest books: **The Supreme Court Justices: Illustrated Biographies 1789-1995** (1995), short illustrated biographies of the 108 Justices; **Supreme Court Decisions and Women's Rights: Milestones to Equality** (2000), a guide to gender law cases; **We the Students: Supreme Court Cases for and About High School Students** (2000), a high school textbook written by Jamin B. Raskin; and **Black White and *Brown*: The Landmark School Desegregation Case in Retrospect** (2004) a collection of essays to mark the 50th anniversary of the *Brown* case.

The Society is also conducting an active acquisitions program, which has substantially contributed 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 has approximately 5,700 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, N.E., 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

In our last issue, we ran three pieces on the first full-time newspaper reporter assigned to cover the U.S. Supreme Court, Anthony Lewis of *The New York Times*, and we were gratified by responses we got from people who had known Lewis at the time. But I erred in my introduction when I said that Lewis had been the *only* reporter to win a Pulitzer Prize for his coverage of the high court. A number of astute readers e-mailed me to inform me of something that I should have known: namely, that the current *Times* reporter covering the Court, Linda Greenhouse, also won a Pulitzer for her writing, in 1998. Ms. Greenhouse, it should be noted, refers to Lewis as her "colleague and mentor"; she had been invited to participate in the original symposium, but could not schedule it. So my apologies to Ms. Greenhouse, and a thank-you to all who caught the error.

This issue contains a number of interesting articles. David Lightner looks at how the Supreme Court, reflecting the mood of the country, agonized in its efforts to deal with the constitutional aspects of the interstate slave trade. While the Supreme Court did not address many war-related issues while the Civil War raged, once peace had been restored, a host of issues dealing with various aspects of the late conflagration arose through the federal courts. Daniel Hamilton examines how the Court dealt with one problem, and an important one: the confiscation of southern property.

Today's Justices, and even lower federal-court judges, rarely leave the bench to run for political office. The last Justice who supposedly harbored such sentiments (or at least the last we know about) was William O. Douglas, who came very close to being on the Democratic ticket in 1944 and then turned down the vice presidential slot four years later. But in the nineteenth century, some members of the Court thought about moving up Pennsylvania Avenue quite a bit, and in 1916, Charles Evans Hughes actually resigned from the Court to accept the Republican presidential nomination, losing out narrowly to Woodrow Wilson that November. Allen Sharp gives us a closer look at the presidential ambitions of some of the men who have sat on the high court.

At one time all the Justices had pages, boys who essentially served as what we would now call "gofers." Darryl Gonzalez, who is conducting a general study of pages in both Congress and the Court, ran across a former page, Frank Lyman, and did an oral interview with him. We think readers of the *Journal* will find this behind-the-bench view a little different from our usual article, and that they will be entertained by it.

Justice Harry A. Blackmun served a long time on the bench, and the recent opening of his papers will no doubt spur a great many scholars to examine his life and work. We were approached about whether we would be interested in some unpublished speeches that Justice Blackmun had given, and we thought this one gives us a good insight into both the man and the judge. We want to thank Luther T. Munford, a Blackmun clerk, for giving us this opportunity.

Finally, while Grier Stephenson has provided us with his usual perceptive reviews in the "Judicial Bookshelf," every now and then we run an essay review on books that we think are of particular importance. Such a book is a new biography of Justice Wiley Rutledge, one of the most respected members of the bar and bench in his lifetime, but now forgotten by all but scholars of the modern Court. John Ferren, himself a federal judge, has written a marvelous book on Rutledge. We asked Professor Scot Powe of the University of Texas Law School, a former Supreme Court clerk, to review it. (Truth in advertising requires that you know that the University of North Carolina Press, the publisher of the book, secured a subsidy from the Society so it could include illustrations. The Society, of course, had no say in the contents of the book. I, on the other hand, did read the manuscript for the Society, and did make some suggestions to the author regarding content and style.)

It is, as always, a varied meal, and we hope that you all will enjoy it.

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The Supreme Court and the Interstate Slave Trade: A Study in Evasion, Anarchy, and Extremism

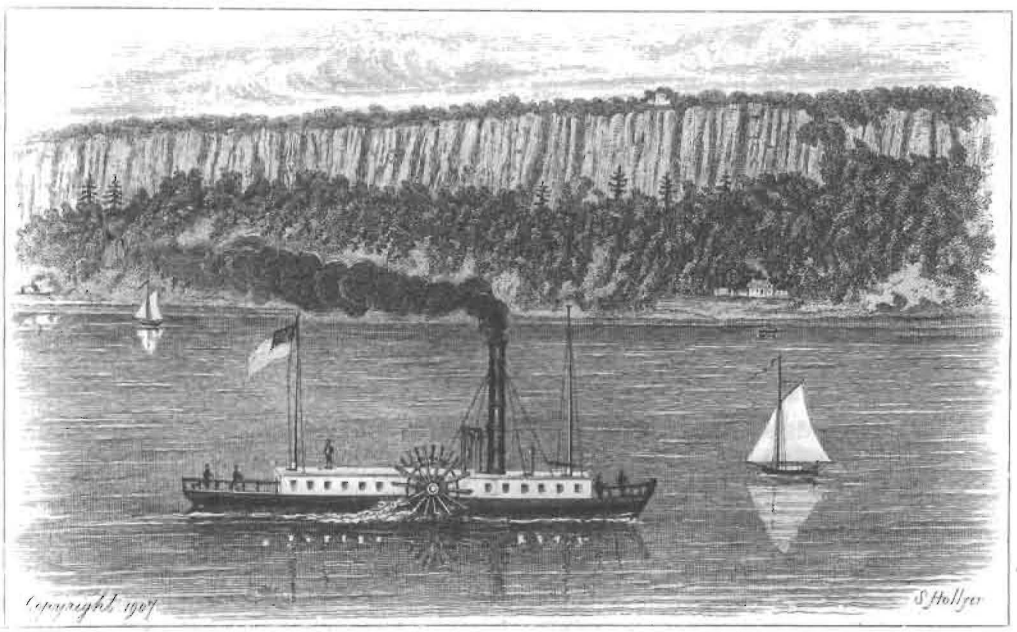
DAVID L. LIGHTNER

Opponents of slavery often argued that the federal government possessed the constitutional authority to outlaw the interstate slave trade. At its founding in 1833, the American Anti-Slavery Society declared that Congress "has a right, and is solemnly bound, to suppress the domestic slave trade between the several States." The idea had been endorsed earlier, during the Missouri controversy of 1819–1820, by both John Jay and Daniel Webster. Later on, in the 1840s and 1850s, it was supported by such prominent politicians as John Quincy Adams, Salmon P. Chase, and Charles Sumner. Defenders of slavery were, of course, horrified by the suggestion that the South's peculiar institution might be attacked in this way, and they vehemently denied that the Constitution permitted any such action. The prolonged debate over the issue focused on two key provisions of the Constitution. One was the Commerce Clause (Article I, Section 8, Clause 3), which says that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The other was the 1808 Clause (Article I, Section 9, Clause 1), which says that the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight." Abolitionists held that the Constitution sanctioned congressional interference in the domestic slave trade both generally, by virtue of the Commerce Clause, and specifically, by virtue of the 1808 Clause. They argued that since slaves were routinely bought and sold, they obviously were articles of commerce, and therefore Congress had unlimited authority over interstate slave trafficking. Furthermore, they said, the words "migration or importation" in the 1808 Clause meant that as of January 1, 1808 Congress had acquired the right not only to ban the importation of slaves, but also to prohibit their migration from one state to another. Defenders of slavery replied that Congress could not interfere in property rights and that the power to regulate commerce did not include the power to destroy it. They also said that the word "migration" in the 1808 Clause referred, not to the domestic movement of slaves, but to the entry into the United States of white immigrants from abroad.[1]

This 1837 broadside publication of John Greenleaf Whittier's poem entitled "Our Countrymen in Chains" shows the seal adopted by the Society for the Abolition of Slavery in England in the 1780s—a man begging for his freedom. The claim at the bottom reads: "England has 800,000 Slaves, and she has made them free. America has 2,250,000! And she holds them fast!!!!"

Both the opponents and the defenders of slavery watched with keen interest whenever the Supreme Court touched upon these issues. Each side hoped that the Court would uphold its point of view. Each side feared that the Court might side with the opposition. As it happened, throughout all of the decades down to the Civil War, the Supreme Court never did issue a definitive ruling on whether Congress could suppress the domestic slave trade. Because no act of Congress ever attempted to ban the slave trade, there was no occasion to test the constitutionality of such an act before the judiciary. There were, however, a series of cases in which the Court assessed the legitimacy of state actions that arguably conflicted with the federal commerce power. In its ruling on any one of those cases, the Court might have made clear what the scope of the federal power actually was. The Court never did so, at first because of a wise refusal by Chief Justice John Marshall and his colleagues to attempt a judicial resolution of this profoundly political issue, and later because of clashing views among the Justices of the Court headed by Marshall's successor, Roger B. Taney, that made it impossible for the judges to agree upon an answer to a question that could be as complex as it was incendiary. It was only in the midst of the great sectional crisis of the 1850s that the Court implicitly veered toward the proslavery side in such an extreme way as to help plunge the nation into catastrophe.[2]

The Supreme Court first contemplated the meaning of the commerce power in the famous case of *Gibbons v. Ogden*.[3] The case was first scheduled for consideration in 1821, when the surfacing of the slave trade issue in the Missouri Debates was still fresh in the public mind, but for procedural reasons was put off until 1824. It concerned a New York state law that granted to Robert Fulton and his associates the exclusive right to operate steamboats in New York waters. The Fulton monopoly was challenged by rival boat owners, who claimed that the New York statute was an unconstitutional invasion of the federal government's power to regulate interstate commerce.



The Supreme Court first debated the meaning of the commerce power in an 1824 case that concerned a New York law granting Robert Fulton a monopoly to operate steamboats in New York waters. Although the case had nothing to do with slavery, it was obvious that it could have ramifications for the slave-trade issue.

Although the case had nothing directly to do with slavery, it was obvious that it could have important implications regarding state versus federal control over the passage of slaves from state to state. Moreover, the case also could have implications regarding the constitutionality—or lack of it—of the Negro Seamen's Act, a law that had been enacted by South Carolina in the aftermath of an attempted slave insurrection, the Denmark Vesey conspiracy of 1822. The Negro Seamen's Act was aimed at preventing free blacks from the North or from abroad from contaminating the state's slaves with ideas of resistance and freedom. The law provided that any black crewman debarking from a vessel at a port within South Carolina was to be jailed until his vessel was ready to depart. The cost of incarceration was to be paid by the ship's captain. Any sailor not redeemed by his captain could be sold into slavery. In the United States Circuit Court for South Carolina, in 1823, Justice William Johnson declared the Negro Seamen's Act unconstitutional, on the grounds that the power of the federal government over interstate commerce was paramount and exclusive. South Carolina ignored Johnson's decision, however, and continued to enforce its statute. The governor of the state urged upon its legislature "A firm determination to resist, at the threshold, every invasion of our domestic tranquility and to preserve our sovereignty and independence," because, he said, "there would be more glory in forming a rampart with our bodies on the confines of our territory" than in becoming either the victims of a successful slave rebellion or "the slaves of a great consolidated government."[4]

Chief Justice Marshall regarded Johnson's action as rash. Marshall had himself confronted on circuit a Virginia law modeled on that of South Carolina, but had avoided pronouncing it unconstitutional. In a private letter to Justice Joseph Story, Marshall said, "Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny state rights in South Carolina.... The subject is one of much feeling in the South. Of this I was apprized, but did not think it would have shown itself in such strength as it has.... [T]he sentiment has been avowed that if this be the constitution, it is better to break that instrument than submit to the principle." Marshall then explained how he himself had avoided becoming similarly snagged. Alluding to the South Carolina law that Johnson had denounced, Marshall said, "We have its twin brother in Virginia, and a case has been brought before me in which I might have considered its constitutionality had I chosen to do so; but it was not absolutely necessary, and, as I am not fond of butting against a wall in sport, I escaped on the construction of the act."[5]

In *Gibbons v. Ogden*, the attorneys who defended the New York law granting the steamboat monopoly argued that commerce encompassed only the exchange of goods and did not include either navigation or the transport of passengers. They also maintained that the federal power to regulate commerce, although admittedly supreme, was not exclusive. That is, it did not preclude states from exercising a concurrent power over commerce so long as their actions did not actually conflict with any federal legislation. After all, the lawyers said, both before and after the adoption of the Constitution, many states had prohibited the importation of slaves not only from foreign countries but from other states as well. Thus the states possessed and were actually exercising a concurrent power over commerce. Interestingly, the lawyers acknowledged that the power to regulate included the power to prohibit, because "[t]he difference between regulation or restraining and interdiction, is only a difference of degree in the exercise of the same right, and not a difference of right."[6] (While most of these lawyers' arguments would support the case for state authority over the slave trade, this last one—that a power to regulate included the power to prohibit—would have been music to the ears of advocates of a federal ban on the interstate slave trade.)

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Daniel Webster, one of the attorneys for the other side, dismissed the notion of a concurrent commerce power. The authority of Congress, he said, was "complete and entire." If Congress had not regulated some aspect of interstate commerce, then its decision not to act was as valid an exercise of the federal authority as was a decision to do so. In either case, a state had no right to stray into an area of exclusive federal jurisdiction. Despite this fiercely nationalist stance, however, Webster hinted that there remained some opening for state action. Probably he left the door ever so slightly ajar because he surmised that the Court would not dare to adopt an absolutist position on so volatile an issue. Webster said that the federal power over commerce was exclusive "so far, and so far only, as the nature of the power requires." (What that Delphic statement meant was anybody's guess.) More specifically, he said that state quarantine laws were an exercise of police power, rather than of commercial regulation, and so did not trespass upon the federal jurisdiction over commerce. He hedged on the touchy question of whether a state law prohibiting the importation of slaves could be constitutional, saying that it would depend upon the law's particular provisions. Here Webster perhaps intended to signal both that South Carolina's law on Negro seamen could be defended as a police regulation and that all of the states might still be allowed to control the entry or non-entry of slaves, even though Congress had exclusive authority over what Webster termed "the higher branches of commercial regulation."[7]

The decision of the Court, delivered by the Chief Justice, was a masterpiece of bold assertion coupled with discreet sidestepping. John Marshall defined commerce broadly so as to include both navigation in general and the transport of people in particular. On the latter point, he cited the 1808 Clause of the Constitution, noting that "it has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, as far as an exception from power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily." Marshall also declared that the federal power over commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations." It is vested in Congress as absolutely as it would be in a unitary government in which there was no sharing of power with the states. Referring to Webster's contention that the states could not encroach upon the federal jurisdiction even in those areas where Congress had as yet done nothing, Marshall said, "There is great force in this argument, and the Court is not satisfied that it has been refuted." Marshall thus adopted initially a nationalist stance that was, if anything, even more uncompromising than Webster's. But Marshall then went on to declare that it was not necessary in this case for the Court to decide whether the states possessed any concurrent power over interstate commerce. The competitors of Robert Fulton had obtained a license under the federal Coasting License Act of 1793, Marshall said, and the New York law that gave Fulton his monopoly was unconstitutional because it conflicted with that license. (That the New York law really clashed with the federal coasting license was doubtful, for the license merely gave to American vessels some privileges that were denied to foreign ones, but it suited Marshall's purpose to claim that there was a conflict.) Through this maneuver, Marshall was able to have his cake and eat it too. He made a strong argument for exclusive federal power over interstate commerce but did not make it a formal ruling of the Court. That is, he made it quite clear that he agreed with Webster that the federal authority over interstate commerce was exclusive and precluded any trespassing by the states onto the federal turf. But he ruled definitively only that a state law

William Johnson was the only member of the Supreme Court who did not go along with Chief Justice Marshall in sidestepping the question of whether a concurrent power to regulate interstate commerce remained with the states in *Gibbons v. Ogden*. Johnson (pictured) concurred with the Court's unanimous decision to annul the steamboat monopoly, but he rejected Marshall's reasoning that the law that had created the monopoly was unconstitutional because it conflicted with a federal regulation.

was invalid when it conflicted with an actual federal regulation of interstate commerce. The latter was a relatively narrow ruling that was unlikely to provoke virulent opposition. Thus, with the adroitness that was his trademark, Marshall avoided bringing down upon his head the southern denunciations that surely would have followed a stronger decision that more clearly threatened the slaveholding interest.[8]

Only one member of the Court refused to shuffle along with Marshall in his sidestepping of the question of whether a concurrent power to regulate interstate commerce remained with the states. Justice Johnson concurred with the Court's unanimous decision to annul the Fulton steamboat monopoly, but he rejected Marshall's explanation that the law that had created it was invalid because it conflicted with a federal regulation. The New York statute would have been just as invalid, Johnson said, even if there were no such thing as a federal coasting license. The federal commerce power, he insisted, "must be exclusive," for "the grant of this power carries with it the whole subject, leaving nothing for the State to act upon." Thus Johnson held firmly to the nationalist position that he had adopted when he declared unconstitutional South Carolina's Negro Seamen's Act. But once again Johnson's was a lone voice crying in the wilderness, for not even so fervent a nationalist as John Marshall dared to join with him in his unabashed insistence upon an exclusive federal power.[9]

Thirteen years later, in *New York v. Miln* (1837), the Supreme Court rehashed the question of federal versus state power over interstate commerce, without clarifying it.[10] By this time, Marshall had passed from the scene and the Court was headed by Roger B. Taney. The new Chief Justice had served as Attorney General under Andrew Jackson between 1831 and 1833. In that capacity, he had defended the constitutionality of the South Carolina Negro Seamen's Act, saying, "South Carolina or any other slave holding state has a right to guard itself from the danger to be apprehended from the introduction of free people of color among their slaves—and have not by the Constitution of the United States surrendered the right to pass the laws necessary for that purpose."[11] Taney now led his mostly like-minded colleagues in edging away from the rigorous nationalism that had been so dear to his predecessor. By this time, however, the radical abolitionist movement had arisen and was inundating Congress with petitions signed by thousands of people demanding that it outlaw the interstate slave trade.[12]

Like *Gibbons v. Ogden*, *Miln* focused on a New York state law, but this time the statute in question was one that imposed regulations on ships bringing immigrants into the port of New York. The attorneys who defended the law before the Supreme Court repeated the now-familiar claim that the states possessed a concurrent power over commerce. As evidence, they cited the 1808 Clause of the Constitution, arguing that the clause's mention

In *New York v. Miln* (1837), the Court reviewed the question of whether New York had the right to impose regulations on ships bringing immigrants into its port (pictured here in 1830). Writing for the Court, Justice Philip Barbour (right) avoided saying whether the federal commerce power was exclusive and upheld the New York law.

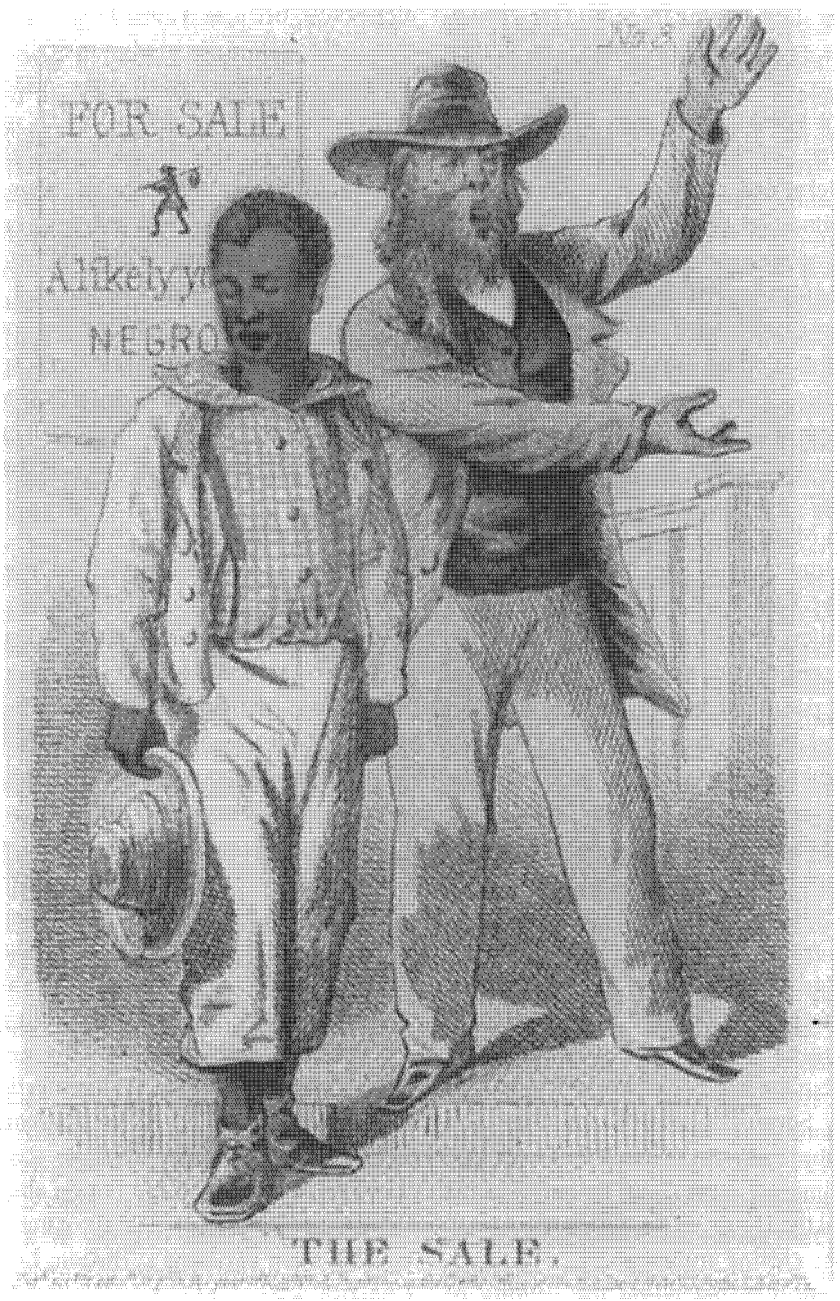
of "such Persons as any of the States now existing shall think proper to admit" was proof that states, and not just the federal government, had the power to allow or deny the entry of people. They warned that if the Court declared the federal power to be exclusive and on that basis struck down the New York immigration law, then many other state laws also would have to be considered invalid, including "a class of laws peculiar to the southern states," among them those "prohibiting masters of vessels from bringing people of color in their vessels."[13]

The attorneys for the other side repeated the equally familiar claim that the states could not transgress upon what was an area of exclusive federal jurisdiction. As to the idea that the 1808 Clause was proof of concurrent state power, the opposing lawyers said, "This is not considered a correct deduction. If a state law prohibiting migration or importation, shall be brought into question; the point will arise, as to the power of the state to legislate upon it." The 1808 Clause did not negate any part of the federal power over commerce; it only temporarily suspended one aspect of it. "It is fully granted,

and could have been executed instantly, but for the limitation; and when that expired, it came into active existence. It was, from that time, as full as if it had never been interfered with." In other words, the right of states to regulate migration or importation expired in 1808 when the federal power came into full force and thereby extinguished all state authority over such matters.[14]

In its ruling in *Miln*, the Court again avoided saying whether the federal commerce power was exclusive, and again a single Justice dissented. Speaking for the majority, Justice Philip Barbour upheld the New York law as constitutional on the grounds that it was "not a regulation of commerce, but of police," and each state possesses, in its police power, "the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States." Thus the official ruling of the Court avoided making any new statement about the nature of the commerce power. In separate opinions, however, two Justices chose to address the unresolved issue of concurrent commerce power, one to defend the concept and the other to denounce it. In his concurring opinion, Justice Smith Thompson said that the New York law would be constitutionally acceptable even if it did regulate commerce, because Congress had made no regulation with which it conflicted. Thompson declared (rather clumsily) that he considered it "a very important principle to establish, that the states retain the exercise of powers; which, although they may in some measure partake of the character of commercial regulations, until congress asserts the exercise of the power under the grant of the power to regulate commerce." In stark contrast, Justice Joseph Story, who was the lone dissenter in the case, said that the New York law should have been struck down as a violation of the exclusive authority of the federal government over commerce, a subject "cut off from the range of state sovereignty and state legislation." Echoing the earlier words of John Marshall—and, through him, Daniel Webster—Story said that "it has been remarked with great cogency and accuracy, that the regulation of a subject indicates and designates the entire result; applying to those parts which remain as they were, as well as to those parts which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that upon which it has operated." Thus, although back in 1824 he had gone along with Marshall's equivocation on the issue in *Gibbons v. Ogden* (and, in fact, there is even a possibility that he was the principal author of the ruling that Marshall delivered), Story now opted for the uncompromisingly nationalist position that only Johnson had been willing to adopt in the earlier case.[15]

Miln did nothing to clear the muddied waters left by *Gibbons v. Ogden*. Slaveholders could draw comfort from the fact that the *Miln* decision ascribed to the states a police power that, although only vaguely defined, appeared plenty broad enough to encompass measures like the South Carolina Negro Seamen's Act, but they worried that the Court still shrank from ruling definitively that the states possessed a concurrent power over commerce such as would unquestionably allow them to control the domestic slave trade. Radical abolitionists, on the other hand, could take heart from Justice Story's declaration that interstate commerce was totally within the realm of federal power and entirely beyond the reach of state sovereignty. Thus the abolitionists could continue to trumpet their claim that Congress had both the right and the duty to abolish the interstate slave trade. Consequently, both the friends and the enemies of slavery had good reason to hold their breath when, in the 1841 case of *Groves v. Slaughter*, the Court, for the first and only time in its history, took on a case that focused directly upon the question of which level of government had authority over interstate slave trafficking.



In 1832, Mississippi adopted a state constitution that contained a clause prohibiting the bringing in of slaves as merchandise—not as an antislavery measure, but as a way to prevent capital from being drained from the state. When a slave trader challenged the clause, the case went before the Supreme Court in *Groves v. Slaughter*, where it drew enormous attention.

In 1832, Mississippi adopted a state constitution that contained a clause prohibiting the bringing in of slaves as merchandise after May 1, 1833. The clause was not an antislavery measure. It did not stop new settlers from bringing slaves with them when they came to live in Mississippi, nor did it prevent residents of the state from traveling beyond its borders,

doing their slave-buying there, and then bringing their acquisitions home with them. Rather, the measure reflected concerns that too much capital was being drained away from the state, that the price of the slaves already there was being undermined, and that the slaves brought in by commercial traders often were misrepresented and so were more likely to turn out to be unhealthy, unreliable, or rebellious. Even this attempted curbing of the commercial trade was easily evaded by those slave dealers who simply shifted their transactions to places just outside Mississippi's borders. Yet many of the traders did not bother to do even that, and the commercial slave trade continued to flourish within Mississippi itself, despite what the state constitution said. The case that eventually reached the Supreme Court was brought by a trader, Robert Slaughter, who had sold some slaves on credit inside Mississippi in 1835 and 1836. The purchaser, whose personal notes for $7,000 had been accepted by Slaughter, refused to make good on the notes when they became due, on the grounds that the original sale contract was invalid because the aforementioned clause of the Mississippi constitution made the whole transaction illegal. The arguments in *Groves v. Slaughter* lasted a full week and attracted unusual attention. According to a newspaper account, the ladies of Washington occupied all of the vacant seats and crowded everyone but the judges and lawyers out of the bar. Many Senators played hooky from their own chamber and went to watch the Court proceedings instead. Even John Quincy Adams abandoned the House of Representatives to go listen to the closing arguments.[16]

One attorney defending the validity of the notes—and thus of Slaughter's right to receive payment for the slaves that he had sold—evidently believed in covering all bases, for he presented the Court with an initial position, a fallback from that one, and then a fallback from the fallback. First, he said that the relevant clause in the Mississippi constitution was not a regulation of commerce but an exercise of police power, because it aimed to do such things as "guard against the admission of the vicious, through the deceptions of negro-traders," actions which were "evidently objects of proper municipal regulation." Next, he said that even if the clause was a regulation of commerce, "it is one excepted from this power of congress, and remains in the state." (He did not explain why.) Finally, the attorney said that even if authority over the interstate slave trade was vested in Congress, it nevertheless "may also be exercised by the state"—in other words, that the states possessed an authority over interstate commerce that was concurrent with the federal power.[17]

Mississippi Senator Robert J. Walker presented a more outspoken defense of his home state's right to regulate the slave trade. Walker acknowledged that the federal commerce power was "supreme and exclusive," but insisted that Congress nevertheless could not control the interstate slave trade because slavery was exclusively a state concern "over which it never was designed by the constitution, that congress should have the slightest control. . . . Such a power in all its effects and consequences, is a power, not to regulate commerce among the states, but *to regulate slavery*, both in and among the states. It is abolition in its most dangerous form, under the mask of a power to regulate commerce." Turning the tables on the abolitionists, Walker declared that if Congress were held by the Supreme Court to have power over the interstate slave trade, then the *free* states would not be able to forbid the entry of slaves. "The slave trader might encamp them in chains at Boston, Lexington, Concord, or Bunker Hill. . . . This the abolitionists would regard with horror and dismay; but to all this they subject their own states . . . in their efforts to force their doctrines upon the southern states." Walker appealed to the Court to banish the specters of "anarchy and civil war . . . death and desolation" by declaring that "over the subject of slavery, congress possesses no jurisdiction."[18] Walker was so proud of

his argument that he later sent a copy to ex-president Martin Van Buren, saying that he had addressed "the great constitutional question of the power of congress to prohibit the importation of slaves from state to state" and claiming that "the opinion of the Court on *that point* was in my favour." But Walker's oratory had not impressed John Quincy Adams, who wrote in his diary, "I left the House, and went into the Supreme Court, and heard the argument of Mr. Webster . . . and the closing argument of Mr. Walker, the Senator from Mississippi, in reply. The question is whether a State of this Union can constitutionally prohibit the importation within her borders of slaves as merchandise. Mr. Walker threatened tremendous consequences if this right should be denied to the State—all of which consequences sounded to me like argument for the constitutional authority [of Congress?] to prohibit it in all the States, and for the exercise of it."[19]

The lawyers for the other side included both Daniel Webster and Henry Clay, "the Ajax and the Achilles of the bar."[20] Clay declared that Mississippi could not prohibit the introduction of slaves as merchandise, because only Congress has the power to regulate interstate commerce. That power, he said, is not "one in which the states may participate. It is exclusive. It is essentially so." It might appear that Clay's strong assertion of exclusive federal power would place him in the company of the radical abolitionists, who agreed that Congress possessed such power, and who wanted Congress to use it to outlaw slave trafficking. But Clay was quick to squelch any such inference. The interstate Commerce Clause of the U.S. Constitution, he said, gives to Congress the power only "to regulate commerce, to sustain it, not to annihilate it. It is conservative. Regulation implies continued existence—life, not death, preservation, not annihilation, the unobstructed flow of the stream, not to check or dry up its waters. But the object of the abolitionists is to prevent the exercise of this commerce. This is a violation of the right of congress under the constitution." Clay thus rendered the interstate slave trade invulnerable. States could not attack it because the federal government possessed exclusive power over it. But the federal government could not attack it either, because Congress had power only to promote rather than inhibit slave trading.[21]

Clay claimed that the lawyers for the other side, in defending the right of Mississippi to prohibit the entry of slaves for sale, were "on the abolition side of the question." Here Clay deliberately misrepresented abolitionist views. It was perhaps true that some abolitionists might have mistakenly taken Mississippi's ban on the entry of slaves for sale to be an anti-slavery measure, and therefore welcomed it, without thinking about the constitutional issues that the measure raised. But Clay knew perfectly well that abolitionists argued for the supremacy of federal rather than state authority over the interstate slave trade. Indeed, Clay himself had implied as much when he said that the object of the abolitionists was "to prevent the exercise" of that particular kind of commerce. Abolitionists agreed with Clay's argument that the federal commerce power was exclusive. But abolitionists vehemently rejected Clay's contention that the authority of Congress over the interstate slave trade could be used only to sustain that trade and not to annihilate it. For the annihilation of the interstate slave trade by act of Congress was precisely what the abolitionists were seeking.[22]

Webster seconded Clay's claim that the national government could not use the Commerce Clause to attack the domestic slave trade, nor could states interfere with it. At the time the Constitution was adopted, Webster said, slavery existed in the majority of the states, and the Constitution recognized the validity of slave property by requiring the return of fugitives. Therefore, "the protection of this right of property in the intercourse between the states, became a duty under the constitution." Slaves are articles of commerce and do fall within

Court's majority had contrived to evade. To the evident surprise of the other Justices,[25] McLean read out a concurring opinion in which he declared that although it was "not necessary to a decision of the case" at hand, he nevertheless wished to make clear his own conviction that Congress had no power to regulate "the transfer and sale of slaves from one state to another." Congress could not interfere with slave trafficking, McLean said, because "the constitution acts upon slaves as persons, and not as property." Because it was only state and not federal law that made slaves property, only the states have power over slavery, "and the transfer or sale of slaves cannot be separated from this power. It is, indeed, an essential part of it." McLean defended state authority over the slave trade in terms that seemingly went beyond even the broad boundaries of state police power. "Each state," he said, "has a right to protect itself against the avarice and intrusion of the slave-dealer; to guard its citizens against the inconveniences and dangers of a slave population. The right to exercise this power, by a state, is higher and deeper than the constitution. The evil involves the prosperity, and may endanger the existence of a state. Its power to guard against, or to remedy the evil, rests upon the law of self-preservation; a law vital to every community, and especially to a sovereign state."[26]

Stung by McLean's boldness, his colleagues swatted about in various directions. Chief Justice Taney, while declining to present any argument to sustain his position, stated his belief that the slave trade was exclusively under the control of the states, "and the action of the several states upon this subject cannot be controlled by congress, either by virtue of its power to regulate commerce, or by virtue of any power conferred by the constitution of the United States." Justice Henry Baldwin disagreed with McLean's notion that the Constitution treats slaves only as persons. If states recognize slaves as property, Baldwin said, then "they become the subjects of commerce between the states which so recognize them, and the traffic in them may be regulated by congress, as the traffic in other articles; but no further." He went on to say, however, that because property rights are protected by the Fifth Amendment, Congress can only facilitate rather than inhibit the interstate slave trade. Thus Congress has the power to prevent states from infringing upon the right of citizens to transfer their slave property from one state to another for sale. "Such transit of property, whether of slaves or bales of goods, is lawful commerce among the several states, which none can prohibit or regulate, which the constitution protects, and congress may, and ought, to preserve from any violation."[27]

To add to the confusion, the official report of the case contains, in between the opinions of Taney and Baldwin, the statement that Justices Story, Thompson, James Wayne, and John McKinley "concurred with the majority of the Court in opinion, that the provision of the constitution of the United States, which gives the regulation of commerce to congress, did not interfere with the provision of the constitution of the state of Mississippi, which relates to the introduction of slaves, as merchandize, or for sale."[28] Presumably the four judges asked the official reporter to insert that peculiar statement. Thompson apparently wanted to be included, even though he had earlier ruled, speaking for the majority, that the issue was not to be addressed. McLean and Taney perhaps did not join in the statement because each of them had already stated independently his view of the matter. Thus all but one of the seven Justices who participated in the case agreed that a state could enact a regulation of the sort Mississippi had attempted, although there was no consensus among them as to whether the constitutional justification for such state action was state police power, concurrent power over interstate commerce, or even (in the case of McLean) a supraconstitutional right of self-preservation. The only dissenter was Baldwin, who believed that although a state might legitimately use its police power to prohibit *all* importation of slaves, it could not, as Mississippi

had tried to do, allow its own citizens to import slaves while forbidding the citizens of other states to come in and sell slaves. To discriminate against the slave traders of other states, Baldwin thought, was to infringe upon the federal commerce power.[29]

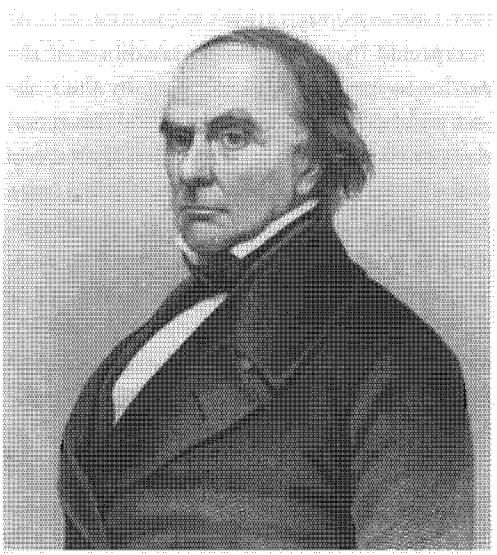
Whether the federal government could use its commerce power to inhibit the interstate slave trade had not been at issue in the case, yet three of the Justices had nevertheless seen fit to say that in their view it could not. Taney made that assertion but did not attempt to justify it. McLean said it was because the Constitution bore upon slaves only as persons. Baldwin said that Congress could use the commerce power only to facilitate the slave trade because curbing it would interfere with property rights. The other four Justices were silent on the issue. Having their objective attacked by three judges and supported by none obviously offered no encouragement to the abolitionists to pursue their campaign for federal suppression of the interstate slave trade. But they could console themselves with the fact that the question still had not been ruled upon officially. It remained in legal limbo.

Unlike *Groves v. Slaughter*, the *Passenger Cases* (1849) did not directly involve slavery. Rather, they concerned a new round of state attempts to regulate immigration. Thus, they revisited the issues that had been addressed in *Miln*, including the vexed topic of the commerce power, with all of its implications for control of the interstate slave trade. By this time, abolitionist agitation had made a considerable impact upon northern public opinion. To be sure, only a tiny minority of northerners had actually embraced radical abolitionism, with its call (in principle, at least) for the immediate, uncompensated emancipation of all slaves. But more and more northerners were becoming restive over what they saw as southern determination to dominate the national government and to compel the free states to cooperate with the slave states in shoring up the latter's disagreeable labor system. Consequently, the sense of comity between the free and the slave states was coming unglued. Northern states were increasingly reluctant either to return runaway slaves or to assist the South in prosecuting anyone who had helped them to escape from bondage. In the late 1830s, the governors of Maine and New York refused to extradite individuals who had been indicted for "kidnapping" slaves in Georgia and Virginia. In the early 1840s, both South Carolina and Virginia passed laws restricting the departure from their port cities of slaves on ships, especially ships that had come from New York. If the Supreme Court should ever rule that the federal commerce power was exclusive, thus voiding all state actions encroaching upon it, what would become of such laws? "In the name of Heaven," exclaimed a Virginia newspaper, "what power would the States have of protecting the lives and property of their own citizens, if this sweeping power of Commerce were admitted? . . . What becomes of the power to keep the citizens of New York from stealing our property and refusing to give it up or those who stole it, if we cannot pass such a bill as may authorize us to search their vessels, or to demand bond and security for the indemnity of masters, whose slaves may be stolen, by every kidnapper?"[30]

Equally at peril was South Carolina's Negro Seamen's Act, still in force despite its denunciation in 1823 by Justice Johnson and now paralleled by similar statutes in North Carolina, Georgia, Florida, Alabama, and Mississippi. In 1844, Massachusetts sent distinguished reformer Samuel Hoar to Charleston to launch a test case challenging the Negro Seamen's Act. He had no sooner arrived than the South Carolina legislature passed a resolution calling for his expulsion, and reports of a gathering mob forced him to flee for his life. Finally, as if all of that were not enough, the conclusion of the Mexican War in 1846 unleashed an acrimonious debate in Congress over whether slavery would be allowed to expand into the newly acquired territories in the West. In the highly charged atmosphere of the late 1840s, it was inevitable that both counsel

and judges would be even more acutely conscious of the slavery entanglements that threatened to engulf them whenever they grappled with the commerce power.[31]

The two legal disputes that the Supreme Court considered collectively as the *Passenger Cases* were first placed on the Court's docket in 1843 and 1844, respectively. One of the cases arose from an attempt by the state of New York to support a marine hospital by levying a tax on incoming passengers, both those arriving from abroad and those landing from coastal vessels. The other case stemmed from a Massachusetts statute taxing all arriving passengers in order to provide a fund for the support of foreign-born paupers. Partly because of vacancies and absences on the Court and partly because the Justices were, according to Daniel Webster, "divided and puzzled,"[32] each of the two cases was heard three times. Only a partial record survives of the many arguments that were presented. The attorneys defending the state laws claimed that they were legitimate exercises of state police power. If the laws should be struck down, one of them warned, then the numerous laws of both free and slave states relating to the entry of both slaves and free blacks would be unsustainable. Slaves, after all, "are held and treated as property, being bought and sold like merchandise," whereas immigrant paupers "in no respect belong to trade, traffic, or commerce." Therefore, "if the law of Massachusetts [relating to paupers] comes within the wide grasp of the commercial power of the United States . . . how are such laws [relating to slaves] to escape? How have they escaped hitherto?" Another of the lawyers—John Van Buren, son of Martin Van Buren and a rising star in the Democratic party—said in his defense of the New York law that states had concurrent power over commerce, and claimed that the Supreme Court had admitted as much when it held in *Groves v. Slaughter* "that the right to admit slaves from other States into Mississippi, or to forbid them to enter, rested exclusively with that State, and was unaffected by the authority of Congress to regulate commerce among the States."[33]



In his last argument before the Supreme Court, an aging Daniel Webster (pictured) called upon the Supreme Court in the *Passenger Cases* to uphold the federal commerce power by striking down the state laws that encroached upon it.

The attorneys for the other side contended that the federal power over commerce was exclusive. Believing (correctly, as it turned out) that he was making his last great defense of federal power before the Supreme Court, an aging Daniel Webster donned a blue coat over a buff vest with brass buttons, the same garb that he had sported in the Senate in 1830 when he delivered the greatest speech of his life, upholding the federal union as one and inseparable.[34] Now Webster called upon the Court to uphold the federal commerce power by striking down the state laws that encroached upon it. Only too aware of the states-rights tendencies of the Taney Court, Webster was pessimistic about his prospects for success, saying in a private letter that he had presented his argument "under great discouragements and evil auspices." Still, he believed that the Court's judgment in the case would be "more important to the country than any decision since that in the steamboat cause. That was one of my earliest arguments of a constitutional question. This will probably be and I am content it should be

my last. . . . Whatever I may think of the ability of my argument, and I do not think highly of it, I yet feel pleasure in reflecting that I have held on and held out to the end."[35]

The counsel for the two sides wrangled also over the meaning of the 1808 Clause of the Constitution. Webster's opponents contended that although the clause gave Congress the right to control the "migration" as well as the "importation" of "persons," it was nevertheless intended to refer only to slaves being brought in from abroad and not to white immigrants. The lawyers ignored the possibility that if "migration" did not refer to white immigrants, then maybe it *did* refer to slaves being transported from one place to another within the United States—and thus suggested that Congress could prohibit the interstate slave trade. Such an interpretation was, of course, not congenial to these defenders of states' rights. An attorney allied with Webster, on the other hand, said that the words used in the 1808 Clause indicate that it was "not restricted to any particular class of persons, bond or free, and show that the whole power over such importations is confided to Congress."[36]

The decision of the Court, when at last it came, was lengthy and confusing. By a bare majority of five to four, the Justices declared the laws of both New York and Massachusetts to be unconstitutional. But there was no consensus as to *why* the laws were unconstitutional. No fewer than eight out of the nine Justices delivered their own opinions, running in all to nearly 200 printed pages. The opinions contained such a diversity of views that the official reporter was forced to throw up his hands and admit that, although a decision had been rendered, the legal basis for it could not be explicated, for there simply was "no opinion of the Court, as a Court."[37]

Justice McLean said that the laws of New York and Massachusetts were unconstitutional because "a concurrent power in the States to regulate commerce is an anomaly not found in the Constitution." In *Groves v. Slaughter*, McLean had declared that although the federal power over commerce was exclusive, it could not be used to ban the interstate slave trade or to prevent states from controlling the admission of slaves. Now he scoffed at the notion that the exclusive federal power might be used to force the free states to accept the entry of slaves onto their territory. "Does anyone suppose that Congress can ever revive the slave trade?," he asked rhetorically. "And if this were possible, slaves thus introduced would be free."[38]

Justice Wayne said that he and three other Justices agreed that the laws in question were unconstitutional, but thought that they should be declared so because they conflicted with existing federal laws and treaties, not because the federal commerce power was exclusive. Wayne added that he himself actually agreed with McLean that the federal power *was* exclusive, but felt there was no need to say so in this case. Wayne went on to reassure southerners that the federal commerce power, whether exclusive or not, could not be used to interfere with slavery. The Constitution, Wayne said, was formed by a coalition of free states and slave states. That was its foundation, and the 1808 Clause and other provisions within it recognized that fact. Consequently, "[t]he Constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and the actual recognition in it of the dissimilar institutions of the States." Wayne said explicitly that there was no basis for southern fears that the federal government could force the slave states to allow the entry of free blacks. He might just as well have added that his rigorously proslavery conception of the Constitution also ruled out any possibility of federal tampering with the interstate slave trade.[39]

Justice McKinley, with the support of Justice Robert Grier, said that the word "migration" in the 1808 Clause referred to free immigrants, as opposed to slaves. Then Grier, with the support of Justice John Catron, reinforced Wayne's point that the slave states

had nothing to fear from the federal commerce power. Any state "whose domestic security might be endangered by the admission of free negroes" could use its police power to exclude them, said Grier. "This right of the States has its foundation in the sacred law of self defence, which no power granted to Congress can restrain or annul." He also remarked that the question of whether the federal commerce power is exclusive "is one on which the majority of this Court have intimated different opinions at different times; but it is one of little practical importance in the present case," since Congress had acted in this area and thus the state laws being disallowed by the Court were in actual conflict with federal policy.[40]

Chief Justice Taney, with the support of Justice Samuel Nelson, presented a lengthy and vigorous dissenting opinion, in which he said that the states possess a concurrent power over commerce and that they—not Congress—have the right to determine what persons are or are not to be allowed to enter their domains. To suggest the opposite he thought absurd. "I cannot," he said, "believe that it was ever intended to vest in Congress, by the general words in relation to the regulation of commerce, this overwhelming power over the States." The statesmen who created the Constitution were "too wise and too well read in the lessons of history and of their own time" to have done such a thing, and "I cannot imagine any power more unnecessary to the general government, and at the same time more dangerous and full of peril to the States." Taney also said that the 1808 Clause, despite its use of the words "migration or importation," referred only to slaves. Because the founders were unwilling to use the word "slaves" in the Constitution, Taney explained, they referred to slaves as "persons," and having done that, "they employed a word that would describe them as persons, and which had uniformly been used when persons were spoken of, and also the word which was always applied to matters of property. The whole context of the sentence, and its provisions and limitations, and the construction given to it by those who assisted in framing the clause in question, show that it was intended to embrace those persons only who were brought in as property."[41]

Another dissenter, Justice Peter Daniel, made similar points. He too said that the states had a concurrent commerce power. Daniel recalled that in his opinion in *Groves v. Slaughter*, Justice Baldwin had defended the notion that the federal power was exclusive. But Daniel said that Baldwin's view counted for little because it was "a dissent by a single judge," and still less because it had "asserted the extraordinary doctrine that the States of this Union can have no power to prohibit the introduction of slaves within their territory when carried thither for sale or traffic, because the power to regulate commerce is there asserted to reside in Congress alone"—which Daniel regarded as an "eccentric and startling conclusion." Daniel also agreed with Taney about the 1808 Clause, saying that it "was intended to apply to the African slave-trade, and to no other matter whatever."[42]

Finally, Justice Levi Woodbury added his voice to the dissenting minority. He thought that Taney was likely correct about the meaning of the 1808 Clause, although Woodbury left the door open to a slightly wider interpretation. Woodbury said, "The word 'migration' was probably added to 'importation' to cover slaves when regarded as persons rather than property, as they are for some purposes. Or if to cover others, such as convicts or redemptioners, it was those only who came against their will, or in a quasi servitude." He added that under the 1808 Clause, "no authority was conferred on Congress over the domestic slave-trade, either before or since 1808." Woodbury also declared forcefully that the states possessed both a concurrent commerce power and a broad police power, and therefore had an unquestionable right to exclude anyone they chose. Since all sovereign states

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Another dissenter, Justice Peter Daniel, made similar points. He too said that the states had a concurrent commerce power. Daniel recalled that in his opinion in *Groves v. Slaughter*, Justice Baldwin had defended the notion that the federal power was exclusive. But Daniel said that Baldwin's view counted for little because it was "a dissent by a single judge," and still less because it had "asserted the extraordinary doctrine that the States of this Union can have no power to prohibit the introduction of slaves within their territory when carried thither for sale or traffic, because the power to regulate commerce is there asserted to reside in Congress alone"—which Daniel regarded as an "eccentric and startling conclusion." Daniel also agreed with Taney about the 1808 Clause, saying that it "was intended to apply to the African slave-trade, and to no other matter whatever."[42]

Finally, Justice Levi Woodbury added his voice to the dissenting minority. He thought that Taney was likely correct about the meaning of the 1808 Clause, although Woodbury left the door open to a slightly wider interpretation. Woodbury said, "The word 'migration' was probably added to 'importation' to cover slaves when regarded as persons rather than property, as they are for some purposes. Or if to cover others, such as convicts or redemptioners, it was those only who came against their will, or in a quasi servitude." He added that under the 1808 Clause, "no authority was conferred on Congress over the domestic slave-trade, either before or since 1808." Woodbury also declared forcefully that the states possessed both a concurrent commerce power and a broad police power, and therefore had an unquestionable right to exclude anyone they chose. Since all sovereign states

could exclude any categories of persons, including "cargoes of shackled slaves," he said, the American states could, if they chose, exclude emigrants "only when slaves, or, what is still more common in America, in Free States as well as Slave States, exclude colored emigrants, though free." Woodbury concluded with a warning and a final rhetorical flourish: "A course of harshness towards the States by the general government," one that interferes with their "domestic policies in doubtful cases, and this by mere implied power," would "tend ultimately, no less than disastrously, to dissolve the bonds of that Union so useful and glorious to all concerned. 'Libertas ultima mundi, Quo steterit, ferienda loco.'"[43]

The Justices had expressed such disparate views that nobody then or since has been able to make any overall sense of them. Humpty Dumpty had taken a flying leap off the wall, and his shattered pieces could not be fitted together into a recognizable whole. Only one thing was clear: the Court majority had struck down the immigration laws of New York and Massachusetts as unconstitutional. But that fact alone was enough to inflame southern opinion. For if the two northern states could not control the entry of immigrants into their port cities, then how could any of the southern states be sure of their own power to control the entry of slaves or free blacks? "If we correctly understand the points decided," cried the *Charleston Mercury*, "they sweep away our inspection laws enacted to prevent the abduction of our slaves in Northern vessels. They sweep away also all our laws enacted to prevent free colored persons—citizens of Massachusetts—or whatever abolition region, from entering our ports and cities. Thus it seems as if the Union is to be so administered as to strip the South of all power of self-protection and to make submission to its rule equivalent to ruin and degradation." Actually, of course, the *Mercury* did *not* correctly understand the points decided, for there were none. And the notion that any southern laws had been swept away was ridiculously alarmist, as the judges had been at pains to signal that nothing of the sort was going to happen. Even McLean and Wayne, the only two Justices who had declared that the federal commerce power was exclusive, had nonetheless also made it equally clear that states had a right to control the entry or non-entry of slaves and free blacks, and that the federal government could not use its commerce power to interfere.[44]

Given the doctrinal anarchy of the *Passenger Cases* decision, it seems astonishing that only three years later a Court made up—with just one exception—of the same men who had produced that dog's breakfast issued a decision in which a solid majority was able to agree not only upon the outcome of a commerce case but also upon the doctrinal basis for it. In *Cooley v. Board of Wardens of the Port of Philadelphia* (1852), the Court upheld the constitutionality of a Pennsylvania law that required vessels entering the port of Philadelphia either to hire local pilots or to make a compensatory payment. The newcomer to the Court, Justice Benjamin R. Curtis, pulled off the near miracle of persuading five of his colleagues to join him in a majority decision that provided, at last, an official ruling on the perennial question of whether the interstate commerce power was exclusively federal or was concurrent with the states. Curtis's solution was to have it both ways: He said that some commerce matters called for exclusive federal power and others did not. "Whatever subjects of this power are in their nature national, or admit of only one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress," he explained. Other commerce matters, such as the hiring of harbor pilots, were essentially local in character, and therefore in those areas the states could exercise a concurrent authority. Not surprisingly, Justices McLean and Wayne dissented from the majority and clung to their view of the federal commerce power as exclusive, full stop.[45]

Although the *Cooley* decision appeared to be an improvement over the *Passenger Cases*,

it really was not, for it merely replaced one unanswered question with another one. Previously the question had been: Is the commerce power exclusive to the federal government, or do the states possess a concurrent power? The answer provided by *Cooley* was that federal power is exclusive over matters that are inherently national, but that states have a concurrent power over matters that are inherently local. But now a new question arose that was scarcely less troubling than the one that had been answered: How can we differentiate the matters that are inherently national from those that are local? *Cooley* provided no answer, aside from saying that pilotage belonged to the latter category. From the point of view of both defenders and opponents of the domestic slave trade, the Court had settled nothing. For who could say for certain whether interstate slave trading was of a national or a local character? And even if there were some magical way to separate all national from all local concerns, neither side in the slavery debate would have been satisfied, for neither side was consistent in its demands. Both sides favored states' rights when it suited them, but both also had no hesitation in opting for national power when it was advantageous to their cause. Thus, for example, proslavery spokesmen always insisted that slave trading was a local matter that the federal government must not touch. Yet those same spokesmen were all in favor of a vigorous enforcement of the federal Fugitive Slave Act, so as to coerce the free states into yielding up the men and women who had managed to shed their chains and follow the drinking gourd northward to freedom. Abolitionists, on the other hand, did everything they could to defy and defeat the Fugitive Slave Law, which they denounced as an unconstitutional abuse of states' rights as well as human rights. Yet those same abolitionists continued to insist that the federal government had both the right and the duty to abolish the interstate slave trade.

The struggle over slavery and the slave trade entered its climactic phase in the 1850s. The decade began auspiciously with a compromise agreement between the North and the South on what to do with the lands seized from Mexico. Yet while the Compromise of 1850 quieted for the moment the quarrel over the territories, it contained two provisions that worsened rather than eased the sectional conflict. First, a new and draconian federal fugitive slave law delighted proslavery southerners but outraged antislavery northerners. Second, the prohibition of commercial slave-trafficking in Washington, D.C. applied a cosmetic balm to northern sensibility over that ugly spectacle but provoked southern anxiety that it might be a first step towards the suppression of the entire interstate slave trade. In 1852, Harriet Beecher Stowe's best-selling novel, **Uncle Tom's Cabin**, brought home to hundreds of thousands of northern readers the cruel separation of slave families that was endemic to that trade. In 1854, the Kansas-Nebraska Act reopened the toxic conflict over whether slavery should be allowed in the territories.

When the Taney Court declared in *Dred Scott v. Sandford* (1857) that Congress did not have the constitutional power to ban slavery in the territories, even the most moderate opponents of slavery were horrified. There was, however, another aspect to the *Dred Scott* decision that was important at the time but is less remembered today: the fact that most of the majority Justices grounded their ruling upon an extreme defense of the property rights of slaveholders. In the official opinion of the Court, Chief Justice Taney said that for Congress to prohibit slavery in a territory was to violate the Fifth Amendment guarantee that a citizen could not be deprived of property without due process of law. "An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law," Taney declared. The fallacy in Taney's reasoning here

While the Compromise of 1850 quieted for a moment the quarrel over the territories, it contained two provisions that exacerbated the conflict: a draconian federal fugitive slave law that delighted proslavery Southerners; and a prohibition against slave trafficking in Washington, D.C. that appeased Northerners. In this photo, slaves pose in front of their wooden house in the nation's capital in 1861.

is obvious. If Congress has outlawed slavery in a territory, then the slaveholders of whom he speaks *have* committed an offense against the law. Therefore, the loss of their property *does* come about through due process of law. Of course Taney denies that because he holds that the law in question is unconstitutional. But why is it unconstitutional? Well, Taney says, it is unconstitutional because it takes property away from slaveholders who have committed no offense. Taney's reasoning is circular. He says the moon is made of green cheese because the Constitution says so. And he says the Constitution says so because the moon is made of green cheese. Taney added that the only power conferred by the Constitution upon the federal government with regard to slave property was "the power coupled with the duty of guarding and protecting the owner in his rights."[46]

Justices Wayne and Grier concurred fully with Taney. Justice Daniel stressed property rights even more strongly, saying that "the only private property which the Constitution has *specifically recognised*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty." Justice John Campbell (the only newcomer to the Court since the *Cooley* case) claimed that it was already a "settled doctrine" of the Court that the federal government "can exercise no power over the subject of slavery within the States, nor control the intermigration of slaves, other than fugitives, among the States." Whatever state law makes property, Campbell said, must be recognized as property by the federal government in all areas within its jurisdiction. Therefore, "wherever a master is entitled to go within the United States, his slaves may accompany him, without any impediment from, or fear of,

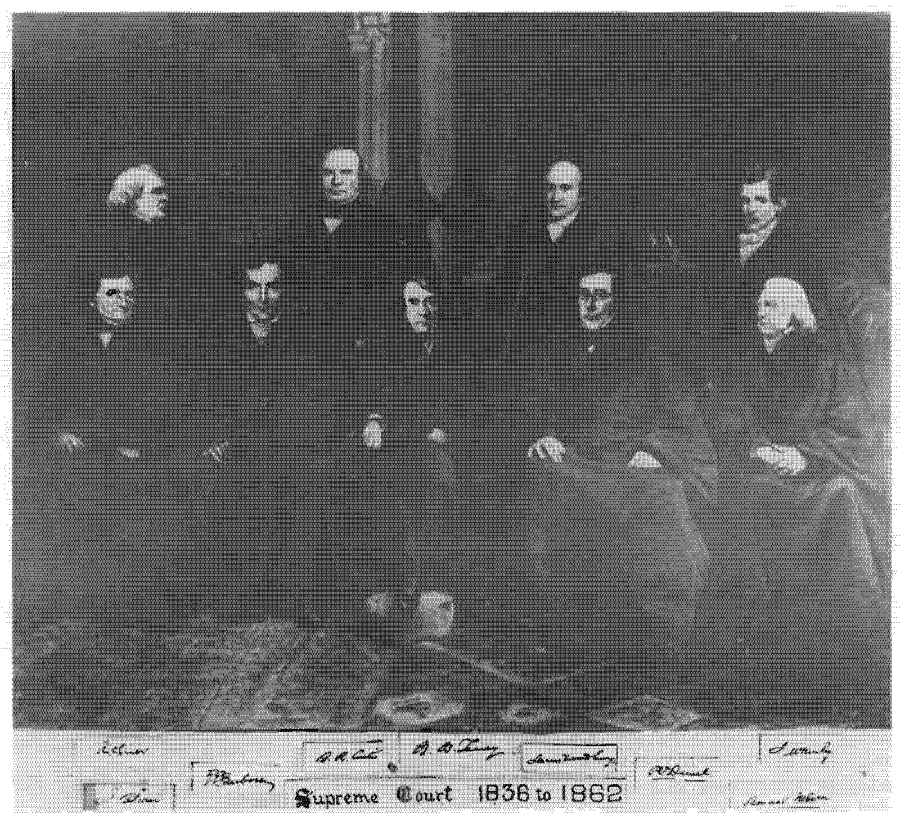
In *Dred Scott v. Sandford* (1857), Justice John Catron of Tennessee (pictured) held that the Louisiana Purchase treaty had guaranteed equal rights to all settlers, including slaveholders, who may not be denied their equal enjoyment of the territories.

Congressional legislation or interference."[47] Thus, five Justices—a majority of the Court's members—explicitly affirmed that Congress could not ban slavery from a territory because to do so was to violate property rights.

The other four Justices disagreed. Justice Catron concurred with the majority's decision, but not with their reasoning. Catron held that the Louisiana Purchase treaty had guaranteed equal rights to all settlers, including slaveholders. He also said that because Article IV, Section 2, Clause 1 of the Constitution declares that the citizens of each state are entitled to the privileges and immunities of citizens in the several states, slaveholders may not be denied their equal enjoyment of the territories.[48] Justices Curtis and McLean wrote vigorous dissents. Yet even as McLean upheld the right of Congress to ban slavery in the territories, he reiterated his denial that Congress could ban the interstate slave trade. McLean said (inaccurately) that in *Groves v. Slaughter*, "Messrs. Clay and Webster contended that, under the commercial power, Congress had a right to regulate the slave trade among the several States; but the Court held that Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among them. If this trade were subject to the commercial power, it would follow that Congress could abolish or establish slavery in every State of the Union."[49] The ninth Justice, Samuel Nelson, did not address the great issues that so preoccupied his colleagues. Instead, he simply upheld the earlier ruling by the U.S. District Court that Dred Scott was not free.[50]

The Court majority's extreme solicitude for the property rights of slaveholders was bad news for the radical advocates of a ban on the interstate slave trade, whose cause obviously stood no chance before a Court so doctrinaire about the sanctity of slave property. It was also disquieting to the far more numerous antislavery moderates, who now wondered how far the Court majority might push its doctrine. Abraham Lincoln, for one, predicted that in some future case the Court would rule that no state could exclude slavery. "We shall lie down pleasantly dreaming that the people of Missouri are on the verge of making their State free," Lincoln said, "and we shall awake to the reality instead, that the Supreme Court has made Illinois a slave State." After all, Lincoln explained, if, as the Taney Court had avowed, "the right of property in a slave is distinctly and expressly affirmed in the Constitution," then it followed that "nothing in the Constitution or laws of any State can destroy the right of property in a slave."[51]

That Taney and his colleagues would have dared to try to transform the free states into full-fledged slave states is scarcely believable. But it is not far-fetched to surmise that the Court's extreme commitment to property rights in slaves might have led it to make



The author argues that if the Justices of the Taney Court had at any point been asked to render a formal ruling on the question, they would have been unanimous in holding that Congress did not possess the authority to abolish the interstate slave trade.

inroads in that direction. The Court might, for example, have established a constitutional right of transit for slaveowners wishing to traverse a free state along with their human chattels. A case that could have provided the context for just such a ruling was, in fact, in the pipeline. In 1852, the courts of New York State had freed eight slaves belonging to Mr. and Mrs. Jonathan Lemmon, who had brought them from Virginia to New York City in order to board a steamer for New Orleans. The resulting case of *Lemmon v. the People*[52] (1860) was headed for the Supreme Court on appeal. Charles Sumner, Salmon Chase, and Horace Greeley all predicted that if the Democrats won the presidency in 1860, then the Taney Court would use this case to force the introduction of slavery into the free states. The Democrats did not win the presidency, however, and the *Lemmon* case was overtaken by events, as the nation spiraled into the maelstrom of secession and civil war.[53]

Throughout the antebellum decades, the Supreme Court never made a definitive ruling as to whether or not Congress could interfere with the interstate slave trade. At first, under the wise leadership of John Marshall, it did not do so because Marshall realized that it would be foolhardy to ignite southern public opinion over so inflammatory an issue. Later, under the lesser genius of Roger B. Taney, it did not do so primarily because of doctrinal disagreements among the judges. If they had issued a formal ruling on the question at any point, it

appears almost certain that the Justices who served under Taney would have been unanimous in holding that Congress did not possess the constitutional authority to abolish the interstate slave trade. Not a single Justice had ever stated it to be his belief that Congress did have such power, whereas eight of them had made evident their personal conviction that it did not. Five of the eight (McLean, Taney, Baldwin, Woodbury, and Campbell) had said explicitly that Congress could not interfere with the slave trade, and the other three (Wayne, McKinley, and Grier) had made remarks carrying such a strong implication to that effect as to make their stance unmistakable. The Justices would not have been unanimous in their legal reasoning as to *why* the interstate Commerce Clause did not give Congress the power to halt the slave trade. But by the time of the *Dred Scott* decision, a majority of them had coalesced around a doctrine that held that the right to property in slaves was constitutionally sacrosanct and untouchable.

In its zeal to prevent the struggle over slavery from threatening the unity of the nation, the Taney Court rashly sought in *Dred Scott* to resolve by judicial fiat the ambiguous constitutional legacy of the founding fathers. To the founders, the long-term fate of slavery in the republic was a question left open for political resolution by future generations. To Taney and his like-minded associates, the question was now closed. Slavery and the interstate slave trade were safe behind the bulwark of such a Court as this. But even Justices of the Supreme Court are not immortal. The character of the Court changes as vacancies occur and new judges are appointed. By 1860, a great political party had arisen in the North that was openly hostile to slavery and the slave trade. A man who had denounced the *Dred Scott* decision and called for it to be reversed had been elected to the presidency. It was Abraham Lincoln who would be proposing any new Justices to join the Court. How safe was the interstate slave trade now? The South's answer to that question is part of the explanation for the nation's declension into bloodshed and horror.

ENDNOTES

[1]American Anti-Slavery Society, "Declaration of Sentiments," **Proceedings of the Anti-Slavery Convention, Assembled at Philadelphia, December 4, 5, and 6, 1833** (New York: Dorr & Butterfield, 1833), 15; John Jay to Elias Boudinot, 17 November 1819, draft copy, John Jay Papers, Columbia University, New York; Daniel Webster et al., **A Memorial to the Congress of the United States, on the Subject of Restraining the Increase of Slavery in New States to Be Admitted into the Union, Prepared in Pursuance of a Vote of the Inhabitants of Boston and Its Vicinity, Assembled at the State House, on the Third of December, A.D. 1819** (Boston: Sewell Phelps, 1819), 9–10; **Memoirs of John Quincy Adams Comprising Portions of His Diary from 1795 to 1848,** ed. Charles Francis Adams (12 vols., Philadelphia: J. B. Lippincott, 1874–1877), 4: 529–30; S[almon] P. Chase to H[enry] B. Stanton and Elizur Wright, Jr., 23 September 1845, in **Proceedings of the Great Convention of the Friends of Freedom in the Eastern and Middle States, Held in Boston, Oct. 1, 2, & 3, 1845** (Lowell: Pillsbury and Knapp, 1845), 30–31; "Mr. [Charles] Sumner's Speech at the Whig State Convention, Wednesday [23 September 1846]," Boston *Daily Whig*, 25 September 1846, copying Boston *Courier*. For discussion of these and related matters, *see* my articles: "The Founders and the Interstate Slave Trade," *Journal of the Early Republic* 22 (Spring 2002): 25–51; "The Door to the Slave Bastille: The Abolitionist Assault upon the Interstate Slave Trade, 1833–1839," *Civil War History* 34 (September 1988): 235–52; "The Interstate Slave Trade in Antislavery Politics," *Civil War History* 36 (June 1990): 119–36; "The Interstate Slave Trade as an Issue in the Secession Crisis," *Southern Studies* 9 (Summer/Fall 1998): 1–35.

[2]While this article derives primarily from my own analysis of the official reports of the relevant Supreme Court cases, I have benefited greatly from the factual detail and explication of legal complexities in G. Edward White, **The Marshall Court and Cultural Change, 1815–35**, Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vols. 3–4 (New York: Macmillan, 1988), and in Carl B. Swisher, **The Taney Period, 1836–64,** *ibid.*, vol. 5 (New York: Macmillan, 1974). Equally helpful was Charles Warren, **The Supreme Court in United States History**, rev. ed., 2 vols. (Boston: Little, Brown, 1937), which remains unsurpassed in its attention to the political context of the Court's decision-making.

[3]*Gibbons v. Ogden*, 22 U.S. (9 Wheaton) 1 (1824).

[4]Swisher, **Taney Period**, 378–82; Warren, **Supreme Court**, 1: 623–27. Johnson nullified the South Carolina law in *Elkison v. Deliesseline*, 8 Federal Cases 493 (1823). The South Carolina Governor's message, 1 December 1824, is quoted in Warren, **Supreme Court**, 1: 627.

[5]Marshall to Story, 26 September 1823, Joseph Story Papers, Massachusetts Historical Society, Boston. The Circuit Court case in which Marshall confronted the Virginia law was *The Brig Wilson*, 1 Brock 423, according to Warren, **Supreme Court**, 1: 624n.

[6]*Gibbons v. Ogden*, 33–159; quotation from argument of Thomas Emmet, *ibid.*, 119.

[7]*Gibbons v. Ogden*, 9–10, 14, 26.

[8]*Ibid.*, 186–222; quotations on 216–17, 196, 209. On the doubtful conflict between the New York statute and the federal license, *see* White, **Marshall Court**, 570.

[9]*Gibbons v. Ogden*, 222–31; quotation on 227.

[10]*City of New York v. Miln*, 36 U.S. (11 Peters) 102 (1837).

[11]Draft of Taney's unpublished advisory opinion, 28 May 1832, quoted in Carl Brent Swisher, "Mr. Chief Justice Taney," in **Mr. Justice**, ed. Allison Dunham and Philip B. Kurland, rev. and enl. ed. (Chicago: University of Chicago Press, 1964), 43.

[12]Lightner, "Door to the Slave Bastille," 240–46.

[13]*City of New York v. Miln*, 109.

[14]*Ibid.*, 119, 119–20.

[15]*Ibid.*, 132, 139, 152–53, 157, 158; White, **Marshall Court**, 573n.

[16]Swisher, **Taney Period**, 365–67; Warren, **Supreme Court**, 2: 67–70. For the newspaper reporting about the ladies and Senators, Warren cites the *New York Express*, 19 and 23 February 1841.

[17]*Groves v. Slaughter*, 40 U.S. (15 Peters) 449 (1841), quotations on 468, 468, 465, 465.

[18]Robert J. Walker, **Argument of Robert J. Walker, Esq., before the Supreme Court of the United States, on the Mississippi Slave Question, at January Term, 1841. Involving the Power of Congress and of the States to Prohibit the Inter-state Slave Trade** (Philadelphia: John C. Clark, 1841), 49, 51, 58, 88.

[19]R. J. Walker to Martin Van Buren, Washington, D.C., 31 August 1842, Martin Van Buren Papers, Library of Congress, Washington, D.C.; John Quincy Adams diary, 19 February 1841, **Memoirs of John Quincy Adams**, 10: 426–27.

[20]As they were termed by their fellow counsel Walter Jones. *Groves v. Slaughter*, 477.

[21]*Ibid.*, 489.

[22]*Ibid.*, 488.

[23]*Ibid.*, 495.

[24]*Ibid.*, 457, 503.

[25]John Quincy Adams diary, 10 March 1841, **Memoirs of John Quincy Adams**, 10: 442.

[26]*Groves v. Slaughter*, 503, 506, 506, 508, 508.

[27]*Ibid.*, 508, 515, 516.

[28]*Ibid.*, 510.

[29]*Ibid.*, 516.

[30]Warren, **Supreme Court**, 2: 168–70; *ibid.*, 170, quoting *Richmond Enquirer*, 4 March 1841. For a superb account of the breakdown of comity among the states, *see* Paul Finkelman, **An Imperfect Union: Slavery, Federalism, and Comity** (Chapel Hill: University of North Carolina Press, 1981).

[31]Swisher, **Taney Period**, 378–82.

[32]D[aniel] Webster to Fletcher Webster, Washington, D.C., 16 June 1849, **The Private Correspondence of Daniel Webster**, 2 vols. (Boston: Little, Brown and Company, 1857), 2: 327.

[33]*Ibid.*, 2: 382–84; *Passenger Cases*, 48 U.S. (7 Howard) 283 (1849), 331, 374.

[34]"Speech of Daniel Webster [26 January 1830], in Reply to Mr. Hayne, of South Carolina: The Resolution Offered by Mr. Foot, of Connecticut, Relative to the Public Lands, Being Under Consideration" (Washington, D.C.: Gales and Seaton, 1830; microfiche, Louisville, KY: Lost Cause Press, 1978); Swisher, **Taney Period**, 384–85; Warren, **Supreme Court**, 2: 175–78.

[35]D[aniel] Webster to Richard Milford Blatchford, 3 February 1849, **The Papers of Daniel Webster: Legal Papers**, ed. Alfred S. Konefsky and Andrew J. King, 3 vols. (Hanover, NH: University Press of New England for Dartmouth College, 1982), vol. 3, part 2, pp. 727–28.

[36]*Passenger Cases*, 326, 349, 377, 305–06, 382; quotation on 382.

[37]Swisher, **Taney Period**, 388; *Passenger Cases*, 283 (quotation).

[38]*Passenger Cases*, 396, 406.

[39]*Ibid.*, 410, 428–29 (quotation).

[40]*Ibid.*, 452, 455, 456 (quotation), 462 (quotation), 464.

[41]*Ibid.*, 471, 474 (quotations), 476 (quotation), 518.

[42]*Ibid.*, 498 (quotations), 511 (quotation).

[43]"The remaining liberty of the world was to be destroyed in the place where it stood." *Ibid.*, 542, 528, 526, 572. The Latin is from the classical author Locanus (Marcus Annaeus Lucan), **Pharsalia**, Book 7, line 580.

[44]*Charleston Mercury*, 14 February 1849, copied in *Boston Courier*, 21 February 1849, quoted in Warren, **Supreme Court**, 2: 182.

[45]*Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 Howard) 299 (1852), quotation on 319; Swisher, **Taney Court**, 404–07.

[46]*Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857), 450, 452.

[47]*Ibid.*, 490, 500, 516.

[48]*Ibid.*, 518, 527.

[49]*Ibid.*, 536–37.

[50]*Ibid.*, 457–69.

[51]Abraham Lincoln, "House Divided" speech, Springfield, 16 June 1858, **The Lincoln-Douglas Debates of**

1858, ed. Robert W. Johannsen (New York: Oxford University Press, 1965), 19–20; Lincoln's reply, fifth joint debate, Galesburg, 7 October 1858, *ibid.*, 230, 231.

[52]20 N.Y. 562 (1860).

[53]William E. Nelson, "The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth-Century America," *Harvard Law Review* 87 (January 1974): 546–47; Finkelman, **Imperfect Union**, 296–310, 314–15. For an imaginative but well-grounded explanation of how the Taney Court might have made this dire prediction come true, *see* Paul Finkelman, "The Nationalization of Slavery: A Counter-factual Approach to the 1860s," *Louisiana Studies* 14 (1975): 213–40.

A New Right to Property: Civil War Confiscation in the Reconstruction Supreme Court

DANIEL W. HAMILTON*

During the Civil War, both the Union Congress and the Confederate Congress put in place sweeping confiscation programs designed to seize the private property of enemy citizens on a massive scale. Meeting in special session in August 1861, the U.S. Congress passed the First Confiscation Act, authorizing the federal government to seize the property of those participating directly in the rebellion.[1] The Confederate Congress retaliated on August 30, 1861, passing the Sequestration Act.[2] This law authorized the Confederate government to forever seize the real and personal property of "alien enemies," a term that included every U.S. citizen and all those living in the Confederacy who remained loyal to the Union.

Ten months later, in July 1862, the U.S. Congress passed the much broader Second Confiscation Act.[3] This expansive law permitted the Union government to seize all the real and personal property of anyone taking up arms against the government, anyone aiding the rebellion directly, or anyone offering aid or comfort to the rebellion. This effectively meant the U.S could legally seize all the property of all those who recognized and supported the legitimacy of the Confederacy.

The Civil War represented the second great American experiment with broad legislative confiscation during wartime, after the American Revolution.[4] The Civil War is justly described as America's second revolution.[5] Yet the nineteenth-century experience with confiscation reveals the extent to which, when it came to the relationship of property and the state, the country had changed from the first revolution to the second. The outcomes of these two wartime experiments with confiscation were nearly opposite. Revolutionary confiscation was marked by the quick, decisive, vigorous pursuit of disloyal property. A great deal of Loyalist property was seized forever, without compensation or recourse to the courts.

Eighty years later, confiscation met quite a different fate. During the Civil War, the

Revolutionary conception of sovereignty found its fullest expression only in the losing section. The Confederacy quickly put in place an effective confiscation program, designed to seize U.S. property, that was every bit as zealous as any pursued during the Revolution. Yet in the wake of Confederate defeat, this broad assertion of legislative power was quickly reversed. After the war, the Confederate confiscation program was completely dismantled. Soon after victory, the Union nullified almost all the public laws of the Confederacy, including sequestration. From the point of view of American law after the Civil War, it was quite literally as if the Confederate Sequestration Act had never existed. The seizure of millions of dollars of U.S. property by the Confederacy was meaningless and had never, in the eyes of the law, taken place.

If Confederate sequestration was marked by vigor, Union confiscation was marked by an agonized, intractable, ideological impasse. Union confiscation defied legislative consensus and mostly failed in practice as a result. The language of the Acts contained confusing, even contradictory instructions, which made their enforcement immensely difficult, if not virtually impossible. Relatively little property was actually confiscated, and the Second Confiscation Act was more or less ignored by Lincoln and the executive branch during the war before languishing in the federal courts for decades afterwards.

Once confiscation ceased to be politically viable, it did not simply vanish. Instead, it remained a fixture in American property law for fifty years. Even as the executive branch ceased to confiscate property, the federal courts were beginning to consider the vital legal and constitutional issues raised by confiscation. These questions included many that the Supreme Court had not faced in seventy-five years, or had never faced. Was permanent, uncompensated property confiscation for disloyalty a legitimate power of Congress? Did a presidential pardon mandate the return of already-confiscated property? Who had title to confiscated land, and how should it be treated in the marketplace? What was the legal and constitutional status of the Confederate Sequestration Act and property seized under the Act? The Supreme Court had never been asked these fundamental legal questions. Its answers to them had profound implications both for property law and for conceptions of property that fought for dominance after the Civil War.

The longevity of confiscation prompts reconsideration of the law's ultimate significance and takes the focus off President Andrew Johnson as the near-exclusive dismantler of the legislation. Attention to the treatment of confiscation in the federal courts, particularly the Supreme Court, after the Civil War reveals a much longer, richer lifespan for confiscation than historians have generally recognized. Confiscation lived on as an important issue for decades after the war and was not entirely put to rest until the twentieth century. This essay traces the Supreme Court's interpretation of confiscation and its implications for property law and constitutional law in the immediate wake of the Civil War and for several decades afterwards.

In case after case in the decades after the war, the Supreme Court used legal questions arising out of the confiscation acts to limit the power of the federal government over property and to argue for the sanctity of individual property rights. The Court was divided at points, but proponents of a broad confiscatory power were normally in the minority. Confiscation faded as a possibility after the war not solely due to the intransigence of the chief executive, but also because the Supreme Court—in particular Justice Stephen Field—chipped away at the power of the state to confiscate property on a broad scale. Confiscation cases served the Supreme Court as vehicles for the elaboration of a property ideology steeped in the natural rights of individuals protected at the expense of sovereign power. Field was

able, for the most part, to use major confiscation cases as opportunities to press for a liberal understanding of property rights and their place in the Constitution.

The power to confiscate property entered the nineteenth century as a controversial practice of legislatures as a punishment for disloyalty. It left the nineteenth century as a relic, enforceable only by courts. Confiscation at century's end seemed almost quaint, a remnant of Revolutionary republican fervor nearly out of place at mid-century and badly anachronistic in the midst of an industrial revolution. Yet confiscation was not charming to its radical proponents seeking to refashion the South, or to President Lincoln fearing the same, or to congressional conservatives fearing a legalized land grab as a consequence of the Civil War. The Supreme Court was able to accomplish what no other institutional actor could on confiscation. It stripped confiscation, through a thousand cuts, of both its menace and its appeal.

The Supreme Court underwent a dramatic change in leadership after Chief Justice Roger Taney died on October 12, 1864.[6] Taney, who had served for twenty-eight years, was by that time so despised by Republicans for his opinion in *Dred Scott v. Sandford* that Congress refused to place a bust of him in the Court's chambers in the Capitol.[7] Radical Republican Salmon P. Chase, Lincoln's Secretary of the Treasury, replaced Taney on December 15. In 1863 Congress had created a tenth judicial circuit and increased the number of Justices to ten. It then reduced the number of Justices to six in 1866 before returning it to nine in 1869. Chase was one of five Lincoln appointees to the high Court; the others included Noah Swayne, Samuel Miller, David Davis, and—most importantly—Stephen Field. President Grant made a remarkable eight appointments to the Supreme Court. Only four ultimately served, of whom the most important were William Strong, Joseph P. Bradley, and Morrison Waite, who replaced Chase as Chief Justice after only eight years in 1874.[8]

The Longevity of Confiscation: Beyond Tragedy and Vengeance

Generally, leading studies of confiscation have followed it only to the end of its enforcement, ignoring its significant afterlife in the Supreme Court. The demise of confiscation has been treated either as a judicious response to Radical Republican vengeance or as a tragic missed opportunity of Reconstruction. James G. Randall led the first school. Eric Foner and Michael Les Benedict currently dominate the second.

In his classic textbook on the Civil War, Randall called the Second Confiscation Act "one of the most drastic laws ever enacted by the American Congress." In Congress, he posited, moderates argued in vain in the face of Radical determination to punish the South. To Randall, only Lincoln restrained Congress from the unconstitutional pursuit of broad confiscation, by threatening to veto the legislation and then forcing upon Congress an explanatory joint resolution providing that property could be seized only for the lifetime of an offender convicted under the Confiscation Act.[9] For Randall, Lincoln effectively stopped the legislature in its "attempt to appropriate the private property of unoffending citizens," and the wartime experience with confiscation "was such as to condemn the policy of promoting war by harsh punitive measures for the coercion of individuals."[10]

For Foner and Benedict, confiscation was the best hope for providing land to millions of freed slaves. Foner writes that Radicals in Congress advocated "an act of federal intervention comparable in scope only to emancipation itself—the confiscation of planter lands and their division among the freedmen."[11] For Benedict, "the concept of confiscation had been fundamentally altered" with the passage of the Freedman's Bureau Act in early 1865.[12] The law provided that Southern lands

This vitriolic indictment of the Confederacy shows cotton, tobacco, and sugar plants and the slaves the planter class relied on to grow these crops. Congress intended the Confiscation Acts to redistribute planters' lands. In the end, however, only a miniscule amount of land ended up in the possession of freed blacks.

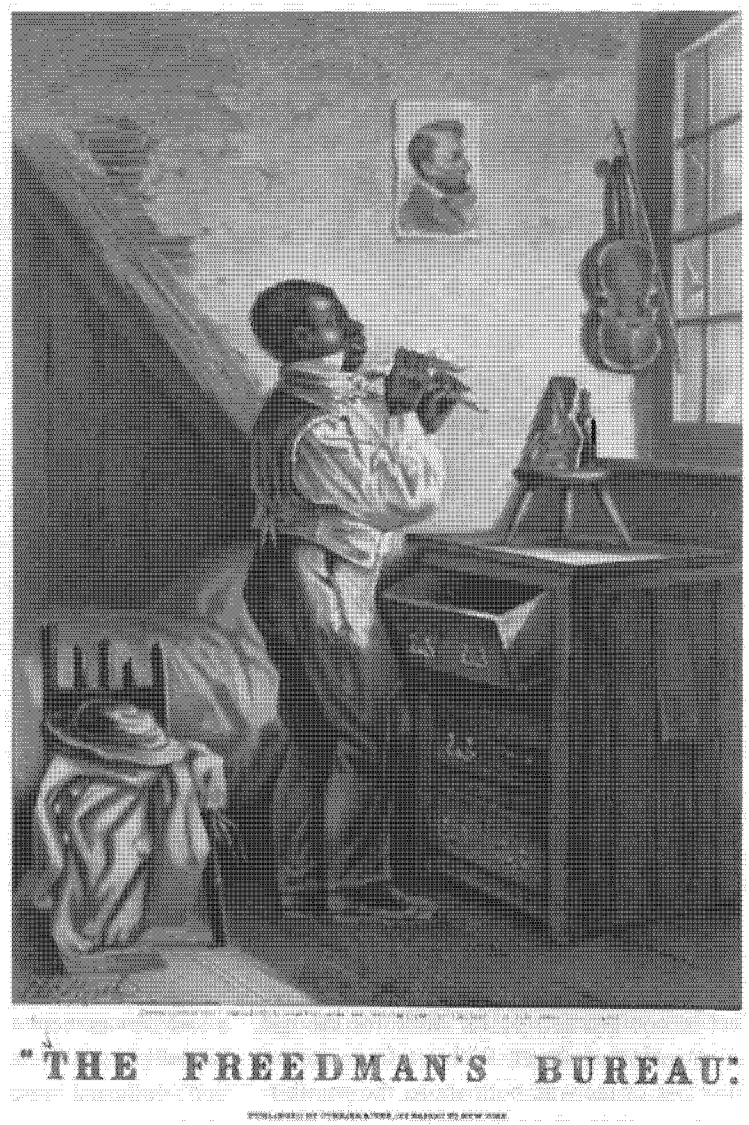
abandoned by their owners and property subject to confiscation be set aside for the use of emancipated slaves. Within a few years of the close of the war, both argue, the possibility of any widespread distribution of land was squelched. Mainstream Republicans resisted the efforts of House Radicals George Julian and Thaddeus Stevens, as well as freedmen themselves, and "in the end the amount of land that came into the possession of blacks proved to be miniscule."[13]

Foner and Benedict make a much more compelling historical case than does Randall. Confiscation was not some kind of Radical plot foiled by manifest constitutional law. Yet it is undoubtedly true, as Foner and Benedict argue, that confiscation policy after the war was a squandered opportunity to provide freed people with some measure of economic opportunity. However, confiscation was not purely a sad denouement to the Civil War; neither school pays sufficient attention to confiscation's enduring importance for the articulation of liberal property ideology after the war.

Property Seizure during the Civil War

Alternative Regimes

During the Civil War, there were three legislative (as opposed to military) property regimes in place. The First Confiscation Act of 1861 authorized the permanent seizure of property used in support of the rebellion.[14] The Second Confiscation Act of 1862 authorized the seizure of any property belonging to anyone taking part in the rebellion or lending it aid and comfort.[15] Finally, the Abandoned and

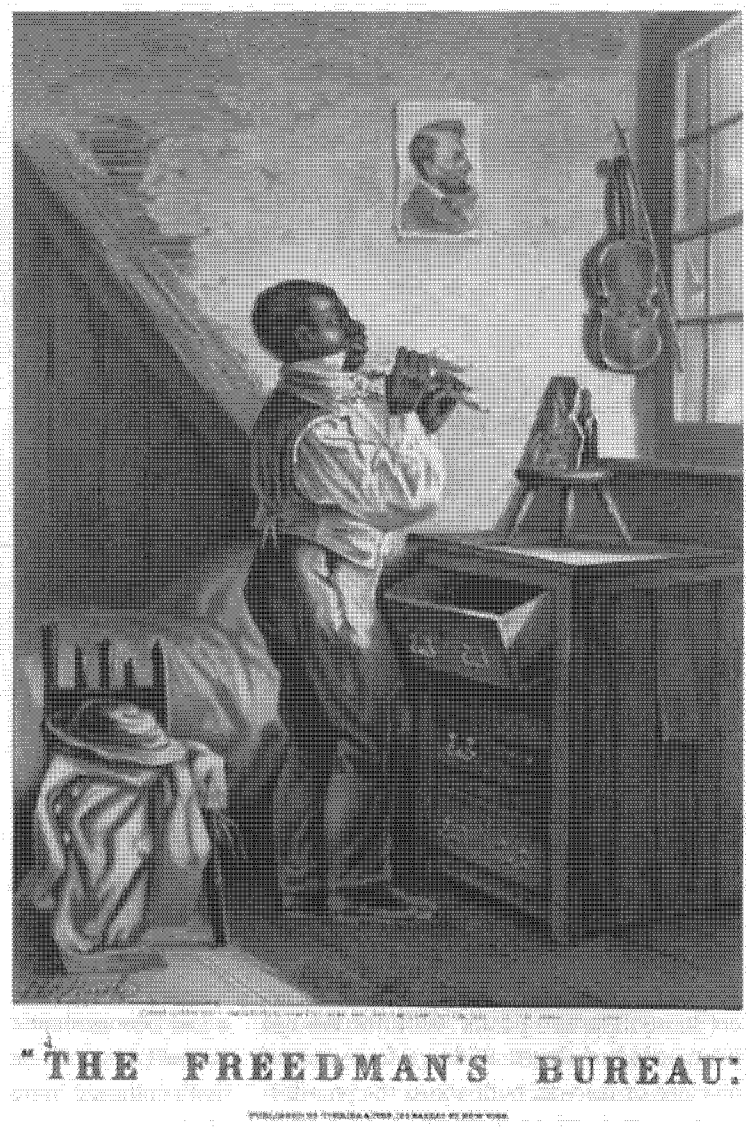


With passage of the Freedman's Bureau Act in 1865, providing for the division of Confederate property among emancipated slaves, the concept of confiscating Confederate property took on new meaning.

Captured Property Act of 1863 authorized the army to take what amounted, in many cases, to temporary possession of any property it came across.[16]

It is important to distinguish confiscated property from abandoned property. Abandoned property was land or personal property that had been deserted by its owners and then seized by the army.[17] The U.S. Treasury appointed special agents to receive and collect such property under the Abandoned Property Act. This act did not repeal or replace either of the Confiscation Acts, but operated alongside them. The crucial difference between abandoned and confiscated property was that the former was seized without title passing to the government. Instead, the owner of abandoned property had two years after its seizure to appear before the Court of Claims and prove ownership and loyalty.[18]

While it might well make no difference to a Confederate cotton planter which regime his property was seized under, it provided for crucial distinctions in the courts. The Abandoned



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Property Act did not upset title to property: it amounted to an enforced loan in the case of Unionists, and to the traditional exercise of an army's seizure of enemy property under the laws of war in the case of rebel property. Confiscated land was not physically seized by an army, but legally taken by Congress and by judges operating far from the battlefield. Such property belonged, at least for the lifetime of its owner and maybe longer, to the government. Presidential pardons also applied quite differently to those whose land had been confiscated and to those whose land had been seized. To be sure, confiscation cases and abandoned property cases were at points heard together, and each type of case at points drew rulings that affected the other. Yet it is still necessary to keep the two conceptually separate for the most part.[19]

Lincoln, Johnson, and Wartime Confiscation

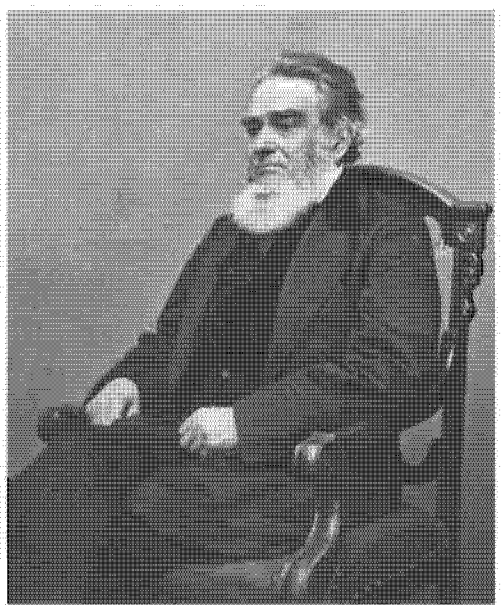
The Confiscation Acts were difficult to enforce from the start. For purposes of confiscation, rebel property fell into two categories. Rebel property located in either the North or South and used directly in support of the rebellion was subject to seizure under the First Confiscation Act, which was applied almost exclusively to property inside the Confederacy (since little property in the North was used to directly support the rebellion). Rebel property located in either the North or South and belonging to anyone offering aid or comfort to the rebellion was subject to seizure under the Second Confiscation Act, which was initially applied only to rebel property located in the Union (since the confiscation of any property behind enemy lines necessarily awaited the reopening of the U.S. courts there). As described above, the Second Confiscation Act provided little by way of instructions on its enforcement. It simply asserted, "It shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits and effects."[20] Confiscation was initiated—though exactly how was not specified—by a U.S. Attorney in a judicial district "within which the property may be found."[21] Until the end of the Civil War, the vast bulk of Confederate property liable to confiscation remained in the South and under Confederate control. Only when the Union had dominion over a given district and a U.S. district court reopened could confiscation take place.

On the confiscation issue, Lincoln fit comfortably within the group of conservative Republicans led by Edgar Cowan and Jacob Collamer: he was openly dubious about the new legislation. Lincoln planned to veto the Second Confiscation Act; it was saved only by the inclusion of a last-minute congressional Joint Resolution that significantly weakened the bill. While the President did sign the bill, he nevertheless sent to Congress the veto message he had drafted but not used, in a move that signaled his doubts about the legislation. In the veto message, Lincoln questioned both the act's constitutionality and its political utility. The President, Foner writes, "had no enthusiasm for large-scale confiscation that, he feared, would undermine efforts to win the support of loyal planters and other Southern whites, and the act remained largely unenforced."[22] During the war, Lincoln followed the letter of the law—in November 1862, he ordered Attorney General Edward Bates to issue instructions to federal district attorneys to enforce the Act—but he did not do much beyond this.[23] Bates, who was given authority to implement confiscation, was himself a conservative Missouri Republican and a strict defender of individual property. He did little to enforce the acts or even give advice to U.S. Attorneys seeking guidance.[24]

The Lincoln administration's lackluster enforcement of confiscation drew considerable criticism from Congress and from the Northern public. Perhaps most famously, on August 19, Horace Greeley, editor of the *New York Tribune*, published an open letter to the President, "The Prayer of Twenty Millions."

Jacob Collamer and Edgar Cowan (left to right), both conservative Republican Senators, opposed the confiscation acts, which were to be enforced by the U.S. Attorney within the jurisdiction of the rebel property in question.

The *Tribune* was the most widely read Republican newspaper in the country and was sure to grab Lincoln's attention.[25] Greeley seized upon the sections of the law freeing slaves that came within Union lines and demanded that the President enforce them: "We think you are strangely and disastrously remiss in the discharge of your official and imperative duty with regard to the emancipating provisions of the new Confiscation Act." He urged



President Lincoln (left) was not enthusiastic about the Confiscation Acts and did not do much to enforce them beyond ordering Attorney General Edward Bates (right) to instruct federal district attorneys to carry out the law.

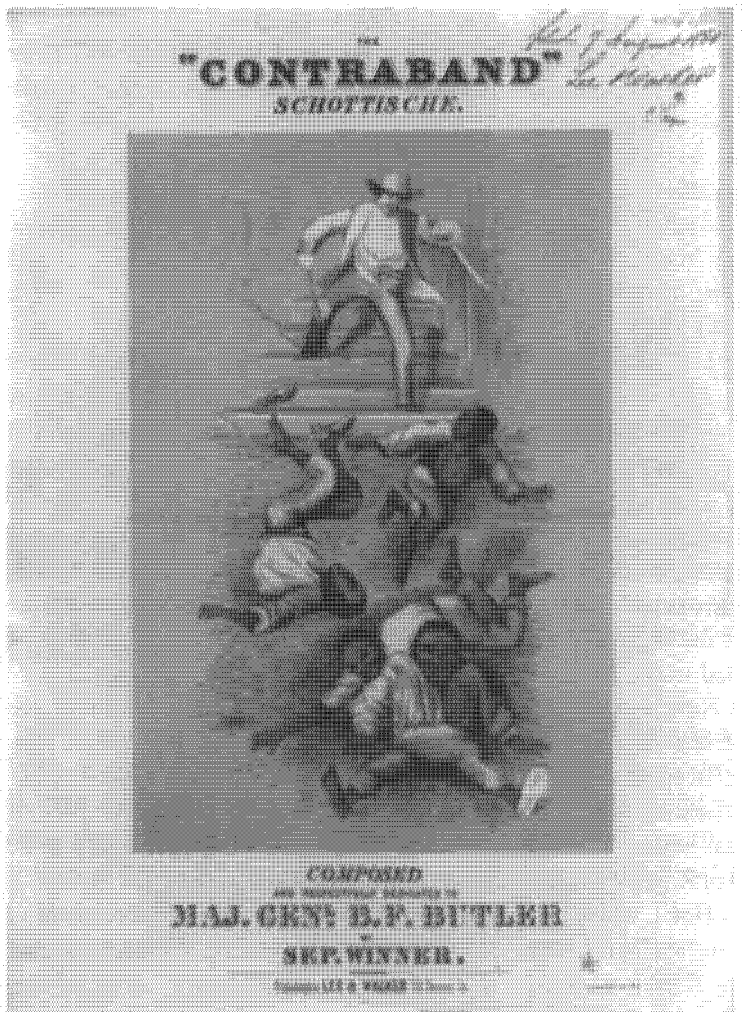
that Lincoln, "as the first servant of the Republic, charged especially and pre-eminently with this duty, . . . execute the laws."[26]

Lincoln received pressure not just from the press, but also from his own Cabinet. In his 1863 Report to Congress, Secretary of the Treasury Chase urged Lincoln to move quickly against property located in the North and owned by those aiding the rebellion. "Property of great value in loyal states is held by proprietors who are actually or virtually engaged in that guilty attempt to break up the Union," he wrote. Such property "should be subjected by sure and speedy processes to confiscation."[27]

This is not to suggest that Lincoln blocked any and all property confiscation. After the passage of the First Confiscation Act in August 1861, U.S. Attorneys were given wide discretion to instigate proceedings and began to seize Confederate property located in the North.[28] In the Southern District of New York, which includes New York City, the district courts ordered eighteen separate confiscations of property under the Second Confiscation Acts.[29] In Cleveland, the U.S. marshal seized $300 in gold coins in the possession of R. M. N. Taylor, the proprietor of the Angier Hotel, which had been hidden with Taylor by a Confederate sympathizer arrested while fleeing south.[30] In Washington, D.C., the house of William B. Cross, a major in the Confederate army, was confiscated in 1863 by U.S. Attorney Edward Carrington.[31] Nearby, in Allegheny County, Maryland, money was seized belonging to another Confederate officer, Joseph Anderson.[32] George Coffey, the U.S. Attorney for the Eastern District of Pennsylvania, wrote Lincoln to inform him that under the First Confiscation Act, "the marshal by my direction has seized all copies of the *New York Daily News* found in this city." Coffey asserted the paper was "property used for insurrectionary purposes" and asked Lincoln, "Am I right?"[33]

Military commanders in the field carried out some property confiscation, erroneously claiming broad authority under the First and Second Confiscation Acts. In violation of the legislation's requirement that property confiscated under the law take place in civilian courts, the army took matters into their own hands at some points.[34] Relatively early in the war, Northern armies occupied parts of the Confederacy, including Tennessee, southern Louisiana, and eastern Virginia, as well as portions of the South Carolina and Georgia coasts.[35] General Benjamin Butler in Louisiana carried out the most aggressive confiscation of any military commander. After conquering New Orleans in April 1862 Butler used the Confiscation Acts to seize and sell estates and personal property, before Lincoln replaced him with General Nathaniel Banks. General George McClellan tried to keep a tight reign on behavior, declaring that private property be protected and that seized property be paid for, but military confiscation continued throughout the war.[36]

For proponents of confiscation, the prospects for enforcement were made considerably worse when Andrew Johnson became President in April 1865. As part of the Johnson administration's drive to placate white Southerners and restore the Union, it began to radically restrict the enforcement of the Confiscation Acts. In the summer and fall of 1865, Johnson began to issue special pardons that restored the property rights of rebels, with dramatic—though not yet certain—consequences for the legal status of confiscated and abandoned land.[37] Johnson's Attorney General James Speed took a narrow view of confiscation: by the end of 1865, he was telling federal district attorneys to enforce confiscation only against those considered still rebellious. Ultimately, Speed declared that peacetime confiscation was illegal, and by June of 1866 he had ordered a halt to any more seizures. The President ordered that land seized by the federal government under the Confiscation Acts—land to which the United States had title—should be returned to its owners, unless it had already been sold to a third party. By then, Benedict argues, Johnson had "effectually nullified both the confiscation and the Freedmen's Bureau laws."[38]



Until Lincoln replaced him, Union General Benjamin Butler in Louisiana carried out the most aggressive program of confiscation of any military commander, using the Confiscation Acts to seize and sell estates and personal property. This 1861 sheet-music cover shows slaves trying to run from the ruthless Butler, who declared such fugitives contraband of war.

All told, total proceeds from confiscation by 1867 amounted to roughly $300,000.[39] Civil War confiscation in the field was over in political terms before it began: it lasted for little more than five years, from 1861 to roughly 1866. Yet in that period, legal and constitutional questions were raised that remained in the courts—most notably the Supreme Court—for decades afterwards.[40]

Confiscation's Hidden Legacy: The Right to Property and the Supreme Court

Coming from the California Supreme Court, Justice Stephen J. Field took his seat as the tenth Justice in December 1863, and stayed on the Court until December 1897. An ardent Democrat with a strictly religious upbringing in New England, Field moved to Washington flush with legal and commercial success on the California frontier, seeped in dogmatic beliefs in moral absolutes and ideals of the free individual.[41] On the Supreme Court, Field soon "came to believe in a rather extreme version of an inalienable right of property" protected by the Constitution.[42] These views were exemplified in his famous dissents in the *Slaughterhouse Cases*[43] in 1873 and in *Munn v. Illinois* in 1877, arguing against the power of state legislatures to regulate commerce.[44] In his thirty-four years on the bench, Field

Attorney General James Speed took a narrow view of confiscation: By the end of 1865, he was telling federal district attorneys to enforce confiscation only against those considered still rebellious.

"profoundly influenced the character of American law" and in particular exerted "extraordinary influence" on "American constitutional development."[45]

Field's steps toward locating substantive rights protecting property in the Constitution was part of a larger postwar trend reflected in the 1868 publication of Judge Thomas M. Cooley's hugely influential **Constitutional Limitations**, a book that was "unabashedly designed to facilitate constitutional challenge to the legislature's will" and aimed to "stake out the domain beyond which legislation could not go, no matter how alluring the public benefits."[46] After the Civil War, as James Ely has noted, "prevailing constitutional thought stressed property rights and limitations on legitimate government authority." Gradually, the Supreme Court "embraced laissez-faire constitutionalism,"[47] which, for its proponents, was "more than a preferred policy" but "a matter of natural law and natural rights."[48] Armed with this belief in the market and the rights of property, a Supreme Court majority exercised supervision most famously over state laws, but also—as their treatment of confiscation makes clear—over federal legislation as well.

There has been extensive debate on whether Field and other proponents of an expanded constitutional right to property were shielding commerce from legislative control or utilizing a Jacksonian ideology hostile to corporate interests. At times, this debate has broken down into binary categorical disputes in which Progressive historians, having branded Field and the Court as pawns of big business, are then rescued by more recent historians—most notably Charles McCurdy and Benedict—who argue that Field and his cohort's constitutional interpretation was driven by a Jacksonian free-labor ideology opposed to corporate privilege and corruption.[49] As James Kloppenberg has warned us, in the liberalism-republicanism debate, binaries are historically dangerous. We can concede that Field and others had alternative commitments and different ideational tools at hand. If we move past the opposition of greed and ideology, we find, generally, that protecting commercial growth and protecting individual rights both produced a common outcome: namely, shielding property from legislative control. Morton Horwitz has persuasively argued that "[t]raditional conservative fears that the state might be used to protect debtors or to take property in order to equalize wealth were thus matched by neo-Jacksonian anxieties that the state would be taken over by corporate interests." Instead of acting in opposition, these "twin fears" of the exercise of power by the state "combined to produce laissez-faire ideology."[50]

Within the parameters of laissez-faire, liberal constitutionalism, Field held a special disdain for confiscation, which came to be an epithet in his jurisprudence, synonymous with the illegitimate regulation of property by the state.[51] It is important to remember that even as he and the rest of the Court struggled to determine when regulation—especially rate

regulation—became "confiscatory" and so unconstitutional, they were at the same time ruling on actual confiscation cases—e.g., considering the power of the legislature to seize property outright.

In the 1870s and 1880s, even as the war receded into memory, confiscation remained a near constant in the Court, and Field was increasingly able to use confiscation cases to advance liberal property jurisprudence and liberal constitutionalism. For advocates of liberal property ideology, these cases were opportunities to recast what constituted legitimate property law under the Constitution. Legislative confiscation had emerged from the Union Congress in 1862 bloodied but still alive. After the war, however, Field and other Justices weakened and undermined the legislative power to confiscate property more effectively than Democrats in the 37th Congress could have hoped. The Confiscation Acts themselves were upheld as constitutional, even as their radical elements were gutted from within, leaving only an empty shell. Under the Court's direction, confiscation was upheld on extremely narrow grounds with almost no precedential value. At the same time, confiscation beyond the lifetime of the offender was made explicitly unconstitutional, a broad presidential pardon power restoring all rights in land was recognized, and those whose property had been confiscated were given the right to alienate ultimate title to their property by sale or by will.

There were some instances when confiscations were upheld, but only in cases where the commitment to protecting the natural rights of property clashed with an explicit utilitarian concern for the function of the marketplace. This conflict arose primarily in cases in which the Court considered claims turning on property that had already been confiscated, sold by

Although the Civil War receded in memory in the 1870s and 1880s, confiscation issues constantly came before the Supreme Court.

the government, and then re-sold as alienable life estates in land. Once the offender whose property had been seized in the first place died, their heirs demanded the return of the property. In these cases, Field often deferred to settled property arrangements and upheld confiscations when invalidating them would upset the apple cart, or when intervention by the government reversing confiscation would disrupt private arrangements arrived at in the marketplace.

Field was generally "strongly results-oriented": in cases where ideological commitments would lead to the "wrong" decision, these commitments gave way to a utilitarian drive to arrive at the right result.[52] Here again, he was in line with broader postwar historical trends. Horwitz has noted that "as the law became increasingly implicated in the process of promoting economic growth," judges turned more frequently to the "overtly instrumental use of private law to advance utilitarian objectives."[53] Confiscation is an instance of the overt use of public law to advance the same objectives.

Hollow Victory: Confiscation Upheld

During the Civil War, one state court invalidated the Second Confiscation Act. In the summer of 1863, in *Norris v. Doniphan*, the Kentucky Court of Appeals held that the Second Confiscation Act was unconstitutional and therefore void.[54] Coming from a bitterly divided state with a large population subject to property confiscation by the federal government, *Norris* was a full-throated denunciation of the Second Confiscation Act. The case was initially brought in Mason County Court and turned on a $5,000 debt owed by Norris to Rebecca Doniphan. Norris did not deny owing the money, but asserted as a defense that Doniphan was a professed secessionist who had moved to Arkansas at the outbreak of war and regularly had given aid and comfort to the rebellion. Doniphan's property was therefore covered by the Second Confiscation Act, which provided that any offender was barred from bringing suit "for the possession and use" of his or her property. From this rather thin opening—would the court enforce the debt?—the court seized the opportunity to rule on the law as a whole.

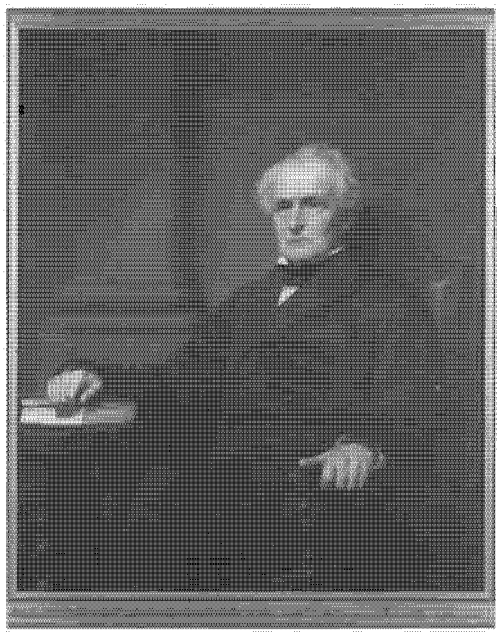
The court's opinion reads like a speech made by a conservative Democrat in the Senate in opposition to confiscation. Southerners retained their rights as citizens, and confiscation was a straightforward violation of the Fifth Amendment's guarantees of due process and uncompensated takings. Making reference to the Magna Carta, the writings of Lord Coke, and Story's **Commentaries**, the opinion rails against the usurpation of private property by the federal government. Confiscation had not been recognized by the law of nations since the eighteenth century, and since then "nearly a century's advance of commerce, civilization and Christianity" had rendered "the barbarous rules of the past intolerable."[55] In sum, the Second Confiscation Act was "in derogation of the personal rights and rights of property." It could not constitutionally be upheld and was "a nullity."[56]

Norris remained the only judicial decision on the constitutionality of confiscation for more than seven years. Even though the question had not yet been litigated, Chief Justice Chase, in his capacity as a circuit court judge, made clear his position that most lawyers and judges believed the Second Confiscation Act was constitutional.[57] However, as more and more confiscation cases were docketed at the Supreme Court in the late 1860s, it was only a matter of time until the Court considered the question. As Fairman noted, "Inevitably an assault would be made: the legislation did not seem impregnable, and there were many interested in attacking it."[58]

Such a case, *Miller v. U.S.*, reached the Supreme Court from the Circuit Court of the Eastern District of Michigan.[59] Samuel Miller, a citizen of Virginia, owned shares in two Michigan railroads. These shares were seized in April 1864 and later sold at auction. After the war, Miller challenged the sale under the Fifth

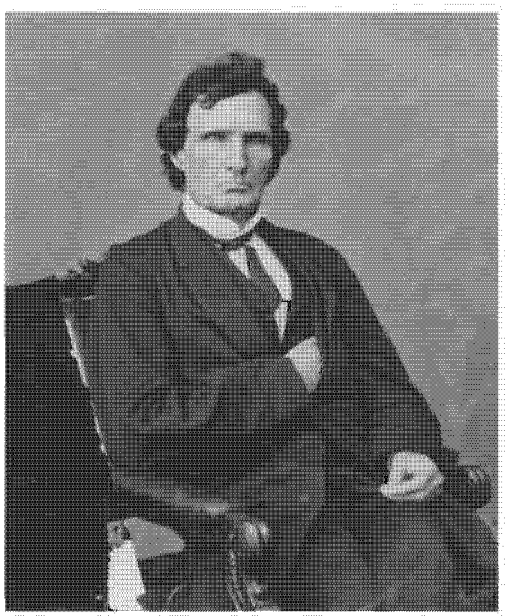
Amendment. The case was argued before the Supreme Court on February 1 and 2, 1870.[60] In an opinion by Justice William Strong, the Court sustained the constitutionality of the Act on April 3, 1870 by a 6–3 vote, with Justices Field, Clifford, and Davis dissenting.

Miller is routinely cited as sustaining the constitutionality of confiscation, but this description, while technically correct, can be misleading. The majority ruling in *Miller* was narrow—so narrow that virtually none of the competing conceptions of property advanced in Congress and by the President were even so much as raised. Confiscation as a congressional power was not upheld by the majority so much as subsumed within existing rights recognized by the laws of war. The principled property debates that had dominated consideration of confiscation were nowhere in evidence in *Miller*. Instead, the Court treated intensely controversial legislation as settled law, stripping away any larger implications for ideas of property.



Justice William Strong (pictured) allied himself with Justice Stephen Field in opposing radical confiscation. He went to great lengths to uphold confiscation while minimizing its consequences for American property ideology and property law.

Justice Strong was normally an ally of Field and an opponent of radical confiscation.[61] However, Strong was also a former Democratic congressman and a recent convert to the Republican party, appointed to the Court by President Grant in 1870. His opinion accomplished the objective of sustaining Republican legislation while maintaining the majority's commitment to liberal conceptions of property. Already marginalized by the *Dred Scott* decision and the impotent objections made by Chief Justice Taney to Lincoln's actions during the war, the Court had found a way to sustain a popular law while giving no ground to radicals, such as Representative Stevens, who asserted the broad powers of Congress to seize and allocate land. Confiscation for the majority was not a congressional power at constitutional law, but a belligerent power at international law.



Radicals such as Thaddeus Stevens, the Senator from Pennsylvania, pushed for broader powers of Congress to seize and allocate land.

Justice Strong went to great lengths to uphold confiscation while minimizing its consequences for American property ideology or property law. The main constitutional question for Strong was whether the Confiscation

Acts were criminal statutes or emergency war measures. If the former, he conceded that full constitutional protections, most notably trial by jury, were due before any property could be confiscated. If the latter, then confiscation was in line with existing Supreme Court doctrine on the powers conferred on the federal government during war. For Strong, it was settled that the war power included "the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor." Confiscation was justified "not because of crime" but because property belonging to a belligerent enemy was "not affected by the restrictions imposed by the fifth and sixth amendments" and was instead "liable to confiscation under the rules of war."[62]

Strong clung tightly to the Supreme Court's by-then famous "dual sovereignty" theory, promulgated in the *Prize Cases*,[63] which allowed Congress and the President to treat rebels as both enemy belligerents and American citizens. It was a recognized fact that war existed between the Union and the Confederacy. Once war existed, Strong declared, "The United States were invested with belligerent rights in addition to the sovereign powers previously held." Congress had "full power to provide for the seizure and condemnation of any property" of use to belligerent enemies. The fact that it was a civil war did not mean that the government was "shorn of any of those rights that belong to belligerency."[64] Thus, Congress could confiscate enemy property, even as the President could blockade enemy ports. Both fell within the powers of belligerents during war.

Field's Dissent

The dissent by Justice Field was an explicit condemnation of confiscation legislation as a violation of international law and an unconstitutional deprivation of individual property without trial. Field, as a matter of international law, disagreed with Strong that there was a recognized right to confiscate all enemy property, arguing that "there is a limit to the subjects of capture and confiscation which government may organize."[65]

Domestically, the Confiscation Acts were simply a species of criminal law, and were manifestly unconstitutional. Field echoed the claim made by conservatives in the congressional debates that, away from the battlefield, only judges could seize property as punishment for crimes of disloyalty. Property not taken to directly support the military was illegitimately taken unless taken pursuant to a trial. The *in rem* property seizures provided for in the Act did away with constitutional protections altogether and worked "a complete revolution in our criminal jurisprudence" that meant that individual trials for criminal offenders might be disregarded and "proceedings for such punishment be taken against [their] property alone."[66]

The radical proponents of confiscation would not disagree with Field's analysis of confiscation proceedings, but would disagree vehemently that these proceedings were unconstitutional. For them, it was an entirely constitutional premise that Congress could constitutionally set the criteria for determining the guilt of a disloyal offender and order the seizure of property based on that determination. Field's dissent assumed what the congressional opponents of confiscation had argued: that confiscation was not a legitimate legislative function. This was an institutional argument with ideological implications, and it represented a view that was more liberal, more individual, and more protective of property. Congressional confiscation harkened back to a time when republican theory made the disposition of property the shared province of both the legislature and the courts. Field's arguments in *Miller* show the growing dominance after the Civil War of the argument that only judges could legitimately order the uncompensated seizure of individual property. For Field, property ownership was by its nature individual, and property could only be seized with all the protections offered an individual at trial. Anything else was congressional usurpation of the judiciary's exclusive power to seize

property for crimes. Though relatively new, the assertion of judicial exclusivity was boldly presented by Field as customary and even natural.

Field and the Sharp Edge of Admiralty Law

Even as confiscation was upheld on narrow grounds, Field wrote the majority opinion in a number of subsequent cases that held particular confiscations to be illegal. His technique for undermining confiscation was an exaggerated adherence to doctrinal technicalities, particularly those arising out of admiralty law. Field was not generally a high legal formalist; instead, he often arrived at results with little textual grounding. Yet in cases where a confiscation could be struck down on technical grounds, Field was brutally exacting. While Field had lost in *Miller*, he thereafter applied rigid, even aggressive, doctrinal inflexibility, making the Confiscation Acts almost impossible to enforce.

Both the First and Second Confiscation Acts provided that proceedings for confiscation should conform as much as possible to proceedings in admiralty law or revenue collection. This was a somewhat confusing instruction, in that admiralty jurisdiction did not normally extend to seizures on land, or revenue collection to enemy confiscation. Both were settled, highly specialized areas of law, each with arcane peculiarities and idiosyncratic requirements.[67] Chief Justice Chase acknowledged this ill fit between admiralty, revenue, and confiscation in an early case arising out of the First Confiscation Act, *Union Insurance Company v. U.S.* Chase did not labor to align confiscation with admiralty, but held that "when we look beyond the mere words to the obvious intent" of Congress, admiralty could be seen as a template for confiscation and not a controlling body of law.[68]

Field rejected any notion of a "template" and turned to formalism in an attempt to undo property confiscation. In *Tyler v. Defrees*,[69] a case announced soon after *Miller*, Field wrote a blistering dissent asserting that confiscation must precisely resemble seizures in revenue cases. In revenue cases, property was seized by an executive officer who brought it into court, where it was effectively seized again by a judicial officer and so brought under the court's control. In confiscation cases, judicial officers—normally the marshals—seized the property in the first place, and no "second seizure" was observed. Field claimed that the slight departure from revenue proceedings in this case made the confiscation invalid.

Writing for the majority, Justice Samuel Miller accused Field of attempting to accomplish what he had been unable to achieve in *Miller*. If Field's constricted interpretation was adhered to, then "the confiscation acts would be nugatory from the difficulty of putting them judicially in force, though their constitutionality be conceded." The analogy to admiralty and revenue law called for "reasonable and sound rules," not "a system of procedure so captious, so narrow, so difficult understand or to execute, as to amount to a nullification of the statute." For his part, Field essentially admitted that his resort to formalism was another method of undermining the law. Responding to Miller's charge of raising an "unsubstantial objection," Field railed, "I answer that no objection is narrow or unsubstantial which goes to the jurisdiction of the court to forfeit the property upon *ex parte* proceedings, without a hearing."[70]

In subsequent decisions, the Court was split, as Field was occasionally able to convince the Court to adopt his formalist objections to confiscation. In *Winchester v. U.S.*,[71] the executor of the will of John C. Jenkins sought to recover the proceeds of the sale of 168 bales of cotton from Jenkins' Mississippi plantation that had been confiscated and later sold. Field held for the Court that the confiscation was invalid on the grounds that the executive branch had never formally seized the property, and "the executive seizure is the foundation of all subsequent proceedings under the Confiscation Act." Field was not always able

John Slidell and his wife (pictured) were prominent Confederates who owned substantial property in New Orleans. Their confiscation case drew nationwide attention when it came before the Supreme Court, and the public pressured the Justices to uphold the seizure of their lavish property. In his 1873 opinion for the Court, Justice Strong saved the confiscation of the Slidells' property.

to carry the majority, but his resort to high formalism did slow—and, in some instances, prevent—the confiscation of property.[72]

The Question of Permanent Confiscation

The next great question for confiscation was whether property could be confiscated forever or only for the lifetime of the offender. This had been the crucial issue that had drawn the threat of Lincoln's veto. It was, in fact, the threshold question that determined whether confiscation could ultimately be considered legitimate or successful at all. The Constitution explicitly prohibits bills of attainder, or the conviction of those named guilty of treason in legislation, and corruption of blood, or a prohibition on heirs inheriting property as part of the punishment for treason. If these constitutional provisions were interpreted to mean that confiscation of property by the federal government could only be temporary, then confiscation was doomed to failure.

Temporary confiscation meant the government's taking title to a life estate in confiscated property and would give the government control over the property only so long as its former owner remained alive. After death, it would revert to the former owner's heirs. In material terms, a life estate meant lasting confusion and a deep reduction in the value of virtually all confiscated property. A former rebel might die tomorrow or in fifty years or more. When the government sold confiscated land at auction, it could sell only a life estate, not a fee simple title. Heirs to confiscated property, awaiting the death of the offender, could in the meantime sue to prevent the waste of the property. The record-keeping required over the course of decades to keep track of who retained what interest in the land would be extremely onerous. In short, as a practical matter, temporary confiscation would almost guarantee a failure to raise much money or to result in anything other that litigious chaos.

As a conceptual matter, the question of temporary or permanent confiscation meant the difference between a property-seizure regime based on republican ideology and one based more closely on the idea of individual property rights as sacrosanct. Revolutionary confiscation was permanent, and not just because there was not yet a Fifth Amendment. It was permanent because one's ownership of property was explicitly based on continuing loyalty to the political community, a theme that was reiterated over and over again in the confiscation statutes passed by colonial legislatures. The inclusion of a Just Compensation Clause in the Constitution, as well as the attainder and corruption-of-blood provisions, represented a significant shift toward a more liberal, individual conception. Yet the question remained of whether violent disloyalty to the nation—treason on a massive scale—could allow for the legitimate, permanent seizure of enemy property, even if it was domestic.

Lincoln had hoped to squelch any controversy over this question by forcing the inclusion of an "explanatory resolution" providing that property could be seized only for the lifetime of the offender.[73] In a key radical victory, confiscation had been seemingly permanent in the bill initially passed by both houses of Congress. Lincoln's Resolution soon completely upset the delicate legislative maneuvering that had led to the bold assertion of the power of Congress to permanently seize property without compensation. For Lincoln, this was an illegitimate encroachment on the rights of property.

Judge John C. Underwood (pictured), of the restored U.S. District Court for Eastern Virginia, was at odds with President Lincoln's new Joint Resolution, providing that Confederate property could be seized only for the lifetime of the offender. Underwood argued that the resolution rendered property confiscation unworkable and emasculated the original acts—which was precisely Lincoln's intention.

Importantly, the Joint Resolution did not settle the issue as Lincoln had hoped, and permanent property confiscation remained a live controversy. In both Congress and the courts, powerful voices continued to assert that the Constitution did not prohibit permanent confiscation. In a ringing endorsement of the radical position, Judge John C. Underwood, in Alexandria's restored U.S. District Court for Eastern Virginia, delivered an opinion entirely at odds with Lincoln's position. Underwood,

who had been a small-town lawyer in private practice in upstate New York, and then secretary of the Emigrant Aid and Homestead Society, had received a recess appointment by Lincoln in March 1863.[74] In the case of *U.S. v. Right Title and Interest of Hugh Latham*, he read the constitutional provisions on bills of attainder and corruption of blood "except during the life" of the offender as prohibiting the sometime practice of the British Parliament of seizing the land and personal property of those considered traitors after their deaths. The explanatory resolution simply brought the Second Confiscation Act within this requirement. To read the resolution as limiting confiscation to life estates would be an absurdity, because it would mean that an explanatory provision had been passed that effectively destroyed the original bill itself. "It cannot be supposed," he declared, "that Congress intended to repeal its own act by the resolution, or so to emasculate it as to make it worse than a nullity."[75]

To emasculate the Act was precisely Lincoln's intention. The "explanatory" Joint Resolution did not explain anything. Rather it forced into the bill, on the last day of the legislative session and under threat of a veto, the President's understanding of the Constitution. Thus, Underwood was presented with a bill that provided for property confiscation and an accompanying resolution that made property confiscation unworkable. If, Underwood claimed, the law was read to require that "only a life estate is to be confiscated," then the underlying purposes of the bill were undermined—and the reading would "defeat the leading objects" of the legislation itself. Such a reading would "promote jealousy and hatred between the holders of life estates and reversionary interests," and would in any event raise little money because "if only a life interest is to be acquired, no purchaser could afford to take on so uncertain a tenure."[76] Underwood ordered that all confiscated property sold in his district be sold in perpetuity and offered the federal judiciary a radical interpretation of the Second Confiscation Act.

At the same time, Congress was divided over precisely the same issue. In the first session of the 38th Congress, Lyman Trumbull and Charles Sumner in the Senate and George Julian in the House pressed for the repeal of Lincoln's Joint Resolution. Both houses of Congress ultimately repealed the resolution in 1864. Early in the session, the House passed a resolution that essentially adopted Underwood's reading of the Constitution. The resolution provided that the last clause of Lincoln's Resolution be replaced with the instruction that no confiscation would take place that was "contrary to the Constitution of the United States." This removed the language permitting only the confiscation of a life estate and was an implicit restatement of Underwood's argument that more was permitted by the Constitution. The resolution passed 83–76.

On February 17, 1864, during consideration of the bill establishing the Freedmen's Bureau, Trumbull submitted a resolution providing that the operative clause of the Second Confiscation Act's Joint Resolution be "hereby repealed." The amendment was tabled along with the rest of the bill and did not surface again until June 28. On that day, the amendment passed 23–15 with support from radical Republicans and opposition from Democrats and conservative Republicans such as Jacob Collamer and Edgar Cowan. Two days later, on June 30, the whole of the Freedmen's Bureau bill was referred to a House committee, where consideration of the bill was postponed until December 20. This had the effect of delaying joint consideration of the measures repealing Lincoln's resolution, and a common bill was never passed.

The Supreme Court soon slammed the door on these broad interpretations of the power of Congress to permanently confiscate property in the 1870 case of *Bigelow v. Forest*.[77] In this case, a tract of land in eastern Virginia belonging to French Forrest, an officer in the Confederate Navy, had been seized by a U.S. Attorney in September 1863 and ordered confiscated under the Second

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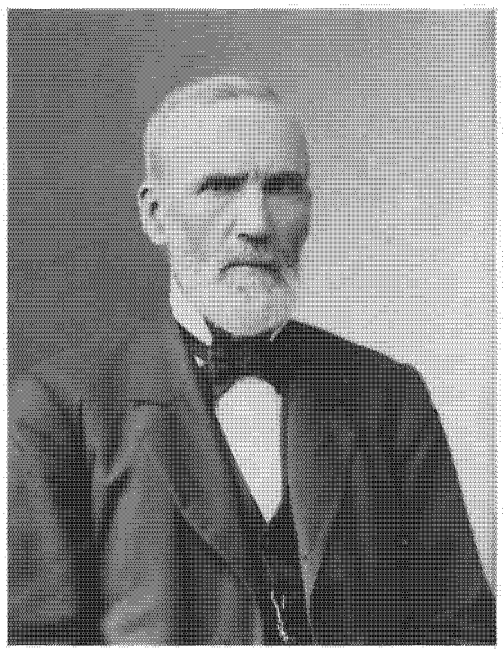

Senator Lyman Trumbull (above, left) and Representative George Julian (above), both of Illinois, and Senator Charles Sumner of Massachusetts (left) pressed for the repeal of Lincoln's Joint Resolution. Congress ultimately repealed the resolution in 1864.

Confiscation Act by the U.S. District Court for the Eastern District of Virginia on November 9. The land was sold in July 1864 to the highest bidder, one Buntley, who then sold the deed to Bigelow. Forrest died without a will on November 24, 1866. His son Douglas, asserting that the confiscation was good only for the life of the offender (his father), brought an action of ejectment against Bigelow, and the case worked its way to the Supreme Court.

As of 1869, Underwood's opinion in the *Latham* case was still the most prominent ruling on this issue by a federal court. In *Bigelow*, however, Justice William Strong utterly rejected Underwood's interpretation. Strong's language was a model of conservative

The Supreme Court heard a case in 1870 involving a tract of land in eastern Virginia belonging to French Forrest (pictured), an officer in the Confederate Navy, that had been confiscated and sold. When Forrest's son asserted that confiscation was good only for the life of the offender (his father was now deceased), the Supreme Court ruled that Congress did not have the power to permanently confiscate property.

Republican thinking on confiscation and went to great lengths to squash the radical interpretation of Lincoln's explanatory resolution. The resolution was not, Strong contended, simply a cautious reiteration that all constitutional limitations must be observed. Instead, it was an explicit limitation that did not explain the bill so much as amend it. For Strong, "the act and the resolution are to be construed together," and taken together, they could "admit of no doubt" that the U.S. could seize property only for the "life of the person for whose act it had been seized." The U.S. could not, of course, sell any more than it possessed. Whether he understood it at the time or not, Bigelow had been sold a life interest in the confiscated estate of French Forrest—an interest that expired along with Forrest on November 24, 1866. Strong also made clear his view that Lincoln's Resolution had saved the Second Confiscation Act from unconstitutionality. The resolution ensured that "the punishment inflicted" upon a property owner subject to the Act was "not to descend to his children." Thus "his heritable blood is not corrupted."[78]

Bigelow represented a signal triumph for liberal property ideology and liberal constitutionalism. Efforts in Congress to repeal the explanatory Resolution now faced a hostile Supreme Court ready to overturn such a move. The legal interpretation allowing for permanent confiscation had been demolished by the nation's highest court. As a practical matter, all the U.S. could sell was a terribly uncertain life estate that might well last for only a short time—as Bigelow learned. In addition, all those who had purchased confiscated property were now put in the position of keeping tabs on a former rebel—in all likelihood a stranger—or waiting for the day his or her heirs came to take back the property. Underwood had argued that, as a matter of policy, Congress could not have intended to pass an explanatory resolution that confined the courts and the executive to seizing and selling life estates. Such a reading, he feared, would "open the door to absurdities and calamities."[79] In practice, his fears had come to pass.

Apart from its significance for the reading of the Civil War confiscation acts, *Bigelow* had wider significance for the future of congressional confiscation. During the American Revolution, disloyal property had been permanently seized, as part of a republican vision of the overriding importance of allegiance to the polity. This vision had not altogether died by the 1860s, and it had been maintained by radicals like Charles Sumner in Congress during the confiscation debates. *Bigelow* represented a direct repudiation of this view. Before *Bigelow*, Lincoln's resolution had been an argument; afterwards, it was constitutional law. After *Bigelow*, permanent, uncompensated property confiscation for disloyalty was practically impossible and conceptually illegitimate. However, despite the certainty of Strong's language, the issue was still, as a historical matter, unsettled; indeed,

it was controversial during Strong's own time. In reading his opinion, it is striking to remember that *Bigelow* settled the question not by maintaining an established tradition, but by rejecting a much older tradition of legislative confiscation.

Presidential Pardons and Instrumental Confiscation

The Constitution grants the President the power "to grant reprieves and pardons for offences against the United States." The power of the sovereign to offer "grace" to offenders within the Anglo-American legal system was ancient, or, as Chief Justice Marshall declared, "had been exercised from time immemorial."[80] Presidents Lincoln and Johnson—both of whom considered the Civil War one to preserve the Union, not to remake the South—found in the executive's broad prerogative to pardon a powerful policy tool. Lincoln issued his first general pardon on December 8, 1863. In it, he offered the vast bulk of those taking part in the rebellion the chance to sign a loyalty oath. Once taken, they were granted a "full pardon" with, among other things, the "restoration of rights of property, except as to slaves, and in property cases where rights of third parties have intervened."[81] This proclamation thus gave the vast bulk of rebels an opportunity to escape property confiscation, while at the same time preventing the return of property that had already been confiscated. In 1864, Lincoln issued a second proclamation reiterating his offer of pardons for those who had "sufficiently returned to their obedience to the Constitution."[82]

On taking office, President Johnson quickly issued pardon proclamations that reflected his professed hatred for the South's slave-owning planter class. On May 29,

President Andrew Johnson eventually proclaimed unconditional amnesty for all those who took part in the rebellion and ordered the return of all abandoned or confiscated property to those who had been pardoned. This 1866 cartoon shows Uncle Sam leaning on a bar for "shattered constitutions" and offering Johnson a glass of medicine.

1865, in two separate proclamations, he issued a broad amnesty that included the reestablishment of all property rights excluding slaves. Johnson, however, excepted fourteen separate classes from the proclamation, including those who owned in excess of $20,000 of taxable property; they were forced to apply for individual pardons. A dedicated opponent of black suffrage, Johnson took steps to align himself with the white yeoman class in the South, and also to liberally grant individual pardons to rich Southerners, eventually totaling over 7,000 individual pardons. As 1865 progressed, Johnson "further encouraged white Southerners to look upon the President as their ally and protector."[83] In August, he ordered the return of abandoned and confiscated property to those who had been pardoned. Even more expansive general pardons followed, culminating on Christmas 1868, when a lame-duck Johnson proclaimed an unconditional general amnesty for those who had taken part in the rebellion.

Johnson's Christmas amnesty proclaimed the "restoration of all rights, privileges and immunities under the Constitution" and had potentially broad implications for confiscation.[84] Without question, it ended any new prosecutions. All Southerners supporting the rebellion were given a full unconditional pardon and were free from any future prosecution as rebels. In its breadth, the Christmas pardon also threatened to undo any past confiscation. In past decisions, the Supreme Court had held that a presidential pardon barred the U.S. from afterwards seeking to confiscate the offender's property.[85] Left undecided was the effect of a pardon on past confiscations.[86] This question came before Field who, a decade earlier, had written the Court's leading pardon case.[87]

In the October 1877 term, the Court heard the case of *Knote v. U.S.*[88] Knote was a Virginia resident whose personal property was confiscated and sold for $11,000, with the proceeds deposited into the U.S. Treasury. Johnson's amnesty proclamation applied "to all and to every person who directly or indirectly participated in the late insurrection" and unconditionally bestowed "a full pardon."[89] Citing the pardon, Knote sued for the reversal of the confiscation against him and reimbursement for assets seized and sold. The stakes were considerable: given the breadth of the Christmas pardon's language, a holding that the pardon had undone confiscation for Knote could undo confiscation for all former rebels. In ruling on the retroactivity of pardons, Field had a chance to undo confiscation altogether. Yet he did not.

In *Knote*, Field upheld past confiscations when reversing them on a massive scale would have hurt the settled expectations of the market and of "innocent" third parties. In general, Field reversed confiscations when there was not more than one subsequent buyer of confiscated property—e.g., in cases where the government seized property and sold it at auction, depositing the proceeds in the Treasury. In these cases, it was relatively easy for Field, the protector of property, to order the return of land, or proceeds from the sale of land, to its original owner when the current possessor of the property was a shrewd speculator who had bought at a discount land auctioned by the U.S. government.

Field denied Knote's claim, however, and the opinion reveals his instrumentalism in high relief. In pardon cases, Field's belief in the liberal rights of individual property clashed with a liberal devotion to the unfettered alienation of property. In many instances, confiscated property had re-entered the marketplace, and had been bought and sold in good faith. To undo one was a way to restore property that had been taken unconstitutionally by the government. To undo them all—this was to bring uncertainty to the market and disappoint the reasonable expectations of those seeking to buy and sell property already sold by the government pursuant to a confiscation.

A pardon, Field asserted, "does not make amends for the past." Once an offense was "established by judicial proceedings," then any penalty was "presumed to have been rightfully done and justly suffered." Turning to

confiscation, Field held that a pardon did not "affect any rights which have vested in others directly by the . . . judgment of the offence, or which have been acquired by others whilst that judgment was in force." After property had been confiscated, seized, and sold, "the rights of the parties have become vested, and are as complete as if they were acquired in any other legal way."[90]

Once the proceeds of a sale had been deposited in the Treasury, not only the subsequent purchaser but also the U.S. government was safe. If "the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be withdrawn by an appropriation." In cases where confiscated property had not been sold but was in the control of the federal government, however, "property will be restored or its proceeds delivered to the original owner, upon his full pardon."[91]

Field's declarations about the Court's inability to order the U.S. government to pay back confiscated proceeds are quite inconsistent with his other confiscation decisions, and they throw his instrumental jurisprudence on confiscation into high relief. He dissented in *Miller* and *Tyler* on the grounds that confiscations were upheld and money not restored. In *Winchester,* one year after *Knote,* he reversed a confiscation of cotton and held that "the claimant must have judgment for the amount" claimed.[92] This was a routine remedy in confiscation cases reversed by the Court, particularly those concerning personal property such as cotton that had been sold on the open market. Similarly, Field nowhere else expressed such strong adherence to the notion that once real property had been sold pursuant to confiscation it had, by right, "vested" in other parties. Indeed, in other cases Field urged that title to property be stripped from owners who bought it pursuant to a defective confiscation.[93] Confiscated property had "vested" in everyone who bought it. Implicit in Field's sudden concern for the protection of property "vested" and "complete" by sale was a larger concern for keeping the government from reversing settled private property transactions.

Instrumental Confiscation at the Turn of the Century

Field's implicit balancing in *Knote* became the norm in the Supreme Court's treatment of confiscation. Nowhere was this more apparent than in the Court's treatment of the heirs to confiscated land, which ultimately included the Court's greatest switch—or complete reversal—on any important confiscation issue. The *Bigelow* decision provided that the government could not constitutionally confiscate property permanently: It could only confiscate property for the lifetime of the offender. In this ruling, the Court had inadvertently lit the fuse on thousands of legal time bombs, set to explode some decades after the Civil War when those whose property had been confiscated started to die off and their heirs came to collect their property. Questions remained over exactly what happened to the land after the offender died. After *Bigelow*, it was still unclear who held the fee in confiscated property.

There were three possibilities. First, that the U.S confiscated the whole fee from the rebel, and held it in trust for the heirs, to descend to the heirs upon the rebel's death. Second, that the U.S. confiscated only a life estate from the rebel, with the remainder vesting, at the moment of confiscation, in the rebel's heirs. Third, that the U.S. confiscated only a life estate from the rebel, leaving the reversion fee in the rebel. If this was the case, then the rebel could, while still alive, sell the future interest in the property, or title to the land after his or her death. This was an intricate future-interests problem, with important legal and policy consequences. What did the rebel continue to own, if anything? If either the U.S. or the heirs held the ultimate fee in confiscated property, then the rebel owned nothing and could sell nothing. If the rebel owned the future interest then sales of that future interest were valid.

There was little question that rebels were, in practice, routinely selling their reversionary interests in confiscated property up to the decision in *Wallach v. Van Riswick* in 1875.[94] This was not surprising, given the sweeping language of Johnson's general amnesty and the ambiguous language of *Bigelow*. Were all these sales invalid? As a matter of policy, should former rebels retain such broad power over property confiscated from them for disloyalty? After *Bigelow*, with its adamant insistence that confiscation was for the lifetime of the offender alone, it was only a matter of time until heirs of offenders showed up claiming title to the property, forcing the Court to settle these thorny issues.

In *Wallach*, the Court came down firmly on the side of the heirs, holding that a rebel owned no part of property that had been confiscated. In this case, the children and heirs of Charles L. Wallach, an officer in the Confederate army, claimed title to their father's confiscated land upon his death in 1872 (Wallach's Washington, D.C. estate had been seized and sold in 1863). Six years before, in1866, Wallach sold the remaining interest in the land to Van Riswick. The heirs claimed that this sale to Van Riswick was meaningless, and that upon confiscation Wallach owned no remaining interest in the land. The heirs demanded "a decree for delivery of possession" of the land.

Writing for the majority, Justice Strong issued the decree and blasted former rebels who sought to sell future interests in confiscated land. The Court had been wrong to say, as it had in *Bigelow*, that the government had sold under the confiscation acts only "a life estate carved out of a fee." This language, Strong wrote, "was, perhaps, incautiously used." He explained: "We certainly did not intend to hold that there was any thing left in the person whose estate had been confiscated." The confiscation of Wallach's property "left in him no estate or interest of any description." To give offenders remainder interests in confiscated land "would defeat the avowed purpose of the Confiscation Act." The whole justification of Lincoln's explanatory resolution prohibiting confiscation beyond the life of the offender was to prevent against "corruption of blood," or the unjust, unconstitutional punishment of future generations. "No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers." To hold otherwise "would give preference to the guilty over the innocent."[95]

Fifteen years later, the Court reversed itself entirely. In 1890, Justice Bradley held in *Illinois Central Railroad v. Bosworth*[96] that the title to confiscated property remained in the rebel. The Court reasoned that this was a necessary inference of property law. The heirs to confiscated property could inherit the property from the offender only if the offender still retained the ultimate title to the property. "Otherwise," Bradley asked, "how could his heirs take it from him by inheritance?" The Court therefore concluded that the U.S. seized only a life estate from the rebel and that ultimately "the fee remains in him but without the power of alienating it during his life." The rebel's fee was "a mere dead estate" in "a condition of suspended animation" and would transmit to his heirs by descent.[97]

Having declared the rebel's fee in a state of suspended animation, the Court next revived it. Johnson's sweeping Christmas amnesty of 1868, Bradley argued, restored to offenders their future interests in confiscated property. In *Knote*, Justice Field's great confiscation pardon case, the Court protected the purchasers of confiscated property, ruling that the pardon did not restore ownership to property already sold. This case did not prohibit the restoration by pardon of future interests in that property, however. Here the Court ruled that the Christmas amnesty had taken the fee out of suspended animation and restored the rebel's power to alienate future interests. The pardon did not undo the seizure and sale of life estates in confiscated property. It did, however, restore all interests in property that had not vested in

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Instrumental Confiscation at the Turn of the Century

Field's implicit balancing in *Knote* became the norm in the Supreme Court's treatment of confiscation. Nowhere was this more apparent than in the Court's treatment of the heirs to confiscated land, which ultimately included the Court's greatest switch—or complete reversal—on any important confiscation issue. The *Bigelow* decision provided that the government could not constitutionally confiscate property permanently: It could only confiscate property for the lifetime of the offender. In this ruling, the Court had inadvertently lit the fuse on thousands of legal time bombs, set to explode some decades after the Civil War when those whose property had been confiscated started to die off and their heirs came to collect their property. Questions remained over exactly what happened to the land after the offender died. After *Bigelow*, it was still unclear who held the fee in confiscated property.

There were three possibilities. First, that the U.S confiscated the whole fee from the rebel, and held it in trust for the heirs, to descend to the heirs upon the rebel's death. Second, that the U.S. confiscated only a life estate from the rebel, with the remainder vesting, at the moment of confiscation, in the rebel's heirs. Third, that the U.S. confiscated only a life estate from the rebel, leaving the reversion fee in the rebel. If this was the case, then the rebel could, while still alive, sell the future interest in the property, or title to the land after his or her death. This was an intricate future-interests problem, with important legal and policy consequences. What did the rebel continue to own, if anything? If either the U.S. or the heirs held the ultimate fee in confiscated property, then the rebel owned nothing and could sell nothing. If the rebel owned the future interest then sales of that future interest were valid.

There was little question that rebels were, in practice, routinely selling their reversionary interests in confiscated property up to the decision in *Wallach v. Van Riswick* in 1875.[94] This was not surprising, given the sweeping language of Johnson's general amnesty and the ambiguous language of *Bigelow*. Were all these sales invalid? As a matter of policy, should former rebels retain such broad power over property confiscated from them for disloyalty? After *Bigelow*, with its adamant insistence that confiscation was for the lifetime of the offender alone, it was only a matter of time until heirs of offenders showed up claiming title to the property, forcing the Court to settle these thorny issues.

In *Wallach*, the Court came down firmly on the side of the heirs, holding that a rebel owned no part of property that had been confiscated. In this case, the children and heirs of Charles L. Wallach, an officer in the Confederate army, claimed title to their father's confiscated land upon his death in 1872 (Wallach's Washington, D.C. estate had been seized and sold in 1863). Six years before, in1866, Wallach sold the remaining interest in the land to Van Riswick. The heirs claimed that this sale to Van Riswick was meaningless, and that upon confiscation Wallach owned no remaining interest in the land. The heirs demanded "a decree for delivery of possession" of the land.

Writing for the majority, Justice Strong issued the decree and blasted former rebels who sought to sell future interests in confiscated land. The Court had been wrong to say, as it had in *Bigelow*, that the government had sold under the confiscation acts only "a life estate carved out of a fee." This language, Strong wrote, "was, perhaps, incautiously used." He explained: "We certainly did not intend to hold that there was any thing left in the person whose estate had been confiscated." The confiscation of Wallach's property "left in him no estate or interest of any description." To give offenders remainder interests in confiscated land "would defeat the avowed purpose of the Confiscation Act." The whole justification of Lincoln's explanatory resolution prohibiting confiscation beyond the life of the offender was to prevent against "corruption of blood," or the unjust, unconstitutional punishment of future generations. "No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers." To hold otherwise "would give preference to the guilty over the innocent."[95]

Fifteen years later, the Court reversed itself entirely. In 1890, Justice Bradley held in *Illinois Central Railroad v. Bosworth*[96] that the title to confiscated property remained in the rebel. The Court reasoned that this was a necessary inference of property law. The heirs to confiscated property could inherit the property from the offender only if the offender still retained the ultimate title to the property. "Otherwise," Bradley asked, "how could his heirs take it from him by inheritance?" The Court therefore concluded that the U.S. seized only a life estate from the rebel and that ultimately "the fee remains in him but without the power of alienating it during his life." The rebel's fee was "a mere dead estate" in "a condition of suspended animation" and would transmit to his heirs by descent.[97]

Having declared the rebel's fee in a state of suspended animation, the Court next revived it. Johnson's sweeping Christmas amnesty of 1868, Bradley argued, restored to offenders their future interests in confiscated property. In *Knote*, Justice Field's great confiscation pardon case, the Court protected the purchasers of confiscated property, ruling that the pardon did not restore ownership to property already sold. This case did not prohibit the restoration by pardon of future interests in that property, however. Here the Court ruled that the Christmas amnesty had taken the fee out of suspended animation and restored the rebel's power to alienate future interests. The pardon did not undo the seizure and sale of life estates in confiscated property. It did, however, restore all interests in property that had not vested in

another—"namely, the naked residuary ownership of the property."[98]

Two years later, in *U.S. v. Dunnington*,[99] the Court again protected the alienation of rebel property against the claims of the rebels' heirs. In 1863, the Washington, D.C. property of a rebel, Charles Dunnington, was seized and sold to one A. R. Shepard. Dunnington never sold his reversionary interest, and he died without a will in 1887. Dunnington's land was adjacent to the U.S. Capitol. Before he died, and without the notice of him or his heirs, Congress condemned the confiscated property to make it part of the Capitol grounds in 1872, paying Shepard market value for it. The heirs never knew about the condemnation proceedings and, upon their father's death, they asserted that they were entitled to the property or, at the least, new condemnation proceedings. They argued that intervening in the earlier condemnation case was legally impossible, even if they had known about it. They claimed that they had no recognizable interest in the property until the rebel died and it passed to them by descent. In any event, the U.S. could not condemn any more than the purchaser of confiscated property owned, or anything more than a life estate. From a legal standpoint, the heirs were almost certainly correct. Yet the Court rejected their position outright in openly instrumental language. "Such a construction," Justice Brown wrote, "would be intolerable." "The march of public improvement," he asserted, "cannot thus be stayed by uncertainties, complications, or disputes regarding the title to property sought to be condemned."[100]

The historical relevance of *Wallach* on the one hand and *Bosworth* and *Dunnington* on the other lies less in the reversal of precedent than in recognizing the social, economic, and ideological pressures operating on the Court in the decades between the decisions. In *Wallach*, the heirs sought and received title to one Washington, D.C. estate. This was relatively easy to accomplish and unsettled a relatively small set of expectations. In *Bosworth*, on the other hand, the heirs sought one-sixth of a tract of Louisiana land that had belonged to their father and that, over the years and several sales, had been conveyed to the Illinois Central Railroad. For the Supreme Court to upset what was treated as settled title twenty-five years after the Civil War was too damaging to expectations, inserting uncertainty into land deals that the market considered certain. *Bosworth* and *Dunnington* had the effect of ratifying the status quo. To the extent that former rebels had sold the future interest in confiscated property, these sales were validated. To the extent that former rebels had not sold their reversionary interests, they were now free to do so.

Decades removed from the battlefield, the impulse to punish rebels so manifest in *Wallach* gave way to the preservation of rebel property sales in *Bosworth*. As the century came to a close, the Court retreated in its confiscation opinions from its earlier stance of punishing rebels and preserving the property rights of individual heirs to one favoring a laissez-faire economic policy that favored the alienability of property, even by rebels. Justice Field, still on the bench, had long favored such a position; now, in these last confiscation cases, so did his colleagues.

Confiscation and Conquest

In 1877, the Court issued an important opinion by Justice Field in the case of *Williams v. Bruffy*,[101] the only major confiscation ruling considering the legitimacy not of Union confiscation but of Confederate sequestration. This was a case with broad implications, not just for property, but also for the determination of the legitimacy of Confederate law. Given its idiosyncrasy, *Williams* benefits from being considered last. In this case, unlike any other, the Court put aside for the most part the ideological balancing of commitments and instead speculated openly on the contingent relationship of property and sovereignty.

In *Williams*, Pennsylvania creditors sued the estate of George Bruffy of Rockingham

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In *Williams*, Pennsylvania creditors sued the estate of George Bruffy of Rockingham

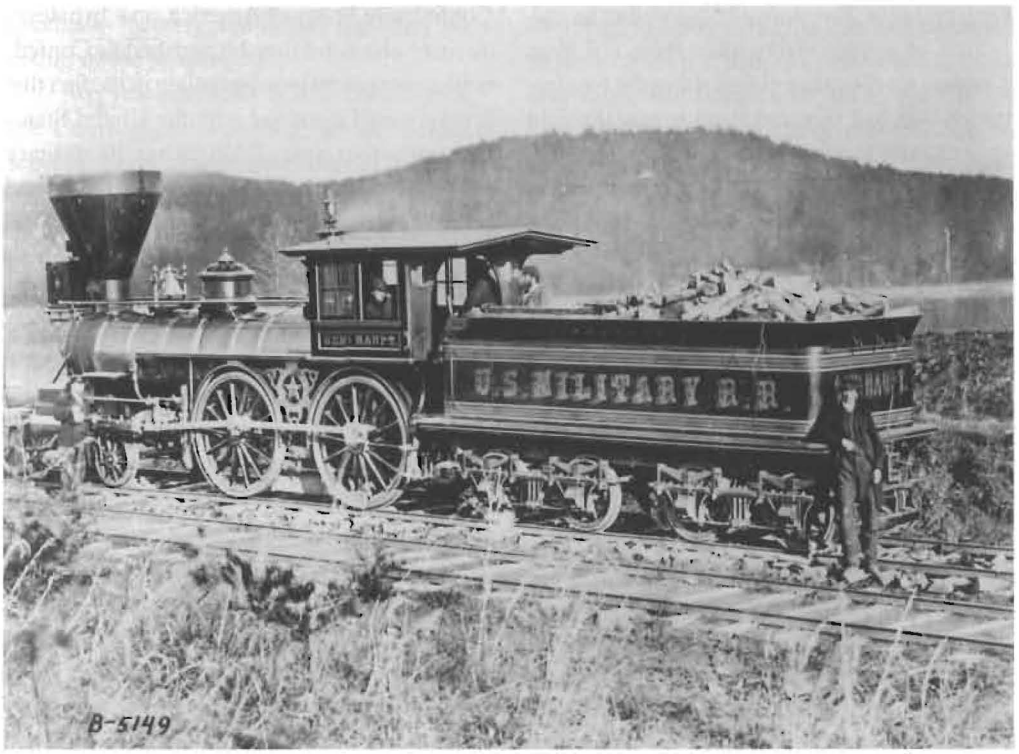
County, in the Shenandoah Valley, for the collection of unpaid debts after the Civil War. Lawyers for the estate claimed that the Sequestration Act had required them to pay the debt to the Confederate government, that they paid off the debt—with interest—to a Confederate district court in January 1862, and that by the terms of the law they were discharged of further responsibility for payment of the debt.

Up to this point, the Supreme Court had recognized the legal validity of commercial transactions inside the Confederacy. Four years earlier, in *Day v. Micou,* Justice Strong had held that confiscation did not destroy pre-existing mortgages on confiscated property.[102] In the same term as *Williams*, Field wrote *Conrad v. Waples*[103] and its companion case *Burbank v. Conrad*,[104] in which he considered the validity of conveyances in Louisiana by a father to his sons of land and money before the Second Confiscation Act took effect. In confiscation proceedings against the father, Field held that the U.S. could confiscate and sell only property the father owned as of the passage of the Act, explicitly recognizing the validity of transfers before the Act and preventing the confiscation of property conveyed by the father to his sons before July 17, 1862. The plaintiffs claimed that the U.S was not bound to protect transactions made by rebels inside enemy country, but they were rebuffed by the Court on the grounds that "the character of the parties as rebels did not deprive them of the right to contract with and to sell to each other." In the Confederacy, the Court held, "all the ordinary business between people of the same community in buying, selling, and exchanging property, movable and immovable could be lawfully carried on."[105]

If "ordinary" legal transactions were valid inside the Confederacy, then were Confederate legislation or parts thereof also valid? Here Field drew a dramatic line. Federal legislation inside the Confederacy was null and void: There was "no validity in any legislation of the Confederate States which this court can recognize." Legally speaking, there was no Confederate States of America, and "whatever *de facto* character may be ascribed to Confederate government consists solely in the fact that it maintained a contest with the United States for nearly four years." Yet "when its military forces were overthrown, it utterly perished and with it all its enactments."[106] The debt paid by Bruffy was legally meaningless, and his estate was ordered to pay the debt again. The holding had immediate, harsh consequences for defeated Southerners who had obeyed the Sequestration Act: every debt sequestered and paid to the Confederate government remained due to Northern creditors.

The Court's reasoning was striking, amounting to a nineteenth-century version of the ancient power of conquest. Field unabashedly said that the main reason for the invalidity of Confederate legislation was that they had lost. While he could not deny there was a power called the Confederacy, its legal enactments would only gain legitimacy with military victory. Victory, not natural law or inalienable rights, was, he claimed, the ultimate arbiter of the legitimacy of secession or revolution. In the case of revolution, legislative acts were valid only when the opposition "has expelled the regularly constituted authorities from the seats of power" and "established its own functionaries in their places, so as to represent in fact the sovereignty of the nation." Thus "the government of England under the Commonwealth" was "established upon the execution of the king and the overthrow of the loyalists."[107]

In the case of secession, or when "a portion of the inhabitants of a country have separated themselves from the parent state" the validity of the *de facto* government's acts "depends entirely upon its ultimate success." If, Field claimed, "it fails to establish itself permanently, all acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." This was the case in the American Revolution, when the colonists "made good their declaration



"General Haupt" was the name given to this locomotive—after the first chief of the Union's military railway service—when it was confiscated from the Confederates.

of independence." Had they failed to defeat King George, "no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation."[108]

Normally the great explicator of inalienable rights maintained in the Due Process Clause, Field here seems to have bestowed legal legitimacy from the barrel of a gun. A sovereign is sovereign, he suggested, primarily because it can control what constitutes protected property inside a given community. Put another way, without the physical ability to define and set property relations, there is no sovereignty. The Union had no more intrinsically legitimate claim, whether under Locke's natural law or Lincoln's democratic theory, to exercise sovereignty over Southern property than the South did to exercise sovereignty over itself. Instead, when the war was over, the Union controlled the land and therefore controlled the types of property claims it would protect and the types it would not. Williams' claim to Bruffy's debt was legitimate for no other reason than that the sovereign could force Bruffy to pay. In this case, which turned on fundamental questions of state formation, even someone as ideologically committed as Justice Field argued that law and rights were not wholly natural but, like history, were written—or, more importantly, legitimated—by the winners.

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ENDNOTES

[1]"An Act to Confiscate Property used for Insurrectionary Purposes," 12 *Statutes at Large* 319 (1861) (hereinafter the "First Confiscation Act").

[2]"An Act for the Sequestration of the Estates, Property and Effects of alien Enemies and for the indemnity of citizens of the Confederate States and Persons aiding the same in the existing war with the United States" (hereinafter the "Sequestration Act"), in **Acts and Resolutions of the Third Session of the Provisional Congress of the Confederate States** (Richmond: Enquirer Book and Job Press, 1861), 57–67.

[3]"An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes," 12 *Statutes at Large* 589 (1862) (hereinafter the "Second Confiscation Act").

[4]Confiscation was in use at other points during the antebellum period, most notably in the seizure of Native American land. William Fisher estimates that of the two billion acres of land acquired from Native American tribes, "approximately one sixth was confiscated unilaterally by a federal statute or Executive Order without compensation." William W. Fisher III, "Property and Power in American History," in Ron Harris et al. (eds.), **The History of Law in a Multicultural Society** (Burlington, Vermont: Ashgate, 1992), 393–405, 395.

[5]James M. McPherson, **Abraham Lincoln and the Second American Revolution** (New York: Oxford University Press, 1991).

[6]The role of the Supreme Court during the Civil War is explored extensively in Carl B. Swisher, **The Taney Period** (New York: Macmillan, 1974); David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789–1888** (Chicago: University of Chicago Press, 1985); Jennifer Lowe (ed.) **The Supreme Court and the Civil War** (Washington, D.C.: The Supreme Court Historical Society, 1996).

[7]*Dred Scott v. Sandford*, 60 U.S. 393 (1857). This anecdote is found in Kermit Hall (ed.), **The Supreme Court of the United States** (New York: Oxford University Press, 1992), 154.

[8]Currie, **The Constitution in the Supreme Court**, 356.

[9]12 *Statutes at Large* 627 (1862).

[10]James G. Randall and David Donald, **The Civil War and Reconstruction** (Boston: D. C. Heath and Co., 1961), 284–85. *See also* the chapters on confiscation in J. G. Randall, **Constitutional Problems Under Lincoln** (Gloucester, Massachusetts: Peter Smith, 1963), 275–341 (hereafter **Constitutional Problems Under Lincoln**).

[11]Eric Foner, **Reconstruction: America's Unfinished Revolution** (New York: Harper and Row, 1988), 68. For a detailed treatment of Radical hopes for the distribution of land to the freedmen, *see* "Thaddeus Stevens, Confiscation and Reconstruction," in Eric Foner, **Politics, Ideology, and the Civil War** (New York: Oxford University Press, 1980) 128–49.

[12]Michael Les Benedict, **A Compromise of Principle: Congressional Republicans and Reconstruction** (New York: W. W. Norton, 1974), 247.

[13]Foner, **Reconstruction**, 121.

[14]12 *Statutes at Large* 319 (1861).

[15]12 *Statutes at Large* 589 (1862).

[16]12 *Statutes at Large* 821 (1863).

[17]The most prominent historical account of the Abandoned Property Act remains James G. Randall, "Captured and Abandoned Property During the Civil War," *American Historical Review* 19 (1913), 65–79.

[18]For a full discussion of the doctrinal and practical differences between the three distinct property regimes, *see* Chief Justice Chase's opinion in the pardon case *U.S. v. Klein*, 80 U.S. 128 (1871) and Elizabeth Lee Thompson, "Reconstructing the Practice: The Effects of Expanded Federal Judicial Power on Postbellum Lawyers," *American Journal of Legal History* 43 (1999).

In 1871, Congress further modified this regime and created the Southern Claims Commission, under the auspices of the Treasury Department, to hear claims for compensation from Unionist Southerners who asserted that they had maintained their loyalty throughout the Civil War. Some 106 commissioners were sent to the South to hear thousands of claims. For a classic study of the Commission, *see* Frank W. Klingberg, **The Southern Claims Commission** (Berkeley: University of California Press, 1955). For an excellent recent study on the claims made by freed slaves, *see* Dylan Penningroth, "Slavery, Freedom, and Social Claims to Property Among African Americans in Liberty County, Georgia, 1850–1880," *The Journal of American History* (1997), 405–37.

[19]This is something Randall did not do. His dissertation tends to lump together all seized property when they were, conceptually and in practice, distinct regimes. *See* James Randall, **The Confiscation of Property During the Civil War** (Indianapolis, Indiana, 1913).

[20]Section 5, Second Confiscation Act.

[21]Preamble, Second Confiscation Act.

[22]Foner, **Reconstruction**, 51. Foner later asserts even more starkly that "the Lincoln Administration had left the 1862 Confiscation Act virtually unenforced." *Ibid.*, 158.

[23]Bates, "General Instructions to District Attorneys and Marshals relative to proceedings under the acts of Congress for Confiscation" (Washington, D.C.), January 8, 1863.

[24]Marvin R. Cain, **Lincoln's Attorney General Edward Bates of Missouri**, (Columbia: University of Missouri

Press, 1965); John Syrett, "The Confiscation Acts: Efforts At Reconstruction During the Civil War" (unpublished dissertation, University of Wisconsin, 1971), 93.

[25]For the text of Greeley's letter and commentary on it, *see* William Gienapp (ed.) **The Civil War and Reconstruction: A Documentary Collection** (New York: W. W. Norton, 2001), 125.

[26]*New York Tribune*, August 20, 1862. Abolitionist ministers also seized upon the Confiscation Acts. In September, 1862, J. W. Chafin, president of the Conference of Wesleyan Methodist Connection, urged Lincoln that "the confiscation law just past at the last session of Congress should be faithfully executed" and that "to neglect this national righteousness" would prove "disastrous to the American people." J. W. Chafin to Abraham Lincoln, September 6, 1862. "Abraham Lincoln Papers," in "American Memory: Historical Collections for the National Digital Library", http://memory.loc.gov (Washington, D.C.: Library of Congress) (last accessed 17 August 2004).

[27]"Annual Report of the Secretary of the Treasury" (Washington, D.C.: Government Printing Office, January 1863).

[28]For the most complete discussion of the extent of Southern holdings located in the North, *see* Paul Wallace Gates, "Southern Investments in Northern Lands Before the Civil War," *The Journal of Southern History* 5 (February 1939), 155–85. For a consideration of the confiscation of Confederate property in New York, *see* Henry D. Shapiro, **Confiscation of Confederate Property in the North** (Ithaca, New York: Cornell University Press, 1962).

[29]Shapiro, **Confiscation of Confederate Property in the North,** 44.

[30]**The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies,** (Washington: Government Printing Office, 1880–1901), Series II, Volume 2, Part 1, 1071–72.

[31]Edward Bates to Abraham Lincoln, December 2, 1863, in Abraham Lincoln Papers, "American Memory," http://memory.loc.gov. *See also* "Rebel Property Seized In Washington City," H.R. Exec. Doc. No. 44, 37th Cong. 3rd Sess. (1863).

[32]Edward McPherson (ed.), **The Political History of the Great Rebellion** (New York: Appleton & Co., 1864), 206.

[33]George A. Coffey to Abraham Lincoln, August 22, 1861, in Abraham Lincoln Papers, "American Memory," http://memory.loc.gov.

[34]Military commanders had already been authorized by Lincoln to seize enemy property considered necessary for military purposes. The military had also been authorized to assist U.S. Attorneys in carrying out confiscation. No law on the books had given military commanders a general power of confiscation, though this is how the Acts were read by generals in the field at some points. The best treatment of the Union military's treatment of civilians is Mark Grimsley, **The Hard Hand of War: Union Military Policy Toward Southern Civilians** (Cambridge, UK: Cambridge University Press, 1995).

[35]David Donald, et al., **The Civil War and Reconstruction** (New York: W. W. Norton, 2001), 450.

[36]Grimsley, **Hard Hand of War,** 74–75.

[37]Benedict, **Compromise of Principle,** 159. On May 29, 1865, Johnson issued an amnesty proclamation that provided for the restoration of all property rights—except for those in slaves—for participants in the rebellion who took an oath pledging support for the Union and for emancipation. Wealthy participants were exempted and were required to apply to the President for individual pardons.

[38]Benedict, **Compromise of Principle,** 249–50.

[39]Randall, **Constitutional Problems Under Lincoln,** 291. Randall relied on district court records, and he changed his estimates over the course of his career. He put the figure somewhat lower—at $129,680—in his earlier work, **The Confiscation of Property During the Civil War** (Indianapolis, 1913). Foner and Randall both date the decline of the active pursuit of new property confiscation to roughly 1867. In that year, Foner argues, Republican setbacks in elections "marked the end of any hope that Northern Republicans would embrace a program of land distribution." Foner, **Reconstruction,** 316.

[40]*See* Charles Fairman, **Reconstruction and Reunion, 1864–1888** (New York: Macmillan, 1971), 776. Fairman's book, part of the Oliver Wendell Holmes Devise series on the history of the Supreme Court, is a remarkable accomplishment. It is exhaustive and encyclopedic. However, Fairman's account is doctrinally oriented, and does not consider confiscation in the context of property ideology.

[41]Robert G. McCloskey, **American Conservatism in the Age of Enterprise, 1865–1910: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnegie** (New York: Harper & Row, 1951), 87–93.

[42]Loren P. Beth, "Stephen Johnson Field," in Kermit Hall (ed.), **The Oxford Companion to the Supreme Court** (New York: Oxford University Press, 1992), 291.

[43]83 U.S. 36 (1873).

[44]94 U.S. 113 (1877).

[45]Robert G. McCloskey, **American Conservatism in the Age of Enterprise,** 87, 125.

[46]Daniel L. Rodgers, **Contested Truths: Keywords in American Politics Since Independence** (Cambridge, Massachusetts: Harvard University Press, 1987), 151.

[47]James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights** (New York: Oxford University Press, 1992), 82.

[48]Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (Lawrence: University of Kansas Press, 1997), 5.

[49]Charles McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of

Laissez-Faire Constitutionalism," in Lawrence Friedman et al. (eds.), **American Law and the Constitutional Order: Historical Perspectives,** 2nd ed. (Cambridge, Massachusetts: Harvard University Press, 1988), 246- 66. McCurdy argues that Field was not "a handmaiden for business needs," hostile to governmental intervention and devoted to "laissez-faire constitutionalism" above all else. Instead, he was primarily concerned with ensuring that each individual was free to pursue what Field considered their "natural right" to pursue the "ordinary avocations of life" with minimal restraint. 246–47. *See also* Michael Les Benedict, "Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-faire Constitutionalism," *Law and History Review* 3 (1985), 293–331. For the classic statement of the Progressive view, *see* Arnold Paul, **Conservative Crisis and the Rule of Law: Attitudes of Bench and Bar, 1887–1895** (Ithaca, New York: Cornell University Press, 1960).

[50]Morton J. Horwitz, **The Transformation of American Law: The Crisis of Legal Orthodoxy, 1879–1960** (New York: Oxford University Press, 1992), 23.

[51]*See* Kens, **Justice Stephen Field,** 256–65.

[52]Beth, "Stephen Johnson Field," in Hall, **Oxford Companion to the Supreme Court,** 292.

[53]Horwitz, **Transformation of American Law, 1870–1960,** 112.

[54]61 Ky. 385 (1863).

[55]*Ibid.*, 29.

[56]*Ibid.*, 32.

[57]*Semple v. U.S.*, Fed . Case No. 12,661 (C.C.E.D. Va.).

[58]Fairman, **Reconstruction and Reunion,** 800.

[59]78 U.S. 268 (1870). Two other cases on the docket in that same Term could have served as test cases for constitutionality. In *Garnett v. U.S.*, 78 U.S. 256 (1870), two lots belonging to A. Y. P. Garnett in Washington, D.C., were ordered seized in July 1863 by the District Court for the District of Columbia. Garnett appealed to the Supreme Court of the District of Columbia which, the Supreme Court made clear, exercised appellate jurisdiction over the District Court. Nevertheless, the D.C. Supreme Court dismissed the appeal on the grounds that it could not hear writs of error from the District Court. Justice Swayne explained that "in coming to this conclusion the learned court fell into error," and he remanded the case. *Garnett,* 258. In the other case, *McVeigh v. U.S.*, 11 Wall 259 (1870), McVeigh's Alexandria home and its contents had been confiscated by a Virginia district court during the war. McVeigh, living in Confederate Richmond, appeared in court through his lawyer and sought to answer the charge that his property was liable to confiscation. The judge refused to admit the answer on the grounds that McVeigh was a rebel and an alien enemy with no standing to appear. Justice Swayne took the lower-court judge to task, stating that this ruling was "contrary to the first principles of the social compact and of the administration of Justice," and sent the case back with instructions to admit McVeigh's answer. *McVeigh,* 266. With these cases remanded on jurisdictional and procedural grounds, *Miller* became the test case.

[60]For a detailed discussion of the treatment of *Miller* in the lower courts, *see* Fairman, **Reconstruction and Reunion,** 800–806.

[61]Strong often joined with Field in cases turning on commerce power, most notably joining him in dissent in *Munn v. Illinois*, 94 U.S. 113 (1876). Strong also wrote the opinion in *Bigelow v. Forrest*, 9 Wall 339 (1870) (*see* below), holding that confiscation was not constitutional except for the lifetime of the offender. *See* Michael B. Dougan, "William Strong," in Hall, **Oxford Companion to the Supreme Court,** 846.

[62]78 U.S. at 306.

[63]67 U.S. 635 (1863).

[64]*Ibid.*, 307.

[65]*Ibid.*

[66]*Ibid.*, 323.

[67]Before 1966, admiralty cases were heard on a separate side of federal district courts "where a special terminology and procedure were used." *See* Grant Gilmore and Charles L. Black, **The Law of Admiralty** (New York: Foundation Press, 1975), 34–35. Admiralty jurisdiction attracted Congress because admiralty routinely used *in rem* prosecutions against property.

[68]73 U.S. 759 (1867).

[69]78 U.S. 331 (1870). Harry Tyler was a Confederate colonel whose Washington, D.C. house was confiscated and sold during the war.

[70]*Ibid.*, 344–45; 352.

[71]99 U.S. 372 (1878).

[72]*See In re Confiscation Cases*, 87 U.S. 92 (1873). In this case, Justice Strong saved the confiscation of John Slidell's New Orleans property, even though the proceedings had been marked by "formal defects." Slidell was a prominent Confederate diplomat and was quite wealthy, making for a high-profile case and increased public pressure to uphold the seizure of Slidell's property. Field and Clifford dissented.

[73]12 *Statutes at Large* 627 (1862).

[74]Underwood took over the seat vacated by James D. Halyburton, the Confederate federal judge who authored one of the two major sequestration cases in Richmond. "Judges of the United States Courts" in History of the Federal Judiciary, Federal Judicial Center, http://air.fjc.gov/history/home.nsf (last accessed 17 August 2004).

[75]*U.S. v. Right, Title, and Interest of Hugh Latham,* in Edward McPherson (ed.), **The Political History of the United States of America During the Great Rebellion** (Washington D.C.: Philip & Solomons, 1864), 206–7.

[76]*Ibid.*

[77]9 Wall 339 (1870).

[78]9 Wall at 352. The issue of the duration of the confiscation was one of the only times the Court drew a sharp distinction between the interpretation of the First and Second Confiscation Acts. In *Kirk v. Lynd*, 106 U.S. 305 (1873), Chief Justice Waite made the argument that because the First Confiscation Act authorized the seizure of property actually employed in the rebellion, it was analogous to the seizure of property under the international laws of war. "In war," he wrote, "the capture of property in the hands of the enemy, used or intended to be used for hostile purposes, is allowed by all civilized nations." Absolute title to this hostile property passed to the government immediately, in the case of movable property, and, unless otherwise provided by treaty, when the war was ended in the case of immovable property. *Ibid.*, 298–300. Very little property was confiscated under the First Confiscation Act, and this ruling did not have any effect on the vast bulk of confiscated property touched by *Bigelow*.

[79]McPherson, **Political History of the Rebellion,** 206.

[80]*U.S. v. Wilson*, 32 U.S. 150, 160–61 (1833).

[81]Lincoln, "Proclamation of Amnesty and Reconstruction," December 8, 1863, in Don E. Fehrenbacher (ed.), **Abraham Lincoln, Speeches and Writings** (New York: Library of America, 1989), 555–58. Lincoln exempted from his proclamation all civil and diplomatic Confederate officers, as well as Confederate judges and high-ranking officers in the Confederate military and those who mistreated prisoners of war.

Lincoln's Proclamation was also an initial step in setting Reconstruction policy. He provided that in any rebellious state, once the number of white male voters taking the oath equaled ten percent of the number of votes cast in that state in the 1860 presidential election, these voters could reorganize a state government that would be recognized by the federal government. In opposition, Congress passed the Wade-Davis Bill on July 2, 1864. This bill had sweeping emancipation provisions and required fifty percent of white male voters to take a loyalty oath before a new state government could be organized. Lincoln pocket-vetoed the bill. For a full discussion of presidential Reconstruction policies, *see* Foner, **Reconstruction**, 176–226; Donald, et al., **The Civil War and Reconstruction,** 508–23.

[82]Lincoln, "Proclamation Concerning Reconstruction," July 8, 1864, in Fehrenbacher, **Speeches and Writings,** 605–6.

[83]Foner, **Reconstruction,** 190.

[84]15 *Statutes at Large* 711, December 25, 1868.

[85]*Armstrong's Foundry*, 56 Wall 766 (1867). This case arose under the First Confiscation Act. Attorney General Henry Stanberry argued that the *in rem* proceedings were against the property itself and that a pardon for John Armstrong wiping away *his* guilt had no bearing on the government's attempt to confiscate a New Orleans foundry used in support of the Confederacy. Chief Justice Chase argued that since the Act required the owner's consent to the use of his property in aid of the rebellion as a condition of confiscation, forfeiture was a penalty against the offender, not his property alone. Hence, a pardon absolved the offender of his guilt and barred confiscation.

[86]In *Mrs. Alexander's Cotton*, 69 U.S. 404 (1864), the Louisiana owner of 72 bales of seized cotton sued the U.S. for the proceeds. Roughly three weeks after the seizure, Mrs. Alexander took Lincoln's December 8, 1863 loyalty oath and, claimed, among other things, that the pardon restored her property to her. Chase rejected her claim, not reaching the question of whether pardons were retrospective, on the grounds that a condition of the pardon was continued loyalty to the Union, and that by remaining in enemy territory Mrs. Alexander herself remained an enemy. "Whatever might have been the effect of the amnesty, had she removed to a loyal state after taking the oath, it can have none on her relation as an enemy voluntarily resumed by continued residence and interest." *Mrs. Alexander's Cotton*, 69 U.S. at 421.

[87]Field was the author of the leading pardon case of the Civil War, *Ex parte Garland*, 71 U.S. 333 (1867). *Garland* was a congressional attempt to block former Confederates from appearing as lawyers in federal courts. Before being admitted to practice, all lawyers were required to take an oath swearing they had never supported the rebellion. It was, of course, impossible for former Confederates to take this oath, and so they were effectively barred from practice. Garland sued on the grounds that he had received a full presidential pardon that entitled him to practice in the federal courts. Field, writing for a divided court, took a sweeping view of pardons and rebuked congressional attempts to delimit them. He held that "a pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full it releases the punishment and blots out the existence of the guilt." A pardon makes the offender "a new man, and gives him a new credit and capacity." *Ex parte Garland*, 71 U.S. at 380.

[88]95 U.S. 149 (1877).

[89]*Ibid.*

[90]*Ibid.*, 154–55.

[91]*Ibid.*

[92]99 U.S. at 377.

[93]*See Conrad v. Waples*, 96 U.S. 279 (1877), in which Field, reversing a lower court, returned title to New Orleans real property to two sons whose father had conveyed the property before the Confiscation Act took effect.

[94]92 U.S. 202 (1875)

[95]*Ibid.*, 210–15.

[96]133 U.S. 92 (1890).

[97]*Ibid.*, 103.

[98]*Ibid.*, 99–105. *See also Jenkins v. Collard*, 145 U.S. 546, holding that the Christmas amnesty removed any disability

preventing the offender from exercising control over the future interest of confiscated property.

[99]146 U.S. 338 (1892).

[100]146 U.S. at 349.

[101]96 U.S. 176 (1877). Interestingly, one of the cases making up the *Legal Tender Cases*, 79 U.S. 457 (1870) (considering the constitutionality of "greenbacks," or non-redeemable federal paper money), arose out of the sequestration of a flock of sheep in Texas owned by a Mrs. Lee of Pennsylvania. The sheep were sold at auction to one Knox, who paid in Confederate money. After the war, Lee sued Knox and won, at which point Knox was ordered to pay her several thousand dollars in greenbacks. Because of the demise of the Confederacy, Knox bought the same sheep twice—once under invalidated Confederate law and one under triumphant U.S. law.

[102]18 Wall 156 (1874). In *Day*, the court recognized the validity a mortgage held against the confiscated Louisiana estate of Judah Benjamin, holding that the purchaser of the confiscated land inherited the mortgage.

[103]96 U.S. 279 (1877).

[104]96 U.S. 291 (1877).

[105]*Conrad v. Waples*, 96 U.S. at 286.

[106]*Williams v. Bruffy*, 96 U.S. at 192–93.

[107]*Ibid.*, 185.

[108]*Ibid.*, 185–86.

Justices Seeking the Presidency

ALLEN SHARP

The separation of powers in the Constitution of the United States has never been absolute in either theory or practice. This is especially true in the quest for public office. At least one President, William Howard Taft, aspired to be a Supreme Court Justice. Several Supreme Court Justices seriously considered becoming President. These are a few stories about those ambitions.

Flirting with the Federalists, 1812

In 1812, a strong antiwar sentiment existed in the United States, especially in New England. Federalists called it an offensive war, sure to ruin America. Joseph Story expressed concern that "leading Federalists meditate a severance of the Union."[1] Southern Federalist James McHenry of Maryland argued that only a change of administration could save the country. Another Marylander, former Secretary of the Navy Benjamin Stoddert, suggested that Chief Justice John Marshall, a prominent Federalist, should run for President. He wrote, "Marshall is a man in whom the Federalists may confide—perhaps he is the man for crisis."[2] Stoddert was not the only Federalist to support Marshall's candidacy; many powerful members of Congress hoped he would run for President.

Within days after Stoddert's public proclamation, Marshall wrote privately to Robert Smith of Maryland, who had just been dismissed as Secretary of State by President James Madison. Smith had engaged in a public antiwar effort and had expressed admiration for Marshall's presidential qualifications. When Smith sent Marshall a copy of an attack he made on his former allies in the Madison administration, Marshall replied:

> Although I have for several years forborn to intermingle with those questions which agitate and excite the feelings of party, it is impossible that I could be inattentive to passing events, or an unconcerned observer of them. [But a]s they have increased in their importance, the interest, which as an American I must take in them, has also increased; and the declaration of war has appeared to me, as it has to you, to be one of those portentous acts which ought to concentrate on itself the efforts of all those who can take an active part in

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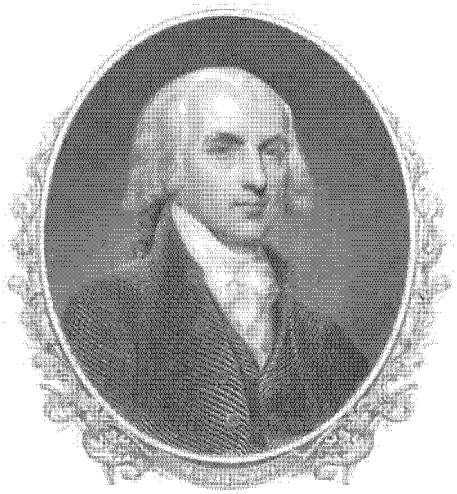

Had Chief Justice Marshall chosen to be the Federalist party's standard-bearer in the 1812 election, he might have fared better than De Witt Clinton (right), the Peace party candidate backed by the Federalists. James Madison (left) beat Clinton 128 to 89, but Marshall's biographer believes that if the Chief Justice had entered the race, he might have prevailed over Madison.

> rescuing their country from the ruin it threatens.
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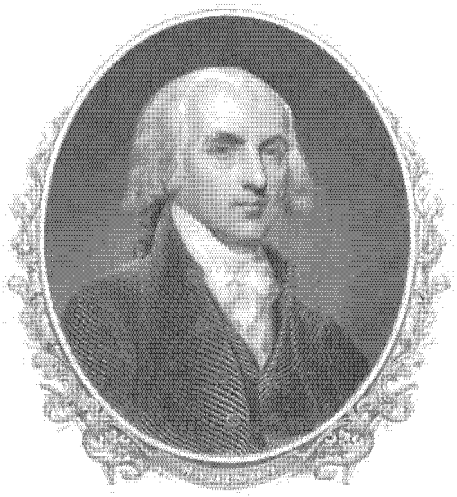
> All minor considerations should be waived; the lines of subdivision between parties, if not absolutely effaced, should at least be covered for a time; and the great division between the friends of peace & the advocates of war ought alone to remain. It is an object of such magnitude as to give to almost every other, comparative insignificance; and all who wish peace ought to unite in the means which may facilitate its attainment, whatever may have been their differences of opinion on other points.[3]

This letter from Marshall to Smith, sent on July 27, 1812, is described by one of the Chief Justice's biographers, Albert Beveridge, as one of "the longest and most unreserved he ever wrote." Beveridge concludes that "the Chief Justice of the United States was at that very moment not only in close sympathy with the peace party, but was actually encouraging that party in its efforts to end the war."[4] A later biographer, Leonard Baker, goes further, stating that the letter was a "declaration of his readiness to become a presidential candidate."[5] Most recently, however, Canadian historian Jean Edward Smith has brushed aside any interest that Marshall may have had in the 1812 Federalist presidential nomination.[6] Marshall's conduct and writings seem to indicate a very temporary and transitory temptation, which he soon put aside. If indeed a presidential bug had bitten Marshall, it did not cause any serious infection.

Marshall's competition would have been the politically cunning DeWitt Clinton, a nephew of Vice President George Clinton and a "Peace Republican" from New York who assured Federalists that he favored an "honourable" peace with England. DeWitt Clinton, who ran under the label "Peace party," was endorsed by the Federalist caucus as the antiwar standard-bearer, but not without some acrimony and dissension. Many Federalists preferred Marshall to Clinton.

The electoral vote was Clinton 89, Madison 128. It was the closest any Federalist candidate had come to winning a presidential



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election since John Adams in 1800, and their candidate would never get so close again. Optimistically, Beveridge estimates that if Marshall had been nominated:

> Marshall surely would have done better than Clinton, who, however, carried New York, New Jersey, Delaware, Maryland and all the New England States except Vermont. The mercantile classes would have rallied to Marshall's standard more enthusiastically than to Clinton's. The lawyers generally would have worked hard for him. The Federalists, who accepted Clinton with repugnance, would have exerted themselves to the utmost for Marshall, the ideal representative of Federalism. He was personally very strong in North Carolina; the capture of Pennsylvania might have been possible; Vermont might have given him her votes.[7]

In a footnote Beveridge adds "the vote of Pennsylvania, with those cast for Clinton, would have elected Marshall."

How would Marshall have acted if nominated? Would he instantly have resigned as Chief Justice, as Justice Charles Evans Hughes would do in 1916? Such a resignation was not a foregone conclusion in 1812. In 1794, Justice William Cushing ran unsuccessfully against Samuel Adams for governor of Massachusetts and did not resign from the Supreme Court. Later, during Marshall's tenure in 1828, Justice Smith Thompson ran for governor of New York against Martin Van Buren and remained on the Court. Would President Madison have made a recess appointment—and if so, who?

A Politician on the Supreme Court, 1832–1860

Another Justice who attempted to gain the presidency after his appointment to the Supreme Court was John McLean. Historian Smith captures the elements of why Jackson appointed McLean to the Court in 1829:

> Two days after the inauguration, Jackson startled his more clamorous supporters by nominating John McLean of Ohio to fill Trimble's seat on the Court. McLean was a moderate Whig who had served effectively as post-master general under both Monroe and Adams. Before that he had been a judge on the Ohio [S]upreme Court. A political rival of Henry Clay, he had remained on good terms with Jackson throughout the 1828 campaign, and it was widely believed that he harbored presidential ambitions four years hence. He was also known to be opposed to the political spoils system. So long as he remained in the cabinet, it would be impossible to restaff the post office with reliable Democrats. By elevating McLean, Jackson demonstrated the adroitness that made him so formidable. With one stroke, he was shelving a potential presidential opponent, opening the post office to his supporters, rewarding a foe of his old enemy Henry Clay, and disarming the Whigs with a judicial appointment they could only applaud.[8]

During the hotly contested presidential election of 1824, Postmaster General McLean had cleverly tried to stay in office in the Adams administration while engaging in back-channel communications with Jackson's supporters. McLean's biographer describes how he tried to walk a political tightrope between Adams and Jackson and accuses him of duplicity.[9] John Quincy Adams' biographer uses "traitorous" to describe McLean's conduct, saying he "carried water on both shoulders," performing with "Machiavellian adroitness."[10] Jackson rewarded McLean for his allegiance by appointing him to the Court in

1829, where he remained for more than thirty years.

Keenly aware of McLean's Machiavellian tendencies, Jackson admonished him to refrain from dabbling in politics. A former judge on the Supreme Court of Tennessee, Jackson considered judges "as ministers of the Temple of Justice" who should remain separate from party politics.[11] This tough talk apparently did not seriously affect McLean, perhaps because Jackson himself was such a thoroughgoing politician. Indeed, the ink was hardly dry on McLean's Supreme Court commission before he was making political moves to run against its signer. As early as 1829, there were rumors that McLean might join Henry Clay as a vice-presidential running mate in 1832. Friends of John Quincy Adams and Daniel Webster expressed some interest in this idea.[12] At one point, McLean was even suggested as the candidate instead of Clay and his name widely circulated as a possible opponent to Jackson. Within two years of his appointment, McLean, not surprisingly, had fallen out of favor with the Jackson administration. In addition to his political infidelity, McLean publicly opposed Jackson's policies: He disapproved of the President's actions regarding the withdrawal of federal deposits from the Bank of the United States, and he openly supported internal improvements and the protective tariff.

When an anti-Masonic movement aimed primarily at Jackson emerged, McLean began to maneuver to gain favor with the anti-Masons. In September of 1831, anti-Mason delegates convened in Baltimore in one of the first political conventions in the history of the United States. Attendees included such luminaries as Thaddeus Stevens of Pennsylvania, William Sprague of Rhode Island, and William H. Seward and Samuel A. Foote of New York. There was talk of McLean as the presidential nominee at the convention from such political powerhouses as Thurlow Weed and Albert Tracy. But Justice McLean, riding circuit in Nashville, Tennessee, wrote to the anti-Masons to decline a potential nomination:

> My situation on the bench imposes considerations of prudence and delicacy which do not arise, perhaps, from any other official station. Whilst no man can deny the right of the people to select their chief magistrates from any of the branches of the government, it would seem that a member of the judiciary should decline the contest, unless the use of his name would be likely to tranquilize the public mind and advance the prosperity of the county. Without presuming that my name would be favorably considered by the convention . . . I most respectfully decline the honor of being presented to that respectable body for nomination to the presidency.[13]

The anti-Masons eventually nominated William Wirt, Attorney General in the administrations of Monroe and Adams. In the presidential election, Wirt received only the seven electoral votes of Vermont. Despite the letter from Nashville, McLean retained a "flickering illusion"[14] that the various parties might give up on Wirt and Clay and agree on him as a moderate, compromise, anti-Jackson candidate.

Martin Van Buren became the Vice President in Andrew Jackson's second administration, and the President's heir apparent. This frustrated McLean's not-so-latent presidential ambitions during the run up to the 1836 election. Undaunted, McLean worked with quiet diligence to secure the favor of the Whigs, particularly in his home state of Ohio. Millard Fillmore, the anti-Masonic congressman from upstate New York, wrote to McLean that he was opposed to Van Buren and would prefer McLean to any other candidate. In Ohio, young Salmon P. Chase lent his support to McLean over William H. Harrison for the Whig nomination.[15] From 1789 to 1891, Supreme Court Justices were required to hold

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court on circuit outside of the nation's capital, and McLean's early circuit included the states of Ohio, Kentucky, and Tennessee.[16] McLean worked very hard as a judge, but he also used these travels for political contacts. On circuit in Tennessee, McLean consulted with James K. Polk, then a member of the United States House of Representatives, and found that future President also to be unenthusiastic about the candidacy of Van Buren.

But, in a move that was becoming a recurring habit, McLean again took himself out of the race. Robert Remini describes McLean's eagerness and withdrawal in the 1836 campaign:

> But some states in the West had already started looking at another candidate. With Clay seemingly out of contention—and he made no move to solicit a nomination—the associate Justice of the Supreme Court John McLean of Ohio indicated his willingness to become a candidate. This was not the first time he had appeared ready to run, only to step aside at the last minute. At this juncture he seemed prepared to go the distance, and before the end of the year a rump caucus in Ohio officially nominated him.[17]

A divided Whig party with William Henry Harrison on the ballot in some states, Daniel Webster on the ballot in Massachusetts, and Hugh Lawson White in Tennessee lost the 1836 election to Van Buren.

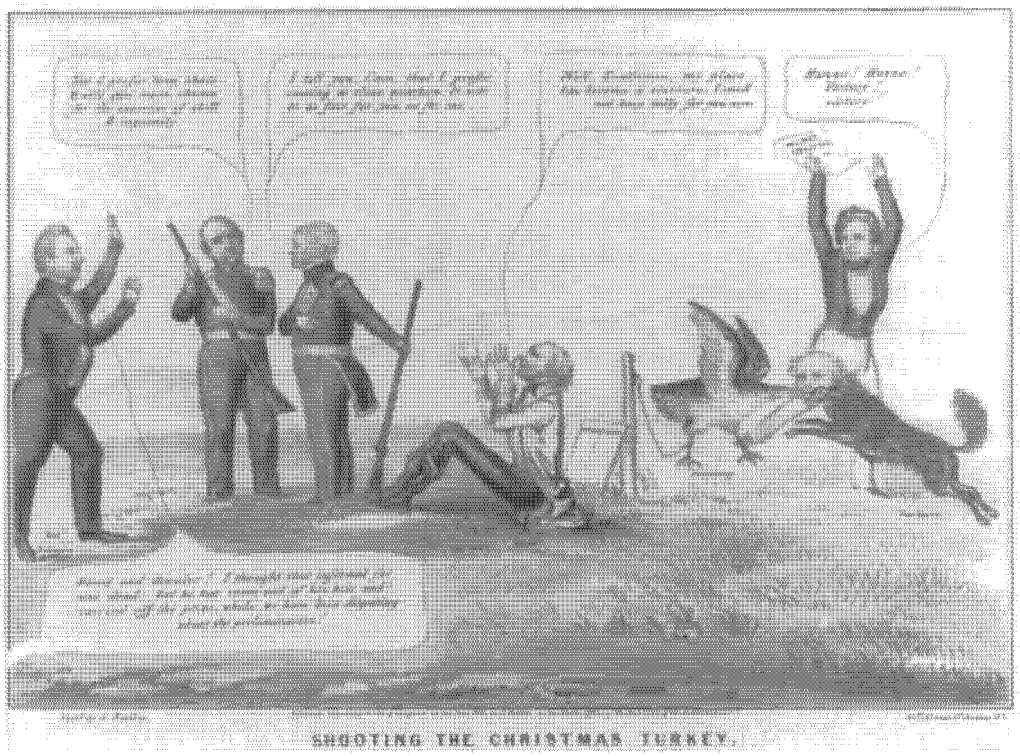
The growing weakness of the Van Buren administration eventually rekindled McLean's presidential ambitions. He made no serious moves in 1840,[18] but he began to make overtures toward the Whig nomination in 1844. Ohio Congressman Joshua R. Giddings was one of several leaders organizing on McLean's behalf to secure the Whig nomination. It was also suggested that McLean might run as Vice President on the ticket with Clay in 1844. But at the Whig Convention in Baltimore, McLean, true to form, finally sent a letter declining a possible nomination.

The 1848 presidential election turned out to be a three-way affair, with Lewis Cass for the Democrats, General Zachary Taylor for the Whigs, and former President Martin Van Buren for the Free Soil party, a newly formed antislavery party. Once again, Salmon P. Chase pushed for McLean, lobbying for him to be on the Free Soilers' presidential ticket at its convention in Buffalo, New York. But after a backroom deal with the so-called Barnburners was struck, Chase went before the convention and withdrew McLean's name. McLean later complained that Chase acted without his authority.[19]

The Mexican War became an issue in the 1848 election. Whig leaders Clay, John Quincy Adams and young Congressman Abraham Lincoln all opposed it. Safe on the Supreme Court, McLean had no obligation to speak on the subject, but he had expressed displeasure with the joint-resolution procedure by which Texas was annexed to the United States in 1845. It had also become very difficult for the Whig party to skirt around the issue of slavery, an issue McLean could not duck because it often came before the Supreme Court. In his opinions, the Justice appeared uncertain as to the power of Congress to regulate slavery in the territories.

Yet there was still strong support in Ohio for McLean, who ranked just behind Whig leaders Clay and Webster. Chase noted that the final choice for the Whigs in 1848 was between Clay and McLean. In Indiana, Caleb B. Smith, later Secretary of Interior to President Lincoln, strongly supported McLean's candidacy. But the Whig party decided to paper over its divisions on the slavery issue by nominating a Mexican War hero. McLean's lack of military service made it impossible to compete with General Zachary Taylor.

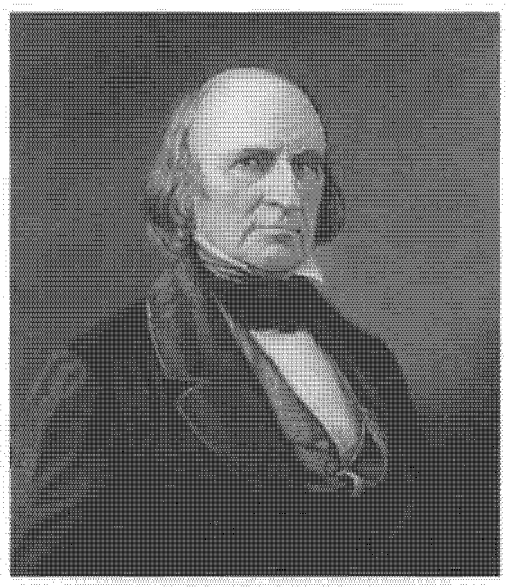
McLean was also passed over by the Free Soilers in favor of Van Buren, but that party's vice-presidential nomination *was* tendered to McLean. A letter to Chase from McLean



In this cartoon, while Democratic and Whig candidates Lewis Cass (facing front with rifle) and Zachary Taylor (facing left) debate strategies to win the presidency—or "shoot the Christmas turkey"—Free Soil candidate Martin Van Buren (far right, pictured as a fox) makes off with the turkey. But Van Buren's support for the Wilmot Proviso, which forbade slavery in territories acquired by the Mexican War, cost him the 1848 election and allowed Taylor, a Mexican War hero, to gain the presidency.

kept the door slightly ajar in case there was a "general upheaval" in his favor. No such upheaval occurred. The venerable Free Soil operative in Massachusetts, Charles Sumner, said McLean as a Free Soiler would have easily swept Massachusetts. Sumner wanted McLean to make a public announcement in favor of the Free Soil ticket. Declining, McLean emphasized his by-then-well-known view that he was in opposition to the extension of slavery. Charles Francis Adams ran instead as Van Buren's Vice President in 1848, but war hero Taylor would carry the day.

The 1856 Republican Convention represented the last real effort by McLean to secure a presidential nomination. By then McLean was a member of the newly created Republican party. Interestingly, McLean had the support of Abraham Lincoln, who had regularly practiced law before him in the



In the run-up to the election of 1848, Supreme Court Justice John McLean (pictured) was seriously considered as a possible candidate by both the Whig and Free Soil parties.

federal courts in Springfield and Chicago. Orville H. Browning, a political powerhouse in Illinois, also supported McLean. So did Ohio lawyer Noah H. Swayne, who would eventually fill McLean's seat on the Supreme Court in 1861. The first ballot at the Republican Convention gave McLean 196 votes to John Charles Fremont's 359, prompting McLean to withdraw his name yet again.

McLean's finest hour on the Court came the next year when he, along with Justice Benjamin Curtis, dissented in *Dred Scott v. Sandford*.[20] At the age of 75, McLean got a few scattered votes in the Chicago Republican Convention that nominated Abraham Lincoln. He died in the first month of Lincoln's administration, giving the President the first of his five Supreme Court vacancies to fill.

The Presidential Maggot in His Brain[21]

A booster for Justice McLean in several elections, Salmon P. Chase was himself considered but passed over for the 1856 Republican presidential selection. The Ohio governor made a run in the 1860 Wigwam Convention on the Republican ticket, but he managed his campaign poorly. While Chase had been the "favorite son" candidate of Ohio, on the third ballot Ohio changed four votes from Chase to Lincoln, assuring the latter's nomination. The presidential fires, however, continued to burn in Chase, whom President Lincoln named Secretary of the Treasury in 1860. In an attempt to gain the presidency, he tried to undermine the renomination of President Lincoln early on in 1864, courting extreme abolitionists and other Radical Republicans to support his candidacy. When that attempt failed, Chase resigned his Cabinet position. Holding no grudge, Lincoln appointed Chase as Chief Justice on December 6, but not without reservations. As Lincoln confided to Representative George S. Boutwell, "But there is one very strong reason against his appointment. He is a candidate for the Presidency, and if he does not give up that idea it will be very bad for him and very bad for me."[22] Lincoln's fears about Chase's relentless presidential ambitions proved prophetic:

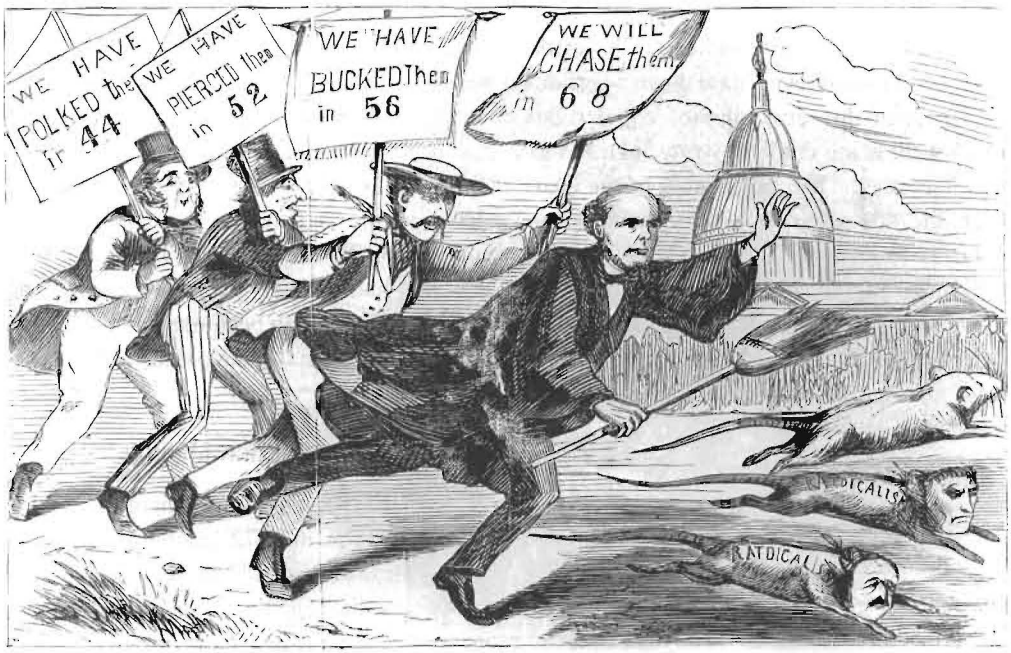
> Mr. Chase will make an excellent judge if he devotes himself exclusively to the duties of his office and don't meddle with politics. But if he keeps on with the notion that he is destined to be President of the United States, and which in my judgment he will never be, he will never acquire the fame and usefulness as Chief Justice which he would otherwise certainly attain.[23]

Chase has received generally good marks for the careful way he handled the attempted impeachment of Andrew Johnson by assuring a fair trial in the Senate. But his sympathy for Johnson caused him to lose favor with members of the Republican party. Since he had been one of the founders of that party in 1856, it would have been logical that he run for the presidency on that party's ticket in 1868. But as the impeachment trial was winding down on May 5, 1868, Chase spoke of his earlier status as a Democrat.

> I was a Democrat then, too democratic for the Democratic party of those days; for I admitted no exception, on ground of race or color or condition, to the impartial application of Democratic principles to all measures and to all men. Such a Democrat I am to-day.[24]

After the 1866 midterm elections, however, Ulysses S. Grant began to emerge as the likely Republican candidate. Historian James M. McPherson explains why Chase fell behind Grant:

> For almost a year before the Republican Convention met in May, 1868, Ulysses S. Grant seemed sure to become the party's nominee. Grant's only serious rival was Salmon P. Chase, a perennial candidate, whose



Having split with the Radical Republicans over their insistence on maintaining a military occupation in the South, Chief Justice Salmon P. Chase (pictured right) encouraged the efforts of some Democrats to get him the presidential nomination in 1868. This cartoon shows Chase vanquishing the "Radicals" while Democrats remind viewers of earlier Democratic victories. Despite wooing Democrats by modifying his support of black voting rights, Chase did not win the nomination.

ambitions were not satisfied by the chief justiceship of the Supreme Court. Most radicals favored Chase in 1867 and distrusted Grant because of the general's antebellum Democratic leaning and his early postwar identification with Johnson's reconstruction policy. But several developments muted these reservations about Grant: his endorsement of the congressional program in 1867; the Democratic gains in the off-year 1867 elections, which convinced many radicals that they needed to nominate a war hero rather than one of their own in 1868; and Grant's bitter break with Johnson in January 1868. Moreover, Chase's conduct of the impeachment trial, in which he had made clear his sympathy for the President's acquittal, caused the chief justice virtually to be read out of the Republican party.[25]

Thus, the ever politically ambitious Chief Justice Chase began to speak of his Democratic origins. His nineteenth-century biographer, Albert Bushnell Hart, chalks up Chase's political opportunism to his "unsatisfied ambition."[26]

The Democratic Convention was held in New York in the summer of 1868; political operatives William Cullen Bryant, Samuel Tilden, and former Governor of New York Horatio Seymour participated. Others, such as August Belmont, a prominent New York banker, supported Chase. Three weeks before the convention, a committee for Chase was formed in Philadelphia, and Gerrit Smith created a pro-Chase circular, which he mailed out by the hundreds.

Despite this weighty support for Chase, all was not well with his candidacy. That effort "seemed to have drawn Chase down a perilous course where his principles of equal rights for all were being eroded," wrote John Niven, his biographer. "The bright side of his character, the oft-spoken belief in common humanity, was swinging slowly to the dark side of political expediency and even cynicism."[27] Some found it embarrassing that Chase was receiving political support from the former pro-South "peace Democrats," especially the infamous Clement Vallandigham, also from Ohio. In 1864, Chase had participated in the arrest of Vallandigham, a Confederate, and the effort to try him before a military tribunal for sedition. Because of his new supporters, Chase lost the support of former boosters and friends such as James A. Garfield, Samuel C. Pomeroy, John Sherman, and Jay Cooke. Chase waffled on issues weighing the needs of newly freed blacks and former Confederates. He supported voting rights for blacks, but he also favored a general amnesty for former Confederates.

The Democratic party had a two-thirds rule at that time, and their conventions often went into long multiple ballots. As late as the sixteenth ballot, Chase was still alive as a candidate. Biographer Willard L. King states:

> He received only a few votes on the convention floor, but in midnight caucuses, with the convention deadlocked, he came close to being chosen. But the suggestion that he was 'dragging his silk gown in the mire' deterred the delegates . . ."[28]

When Tilden opted to support fellow New Yorker Seymour, the Chase bandwagon fell. The convention nominated Francis P. Blair, Jr., whom Chase detested, as Seymour's running mate. Chase was disappointed by the outcome of the convention, as was his daughter, Kate Sprague, who ran his campaign. His first words when he learned of his defeat were, "Does Mrs. Sprague know, and how did she bear it?"

During the 1872 campaign, Chase was ill and near death. According to his biographer, "[d]espite his physical condition, Chase still flirted with a run for the presidency."[30] His support for the Liberal Republicans that year was only halfheartedly expressed: He died on May 7, 1873, having been unable to seriously involve himself in the campaign.

Lincoln's Convention Manager, 1872

While Chase was too ill to be involved in presidential politics in 1872, another member of the Court, Justice David Davis, did participate. Davis was disenchanted with the Republican party, whose members resented his opinion in *Ex parte Milligan*.[31] Like Chase, Davis had also been displeased with the Seymour-Blair Democratic ticket in 1868. Davis's moment in the sun came in 1872, when Republican factions were looking for a viable candidate against Ulysses S. Grant, who had become a disappointment to many in the Republican party.

In January 1871, a group of legislators from Illinois called on Davis in Washington and urged him to run for President. He thanked them and claimed that he was not fitted for the job. He later recalled the incident, saying, "I give you my word. After they left, I had not walked six blocks before I had my entire Cabinet picked out."[32] Friends from Illinois lawyering and judging days hired Leonard Swett and Jesse W. Fell to begin to turn the political crank for Davis. They contacted New York political operative Thurlow Weed about running a "Davis for President" campaign. Some influential newspapers appeared favorably disposed toward the Illinois Justice. Powerful Illinois Senator Orville Browning disdained Grant and promised Davis support if the Democrats nominated him. Young Melville Fuller, then a Democratic leader in Illinois,

In this Thomas Nast cartoon, Chief Justice Chase (left) counsels Justice Davis (right) not to follow his lead and be consumed by presidential ambitions.

expressed an interest in a Davis candidacy. Davis's Republican friends were aghast at his popularity with the Democrats.

Luminaries such as Lyman Trumbull and Charles Sumner in the United States Senate were also disenchanted with Grant and formed a party called the "Liberal Republicans," distinct from the "Radical Republicans." In the meantime, in February 1872 in Columbus, Ohio, the National Labor Union, which included labor leaders from seventeen states, held a convention. The group wanted to nominate Justice Davis, and efforts were made to join forces with the Liberal Republicans. One problem with the platform of the National Labor Union was that it called for expansive paper currency without a metal base and advocated that the currency be issued directly by the government, instead of by banks. When the labor convention tendered its nomination to the Illinois Justice, Davis responded, "[T]he presidency is not an office to be either solicited or declined."[33] The Liberal Republicans ended up choosing the eccentric Horace Greeley, who lost to Grant running on a liberal platform calling for more honest government.

Four years after his abortive attempts to secure a presidential nomination, Davis resigned from the Supreme Court in 1877 and became a member of the United States Senate from Illinois. In 1881, the Senate was equally divided between Democrats and Republicans. Davis was the only Independent, unaffiliated with any party and a man of conscience. As such, he was elected president pro tempore of the Senate, making him third in line in the presidential succession. For a brief time after the assassination of James A. Garfield in 1881, Davis was next in line for the presidency after Vice President Chester A. Arthur.[34]

The Field Brothers and the Democrats, 1880 and 1884

It is apparent that the standards for judicial recusal were not rigidly drawn in the nineteenth century. In *Ex parte Milligan*, one of the advocates was David Dudley Field. His brother, Stephen J. Field, was a member of the Court. In spite of Field's advocacy for Lambdin Milligan, Justice Field remained in the case and concurred in the Davis majority opinion. He also sat on other cases where his brother was counsel and wrote the Court opinion in at least one.[35] David Dudley Field used his prestige at the bar and his political influence to secure the Democratic presidential nomination in 1880 for Justice Field. Appointed by Lincoln as the tenth Justice in an enlarged Court, Field was a "War Democrat" who remained loyal to the Union and to the Democratic party. The story of how the brothers secured a presidential nomination for Field is revealing.

Carl Brent Swisher, Field's biographer, has recorded talking points used for Justice Field in the run up to the 1880 Democratic Convention. They included: (1) his pluck shown in various contests; (2) his comparative youth and personal vigor; (3) his record as a War Democrat; (4) his states'-rights record; (5) his hard-money record; (6) his strict construction of the Constitution; (7) his antagonism to presidential election frauds; (8) his freedom from entangling party complications; and (9) his never having voted a Republican ticket.[36] At one point when Field was advancing himself for President in the Democratic Convention of 1880, the *San Francisco Examiner* suggested that the Supreme Court should adopt a rule preventing its Justices from running for President.[37]

In 1877, Field authored an autobiography titled **Personal Reminiscences of Early Days in California**. His two brothers had thousands of copies of it made and circulated as a campaign document, along with the nine talking points referred to above. It was difficult to make Field's substantive due-process philosophy fit the needs of a Democratic party dominated by Southerners in 1880. Field had voted in favor of the railroad business interests when he dissented in *Munn v. Illinois*.[38] His dissent in the *Slaughterhouse Cases*[39] also won favor with the railroads. He was a close friend of Leland Stanford and C. P. Huntington, both railroad magnates from California. Field's brother, Cyrus, who had gained fame and fortune by laying the Atlantic Cable, also had a business relationship with Huntington.

Field tried to endear himself to the states'-rights southern element by casting a dissent in *Strauder v. West Virginia*,[40] in which he would have permitted states to exclude Negroes from serving on juries. His majority opinions in the test-oath cases were also popular in the South. The Chinese exclusion cases were more difficult for him to make any use of politically. Field had acted on circuit in *In re Ah Fong*[41] in 1874, granting a writ of habeas corpus on equal-protection grounds in the face of a California statute that prohibited Chinese immigrants arriving by vessel from landing until a bond was given by the master of the ship that the immigrants would not become a public charge. Field chose to use some colorful language in his opinion:

> I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day without molestation and without censure.[42]

Field's brother Cyrus had a business relationship with Tilden: Both owned a substantial interest in the elevated railways in New York City. At a key moment, Tilden sold his stock, leaving Cyrus high and dry. Cyrus never forgave him, which may explain why Tilden, who remained a power in the Democratic party in 1880, was cool toward Justice Field as a presidential candidate. Despite the Fields paying

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the way to the Democratic Convention for a number of delegates,[43] Field was not selected for the ballot. California political operatives aborted any Field presidential effort in 1884 before it even got off the drawing board.

From the Supreme Court to the Presidency, 1916

Unlike most Justices, Charles Evans Hughes' quest for a presidential *nomination* was a success. This is because he did things right that his predecessors did not. Hughes got his start by leading an investigation into insurance corruption and then being elected Governor of New York in 1906. While Hughes had serious designs on the Republican presidential nomination at the end of his first term as Governor in 1908, he chose not to challenge Theodore Roosevelt's effort to nominate his Secretary of War, William Howard Taft. He did, however, decline a nomination to be Taft's Vice President. At the end of his second term as Governor, Hughes was in the prime of his life, and people considered him an excellent administrator. Edmund Morris calls him a "coldly brilliant Republican lawyer."[44] In 1910, Taft, now President, appointed Hughes to the Supreme Court, where his service was exemplary.[45] Some members of the Court, including Oliver Wendell Holmes, Jr., were very close to him. Others—including Edward Douglass White, whom Taft elevated to Chief Justice despite expectations that he would choose Hughes—were not.

What prompted this talented man to give up the relative security of the Supreme Court to run for President? He is the only Supreme Court Justice to have taken the risk of resigning from the Bench to make a bid for President. Yet, in stark contrast to Justices McLean, Chase and Field, Hughes was dragged into this presidential effort and did not initiate it. Prominent people in the Republican party enlisted a reluctant Hughes to heal the schism in the Republican party created in 1912 when Roosevelt ran as a Progressive against Taft.

In 1916, it was said that only Hughes had a real chance of harnessing the Elephant and the Bull Moose to a victory chariot and defeating President Woodrow Wilson. It would not be easy, however, especially given the antipathy between Hughes and Roosevelt. Roosevelt remembered and did not appreciate how politically independent Hughes, whose first gubernatorial term overlapped with his last two years in the White House, had been as Governor of New York. "I despise Wilson," Roosevelt declared, adding "Hughes is not an attractive personality . . . for he is a very selfish, very self-centered man." At yet another point, Roosevelt said of Hughes, "I thoroughly dislike him."[46] Despite his distaste for Hughes, however, Roosevelt hated Wilson more, so he swallowed his pride and signed on to the 1916 Hughes campaign. Roosevelt sent William Noble to tell Hughes that he considered him the "brainiest man now in public life in the United States" and "the best-equipped man" for the presidency. Roosevelt also believed Hughes to be "sane, safe, and progressive."[47] As he had done twice previously, however, Hughes refused to allow his name to be used in the primary.

On April 11, 1916, former President Taft sent Hughes a long, pleading, and confidential letter, which is set forth in full in his biography by Merlo O. Pusey. The penultimate paragraph of the letter reads:

> In view of all this, my dear Justice Hughes, I appeal to you not to decide the question [about running for President] until the Convention acts. Then approach its decision, as you will, with a solemn sense of the responsibility on you and with the willingness to make the sacrifice if your duty to accept appears clear.

Taft added a postscript:

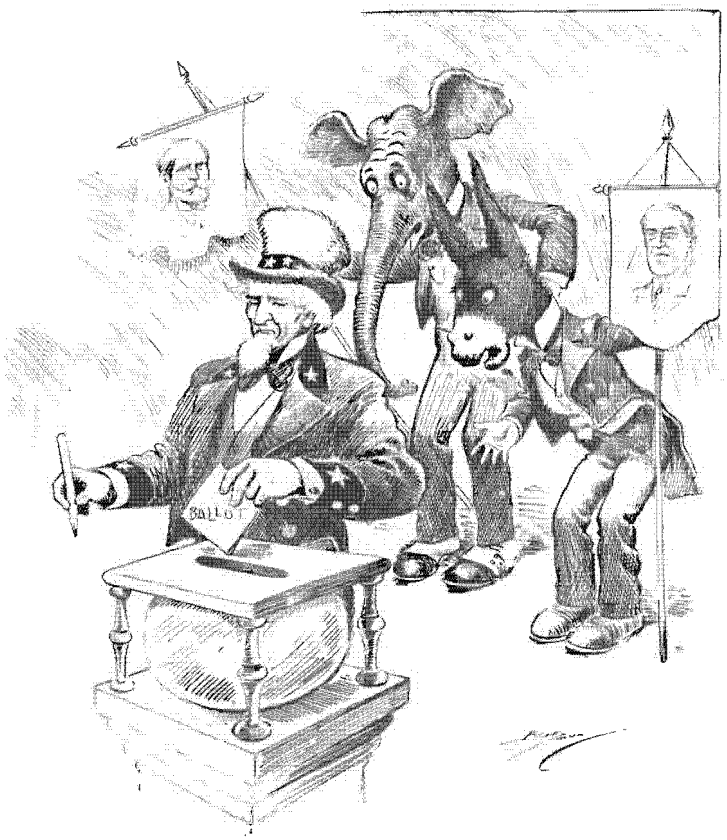
> I have written without any one's knowledge. I have not copied this letter. I do not expect an answer. Indeed I would rather not have one.[48]

Hughes did not reply to the Taft letter, and they did not meet again until after the Republican Convention. Senator William E. Borah of Idaho opined that Hughes would carry every Republican presidential primary in 1916 if his name were on the ballot. The polls showed that Hughes was a much more acceptable Republican candidate than Roosevelt. While he expressed a wish to remain on the Bench, Hughes could not bring himself to refuse point-blank to run. Vice President Thomas Marshall publicly praised Hughes before the Chicago Bar Association for not seeking the presidential nomination.

President Wilson dangled the Chief Justiceship before Hughes in an apparent attempt to dissuade him from entering the campaign. Franklin K. Lane, Secretary of the Interior, dropped a hint to Hughes at a dinner party that if he stayed on the Court, he would be appointed as Chief Justice. Hughes never gave the tacit Lane offer any credence, but he did give a remark made by Chief Justice White serious thought, concluding that White must have been speaking at the suggestion of President Wilson when he told Hughes that he would soon retire and that Wilson would then appoint him Chief Justice.[49]

Unlike the situation with Field, when the content of some opinions became a political issue, nothing that Hughes had written on the Supreme Court and none of his votes on cases ever became a liability. When some operatives in the Wilson camp suggested making an issue

When Justice Charles Evans Hughes (pictured) reluctantly accepted the invitation to be the standard-bearer for the Republican party in 1916, he resigned from the Supreme Court the same day, thereby setting a precedent for leaving the bench before launching a political campaign. "I have not coveted its powers," he said of the presidency, "nor do I permit myself to shrink from its responsibilities."



Hughes (on the left standard) lost to President Wilson (on the right standard) in a very close race. He was eventually re-nominated to the Court in 1930 to be Chief Justice.

out of "dragging the Supreme Court into the mire of politics,"[50] they were reminded that in 1904, Alton B. Parker, then a judge on the Court of Appeals in New York, was the Democratic candidate for President. Wilson never made an issue out of Hughes being on the Court.

While the Republican Convention in Chicago was in session and beginning to vote, Hughes asked Robert H. Fuller, who had been his secretary and political advisor in Albany, to come to Washington. This was probably a signal that Hughes had made up his mind to accept the nomination. By the end of the second ballot, however, Hughes believed that he would not be nominated. He consulted with Fuller and continued to profess to his office staff "if they will only choose some one else at Chicago today and let me go out West with my family this summer, I'll be the happiest man in the world."[51] But that did not happen.

On the third ballot, the Republican nomination was tendered to Hughes, who, on the very same day—June 10—submitted his resignation to President Wilson. He wired his acceptance to the Republican Convention, saying "I have not desired the nomination, I have wished to remain on the bench. But in this critical period in our national history, I recognize that it is your right to summon and that it is my paramount duty to respond."[52] Hughes set an important precedent in resigning from the Court in order to run for office. Oliver Wendell Holmes, Jr., expressed his regret and admiration for Hughes' sense of duty to his country:

DEAR HUGHES

Your first thought was of duty. I must confess that pretty near the first view here was the loss to the Court and especially to me. I shall miss you very much in every way—so much so that

> I wish the need of the country could have been postponed until I am out of this business. As it is I shall look back with affectionate regret at the ending of the time during which we sat (and stood) side by side.[53]

They would serve together briefly again in 1930–32.

Hughes fell short of the presidency by a handful of votes in the State of California. After his defeat, he became one of the superlawyers in the country until his appointment as Secretary of State in 1921. Hughes was the acknowledged leader of the American bar in 1930 when President Herbert Hoover named him to succeed Chief Justice Taft, the man who had first placed him on the Court. The best summation of Hughes's tenure as Chief Justice came from President Harry S. Truman: "There never was an abler man or a more ethical one than Chief Justice Hughes."[54]

Douglas v. Truman, 1944

Tommy "The Cork" Corcoran, a New Deal operative, once said that Justice William O. Douglas "wanted the presidency worse than Don Quixote wanted Dulcinea." Like Justice Davis, Douglas would have been happy gaining the presidency through the "back door" by inheriting it upon the death of the current President. In the 1944 election, his strategy was to be chosen as Vice President by Franklin D. Roosevelt. According to *Time* magazine writer Eliot Janeway, Douglas wanted this position because "he knew the situation with Roosevelt's health. Everyone did."[55] Simon Rifkind once remarked, "I had two classmates who wanted to be President in that class—one [Thomas Dewey] who ran for the office, and one [William O. Douglas] who didn't. [Douglas] just wanted the office handed to him, but he wanted it just as much as the other."[56] Becoming FDR's running mate was

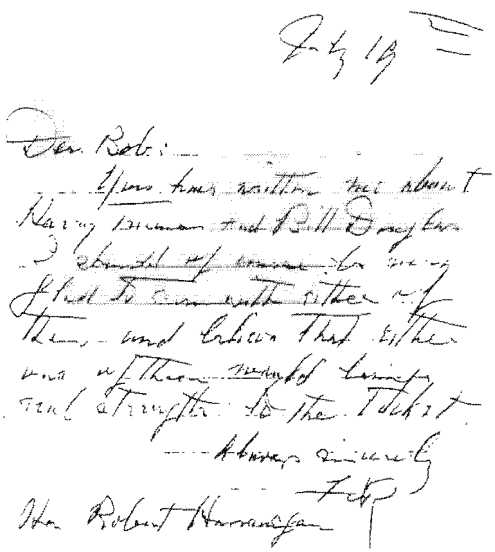
Vice President Henry A. Wallace greeted delegates at the Democratic Convention in Chicago while seeking another term as Vice President. Roosevelt turned against Wallace, however, and chose Harry S. Truman as his running mate. Justice William O. Douglas had also harbored vice presidential aspirations, but he, too, was passed over.

not an easy task. First, Douglas would have to gain favor over Henry A. Wallace, Roosevelt's current Vice President. Then he would have to face an equally daunting task: winning favor over Truman. Douglas succeeded in the first endeavor, but not the second.

Historians have recently examined the political machinations that resulted in Truman's nomination as Vice President at the Chicago Democratic Convention in 1944, and there are some essentials upon which they agree.[57] When Wallace served as Roosevelt's Vice President in his third term, he was considered the darling of the left wing of the Democratic party, especially with the leaders of the Congress of Industrial Organizations (CIO), Sidney Hillman and Philip Murray. In the Cabinet, Harold Ickes, the Secretary of Interior, affectionately known as "The Old Curmudgeon," was also a stalwart Wallace supporter. So were Eleanor Roosevelt and Attorney General Francis Biddle. Wallace's personal and political conduct, however, caused concern for many of the more practical political operators in the Democratic party, including National Chairman Robert Hannegan of Missouri, California's national committeeman Edwin Pauley, and Postmaster General Frank Walker. There was a behind-the-scenes effort by Hannegan, Pauley, and Walker to get Wallace off the ticket. These and many other operators in the Democratic party were keenly aware of the fragile health of the President and realized that in selecting the Vice President, they were also likely selecting a President.

Roosevelt was never one to dwell on his own fallibility and was indirect in handling this sensitive political question. Some have described his dealings in this situation as "devious."[58] James MacGregor Burns said FDR never pursued a more Byzantine course than in his handling the question of the vice presidency in 1944.[59] The President sent a letter to Senator Sam Jackson, the convention chair, stating that if he were a delegate to the convention he would vote for Wallace, a good friend, but that he did not want to tell the convention what to do. Roosevelt also told his Chief of Staff, former South Carolina Senator and former Supreme Court Justice James F. Byrnes, that Byrnes had the most comprehensive knowledge of how government worked. But Roosevelt raised questions about Byrnes' former Catholicism, stance on the poll tax, and standing with Negro voters. Byrnes later complained that FDR resorted to outrageous subterfuge in selecting a Vice President.[60]

But the key event, which is still the subject of considerable discussion and dispute, was a meeting held by Hannegan, Walker, Pauley, Chicago Mayor Ed Kelly, Bronx boss Ed Flynn, and others in the White House with Roosevelt before the Democratic Convention on July 11, 1944. That meeting produced a handwritten note, now in the Truman Library:



At a later time, the note, postdated, was typed and signed by the President in the following form:

> The White House
> Washington
>
> July 19, 1944
>
> Dear Bob:—
> You have written me about Harry Truman and Bill Douglas. I should, of course, be very glad to run with either of them and believe that either

one of them would bring real strength to the ticket.

Always sincerely,
/s/Franklin D. Roosevelt
Honorable Robert E. Hannegan
Blackstone Hotel,
Chicago, Illinois.[61]

This note seemed to eliminate one roadblock from Douglas's path to the vice presidency: namely, it made it appear that Wallace was now out of the picture. Douglas's future still looked good. He was one of FDR's poker-playing buddies and a loyal supporter of the New Deal. The President also seemed enthusiastic about Douglas as a running mate because Douglas was from the West and had a Boy Scout image. Moreover, Roosevelt was less than enthusiastic about Truman and had raised questions about his age. He was also quoted as saying that he did not know Truman well.[62] Jimmy Roosevelt later said, "Although Father did not commit himself, I came away with the distinct impression that he really preferred Justice William O. Douglas as the vice-presidential nominee."[63] Douglas's biographer Bruce Allen Murphy brings forth evidence that Douglas was very much involved and was being kept informed by a coterie of Democratic political operatives working on his behalf. These included a man named Teddy Hayes (one of the key people working for Ed Flynn, the Democratic boss in the Bronx, who was in touch with Douglas on a regular basis), as well as New Deal operatives such as Eliot Janeway, the economics editor of *Time*, Leon Henderson, a wartime price administrator, Abe Fortas, assistant to Interior Secretary Harold Ickes, and Lyndon Baines Johnson, a young Congressman from Texas. New Deal operative Corcoran was also in on the Douglas effort. Ickes and Attorney General Homer S. Cummings now supported Douglas as well.

Unfortunately for Douglas, the road was not as smooth as he had hoped. It is not completely clear how Truman advanced ahead of Douglas. One possibility is that the note written by Roosevelt to Hannegan was doctored or distorted. Some sources suggest that Hannegan put his thumb over Douglas's name, or that in coordination with the President's Secretary, Grace Tully, he transposed the names to put Truman's name first.[64] Historians Robert H. Ferrell and Bruce Allen Murphy are both emphatic that there is no credence to the switched-names story, which was advanced by Corcoran.[65]

Roosevelt himself may also have been directly responsible for jilting Douglas. Ferrell has concluded that the events show "President Roosevelt elevated untruthfulness to a high art."[66] As the Democratic Convention was being held in Chicago, FDR met with Hannegan on the train called the Magellan, which was secretly parked on a Chicago siding, and tacitly approved the nomination of Truman.

Despite Roosevelt's apparent dismissal of Wallace, many at the convention still supported him, including the leaders of the CIO and the permanent chairman of the convention, Senator Jackson. According to Ferrell, there came a point when "Roosevelt . . . turned against Wallace."[67] But events unfolded so fast in the convention that the Truman nomination for Vice President was a done deal before there was any opportunity for Wallace's people to gather around a Douglas nomination. Douglas was in the mountains, but he was at a location where he could be reached by telephone. If not overtly involved, he was intensely interested. When the final roll call for Vice President was called, Douglas ended up with only a small handful of votes and seemed distressed when Hayes called to give him the bad news. When Hannegan and Douglas saw each other later at a party, Douglas asked how Hannegan had stage-managed the Truman nomination and killed off his and Wallace's renomination in the process. Hannegan replied to Douglas that there might be something for him in 1948.

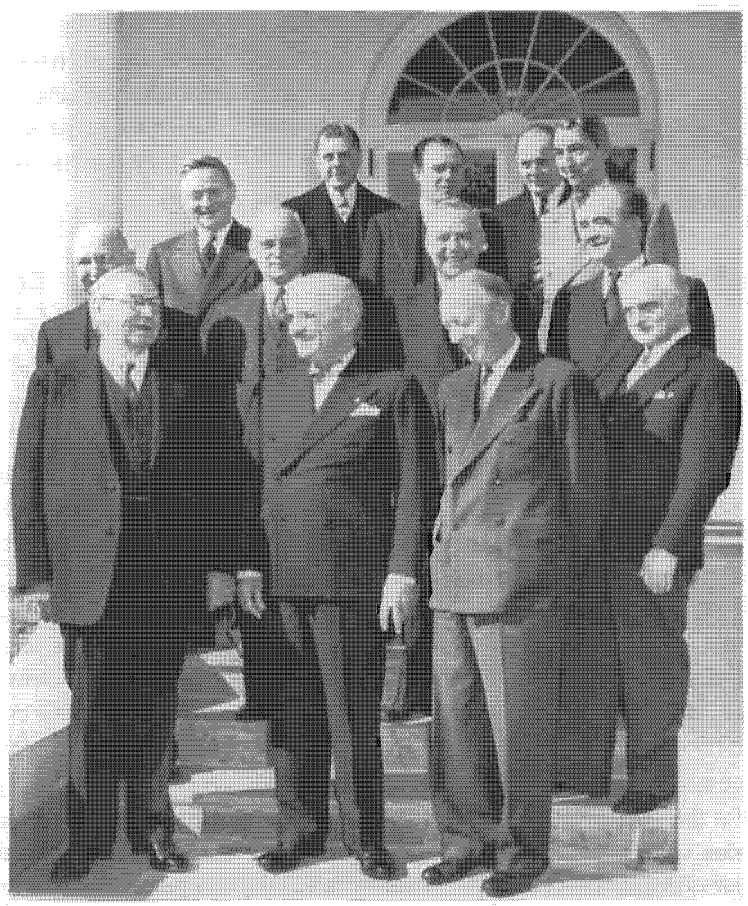
Truman and Douglas, 1948: A Second Fiddle to a Second Fiddle

By early 1948, many in the Democratic party had become disenchanted with the presidency of Harry S. Truman. He had replaced almost

all of Roosevelt's Cabinet. In most instances he did it gently, but in the case of Francis Biddle, Attorney General, there was not much gentle about it: The man from Independence and the Philadelphia aristocrat just did not get along. The newly formed Americans for Democratic Action (ADA), led by persons such as historian Arthur M. Schlesinger, Jr., began to openly complain about Truman. Representative Franklin D. Roosevelt, Jr., a New York Congressman at the time, was also critical of Truman. He persuaded his mother, Eleanor Roosevelt, to join the ADA. A candidate who appealed to many of the leaders of the ADA was army general Dwight D. Eisenhower, now president of Columbia University. However, Eisenhower declined to become involved in running for President on the Democratic ticket.

To many of the leaders of the Democratic party, William O. Douglas was still an appealing alternative, and Douglas took his candidacy seriously for a while. Longtime Washington insider Clark Clifford said, "Douglas wanted to be President, of that I had no doubt."[68] It appears that President Truman was genuinely interested in having Justice Douglas on his ticket as Vice President, prompting former Senator Burton K. Wheeler of Montana, an erstwhile political enemy, to say that the Democratic vice presidential nomination in 1948 would be a second fiddle running with a second fiddle.[69]

Douglas was certainly tempted to run with Truman, but not tempted enough to ignore the problems that his nomination would cause in other areas of his life. His marriage to Mildred Douglas was on the rocks, but she was



Justice Douglas (left, back row) considered running against President Truman (front, center) in the Democratic primary in 1948 but did not want to take the risk of resigning from the bench to campaign because his finances were precarious. President Truman sent emissaries to persuade Douglas to be his running mate, but Douglas declined, in part because he was not sure Truman would win the election.

adamantly opposed to his leaving the Court. The Douglases did not have significant financial resources, and they needed the Court salary just to make it day to day. Douglas was aware of the precedent set by Charles Evans Hughes in 1916, and he knew that if he were nominated he would have to resign immediately. In addition to his financial concerns, Douglas may have also doubted Truman's ability to win the election. He certainly would not have been alone in doing so, since early in the race few people thought Truman had a chance. Truman sent several emissaries to entice Douglas, including Clifford, Fortas, Hannegan, and Eleanor Roosevelt. Eventually, in a somewhat tense telephone conversation, Douglas declined the opportunity to be on the ticket, telling Truman that he chose to remain on the Bench. His desire to become President—or even Vice President—went unsatisfied.

Robert H. Jackson's Presidential Ambition?

Judge Richard Posner has argued that William O. Douglas was not the only member of his Court with an eye on the presidency: Robert H. Jackson also had such ambitions.[70] But evidence of any presidential ambitions by Justice Jackson is minimal, especially during the time he spent on the Supreme Court, from 1941 to 1954. Jackson scholar John Q. Barrett suggests that any such ambitions on the part of Jackson would predate his Supreme Court tenure.[71]

In the run up to the 1940 presidential election before President Roosevelt announced for a third term, Jackson, then in the Justice Department, was put forth to make the case for the New Deal in a major 1939 nationwide radio debate with Wall Street lawyer and future GOP candidate Wendell Wilkie. Jackson was considered a rising star with some potential for the 1940 Democratic presidential nomination, and at that point he probably did have presidential aspirations.[72] Certainly Jackson would have been considered a strong candidate in 1940 if Roosevelt had declined to run, but Jackson was an all-out supporter of Roosevelt and would never have challenged him. Any vice-presidential aspirations Jackson might have had in 1940 and 1944 could not have been acted upon, because he and FDR were both from New York and subject to the "same state provision" in Amendment XII of the Constitution.

There is a remote possibility that Jackson, whom Roosevelt appointed to the Court in 1941, harbored presidential ambitions in either 1948 or 1952. He would have had a motive to run for President after Roosevelt died because, according to Barrett, he did not consider Truman a worthy successor to Roosevelt. Even Truman viewed Jackson as a Democrat with presidential potential, and he considered him a possible competitor in 1948. But Jackson took no action in that direction after his wrenching and exhausting experiences as the American prosecutor at Nuremberg. Eugene C. Gerhart's extensive writings on Jackson in **America's Advocate** make no mention of any presidential ambitions while he was on the Supreme Court.[73]

Conclusion

Some of the most talented Justices of the Supreme Court have considered seeking the presidency. For some of them, the desire was brief and minimal. Chief Justice John Marshall indulged in only a fleeting and private flirtation with the presidency, rather than a dalliance that evolved into a political engagement. Likewise Justice Jackson, while he may have considered the presidency, certainly took no overt action to attain it. For others, the dream of becoming President was ongoing, substantial, and occasionally even consuming. Although Justices Douglas and Davis tried to seize the presidency indirectly, by becoming the Vice President or president pro tempore under a sickly President, both men had their heart set on becoming President.

Other Justices were more direct in their route. Justice McLean involved himself in presidential politics for over a quarter of a century; no other Justice before or since has invested so much time in seeking the White House. Chief Justice Chase's preoccupation with the presidency began long before he was appointed to the Court, making his committment to judicial service a concern to President Lincoln and others. Chase's lust for the presidency manifested itself in many ways, including an attempt to sabotage Lincoln's 1864 renomination. Justice Field's presidential preoccupation was limited to the time surrounding the Democratic Convention of 1880, but his involvement may have influenced several important Court decisions during this time. Justice Hughes was the most successful in his quest: after being drafted as the Republican candidate against his wishes, he resigned from the Supreme Court and lost a very close race to President Wilson.

Whether a Justice thirsted for the presidency or merely considered it in passing, it is clear that the Supreme Court Bench has been a perch from which it is very difficult to fly to the Oval Office.

ENDNOTES

[1]Joseph Story, **Life and Letters**, ed. William W. Story Boston, (John Chapman, London, 1851), August 24, 1812, vol. 1, p. 229.

[2]Letter from Stoddert, July 15, 1812, in Bernard C. Steiner, **The Life and Correspondence of James McHenry** (The Burrows Brothers Co., 1907), p. 581. *See also* James H. Broussard, **The Southern Federalists, 1800–1816** (Louisiana State University Press 1978).

[3]**The Papers of John Marshall**, ed. Charles F. Hobson et al. (University of North Carolina Press, 1974–1995), vol. 7, pp. 337–38.

[4]Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (Houghton Mifflin, 1916–1919), vol. 4, pp. 37 and 41.

[5]Leonard Baker, **John Marshall: A Life in Law** (Macmillan Publishing Co., 1974), p. 532.

[6]Jean Edward Smith, **John Marshall: A Definer of A Nation**, (Henry Holt and Company, 1996), p. 410. Smith edits out key parts of the July 27, 1812 letter.

[7]Beveridge, **Life of John Marshall**, vol. 4, p. 47.

[8]Smith, **Marshall**, p. 503.

[9]Francis P. Weisenburger, **The Life of John McLean: A Politician on the United States Supreme Court** (The Ohio State University Press, 1937), p. 48. This book is the basic source of the detail on McLean's political activities. Unless otherwise indicated, the specifics in this section are from this source. Also of interest are McLean's circuit-riding activities, discussed in Joshua Glick, "On the Road: The Supreme Court and the History of Circuit Riding," 24 *Cardozo L. Rev.* 1753, April 2003. *See* pp. 1802–3 and 1806.

[10]Paul C. Nagel, **John Quincy Adams** (Alfred A. Knopf, 1997), p. 317.

[11]**Reminiscences of James A. Hamilton**, (Charles Scribner & Co., 1869), pp. 162–63. Hamilton was a South Carolina Congressman and Governor in the 1820s and 1830s. Cited in Weisenburger, **McLean**, p. 69 n. 12.

[12]Robert V. Remini, **Daniel Webster: The Man and His Time** (W. W. Norton & Co., 1997), p. 427.

[13]Weisenburger, **McLean**, p. 79.

[14]*Ibid.*

[15]The connection between McLean and Chase was extended when, after the death of his first wife, Chase married Sarah Belle Dunlop Ludlow, making McLean an uncle by marriage to Chase. The marriage ceremony was held in the McLean home.

[16]At a later time, his circuit included Ohio, Indiana, Illinois, and Michigan.

[17]Remini, **Daniel Webster**, p. 427.

[18]During the administration of John Tyler, Secretary of State Daniel Webster persuaded the President to nominate McLean as Secretary of War. Although the United States Senate promptly confirmed him in 1841, McLean just as promptly declined that office. Given that the Supreme Court then met in the Capitol only a few doors from the Senate, it would be hard to conceive that McLean did not know about the move to appoint him to the Cabinet. He let his nomination be confirmed only to immediately decline the office. The catch-and-release equation at work again? Weisenburger, **McLean**, pp. 102–3.

[19]John Niven, **Salmon P. Chase, A Biography** (Oxford University Press, 1995), p. 110.

[20]60 U.S. 393 (1857).

[21]The exact source of this comment by Lincoln about Chase is quoted in a letter from Thurlow Weed to John Bigelow, December 13, 1863, **John Bigelow: Retrospectives of an American Title** (Baker and Taylor, 1909–13), vol. 2, p. 110. *See also* Michael Burlingame, **The Inner World of Abraham Lincoln** (University of Illinois Press, 1994), p. 173, and a brief parallel reference in John Hay, **Lincoln and The Civil War** (Dodd, Mead & Co., 1939), p. 110. This phrase is also reflected in Bernard Schwartz, **A History of the Supreme Court** (Oxford University Press 1993), p. 97.

[22]Recorded in David M. Silver, **Lincoln's Supreme Court** (The University of Illinois Press, 1956), pp. 207–8 (referring to George S. Boutwell, **Reminiscences of Sixty Years**

in Public Affairs (New York, 1902), vol. II, p. 29). *See Ex parte Vallandigham*, 68 U.S. (1 Wall) 243 (1864).

[23]Niven, **Chase**, p. 374.

[24]Albert Bushnell Hart, **Salmon Portland Chase** (Houghton Mifflin, 1899), p. 366.

[25]James M. McPherson, **Ordeal by Fire: The Civil War and Reconstruction** (Alfred A. Knopf, 1982), p. 541.

[26]Hart, **Chase**, p. 362.

[27]Niven, **Chase**, pp. 428–29.

[28]Willard L. King, **Lincoln's Manager, David Davis** (Harvard University Press, 1960), p. 271, a basic source here.

[29]John Niven, **Salmon P. Chase, A Biography** (Oxford University Press, 1995), p. 432.

[30]Niven, **Chase**, p. 447.

[31]71 U.S. (4 Wall) 2 (1866).

[32]King, **Davis**, p. 277.

[33]King, **Davis**, p. 279.

[34]James A. Garfield died September 18, 1881. From that date until March 3, 1883, when his term in the U.S. Senate ended, Davis was second in the line of succession to be President. It is now known that Arthur's illness was life-threatening. *See* Thomas C. Reeves, **Gentleman Boss: The Life of Chester Alan Arthur** (Alfred A. Knopf, 1975), pp. 317–18.

[35]*Cummings v. Missouri*, 71 U.S. 277 (1866), a landmark test-oath case.

[36]Carl Brent Swisher, **Stephen J. Field, Craftsman of the Law** (Brookings Institution, 1930), pp. 286–87.

[37]*San Francisco Examiner*, October 27, 1879. This and other basic information is gleaned from Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (University of Kansas Press, 1997). This journal has recently published the entirety of Field's "Personal Reminiscences," with an excellent introduction by Paul Kens. *Journal of Supreme Court History* 2004, vol. 29, no. 1. There, Professor Kens makes a careful, detailed study of Field's Supreme Court opinions and analyzed how they related to his political campaign.

[38]94 U.S. 113 (1877).

[39]83 U.S. (16 Wall) 36 (1873).

[40]100 U.S. 303 (1880).

[41]*In re Ah Fong*, 1 Fed. Cas. 213 (C.C. Cal. 1874) (Field, J.).

[42]*See id.* This subject is covered in Kens, **Field**, pp. 200–217. *See also Tung v. Freeman*, 92 U.S. 275 (1876).

[43]Kens, **Field**, p. 233.

[44]Edmund Morris, **Theodore Rex** (Random House, 2001), p. 465.

[45]Henry J. Abraham, **Justices, Presidents, and Senators** (Rowman & Littlefield Publishers, 1999), p. 127.

[46]H. W. Brands, **T.R., The Last Romantic** (Basic Books, 1997), pp. 773–76.

[47]Merlo J. Pusey, **Charles Evans Hughes** (The Macmillan Co., 1951), p. 316.

[48]*Id.*, pp. 317–19.

[49]The incidents (offer?) are recorded in David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes** (Harvard University Press, 1973) p. 180.

[50]Pusey, **Hughes**, p. 333.

[51]*Id.*, p. 328.

[52]Danelski and Tulchin, **Autobiographical Notes**, p. 181.

[53]Pusey, **Hughes**, p. 333.

[54]Letter to Merlo J. Pusey from H. S. T., July 11, 1950. Recorded in Eugene C. Gerhart, **America's Advocate: Robert H. Jackson** (Bobbs-Merrill Co., Inc., 1958), pp. 283–84.

[55]Bruce Allen Murphy, **Wild Bill: The Legend and Life of William O. Douglas** (Random House, 2003), p. 218.

[56]Murphy, **Douglas**, pp. 212.

[57]In addition to Murphy's **Douglas**, there are two excellent biographies of Truman: David McCullough, **Truman** (Simon & Schuster, 1992); and Robert H. Ferrell, **Harry S. Truman: A Life** (University of Missouri Press, 1994). *See also* Robert H. Ferrell, **Choosing Truman: The Democratic Convention of 1944** (University of Missouri Press, 1994), and Frank Freidel, **Franklin D. Roosevelt: A Rendezvous With Destiny** (Little Brown, 1990), pp. 525–38.

[58]James MacGregor Burns, **Roosevelt: Soldier of Freedom** (Harcourt Brace Janovich Inc. 1970) p. 503. David McCullough, **Truman** (Simon & Schuster, 1992) p. 295 states "As the historian James MacGregor Burns, then a member of the White House staff, later wrote, Roosevelt never pursued a more Byzantine course than in his handling of this question."

[59]McCullough, **Truman**, p. 295.

[60]James F. Byrnes, **All in One Lifetime** (Harper, 1958), p. 255.

[61]The handwritten note is lifted from the Walker autobiography, **FDR's Quiet Confidant: The Autobiography of Frank C. Walker**, ed. Robert Ferrell (University of Colorado, 1997), 141. The typed version is in all the basic sources. The author is not qualified to wade into some of the controversy about the handwritten note. The two versions were provided to the Truman Library by the family of Robert Hannegan. Professor Murphy deals in great detail with this subject in **Douglas**, in an extended four-page footnote at pp. 605–8. Ferrell also presents a lengthy footnote in **Choosing Truman**, pp. 120–21 n. 4, concluding that the issue about the note (notes) is "downright perplexing." Murphy doubts the switched-name thesis again in a lecture originally delivered on March 18, 2003 at the Cato Institute as recorded on C-Span 2. The tape had been carefully reviewed here.

[62]"I hardly know Truman." McCullough, **Truman**, p. 292.

[63]James Roosevelt and Sidney Shalett, **Affectionately, F.D.R.: A Son's Story of a Lonely Man** (Harcourt, Brace,

1959), p. 351. A recent biography of FDR states: "It is not plausible that Hannegan misled the president's secretary, as some have suggested, into reversing the order of the two preferred candidates." Conrad Black, **Franklin Delano Roosevelt**, (Public Affairs, 2003), p. 971. Thus, Ferrell's general view is reaffirmed.

[64]Grace Tully, **F.D.R., My Boss** (Charles Scribner's Sons, 1949), pp. 275–77. The paragraph on this incident is revealing:

> The historic significance of the incident sprang to my mind when the President died in 1945. I searched our files for the carbon copy of the original version of the letter. It was never found. Dorothy Brady, my assistant, had done the actual retyping and apparently had destroyed the first version when she had completed the final letter. It was a routine and quite logical action on her part—first drafts of letters which are amended before sending are never retained—but it is one case in which an original would have had great historical interest.

William O. Douglas wrote the forward to the Tully book.

[65]*See* note 60.

[66]Ferrell, **Choosing Truman**, p. 91.

[67]Ferrell, **Truman**, p. 164. Allen Drury, *New York Times* reporter and novelist, called FDR's treatment of Wallace "perhaps the coolest and cruelest brush-off in all the long Roosevelt career." Allen Drury, **A Senate Journal: 1943–1945** (McGraw-Hill, 1963), p. 218.

[68]Murphy, **Douglas**, p. 253. For the Clifford statement and discussion, *see* Clark Clifford, **Counsel to the President: A Memoir** (Random House, 1991), pp. 215–16.

[69]Murphy, **Douglas**, p. 255.

[70]Richard A. Posner. "The Anti-Hero," *The New Republic*, February 24, 2003.

[71]Memo to author from John Q. Barrett, June 4, 2003.

[72]*See* comments in the *New York Times*, January 19, 1958.

[73]*See* note 53.

A Voice from behind the Bench: Recollections of a Supreme Court Page

FRANK LYMAN, INTERVIEWED BY DARRYL J. GONZALEZ

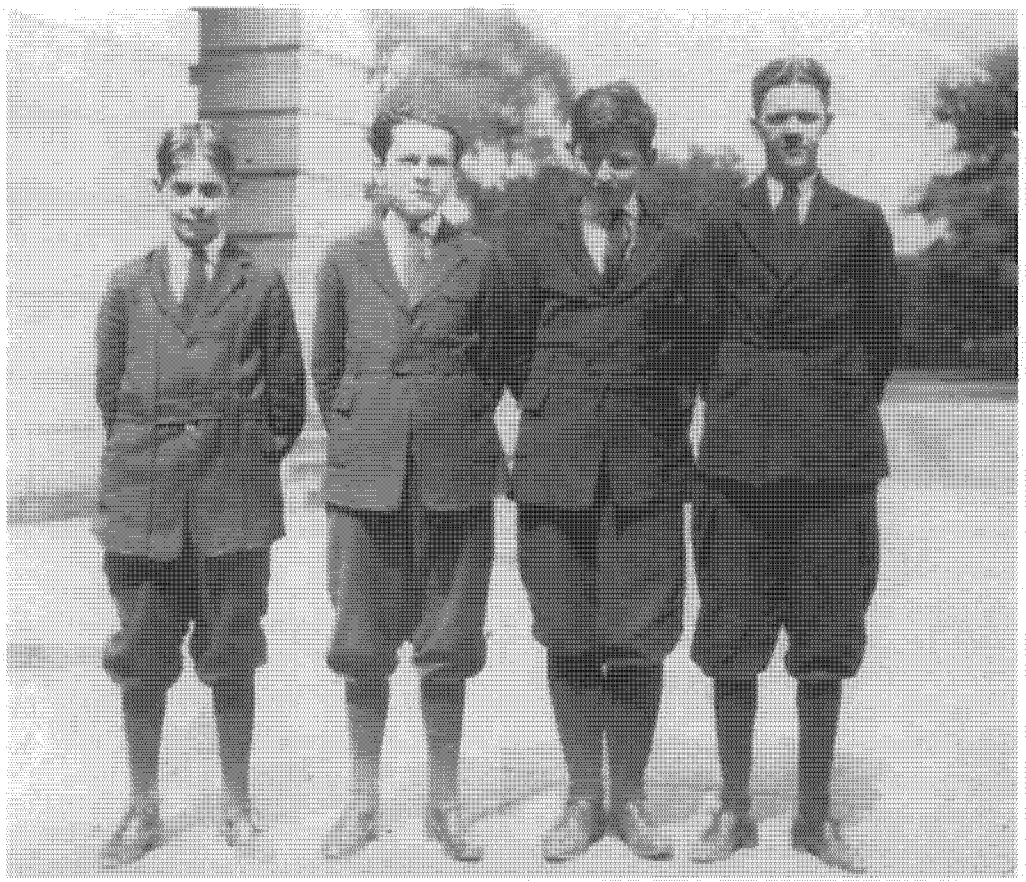
Frank Lyman was 13 years old when he was selected as a Supreme Court page. He served five years, from September 1923 until the spring of 1928, when he became too tall and was forced to leave the page corps. Mr. Lyman served his last two years at the Court as Head Page, supervising the other three pages he worked with.

This interview reveals a part of Supreme Court history that is rarely talked or written about, including pages' interactions with the Justices, their daily behind-the-scenes lives, and what mischief they got into during those times when official duties had been completed. It is an insider's view of the Court that normally receives little, if any, attention in print, even in official government documents. However, pages have a long tradition of serving the Court, and it is time that their stories are told before they are lost forever. We see in this article that Mr. Lyman, as a young teenager, had daily contact with some of the most illustrious men who have served on the Supreme Court Bench: Oliver Wendell Holmes, Jr., Louis D. Brandeis and William Howard Taft, among others.

The following is a compilation of a series of conversations that I had with him in the past year, and includes a small portion from his personal memoirs. Although Mr. Lyman was ninety-two years old when these interviews took place, his memory of events that occurred more than seventy-five years ago is remarkable. This article is taken verbatim from the conversations whenever possible, although small portions of it have been edited for readability and cohesiveness.

Darryl Gonzalez Can you tell me how you became a page at the Supreme Court?

Frank Lyman Well, a friend of the family was the Head Page at the Supreme Court at the time and he happened to know about my family's situation, so he asked me.



Head Page Jan Lamar (right), a great-grandson of Justice Lucius Q. C. Lamar, recommended Frank Lyman (left) be hired as a Supreme Court page in 1923. The Court ignored patronage letters written by Senators and Congressmen and hired pages based on one criterion: financial need. In a tradition dating to the Civil War, all the pages were the sons of widows. Lyman's father, a Navy veteran, had just died of tuberculosis. Tom Cunningham (center left) and Sam Caldwell (center right) were the other two pages that Term.

DG What was your family's situation?

FL In January of 1922, my brother died at the age of 17. He died in the Knickerbocker Theater, when the roof collapsed from Washington's biggest snow storm ever . . . along with ninety-six others, and then my father died of tuberculosis right at the beginning of 1923.

DG Your father died of tuberculosis, and then how much time passed before you became a page?

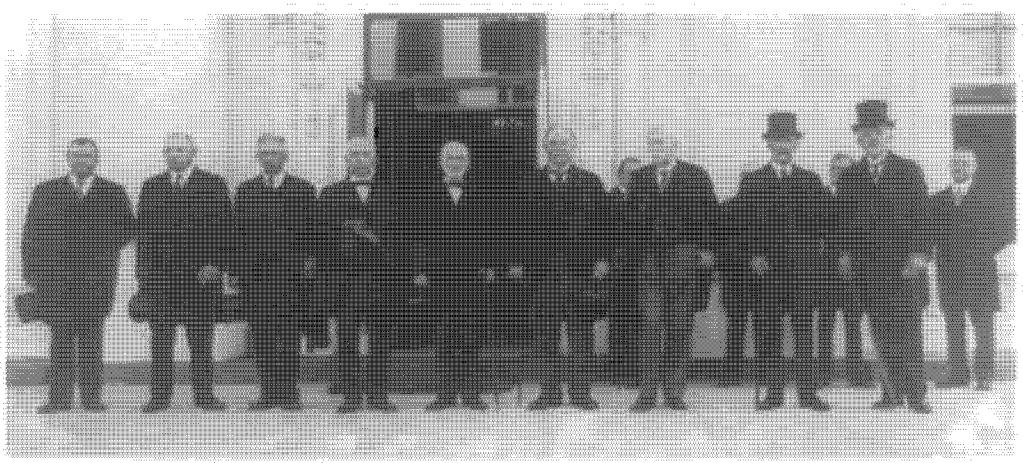
FL About a year.

DG Do you remember when this friend of the family asked you to be a page?

FL Sure, sure. Jan Lamar, he was my brother's friend, came over one evening, and he knew the family situation, and he said, "I just thought I would mention the fact that there's going to be a vacancy on the page boys," and he said, "I can't put in a good word," he said, "but if you go ahead and apply for that, you might stand a chance. I'll just tell them that your father died, and he was in the Navy."

DG How did Jan Lamar get to be a page?

FL His great grandfather was an Associate Justice of the Supreme Court, Lucius Quintus Cincinnatus Lamar (1888–1893). My grandmother knew him, as



Frank Green, the Marshal (far right), interviewed and hired Lyman for the $110-a-week page job after ascertaining that he knew how to read. The responsibility for supervising the pages, however, fell to Thomas Waggaman, the Crier of the Court (partially obscured, fourth from left in back). This photo shows the Justices' visit to the White House on the eve of the Court's opening session in 1924.

a matter of fact. I always remember her saying that he always had tobacco juice in his beard . . . (*laughs*) Now, isn't *that* romantic? At any rate, Jan came over and said there was an opening, that one of the pages had gotten a little too big, and they shooed him on the way. They didn't want big fellows in there, they wanted *boys*, and he said there's an opening there.

DG Do you remember going to the interview?

FL The Marshal, Frank Green, as it turned out, he was from Georgetown in Washington, and my family, well, that's where *they* settled when they came from the South. My family, in the early days, all lived in Georgetown, and my uncle happened to know Frank Green as a young man, and I think that pleased him to be able to go back a little bit and remember the old times at the interview. I think that helped a lot. So, he put me on, at $110 a month—a lot of money in those days. Like Jan though, I had a famous great-grandfather, too: George Alfred Trenholm, who was Treasurer of the Confederate States of America from July 1864 to April 1865, and maybe the richest man in the country at the time. Supposedly, he was the inspiration for Rhett Butler in *Gone with the Wind*. So maybe that helped too, I don't know.

DG Do you remember the conversation with Frank Green? Do you remember what he talked about?

FL Well, he didn't go into any real details, I think he talked more about the old days, with knowing my uncle in Georgetown, and all that sort of thing, and he had heard of my mother and my father, and so forth. I didn't experience any problem, no real in-depth cross-examination from him at all; we mostly just talked. He did ask me if I could read—that was one of the requirements. So, I landed the job, he told me when to report, and that was really it.

DG Did he show you around the Capitol at all, or did you just go to his office?

FL No, no, he just told me to report in, and he turned me over to Thomas Waggaman, who was the Crier of the Court. And he sort of had charge, I suppose he would be our supervisor of the pages. And he just turned me over to him and let me go.

DG Can you describe that Waggaman fellow? What was he like?

FL Well, he was tall, rather handsome. And, uh . . . he knew it! He attracted a little attention in his frocktail coat with the women that were coming there. He's somebody that was all full of knowledge. He might seem a little stiff, but he traveled around a lot, and the company he traveled with were all well-to-do people, I think, and the Waggaman family was well-known in Washington, you know. His family owned a lot of land in Washington. He was a likeable, easy-going fella, and he put up with us . . . And we didn't give them much to worry about. Frank Green didn't worry about us anyway, he let Waggaman do all that; that was *his* job. He was just a heck of a nice fellow. He knew how boys are, but he was easy, and he kept us straight, and we all liked him. He kept a good supply of candy in his top drawer, which we always enjoyed . . .

DG Can you talk about Frank Green for a minute? What was he like?

FL Well, it's sort of hard to describe him. He was rather bald, he didn't have much hair. He had a red face. Just a pleasant looking fella, you know. Always had a smile.

DG Since your friend, Jan, was already the Head Page, did he tell you much about the job?

FL A little bit, but not much, no. I remember in detail this one thing, he said, "I don't have any real advice for you, except to be yourself, and you can't get smart up here, particularly of your own hand. Why, you'll end up the wrong alley. Just do what you're told and you'll impress everybody and find everybody very pleasant, very nice," which they were. And, that was about all. He had a sense of humor and he was a good guy.

DG Do you remember your first day of being a page?

FL Yes, I do. The Court wasn't in session at the time. So, I had plenty of time to be broken in and kicked around and fooled with, all that sort of thing, and so I felt a little bit like a page by the time they did arrive. Let's see, they hired me in early September, and Court comes in about the first of October as I remember . . . .

DG What were the first few days like, being the new boy?

FL Well, I was just sort of numb with it, I suppose. I was obviously interested too, but having Jan there helped out tremendously. He had a great sense of humor, and he introduced me to Sam Caldwell and to Tom Cunningham, the other pages, and he told me, he said, "I'll tell you about these characters right now," and he gave me a rundown on Tom, a rundown on Sam. I don't know, they had a lot of inside jokes, or stories about them; it made me feel at home very quickly. So I was very happy with them. When I went home after that first day, my mother asked me how it went, and I said, "Fine." And that's about the extent of it.

DG Can you talk about what you did as a page?

FL Well, we would be behind the Bench, behind the Judges' chairs, and if they wanted something, why, they would snap their fingers, and one of us would hurry and go see what it was they wanted. Now, I won't say that's all we did, I mean, we had to make sure that the Court was in perfect order, the quill pens and everything was all set up and ready to go. After the Crier was finished with his, "Oyez, oyez, oyez . . ." all the Judges would sit down and we would have to push in their chairs for them. But because there were only four of us and nine of them, we'd have to do it pretty quick. So, when they came in, we stood behind their chairs, these great big chairs, and occasionally we would have a little premature push, and we'd catch them

in the back of the knee and bam! down they'd go! But, we were just messengers; that's all we were, back and forth, off the desk, back to the desk, all of the time . . .

DG Tell me what you had to do with the quill pens.

FL Well, just make sure they were in good supply, and all the desks were ready for them. We'd go in the Judges' cloakroom sometimes, where they would tell us if they wanted anything, why, then, we would be there to help them out. And there really wasn't very much for us to do.

DG Did you ever have to go to the Library of Congress to get books?

FL No, books that they referred to, generally speaking, were all right behind the Bench.

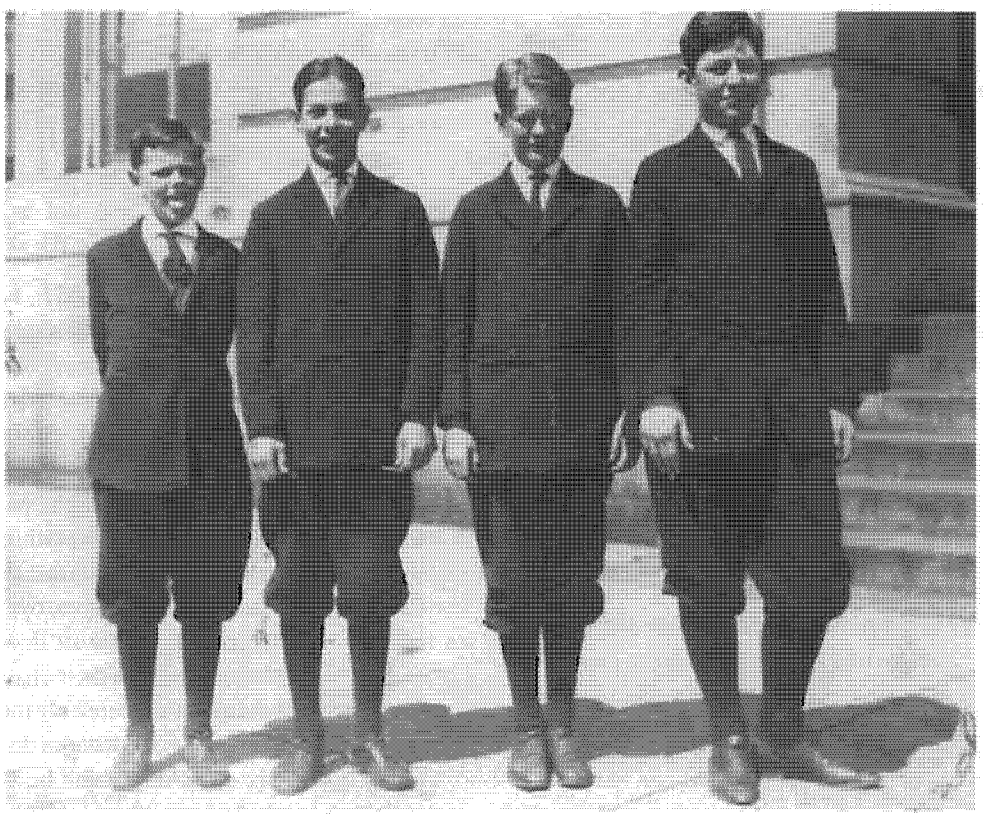
DG They kept them right there?

FL Yeah. So we just walked around the side and picked them out and brought them right back to them.

DG What kinds of things did you have to do?

FL Well, I was a server . . . for the Head Page for awhile. You know, he'd say, "I want some chewing gum" and other things, and I'd be the one to have to go get it for him. They said it was a tradition, and everybody does what the Head Page says. So, it was just a few weeks of that. I knew what was going on, but there was no real hazing of any kind; it settled down pretty quick, I guess because I knew Jan. But then when I became Head Page, I was sure to carry on that tradition.

We had a boy come in when I was Head Page, I'll never forget him, Merritt Chance. I don't know that I picked on



As the new page in 1924, Merritt Chance (left) got sent out to buy cookies and snacks until his mother came in and complained to the Marshal that the older boys (left to right: Lyman, John Kelton, and Sam Caldwell) were using him to run their errands.

him too much, but when he came, we had to initiate him, and there was this understanding that the new boys were the errand boys for the others. If we wanted cookies or candy or anything, why, they would go and get them. So, it was always, "Hey Merritt, time for candy!" So Merritt would have to go down to the Senate place, or wherever it was, down to the candy stand down there and bring us back candy, you know. He didn't object too much, but we didn't do it too long either; we didn't want to be stupid about it. But he must have complained to his mother, because one day Merritt's mother came down to the Supreme Court to the Marshal's office and complained about her son being made a slave to the others and (*laughs*) that straightened us out for awhile. But there wasn't a great deal of that, you know, there wasn't much occasion for it.

DG How did you get to work every day?

FL I suppose mostly by streetcar, but I had a bicycle, and I would pedal down there sometimes, too. If I had any errands to run, the Marshal would give me streetcar tokens, but I usually kept them and I used my bike to run the errands. Then I could use the tokens whenever I wanted to go other places. Traffic wasn't very heavy, obviously.

DG What else did you have to do day-to-day?

FL The pages' duties while sitting behind the judges on the Bench were really quite simple. There were requests for water and law books, which were both close at hand—just any errand required of us. I was Head Page for my last two years, and the title was purely a seniority situation although some supervision was expected of you, and your place on the Bench was directly behind the Chief Justice, and I might add staying awake was quite important.

DG Did pages ever fall asleep during proceedings?

FL Well, there was one place, one chair, that went back pretty far, no one could see you back there and I had a bad habit when I was Head Page, and so did Jan when he was Head Page, we used to get back there and snooze a little bit. I'll blame that one on Jan though, because when he was Head Page, he showed me how to do it. I hadn't been there very long on the Bench and he changed places with one of the pages, one of the young pages, and went down there, and leaned way back and fell sound asleep. The Head Page was assigned to the Chief Justice, so when I was Head Page, I'd be in the center, sitting right behind Taft, and that was between two posts, but the next page down below was between two big pillows, and he could put his chair way back and put his head back and catch a little sleep. But, it wasn't wise to do that.

If we snored, I think Jan snored a little bit, why, we heard about it. Judge McReynolds, he was a sorta harsh fellow. I liked him, he was as bright as he could be, but he didn't have much patience with us. I remember, he could always hear boys chewing gum. He'd snap his fingers and snap at us, "Spit out that wax, boy!" Oh, my . . . Now, think about it: here's a man on the United States Supreme Court, with a big case going on, and he can take time out to reach back, snap his fingers and say, "Boy, spit out that wax!" It wasn't ever "chewing gum," it was "wax." I never chewed any gum while I was there.

DG What other kinds of mischief did you get into?

FL A little craps-shooting was in order sometimes when Court wasn't in session. In fact, we were back by Attorney General Harlan Stone's office one time, down on the long carpet, it was a very nice place to roll the dice, you see, you didn't have

to slide them on the slippery floor, you could use the carpet, and I thought there was somebody standing behind me, and I looked back there and there was the Crier, our boss, Waggaman. He looked at us and said, "This is not a very good place, fellas!"...

DG Do you remember other times that you had to find things to do?

FL Oh, bowling. Yeah, when they weren't in session, we had a bowling set, and we'd set it up on the long carpet by the Attorney General's office. We would bowl, shoot a little dice here and there...

DG Did you ever pay attention to the cases that were being argued, or the legislation in Congress?

FL When we weren't in session, we were pretty much on our own. If the House or Senate was in session, I would spend time in the galleries and listen to the debates, and on occasion would find it all very interesting. In the Courtroom, though, some of the cases, the tax cases and some others, were way over our heads. They were for people who really knew what law meant, but there were others that were pretty much down to earth, and the Justices would loosen up once in awhile. Usually, I had an autograph book with me and anyone that looked important would be asked for their signature....

DG When you were alone with Chief Justice Taft, would there be any conversation?

FL No, he wasn't all that talkative with us. He didn't communicate too much with the boys or with me. Maybe a "How are you today, young fella?" or something, you know, this type of thing. But he was always pleasant, always a smile, a big smile, and we liked him very much. Personality-wise he was great....

DG Did you have the occasion to ever meet Mr. Coolidge?

FL I didn't meet him, but I was at his inauguration. His inauguration was at the Capitol. They asked the Marshal to turn the four of us pages over to do duty for the inauguration—turn us into service guides, and help with the people getting seated, and so forth. And so we did whatever we were told to do. We stood there and we had a sign on our chest that said "Guide" or whatever, and we just seated people and helped them. And then when the curtain closed and they were getting ready to go on, why, we were first to go through the procession, and that's when I came back into the Court and I went in the back there, sat up and watched it happen. I felt badly about it too because I thought someone in my family would love to get up there and watch the procedures.

DG Can you describe where you were, where you sat?

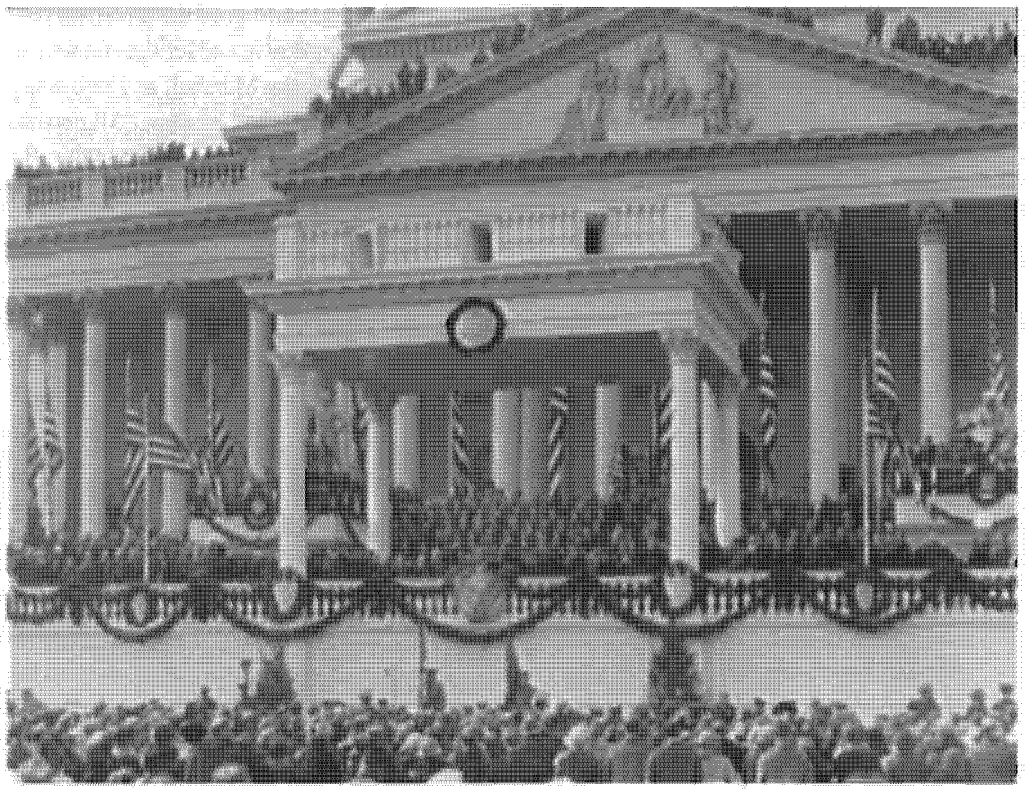
FL Yes, it was directly behind the middle of the Bench. There was a big double window, and three settees, and there's a window on both sides. That's where I was, sitting on that small settee looking out the window onto the East side of the Capitol. We didn't go back there much, except when we sat there when we did any studying and things like that. I was all by myself.

DG And when you looked through the window, what did you see?

FL Well, I could see what was going on. I couldn't hear what was going on, but I could see Coolidge and the swearing-in procedure, and all that sort of thing. And just the fact that the crowd was so big, and the band was playing, and all the singers were there; that was really stimulating.

DG Any cases that you remember specifically?

FL No. But there wasn't much excitement on the floor. It was very cut and dry. And



The Supreme Court pages were asked to help out as guides at President Coolidge's inauguration. Lyman watched the swearing-in ceremony from a settee in the Courtroom (then lodged in the Capitol building), through a window looking down onto the crowds.

I only wished at the time, several times, that I could understand what was going on. I know John W. Davis was a famous lawyer in those days, in fact Charles Evans Hughes wasn't on the Bench yet at that time, but Hughes, he was on a case opposite John W. Davis, and they attracted a lot of attention, and to listen to them and in many instances, not understanding them in their language was still a pleasure. We thoroughly enjoyed them. And I'll tell you, the judges seemed to straighten up with them too, and it attracted a lot of attention inside the Courtroom. I know the number of people watching would grow during that period when a big case like that was going on . . .

DG Can you remember any funny things that happened during sessions?

FL We had several amusing things that happened. It broke up the days, you know. For example, one time, Judge Brandeis snapped his fingers and he wanted somebody to go back and put back a book, and he snapped his fingers, and one boy, Sam Caldwell, stuck his head in between the chairs, right through there to get the book, and as he did, Brandeis had picked up the book and handed it back to him, and it hit him right in the face. He gave him a black eye! It was tremendous. He and Judge Brandeis were friends after that!

DG And did that disrupt what was going on in the Court?

FL No, no it didn't, I mean, it was just done very quietly, and Sam didn't yell or anything, and we administered to him and

that was it. Another time, we had one of the big cases, I remember, there was silence because the judges wanted to talk among themselves, or pay special attention to, I don't know whether it was to Judge Holmes or Judge McKenna. Judge McKenna was on the Bench the first year I was there, but he left that following year. If he wanted to know something, he turned either to Brandeis or Holmes all the time I was there. If you wanted to know anything, you always got the answer from either one of those two. Taft would always move his head to the right or left and listen to Holmes or McKenna when he wanted to know something. And, so that's where they were, they were conferring, you see, everything was deadly silent, and in comes a big lawyer, walks through the little gate, picks out an armchair, sits down and spreads his legs, and then he leans back and the chair tips backwards, and his feet go up in the air, and the big guy falls over and, of course, that broke us up, you know, and we had to go down and ask him if he was all right. Several little things like that happened to sort of break the monotony. And the biggest one I wouldn't want to necessarily publish because it would spoil the dignity of the Court, but I can remember it well.

DG Do you want to tell it?

FL The Crier, Thomas Waggaman, was sick this day, and the Marshal took his place, Frank Green. Now, Frank Green was a little rusty, but he used to be the Crier himself. As a matter of fact, he was even a page at one time. He went up the ladder. So, the Marshal was a little hazy. Of course, it's supposed to go, I can remember, "Oyez, oyez, oyez, all persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!" and bam! goes the gavel, and everybody sits down, and let's get on with it. But this day, the Marshal, as I say, was a little hazy on it, and he says, "All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States *from* this Honorable Court." And we just all gasped and looked at each other, but everything carried on. You know, he couldn't go back and fix it.

DG How did everyone else react?

FL I think that there wasn't too much reaction. Well, Taft, being the friendly, gallant guy that he was, had put his head down, and I was particularly interested in his reaction to it because the pages realized the mistake as soon as it happened and we all looked at each other, like, "Ooooo, listen to him!" And I watched Taft, and after we sat him down, he looked over at Frank Green and smiled and shook his finger at him. And that shows you what kind of man Taft was—he was a good guy. Poor Frank Green, his face was as red as a beet. But he couldn't go back and say, "No, I didn't mean that!"

DG Because the Supreme Court was in the Capitol at the time, did you have much contact with House and Senate pages?

FL We used to go over to the House and the Senate. I used to go over to sit in the gallery in either one of the places when things were a little dull. And we could come and go as we please, as far as that was concerned, and I knew some people over there in the House because my cousin was a House page, Gus Meade. The Senate and the House pages used to have a little competition going about who was superior—you know, talking all the time like they were better than the next. They used to play basketball against each other.

DG But, Supreme Court pages were left out on stuff like the basketball games?

FL No, we didn't have any athletics at all. We just didn't, I remember that. Now, I had a couple of friends over in the House and Senate, and I spent a lot of time over in those other places. Of course, we spent time sightseeing, too, and doing stuff we weren't supposed to be doing . . .

DG Like what?

FL Sometimes we'd get the key to the Dome in the Capitol. In order to get up there, you'd have to go ask the man, "Let me have the key." And then you'd go up the big metal steps, up the back way, up into the top of the Dome and look down into the Rotunda, and also go out on the outside of the Dome, and we could go out there and look over the city . . . .

DG Were there other places that only you could get to because you were a page?

FL Well, sure. I don't know whether you're interested in a little story about the House—what the House pages did. Now that I think of the initiation stories, I can remember one thing that Gus told me they did. I think under the House Floor—of course, there is a tremendous basement there, with pipes and everything running all over the place, all the wires and just whatever, and there's a couple of trapdoors on the Floor up near the Speaker's desk as I remember, and because I've been in there, I've seen it . . . .

DG Can you tell me about the uniforms that you had to wear?

FL Oh, well, it was just regular trousers with stockings. We changed clothes down there in the basement. I wore long trousers to work, but I changed into black stockings and knickers and just a regular clean shirt, and that's about all. We didn't want to be seen in short pants running around. I had to hide from the girls because I didn't want them seeing me in stockings! We were embarrassed to have to wear the stockings. That's a little exaggerated, but these young schoolgirls would come in, sit down before Court started or when we weren't in session and ask us questions sometimes. When we had an opportunity to talk to them, we would. I'm just joking about hiding from them because they probably didn't give two cents what we looked like, but any rate, it went through our minds.

DG Where did you change clothes—in the Justices' Cloakroom, or did pages have a separate dressing room?

FL Well, I had a dressing room down there in the basement. The engineer had an office in the basement—the fella that had to do with all the heating and everything in the Supreme Court, and take care of any mechanical problems, he had a little office down there. I don't know what House and Senate pages did, but this was strictly for Supreme Court pages because he was the engineer for the Supreme Court area, you know. So they assigned us there to hang our clothes; if we wanted to change, we could. Now, I didn't change there the first two years, I think, but then I began wearing long trousers down to work, and I would change them down there into the stockings.

DG Was there a locker down there, or a shower, or was it just a space that you changed?

FL It was really just a basement, and he had his own office down there, so to speak . . . Not much of an office. He was a nice guy . . .

DG Can you tell me about the other pages?

FL John Kelton was very nice. He seemed more like college than high school. John was very straight. Any old nasty conversation, he would stay clear of things like that. You know, he didn't do things like

Although they worked in the same building, the Supreme Court pages were not invited to participate in the athletic games of the House and Senate pages, who played basketball, baseball, and marbles and were invited by politicians for weekend retreats. Above, Senator George W. Pepper enjoys a game of baseball with the Senate page boys in front of the Capitol in 1924. Below, Congressman R. Walton Moore entertains a group of House of Representative pages at his Virginia estate in 1922. (Lyman's cousin Gus Meade sits in the second row, just to the left of the center column.)

that. I think he put up with us; that's about the extent of it. I mean, boys did stupid things, but he wasn't involved in any of it. It's too bad that he died while he was still a page . . . .

DG How did the pages get along with the Justices?

FL Well, we never had any conversation in depth, really. One or two occasions, they would say, "Hey, how are you getting along? Do you find school difficult at night?" and things like that. "Have you always lived in Washington?" Just anything they could think of. Small talk. They didn't go into any depth about anything with us.

Now, Judge Brandeis was a bit different. One of the pages with me, Sam Caldwell, he and his mother used to go to the opera a bit and the big shows, and he ran into Judge Brandeis a couple of times there, and this boy, well, he made himself known to Brandeis at the opera. Well, Brandeis was tickled to death. And when Brandeis would come around, he would stop and talk to Sam for quite awhile about such-and-such an opera, and this Sam was a very intelligent, well-educated little boy, and so they were good friends. I think Brandeis lived with his sister in an apartment and she was very, very nice too. All of them were, as far as I'm concerned. Judge Brandeis was a wonderful fellow.

DG Can you tell me what you remember about some of the Justices?

FL Well, I mentioned Judge McReynolds. There was an article in *Life* magazine a few years ago saying that Justice McReynolds was a cantankerous and bigoted individual. I don't know that I could refute that statement, but somehow I resent it. Of all the judges, he was by far the most brusque with everyone, and many times I was embarrassed by his treatment of the lawyers. Taft, Holmes, and Brandeis were my favorites, and I am sure this stems from observing their attitude to others, including the people around them, as well as the attorneys they faced each day.

DG How about him? (*Shows Mr. Lyman a picture of Justice Van Devanter.*)

FL Van Devanter, yeah. He was a great guy. I've been to his house. He was a man of few words. He would say, "Good morning" or "Good evening," and that's about the extent of it. And that pretty much applies to all of them. Mr. Van Devanter was very nice, he was a little distant.

Now, Oliver Wendell Holmes, he was a little different. He would stop and talk to us going into conference, stop and talk to us, stop and ask us questions. He knew Sam Caldwell pretty well, like Brandeis, he was the same. He was really nice to be around. You felt his presence on the Bench; he was some man.

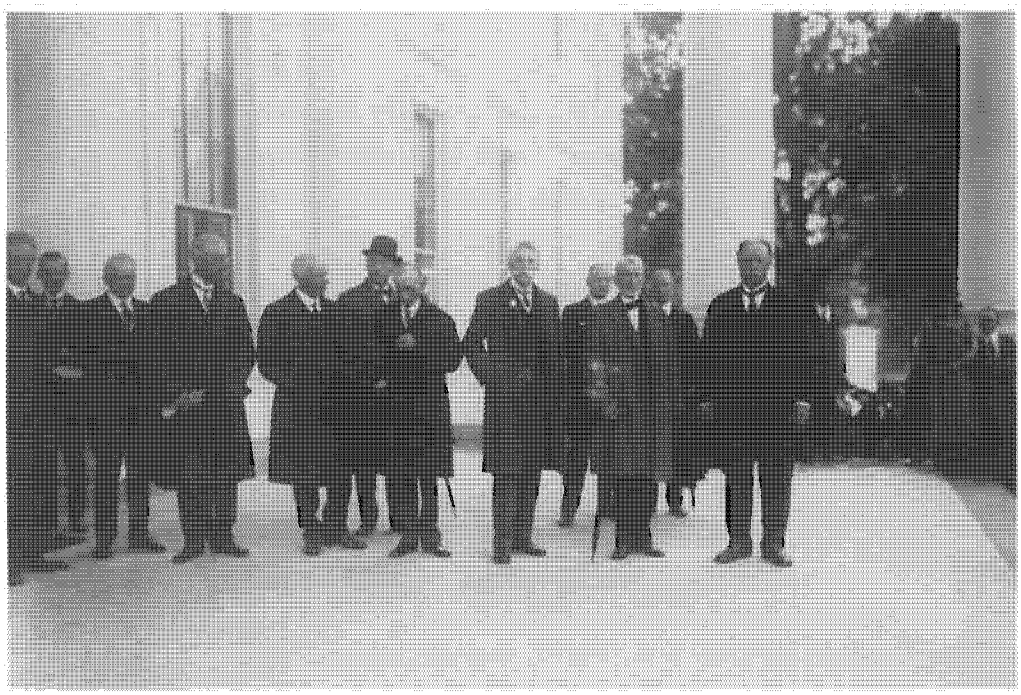
DG Here's Justice McKenna. He was there only a short time while you were there. (*Hands him picture of Justice McKenna.*)

FL Yeah, now I guess he left soon after I got there. I was there with him a year. He was quite elderly, very brainy, but I didn't get to know him very well.

DG You must remember him. (*Hands Mr. Lyman a picture of Chief Justice Taft.*)

FL All I can say about this William Howard Taft was that he was so pleasant—big smile, always friendly, we all liked him. Just a jolly man. I don't think he spent any time with the pages. There wasn't much time for it as far as that goes. Well, they could've made time, but you know . . .

Speaking of Taft, Taft was a tremendous man as you know, big man, heavy, he was a jolly man, and on the Senate side of the Capitol, there's marble steps coming up to the Supreme Court Marshal's office.



Because of his large size, Chief Justice Taft (right) had trouble climbing the marble steps to the Marshal's office and his Chambers in the Capitol building. So they built a two-man elevator to carry him up and one of the Supreme Court pages accompanied him. Pictured are (left to right) Justices Brandeis, Clark, (President Wilson,) Butler, McReynolds, Day, Holmes, and McKenna on a visit to the White House.

The Marshal's office is at the top of the steps. It was an awful climb for Taft, so at the top of the steps they built a two-man elevator—only about two people could be on it, a boy and Taft. So, when it's time for the judges to start making their appearance, we'd keep an eye out the window for him, and, we'd say, "Here he is." Then one of the boys would go run down, take the elevator down to the first floor, and they'd be waiting for him. Then we'd get on up the elevator, and into his room, and it worked very nicely. But I've been told that elevator's been closed over.

They came to work every day in different ways. I remember Judge Holmes would come in a horse and buggy and we would run out and greet him at the curb and help him with his stuff.

DG How about Justice Sanford? (*Hands Mr. Lyman a picture of Justice Sanford.*)

FL Sanford. He was another one of these men who was quiet and kept pretty much to himself as far as I could see. I don't know how I could describe that, but I mean, he came in and he went out. That was about the extent of it. He was pleasant to us, in fact, they all were. I mean, every now and then, you'd get a pat on the head, or the shoulder or something and that was it, but I have no experiences to relate.

One of the later judges, Judge Stone, who was the Attorney General, was very nice. He gave me a written recommendation for a job at the State Department.

DG Is it true that they didn't have offices in the Capitol?

FL That's right, they didn't. I don't remember them having offices, at least. Their offices were in their homes, most of them. I don't know if there were exceptions to

that rule. Somebody may have had an office somewhere—downtown, but I never heard of it.

DG So would you go to their houses in the evening?

FL Their secretary would call, and say that one of them would need a certain book that they didn't have a copy of, or some papers that the Marshal had, and we would hustle just as fast as we could and go and take it out to them. Yeah, we'd go to their houses, and fortunately most of them all lived right up close together.

DG Where did they live?

FL Taft was on Wyoming Avenue, and Brandeis was the street below it, off Connecticut Avenue, and I think Holmes was down on I Street for a little while. Judge McReynolds lived in an apartment house in northwest Washington, just an average hotel-type place.

DG You met their wives and their families?

FL No. Had no close relationship with them at all . . .

DG Were there any women who worked at the Supreme Court?

FL There wasn't a lady involved in *any* feature of the Court. The Marshal himself didn't even have a lady secretary.

DG What were you doing for school the whole time you were a page?

FL It was strange to tell the eighth-grade teacher goodbye after being in her room a week or two when I started. I was completely involved in school, friends and outdoor activities at the time, and I missed out on it all. On the other side, I rather looked forward to the challenge. The fact that I was making money for the family didn't hurt either. Each year we reported to the Court on October 1, and were released June 30, so that didn't leave a lot of time for school.

I was in junior high at that time, but school was very sketchy from there on. I was 13 in the fall of 1923, and I attended Adams Elementary School; it went up to eighth grade. One or two weeks after school started, that's when I quit and went to the Supreme Court. So my education was interrupted, but I did pretty well with it. For about two years, I went to a night school in Georgetown three nights a week at the Devitt Prep School. Dr. Devitt was a professor and he started the school and taught there.

DG Where was Devitt? I know it was in Georgetown; do you remember where?

FL I'm not too sure. I think it was on 36th Street, is there such a thing in Georgetown, I don't know. He had two or three houses—they were joined together—and quite a few pages were there. The Supreme Court, the three of us went, the three of us boys were there. And he moved down to Connecticut Avenue later on.

I took the streetcar each night and I must say my heart wasn't in it . . . I'm not sure that I learned anything. Just ordinary high-school stuff. I read about George Washington and Abe Lincoln in elementary school, and what little grasp of the English language I had was obtained at the Supreme Court and home. I went to several schools after that. I attended business schools off and on for three years; a little bookkeeping, shorthand, which I never used, and typing. That probably was the extent of my public education. See, my education was quite limited. I went to the Woodward School for Boys after Devitt. I didn't go away to college anywhere.

On the other side, I stayed close to my friends and participated in most sports on weekends and didn't miss out on night activity as engaged by high school kids. To sum up this experience as a page, there was an advantage: consider the company I kept, and anyway, there was plenty of spare time to read and study if you wanted

to. I got most of my education through the Supreme Court. I really couldn't qualify that but I think it was the atmosphere and the dignity of it and that sort of thing.

DG Well, not many people can say that. How did you decide when it was time to leave the Supreme Court?

FL Well, I didn't decide. I just knew from experience that my height and everything else had increased to the point where they weren't going to need me any longer. But, I didn't go in and quit. No, sir, I didn't go in and quit. I went in and sat with the Marshal near the end of the year and talked to him. And I said—well, I made *him* say something about it first. "You know," I said, "I just came in to . . . I hope you have a nice whatever . . . summer." He said, "Yeah, Frank, about next year . . . " I said, "Yeah, that's what I want to discuss with you," because I knew that I'd been there five years, I didn't want it to come as a surprise. He said, "Well, I was going to let you know." That was the end of it. So, he let me go, all right; I had to move over, let somebody else come in. But when I was married, then I got a temporary job there in the Marshal's office just to tide me over until my other job turned up.

DG You said earlier that they wanted *boys* as pages. Why do you think that was?

FL In those days, and I don't know how it was later on, but you couldn't get a job as a page with a congressional backing at all; there was no patronage that I knew of. They just decided to hire a boy, but it had to be someone who needed the money. I think it stemmed from maybe back after the Civil War, the boys who were put on the Bench were sons of widows. That's what I was told by someone who worked in the Marshal's Office a long time. That's not a fact necessarily, but, I mean, it makes sense, because I was asked only after my brother and father had died, and the other boys I worked with didn't have fathers either. They had to *need* the money. Like I said, I worked for a short while in the Marshal's Office after I was a page when I was first married, and we had in the Marshal's Office a whole cabinet full of letters from Senators and Congressmen. A little exaggerated, I guess, but there were *lots* of requests for their state to be recognized and have a page boy in the Supreme Court, but they were never recognized because they always chose a boy who needed the money.

DG Do you think being a page helped you later in life?

FL I think it did in associations-wise and the people I met and knew and talked to. I was never involved or never around anything that might send me off on a tangent someplace. It taught me how to be a good worker. But as far as my time in the Supreme Court, I can't think of anything except that it was a wonderful experience, and I made myself known around the Capitol, like with William Tyler Page, and I was in with the doormen of both Houses, so I could go in either Chamber without any problems when we weren't in session; I'd go up and sit in the balcony and listen to what was going on.

There is one thing for sure: that the memory of sitting within arm's reach of William Howard Taft, Oliver Wendell Holmes, Louis Brandeis, and the others has never left me.

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A school was set up in the late 1920s in the basement of the Capitol for House, Senate, and Supreme Court pages. Today, both the House and Senate administer their own school for pages.

The Supreme Court began phasing out the use of pages in 1974, when it replaced one of the four pages with a night law student. The Court did the same in 1975. By 1976, pages were no longer being used.

Some Personal Reminiscences and What They Meant for Me

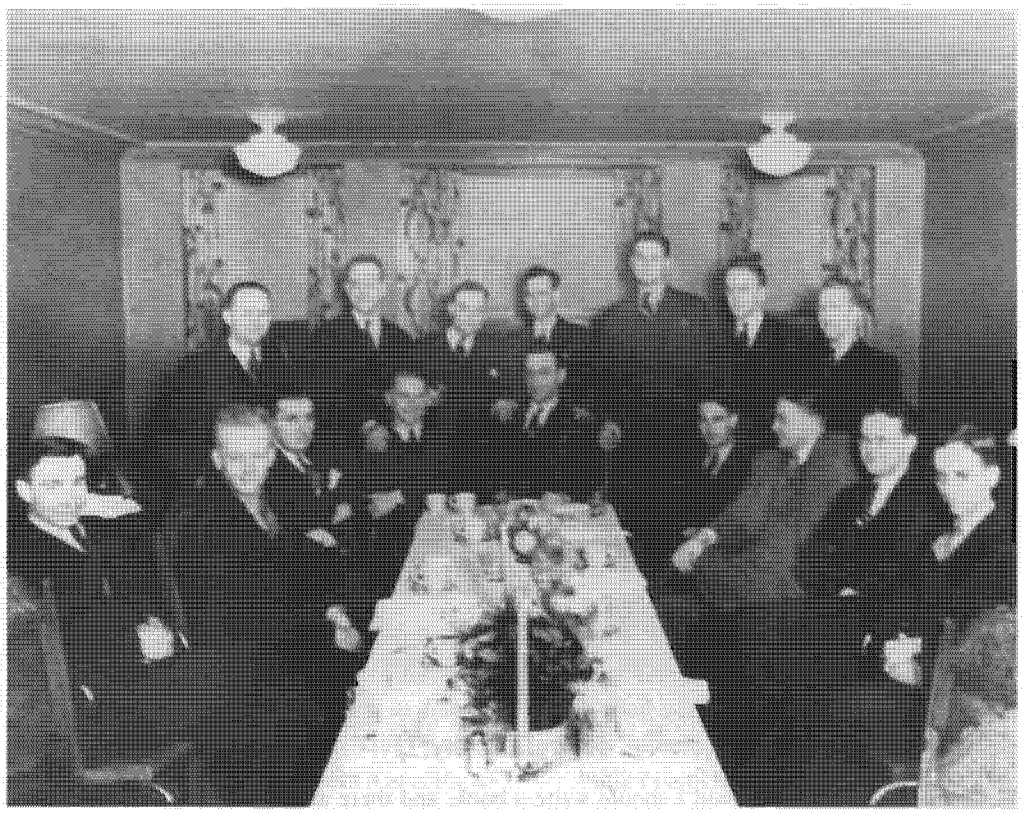
HARRY A. BLACKMUN*

I. Preliminary

There are those who have said I should write a book, and there are those—about the same in number—who have said I should not write a book. Those in the negative assert that my "book" already is written in the several hundred opinions (majorities, concurrences, dissents) I have filed over the years, and in my public utterances. There are valid arguments, I suppose, on both sides. I certainly do not wish to write anything that merely seeks to explain further my vote in decided cases, or to comment—supportively or adversely—on colleagues' votes, or to express little more than after-the-fact criticism. In that context, what might be said belonged in the decisional process itself. But there are other things in Supreme Court experience. Law students are inclined to ask questions. Example: "Tell me, how does one come to be a federal judge?" Justice Tom Clark had a direct response: "One has to be on the corner when the bus comes by." One federal appellate judge plaintively said to me: "The only reason I am on the federal bench is because I was a close friend of a United States Senator." (He had served for a time as the Senator's administrative assistant.) It may perhaps be said that every federal judge comes by his status in his own way. Of course, there are things one must not do, but I doubt that there is a specific path one must follow to be eligible and seriously regarded as a candidate for federal judicial service.

I took my first federal judicial oath on November 4, 1959, more than thirty-six years ago. That was a day with emotional overtones for me. One reason for this was the respect and, indeed, almost reverence I felt for the federal bench, having had the good fortune to be the recipient of a Court of Appeals' clerkship in 1932–1933 and having seen firsthand the responsible work of most federal judges of that time, their devotion to duty, their integrity, and their concern for the positions they occupied.

But a more intimate reason for me was that my clerkship was with a newly elevated federal appellate judge whom I greatly admired, and whom I had the privilege to succeed. He, rather than some of us lesser figures, deserved to be



This photograph shows Harry Blackmun (standing second from the right) with the other associates at the Minnesota law firm of Junell, Driscoll, Fletcher, Dorsey & Barker.

on the Supreme Court. But the political situation at the time, and for several years thereafter, was out of step for him. That fact did not lessen my respect for John Benjamin Sanborn, Jr., an able, fair-minded, hard-working jurist of Minnesota who came to his years of influential service in the late 1920s and the 1930s. I was extraordinarily fortunate in having met him, in having worked as a clerk for him, and in having profited so much from his strikingly correct mentorship.

II. Getting There

I suppose I first should say something about how I landed on the federal bench. Much of what I say at this point contains elements of speculation, for at the time I actually knew little of what was happening. Nevertheless, I believe that most of what I recite did take place.

After I left a pleasant private practice with a large and influential Minneapolis law firm that had afforded me many instructive professional moments, we moved in late 1950 to Rochester, Minnesota, to join the Mayo staff. I had two primary reasons for making regular return visits to the Twin Cities. The first was the fact that my mother and my sister were there. Mother had become a widow in 1947 and lived in that status for more than three decades. My only living sibling, a sister, resided at White Bear Lake, an eastern suburb of Saint Paul. The second reason was Judge Sanborn, especially after Mrs. Sanborn's death, when he was living alone in Saint Paul. I remained in touch with him, and every few weeks I would telephone him or he would telephone me and we would have an evening dinner together. Then, on the night drive back to Rochester, I would tell myself that I should do this more often.

On one of those occasions early in 1959, when the Judge had asked me to come up, he went directly to the point. He said he would like to see me on the federal bench and inquired as to whether I would be interested. He observed that he was getting older and had been thinking about assuming retired status. He said he would be pleased if I could succeed him on the Court of Appeals. My response was a surprised and a somewhat hesitant affirmative. He then went to Washington and, I believe, saw Attorney General William P. Rogers and advised Rogers that he was thinking of retiring. Apparently, he made it clear that he was interested in the identity of his successor and intimated that if he did not like the selection there would be no vacancy to fill. He submitted for consideration at least three Minnesota names that he favored, including mine.

All of this astonished me, for I had assumed that a federal judge could claim no input whatsoever in the naming of his successor. Judge Sanborn's stature, however, was such that he could not be brushed aside, politely or impolitely. And so, after the necessary interval, along came the nomination.

Senator Hubert H. Humphrey of Minnesota telephoned me on Saturday, September 12, 1959. I well remember that call. It was a beautiful day. Over Mrs. Blackmun's persistent objection, I was on the roof of our Rochester house removing accumulated leaves and painting gutters, all in anticipation of winter snow. She called to me and said the Senator was on the phone. I struggled down, convinced that one of my "so-called" friends was playing another practical joke and misidentifying himself as the Senator. I was prepared to make an appropriate caustic remark, but then that distinctive voice came on the line: "This is Senator Humphrey." I refrained from my intended "You don't say." He asked if I would come to Washington as soon as possible for a hearing before a subcommittee of the Judiciary Committee of the Senate. I complied with that request, not really knowing what to expect or how to prepare. I found myself before a panel chaired by Senator William Langer of North Dakota. The other members were Senator Roman Hruska of Nebraska and Senator Christopher Dodd of Connecticut. Someone had warned me that if Senator Langer presided, he would ask me to state the rule in *Shelley's Case*.[1] And, sure enough, the Senator's first and almost only question to me was to state that rule. Why it was important, I do not know, but it seemed to be the opener in his routine. The subcommittee voted favorably, and in due course my nomination went to the floor of the Senate. I was in the gallery when confirmation was considered. Judge William H. Timbers' nomination for elevation to the Second Circuit was on the agenda. There was some temporary difficulty for him, however, and his confirmation was delayed. The Senate seemed anxious to recess, for at the time Mr. Khrushchev was in Washington and had let it be known that he wished to address the Congress. Indeed, the Senate did adjourn shortly after my nomination and the nominations of a few others were confirmed two days later on September 14.[2] Thus, rather suddenly—and certainly without much pain—I found myself accepted for federal judicial service.

The Eighth Circuit's October calendar already was in place, so I was told to prepare for the November session. There was much to be done in winding up pending duties at Mayo's. I arranged to be sworn in on November 4, 1959, before a small gathering of friends and acquaintances in Judge Sanborn's chambers in Room 304 in Saint Paul's old Federal Building, now called the "Landmark Center." Of course, I asked the Judge to administer the oath. He did, and there I was, a United States Circuit Judge, taking office in the very room in which I had worked as a clerk twenty-seven years before. I cherish the photograph I have of the occasion.

III. The Court of Appeals

The first day I sat on the Eighth Circuit was my 51st birthday, November 12, 1959. Judge Sanborn presided for the panel. The other

judge was Martin D. Van Oosterhout of Orange City, Iowa. Archibald K. Gardner of Huron, South Dakota, who then was the "senior judge" (as the status was called at the time) of the circuit at an advanced age of close to 90, thoughtfully had arranged for me to be on a different panel each argument day. This enabled me to sit with every other judge who attended that session. It was helpful.

My years on the Eighth Circuit generally were pleasant. One reason for this was the fact was that we all lived in the field and, as a consequence, looked forward to our gathering for the next session in Saint Louis or Saint Paul. Our statutorily prescribed sessions at Kansas City and Omaha[3] customarily were pretermitted.

Of course, that court, like most courts, was bound by tradition. In those days, the out-of-town judges stayed at the Mayfair Hotel in Saint Louis, where Julia King, its pleasant and efficient manager, anticipated our coming and always had rooms for us. We assembled in the lobby each court day about 8:15 a.m. after breakfast and walked the several blocks to the Federal Courts Building as a body, two by two in order of seniority. So long as I was junior, I brought up the rear. I early learned not to interfere with what was to take place. We went out the door, turned left for half a block, turned left again for a few blocks, and only then crossed the street to continue on our way. One time the light was green to the right. I knew we must cross that street somewhere and suggested that we take advantage of the green light. The judges turned and silently glared at me. No one moved. We waited for the light to change the other way and continued down the same side of the street to the place of traditional crossing. A junior judge may be seen but not heard.

The routine always was the same. We lunched together, dividing our custom between two hotels and two restaurants. We walked together to lunch, and we walked together from lunch. This promoted a sense of camaraderie and enabled us to learn what was happening before the other panels that were sitting at the same time. It also seemed to isolate us from members of the bar. Whether that was good I do not know.

One day, when we returned to the building for afternoon arguments, Judge Van Oosterhout, whom we all admired and regarded affectionately, was presiding. About 2:30 p.m., he leaned over to me on his right and said: "Harry, I am feeling a bit of pressure. Do you mind if we take a short recess?" I indicated that I would not mind at all. He asked the judge on his left the same question and then announced to counsel: "Judge Blackmun needs to take a recess." He almost ran over me as we escaped to the anteroom.

Once, when a lawyer was arguing, he slipped to the floor in a faint. It was the last case of the day, so we stopped at that point and resumed the next morning. On that day, the lawyer stood and continued as though nothing at all had happened. "As I was saying yesterday when we adjourned. . ." He won my admiration.

On still another occasion, when Judge Sanborn was presiding in Saint Paul, an old and persistent criminal defendant rose in open court to interrupt and ask for some unusual relief. It was denied from the bench. As he departed, he stood at the door and said in a loud voice: "Judge Sanborn, once a man, but now a high-up judge." The marshals moved quickly.

I feel that our Eighth Circuit calendars were substantial. We had our share—perhaps more than our share—of important and interesting cases, many of which moved on to the Supreme Court. One comes to expect occasional reversals. That is the way of life in the judiciary, and new judges should not resent or feel hurt by it. I cover this point whenever I speak to newly appointed federal judges. It was always helpful to reveal to them my own record by way of reversals and affirmances on certiorari from the Eighth Circuit to the Supreme Court. Of course, a crowning annoyance was when we were affirmed "but for reasons other than those stated by the Court of Appeals."

The Eighth Circuit had the *Tinker* case.[4] We heard it en banc with eight judges.[5] The issue was the right of elementary school children to wear black armbands in protest against the Vietnam War. We knew that the expressed views usually were those of the parents and not of the children. Our initial vote was 5 to 3. A judge who was one of the five then announced that he would change his vote. Thus, it would become 4 to 4, and the case would be affirmed "by an equally divided court." We would issue no opinion, and the case could be decided, as one judge said, "by those jokers down in Washington." There is comfort in not being at the end of the line.

IV. 1970

The events surrounding my nomination to the Supreme Court and confirmation were different.

A

On the morning of Thursday, April 9, 1970, a telephone call came to my chambers from Attorney General John N. Mitchell. When I reached the phone, he was waiting on the line. He asked me to be in Washington by mid-afternoon. I observed that this command had come without notice and that I could not cover the thousand miles from Rochester to Washington before evening. I asked if there was anything I was to prepare for the occasion. His answer was in the negative. I also told him that the timing was difficult, for Mrs. Blackmun's father had died the day before. His response was that I nevertheless should come to Washington and call his office for instructions immediately on arrival. I learned that I could get a late afternoon flight from the Twin Cities, and further found that a club in Washington, where for some years I had had nonresident status, could provide a room. I reached the airline's counter at the exact time the plane was scheduled to leave, but it had been delayed for a few minutes, and I was the last to board.

The flight was quiet and pleasant enough. I spent the time trying to think through the situation that confronted me. I listed the negatives that might be important for executive and senatorial consideration: my lifelong acquaintance with the new Chief Justice; my political inactivity; criticism to the effect that I took too long to get opinions out; an absence of eagerness on my part for unknown Washington living; and my lack of any connection with Washington power. These wandering notions fortified me for what lay ahead.

I was signing the register at the club when a hand touched my shoulder. It proved to be that of a man who displayed FBI identification and said he had to speak with me "at once." He and I went to my assigned room where, before I could unpack, he insisted on interviewing me. This took almost three hours. He was thorough, polite, and comprehensive. He inquired in depth about my childhood, birthplace, and relatives, our children and their activities and attitudes, my own habits and hobbies—really, everything that conceivably could be regarded as pertinent. Despite its length, it was not a difficult interview. It was an interview and not an interrogation.

Friday, April 10, proved to be a full day. I placed the requested call to the Attorney General. His secretary said that he was in conference but that they had expected to hear from me. Would I call again in half an hour? I did and more than once, but he was still in conference each time I called. Finally, rather than remain at the club, I walked to the Statler Hilton. I called again and was told that I should go to the 16th Street entrance, that I should wait near the door, and that someone would come for me. I went there and sat. In about fifteen minutes, a small car arrived with two men in it. One came in, identified himself as being from the FBI (it was obvious), escorted me to the automobile, and opened the rear door. In I went. The car door was locked, and I sat there alone.

I was driven directly to the Department of Justice building and down into the basement garage. We stopped before an elevator

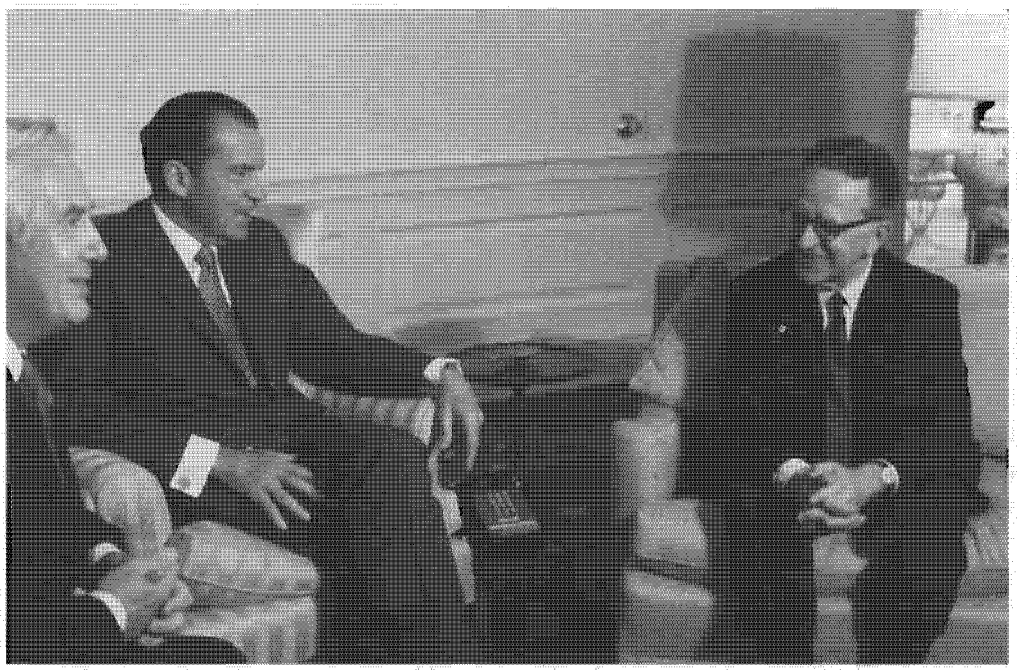
that took us up to the Attorney General's suite. He was not there, but soon entered with his familiar pipe. He said, "I admire your courage." I asked, "What courage?" He said, "For being willing to be nominated after what has happened with Judge Haynsworth and then with Judge Carswell." We talked generalities. He said he knew a good bit about me. He mentioned the names of my colleague, Judge Pat Mehaffy of Arkansas, and Chief Justice Burger. He said "we" had an appointment at the White House at 2:00 p.m. Two others entered. One was Johnnie M. Walters, head of the Tax Division. The second was William H. Rehnquist, Jr., then chief of the Office of Legal Counsel. They and I went to another room where the two questioned me at length. We reviewed my meager investments and they inquired whether I had ever sat in a case involving a corporation in which I held shares. They asked about our daughters. That gave me an opportunity to bring out my photographs. I was asked whether I was free to stay for lunch. I had the feeling that there was not much freedom about it: I was there and was to stay. After lunch, the questioning continued. They went over my outside income. Did I have with me copies of my income tax returns? No one had suggested this. The Attorney General observed that it would be desirable for Mr. Walters to go to Rochester to review my returns in detail. I had a 5:00 p.m. reservation for Minneapolis. Mr. Walters called and obtained one on a different flight that left about fifteen minutes later.

It seemed to me that the three were spending a vast amount of time on me. It became apparent, however, that all three were sensitive about the Haynsworth/Carswell nominations, were especially disappointed about the Haynsworth rejection, and were annoyed by the Carswell fracas. Several references were made to the fact that the President had ordered a thorough FBI investigation of me to be completed overnight and that it was difficult to perform that substantial task in such a short time. There was newspaper speculation that an announcement would be made within the week.

About 1:45 p.m., General Mitchell, two agents, and I took the small elevator down to the garage. The limousine and driver were waiting. We were taken to the southwest entrance of the White House where the presence of the Attorney General was announced to the guards. They were satisfied with his identity but looked somewhat disparagingly at me. Nonetheless, they waved us in. We were taken to the Cabinet Room off the Rose Garden. After about fifteen minutes, the Attorney General and I were escorted through the secretaries' room into the Oval Office. The President was behind his desk. He stood, came over, and shook hands. He directed me to sit in a chair on the left side of his desk and asked General Mitchell to sit across from him.

The conversation, to my surprise, was fairly formal. The President obviously wanted to see this person whose name had been suggested to him. We were there about forty-five minutes. It was clear that Mr. Nixon was irked about the Carswell event.

He asked me directly: "Judge Blackmun, what are you worth?" My hackles rose at this point, and I must have shown it. I told him that, apart from our home, my net worth probably was not even $70,000. The response was: "We have reached the point where we have to put paupers on the Supreme Court." I must have flushed and indicated annoyance, for he then said: "Do not misunderstand me. What I mean is that anyone with substantial wealth is under a disadvantage from the start." He stated that when he left the vice presidency he was worth $42,000, and observed that many in subordinate positions departed from Washington with substantial means. Coffee was served. On occasion, the presidential feet went to the top of the desk. What came through to me was that Mr. Nixon was forceful, hard-nosed, and tough. Finally, he said: "Well, Mr. Attorney General, do you have a recommendation, and, if so, what is it?" The response was: "Mr. President, we recommend that Judge Blackmun be nominated as an Associate Justice of the Supreme Court."



Chief Justice Burger (left) and new Associate Justice Blackmun (right) visited President Nixon at the White House on June 9, 1970, shortly after Blackmun took the oath of office. (Nixon had not been able to attend the ceremony.) Blackmun had found Nixon "forceful, hard-nosed, and tough" when he first met him, prior to being nominated.

Then followed some discussion between them as to when the announcement should be made. The Attorney General wanted to complete his investigation. Far more important, there was at the time great concern about the safe return of astronauts on the crippled mission of Apollo 13. It was hoped that this would be resolved successfully by Monday. "Very well, the announcement will be Tuesday." The President then led me over to the doors looking out on the Rose Garden. He observed that when one comes to Washington, one would be completely independent, but that the "social crowd will do their best to elbow in. Can you resist the cocktail party pressure?" He asked whether Mrs. Blackmun could resist it. I told him that I was certain that she could.

As General Mitchell and I reached the door, Mr. Mitchell was called back into the Oval Office. I must assume that they were discussing the situation and me. At least fifteen minutes elapsed. Time was short, and I was thinking of leaving on my own in order to catch my plane. This was awkward, for I had left my file in the limousine. General Mitchell, however, finally emerged looking somewhat harried. I suspect the President had gone over the Carswell case again with him. We drove to the club where he left me without offering to take me to the airport.

Fortunately, I was able to find a cab and, with my bag, was on my way. The connection at the airport again was close, but I made the plane and dropped into a vacant aisle seat. As I was placing my case under the seat ahead, I discovered, somewhat to my amusement, that standing in the aisle speaking to a man in the seat directly across from me was Senator Walter F. Mondale of Minnesota. The man asked the Senator, "Who is this guy Blackmun whose photograph is on the front page of today's paper?" The Senator replied: "Oh, he's just another old conservative." I wondered, while I was bent over, whether I should let him

know that I was there so that he would not be embarrassed later or whether I should just keep quiet.

At this point, the Senator turned and saw me and said "Oh, Judge, I've just been telling Ed what a great guy you are." "Ed" turned out to be a Mr. Kelly who was in the transportation business and evidently was a contributor to the Senator's campaign fund. The three of us joked a little and Kelly showed me the paper. The Senator asked specifically whether I had seen the President. I felt an obligation to tell him that I had. I also told him that I sensed the political situation and did not want him to feel embarrassed in any way. He said that when we landed in the Twin Cities we undoubtedly would be confronted by the press and that he proposed to make no comment. He stated he did not want me to misunderstand. I told him I would not. The Senator then returned to his seat in the first-class section. After dinner, he came back and visited and was cordial.

At the Minnesota airport, I telephoned my mother. The Senator waved as he went by. After that call, I went to the other concourse and found Mr. Walters, who was just arriving. We went out to the parking lot, located my VW Bug, and drove the eighty-five miles to Rochester. He did not seem to mind too much riding in the Bug. Mr. Walters was most pleasant. He talked about his North Carolina tax practice and his friendship with the Haynsworth family. I took him to his hotel, saw that he was registered and settled, and arranged to meet him at my office the next morning. To my relief, Dottie had returned from Mora, Minnesota, where her father was when he died, but she planned to return there Monday for the funeral. All this was further complicated by the fact that I was to go to Saint Louis late Saturday afternoon for the April argument session there.

Saturday morning, Mr. Walters came promptly to the office. He spent two or three hours reviewing my income tax returns and files. He seemed generally pleased about what he found and noted my reporting in one year the last six cents I received in distribution from my former law office. Finally, he observed: "Those are the cleanest returns I think I have ever seen." Arrangements were made to get Dottie back to Mora. I caught the five p.m. plane for Saint Louis, and Mr. Walters, I believe, took another plane about the same time for Washington. It indeed had been a long day.

B

On Monday, April 13, in the afternoon, we heard en banc the Little Rock school case. The 14th was the usual full morning. Our regular Circuit Council meeting was scheduled for 2:00 p.m. About 3:30 p.m., while the meeting continued, there was an audible rumble in the hall. Our efficient clerk, Robert C. Tucker, went out and returned to say that the hall was filled with reporters and television people. I was able to get to my office through adjoining chambers of other judges without going into the hall, but the media people burst in. Suddenly, I was surrounded and literally backed against the wall. I initially stated that I had no comment because no information had come to me. Someone said: "But it has just been announced that you have been nominated for the Supreme Court." I remember Chris Condon, a popular Saint Louis announcer, on his knees before me holding a microphone and staying out of the way of cameras. After much talk back and forth, I finally agreed to meet the press in Rochester on Friday.

Judge Van Oosterhout stopped in to say that I should not try to sit the rest of the week. This kindly gesture was typical of him. We found places for my secretary, Mary O'Marro, my clerk, Daniel B. Edelman, and me on a Braniff flight due out the next afternoon.

Early on Wednesday morning, the 15th, I returned to my Saint Louis office to clear my desk. I already had received calls from Justice Clark and Justice White in Washington. Each was most cordial. I got away in late morning. I walked alone back to the place where we had rooms but stopped at a doughnut shop on the way and felt lonely and mildly depressed. I also

stopped at the airline office to pick up my ticket. The clerk there seemed to know all that was going on. I decided to take a taxi to the airport for once rather than the scheduled limousine. It gave me a chance to be alone.

It was wet and cold when we landed at Rochester. As we approached the terminal, Dan noted that there were photographers on the ramp. Mary and Dan preceded me off the plane. Inside the terminal building I found Dottie and many others. It was at this point that a certain photograph that later was given much publicity was taken of the two of us. With Dottie was a reporter, none other than Nina Totenberg, then with the *National Observer*. We managed to get home only to be deluged that evening and the next day with calls from kindly intentioned people. The Chief Justice called and advised me to have nothing whatsoever to do with the press. This concerned me somewhat, for I already had set up the Friday meeting. The press conference, as I recollect, was a strain. I am sure I let the reporters carry on too long. It was one question after another about me and my life. The death penalty, among other things, was raised, and I stated that I personally was opposed to capital punishment and had said so in published opinions.[6] I tried to stress, however, that I regarded this primarily as a matter of legislative prerogative.[7] But headlines the next day emphasized the capital-punishment inquiry. For the most part, I thought the press was kind. One somewhat disturbing aspect related to Ms. Totenberg. She had interviewed my mother in Minneapolis. The tenor of her ensuing article seemed to be to the effect that I might endeavor to exert influence on the Chief Justice. The Chief did call to reprove me about making the capital-punishment comment. I reminded him that I already was on the public record on that issue. This seemed to appease him somewhat.

In summary, I thought the press conference went off acceptably well. As matters came into better focus later, I became convinced that this was so. I am further persuaded that it was the thing to do and was unavoidable. It gave the media something they felt they had a right to have, and it got them out of town.

That weekend, the correspondence and telephone calls proved heartening but overwhelming. I need not go into detail about them. I was advised that the Senate hearing would be on April 29. Mr. Rehnquist told me it would be well for me to come to Washington on the weekend and spend a day in preparation. An American Bar Association delegation consisting of Charles A. Horsky of Washington and Robert Harry of Denver stopped by. They already had done a good bit of digging and interviewing in Rochester, but they spent two hours with me and reviewed my life and opinions and general philosophy. The third member of the committee, Albert R. Connolly of New York, did not arrive, due, I was told, to some difficulty with travel reservations.

Dottie and I talked about her going to Washington with me. I feared that she would be confronted by a hostile press and that the media would give her a difficult time. I concluded that I should walk this last mile alone.

I flew to Washington the afternoon of Sunday, April 26. The next morning, I called Mr. Rehnquist. I was told that a car would be around at 10:00 a.m. It arrived and took me directly to the Department of Justice. Time was spent with Rehnquist and Johnnie M. Walters. Walters took me to lunch. It was a pleasant interlude. I met John T. Duffner, executive assistant to the Deputy Attorney General. I was taken in to see Richard Kleindienst for about forty-five minutes. He gave me the well-worn advice not to answer more than I really had to. We called upon Dean Griswold, whom I was delighted to see. Kleindienst referred to him as "Decanus." I was asked whether I would be willing to call upon those members of the Senate Judiciary Committee who might indicate a desire to have me stop by. I was told that perhaps two or three would wish to do this. Late in the afternoon, Duffner returned and said that the next day would be a long one, for every member of the committee wanted to see me. Mr. and Mrs. Walters drove me to the

club where I was staying. As I got out of their car, I heard a rip and discovered a right-angle tear in my coat jacket. It was the one I planned to wear at the hearing, for it was the only dark suit I had with me.

Tuesday the 28th was a bit of a day. Mr. Duffner arrived at 9:20 a.m. He handed me a typed agenda. It began with an appointment to see Senator McClellan of Arkansas and went through to 5:00 p.m., with additions possibly to made as the day went on. There was no time for lunch, and I had none. Senator McClellan was his usual self: positive, direct, and blunt. He expressed concern about the Court. We went one floor below to see Senator Eastland, whom everyone referred to as "The Chairman." On the wall of his secretary's office were photographs of Jefferson Davis, Stonewall Jackson, and others—reminders, I suppose, of our rich heritage. Then on to Senator Hruska's office. Duffner was with me constantly but did not go into any inner office except when specifically invited. I was given a copy of a report with comments about me from members of the general public. One labor lawyer suggested I was biased against labor. Some questioned the length of my opinions.

Then on to Senator Tydings of Maryland and to Senator Cook of Kentucky. Here, for the first time on these rounds, we encountered press and television personnel. Then upstairs to Senator Mondale's office with the press at our heels. That was the pattern for the rest of the day. He called Senator Eugene McCarthy and went with me to the latter's office. Then on to see Senator Mathias of Maryland.

Although it was 12:45 p.m., we went to see Senator Kennedy. This meeting was not at his Senate office, but in his suite as Senate majority whip. As we entered the anteroom, I sensed an atmosphere of distinct coolness from those present there. The Senator, however, immediately came out and invited me into the inner chamber. On the window well was a photograph of the three Kennedy brothers. I commented about it. He explained that the photograph had been taken on the day his brother was nominated for the presidency. We visited for a half hour and talked primarily about young people. I mentioned that Nancy, our eldest daughter, was one of his constituents. He seemed genuinely interested.

We went on to see the minority leader, Senator Hugh Scott of Pennsylvania. He had not supported the Haynsworth nomination. Then on to Senator Griffin of Michigan, the minority whip, and to Senator Fong of Hawaii. The secretaries in his office wore leis of small orchids. I was told they were flown in each day.

From there we went to Senator Thurmond's office. This interview, in contrast to the others, had no aspect of privacy. His secretary had a desk in his inner chamber. He called in his entire staff, some of whom sat on the floor. Next was Senator Ervin of North Carolina. I found him to be knowledgeable; he gave every evidence of being an astute lawyer. Then to Senator Byrd of West Virginia. This, perhaps, was the most difficult conference of the day. He believed strongly in capital punishment and was disturbed by my comments that I did not regard the death penalty to be a deterrent. Then to Senator Burdick of North Dakota, who was a friend of my colleague Charles J. Vogel. He was pleasant and told me he would support the nomination. It was now toward the end of the afternoon. At 4:30 p.m., I was taken to see Senator Hart of Michigan and Senator Bayh of Indiana, one of the leaders in the rejection of the Haynsworth nomination. This marked the end of a day of conferring. I was tired and hungry. Mr. Duffner had been unable to get any sustenance in to me, but he personally was always able to have a bite at each stop as he waited outside.

That night, I again reviewed my material and did what I could to prepare for the following day. I placed my torn jacket in the hands of the doorman, who said he would do the best he could with it.

I slept poorly but was ready to go in the morning. The limousine came at 9:30 a.m. Erwin N. Griswold entered and I greeted him. Then, to my surprise, I discovered that he

Blackmun at his hearings before the Judiciary Committee in 1969, flanked by Minnesota Senators Walter F. Mondale and Eugene McCarthy.

had accompanied John Duffner and intended to ride back with us. I was touched. I later learned that he had been present throughout the morning hearing on the previous day. We drove to the building where James W. Ziglar, Senator Eastland's young assistant, met us. We were escorted to the elevator and went up to the Chairman's office. It was evident that the corridors were closely guarded by the police. I was told that today's hearing was scheduled for 10:45 a.m. We entered through a small conference room in which most of the Senators on the Judiciary Committee were assembled. We then entered the Hearing Room, which, to my distress, I found filled with photographers and television people. All the seats were occupied. Senator Mondale and Senator Eugene McCarthy were gracious, as were Congressmen Quie and MacGregor. I was surprised, and pleased, to have Senator Burdick make a preliminary remark of approval. He was followed by the president of the Minnesota State Bar Association. It was rather overwhelming as one by one the Senators present, or most of them, seemed to announce that they would vote to approve my nomination. When they finished, it was 12:35 p.m., and they recessed. As I turned to head for the door, I saw Mrs. Charles J. Vogel standing with another woman. I had not realized she was at the hearing. I stepped over to her and kissed her cheek. I noticed with amusement that some of the photographers immediately went to her on the assumption that she was Mrs. Blackmun. After lunch, I indicated it would be nice to have a walk. The hall was still packed and guarded, but two from the staff and, as I recall, the Solicitor General himself reached an elevator and walked with me around the building. It was warm, but the walk was welcome.

The hearing continued until 3:45 p.m. We returned to Senator Eastland's suite. He came out of his private office to announce that they had decided not to put the matter to a vote that day. He asked whether I could stay over another night. I shall always remember the

Senator sitting there with his long cigar and with his feet on the desk. He asked me whether I could take some advice. I told him that it depended upon the advice. He said that his advice was that I go back to where I was staying and have four, not three, and not two, but four good "belts" of scotch whisky and a big dinner, and then go to bed. Erwin and Mrs. Griswold, however, had invited me to dinner at the Cosmos Club. I wondered whether I was up to it, but I accepted the invitation. Their guests were Mr. and Mrs. Charles Rhyne (he was later president of the American Bar Association) and the Solicitor General of New Zealand and his wife. It was a happy evening and just what I needed.

The next day, I again was escorted to Senator Eastland's office. I then was told that the matter had gone over to Tuesday, May 5, and that I could return home.

I caught an early plane the next morning. A number of people, primarily our neighbors, were at the airport to welcome me. It was a pleasant surprise.

C

On Tuesday, May 5, word came that the Judiciary Committee had voted 17 to 0 to approve. This unanimous vote was gratifying, of course. I was told that the matter would come up on the Senate floor on May 12. That day came along, and I was concerned to see photographers out in the hall near the room in the Rochester hotel where I was having lunch. I told them I would meet them near my chambers, a few blocks away. They accepted this suggestion and were there equipped with tapes and cameras. We entered and went upstairs. One of the local reporters called shortly to say that the Senate had voted and that it was 94 to 0 to confirm. The President called. That conversation was brief but to the point. He seemed relieved that it was over. I told the press I had no oral observation to make, but I did distribute a short written statement. They took photographs of Dottie and me, and she made a brief comment. That night and the next day the calls and correspondence continued. The Chief Justice telephoned and indicated that it would be desirable for me to examine some twenty pending certiorari petitions that the Court had been "holding for nine" and were to be voted upon before the end of the Term. I therefore should come to the court sworn in and to participate in the vote on those matters. I was to be concerned about pending Eighth Circuit cases that had been assigned to me. He said that I should assign them out to others. I did so in an effort to get those responsibilities off my desk. Everyone was gracious about relieving me. There was another call from the Chief Justice. He suggested that I be sworn in on June 8 or 9. He indicated that he thought the Court would finish within the week. June 9 was chosen.

Then came the pleasant task of discovering who would attend what and how. I was surprised to learn how many really seemed to be interested in going to Washington. I arranged for rooms at the Dupont Plaza and turned down graciously proffered complimentary accommodations at a downtown hotel. A lifelong friend called my mother and offered to accompany her. This kind gesture was a great relief for me.

Dottie and I flew down on June 6 and began a two-week period trying to get ideas for our ultimate place of residence. Dottie worked hard at this. Finally, an apartment at 1701 North Kent Street in Arlington was located, and we signed a year's lease beginning September 1. People who were to be with us at the Dupont Plaza began to arrive on Sunday. The Chief Justice sent his limousine and driver on Monday the 8th. We went to the airport to meet the flight that brought mother and my sister. That night we all gathered at the hotel. Mother was surprised to see there some relatives from her old hometown of Nashville, Illinois.

The next morning everyone was driven to the garage in the Court building. We were taken to what were to be my Chambers. At 9:30 a.m., we were escorted to the courtyard, where photographers were present.

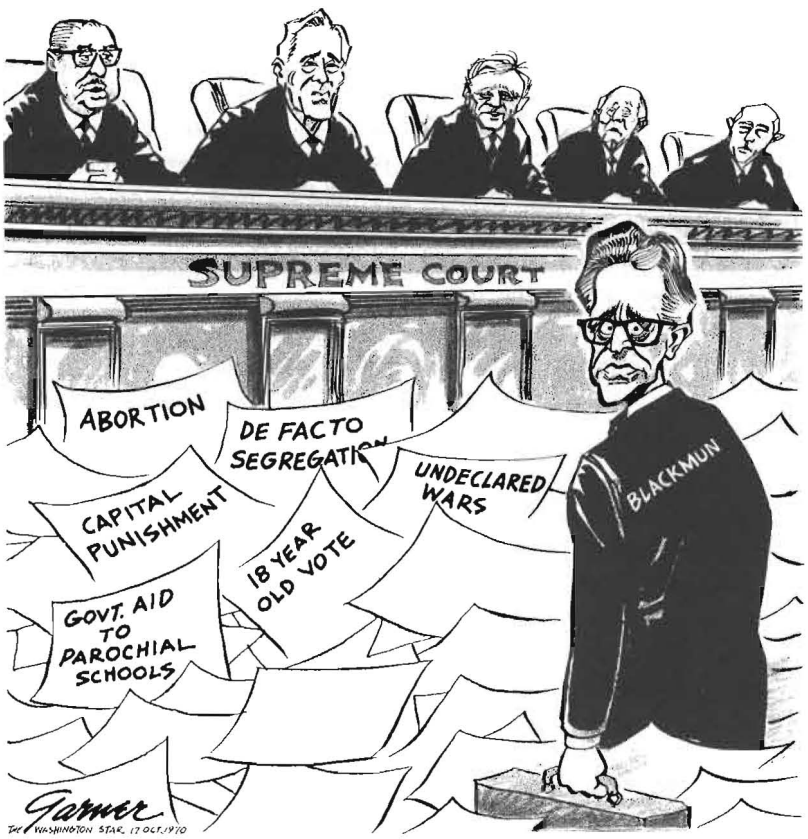
The Chief Justice, the Governor of Minnesota, and Congressmen Quie and

MacGregor appeared. Eventually, the Marshal took me into the courtroom to be seated near the Clerk's desk on the "John Marshall chair." I was surprised to see how full the room was. The proceedings were brief. I took the judicial oath at the center of the bench. I was then robed and sat down at the far left, and that was it. Good old Number Three.

D

The members of the Court were cordial. After the short ceremony, there was a reception in the West Conference Room. The receiving line consisted of Chief Justice and Mrs. Burger, Dottie and me, and Chief Justice and Mrs. Warren. Our three daughters stood apart. The first person through the line was Senator Thurmond. It was a long but pleasant occasion. Later, I had my first lunch with the Court. Our daughters and Dottie went with Doctor and Mrs. Howard P. Rome of Rochester to the Cosmos Club for lunch. That night my old Minneapolis law firm hosted a dinner for us at the Madison. It was a very special event. Henry Halladay took charge and made some remarks that were touching to me because they came from him. Judge Pat Mehaffy spoke. So did the Chief Justice. And then I tried to respond.

That was the day. When we returned to the hotel and were sitting in the small parlor, Nancy, our oldest daughter, announced: "What a lovely day!" It was, indeed.



'WELCOME ABOARD, HARRY!'

Blackmun's appointment brought the Court up to full strength after the nominations of conservative Southerners Clement F. Haynsworth, Jr., and G. Harold Carswell were rejected. Blackmun would leave his mark with his opinions on abortion and his strong stand against capital punishment.

E

Friday was my first conference, and it was an enlightening one. The Court was struggling to complete the Term's business. It turned out that they did not finish on the 15th and also did not finish on the 22nd. By that time, I was a little tired of living out of a suitcase. Dottie left on the 24th, and I finally got away on the 29th. It was good to get home.

In retrospect, I am glad that I had the June experience. It gave me insight into the methods of the Court and some acquaintance with its personnel. My stay there was complicated by the need to select a secretary and a messenger. My sessions with the various Senators on the Judiciary Committee probably were more valuable for me than they were for them. It enabled me to sense their personalities and their concerns and the questions they were likely to ask.[8]

Among the many letters and messages I received during those weeks was one from Chief Judge Clement F. Haynsworth, Jr. Its warm and congratulatory tone tells the measure of a fine person and jurist. He assured me that "the wounds of last fall are all scarred over" and that his "eyes are on the future and [his] emotional health quite unimpaired." Obviously, it was a difficult period for him and for Mrs. Haynsworth. I do not relish the fact that his misfortune led to my eventual placement on the Supreme Court.

*Justice Blackmun wrote this reminiscence in 1995 after his retirement from the Court. He intended to continue with it, but poor health intervened. The Society is grateful to his daughter Sally Blackmun, who provided this memoir to us, and to Luther T. Munford for his help in preparing it for publication.

ENDNOTES

[1] *Wolfe v. Shelley*, 1 Coke Rep. 93b, 76 Eng. Rep. 206 (1581), although perhaps of little practical application today, always seems to be one of the stumbling blocks in a law school study of property and future interests. It has plagued generations of law students.

[2] *See* 105 *Cong. Rec.* 19690 (1959).

[3] *See* 28 U.S.C. 48.

[4] *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

[5] *See* 383 F.2d 988 (8th Cir. 1967).

[6] *Maxwell v. Bishop*, 398 F.2d 138, 153–54 (8th Cir. 1968), cert. granted limited to two questions, 393 U.S. 997 (1968), vacated and remanded, 398 U.S. 262 (1970); *Furman v. Georgia*, 408 U.S. 238, 405 (1972).

[7] 398 F.2d at 154.

[8] The formal aspects of all this are set forth in 116 *Cong. Rec.* 11622, 11794, 11911, 12139, 121,97, 12504, 14786, 14853, 15105, 15109, 15110, 15119, and 15654 (1970), and perhaps elsewhere.

(Re)introducing Wiley Rutledge

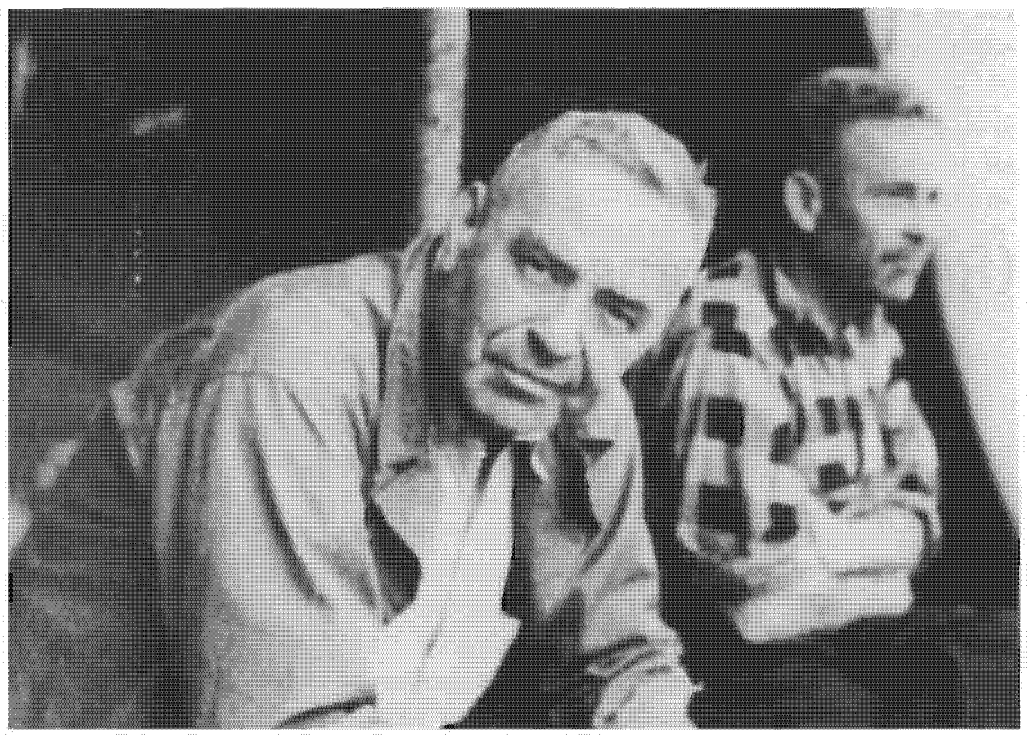
L. A. POWE, JR.

With the rarest of exceptions, when Supreme Court Justices leave the Court, they are soon all but forgotten.[1] Constitutional law is unrelentingly presentist, so closely intertwined with politics and society that sitting (or recently departed) Justices necessarily speak to the issues more directly than those from another era. If that were not enough, being forgotten is virtually inevitable for those whose careers are short. One of those men was Wiley Rutledge who served from February 1943 until his death at age 55 from a cerebral hemorrhage, six and a half years later. Until John M. Ferren's recently published and marvelously researched **Salt of the Earth, Conscience of the Court**,[2] Rutledge even lacked a true biography.[3] That has been a shame, because the two dominant themes of Ferren's book show that Rutledge is worth knowing: He was a good man and a good judge. Indeed, on what probably was the most fractious Court in American history,[4] Rutledge was the sole member both personally liked and intellectually respected by every other member.[5]

Religion and kindness were important factors in Rutledge's life. His father was a loving man who instilled a strong sense of security in his son. Rutledge grew up to be friendly, empathetic, unpretentious, honest, with a good sense of humor—a man who loved being with people.

His father was a Southern Baptist minister who took the Bible literally, but by college Rutledge was moving toward a faith in a kind God who revealed himself through nature. As this view matured he believed in "an ultimate, creative force in the universe [that was] benevolent, inspiring human aspiration and yearning [for] freedom, community, justice."[6] Eventually Rutledge's Christian humanism caused him to cease going to church, but in Washington, D.C. he found his religious home in All Souls Unitarian Church, where the minister, A. Powell Davis, preached against witch-hunting and in favor of civilian control of atomic energy. Those were positions Rutledge believed in.

On his nomination of Rutledge to the Court, Franklin D. Roosevelt noted that "you have a lot of geography."[7] How true: Rutledge went to college in Tennessee and Wisconsin and taught high school in Indiana, New Mexico, and Colorado. He spent time in the state sanitarium in North Carolina getting over

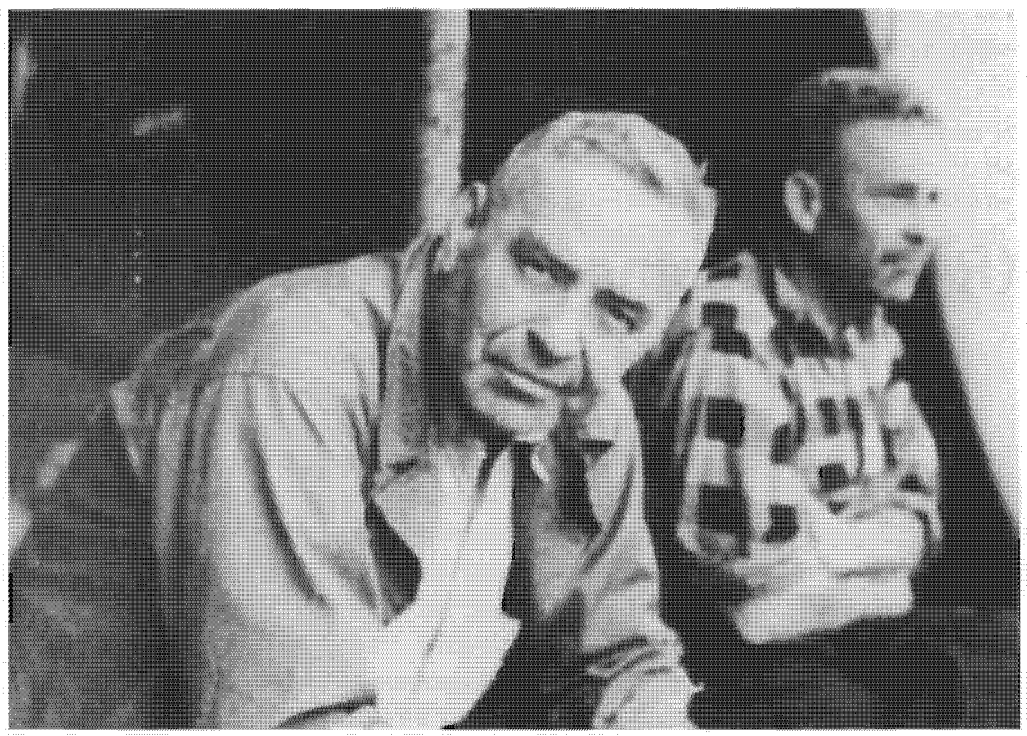


John M. Ferren's new biography of Justice Wiley Rutledge is the first real biography of the Justice. Rutledge and a friend are shown photographed on a camping trip in 1945 two years after he had joined the Supreme Court.

tuberculosis. Then he taught law at Colorado, Washington University, and Iowa. He was a solid, but not great teacher, and he taught "around the curriculum"—that is, everything. He had trouble writing and was not a scholar at all, but he loved giving speeches. He was good at it, so he did it as much as possible, to virtually any group that asked. He cared about law reform and was an ex officio member of the American Law Institute and a commissioner from both Missouri and Iowa for the National Conference of Commissioners on Uniform State Laws.

The previous paragraph describes the attributes of a dean, and Rutledge became one, beginning at age 37 at Washington University and then moving on to Iowa as its dean. The deanships came naturally.[8] Rutledge was someone who could and always did give undivided attention to the person he was with, and he was the type of dean faculty could respect. When it appeared that Rutledge might be called to testify before the Senate in favor of Roosevelt's Court-packing plan, Iowa's president, reflecting the state's sentiment, warned him to "watch [his] step."[9] Rutledge instead found the "issue was too clear for me to dodge and the ultimatum too degrading for me to accept."[10] So he determined to submit his letter of resignation the day he boarded the train for Washington, but he was never asked to testify.

It is well known that Rutledge got to the Court because of the lobbying of Irving Brant, the editor of the *St. Louis Star Times* and one of the few national editors who supported Roosevelt. But Rutledge had other assets. He was a thorough New Dealer, having taken progressive positions that included hard work to prevent child labor and the previously mentioned professionally unpopular backing of the Court-packing plan. He was safe on both civil liberties and labor issues. And, of course, he had great geography. But first there was a consolation stop at the D.C. Circuit when Brant's



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lobbying failed to push Rutledge ahead of two far superior New Deal academics that Roosevelt knew personally—Felix Frankfurter and William O. Douglas.

On the D.C. Circuit and at the Court, Rutledge found writing opinions "extremely hard," a problem never alleviated and one exacerbated by the fact that his opinions were too long and ponderous.[11] He began with the record and his legal hunch, backed by the belief that the Constitution was a living (and basically unconstraining) document, but the test came in whether the opinion would write. He believed in the dignity of each individual, and this carried over into his judging, where he held that a judge must be able to fully explain why the case was to be decided as it was.

Rutledge showed his judicial independence early. Less than a year into his time on the D.C. Circuit, he received a Doctor of Laws at Colorado. The Supreme Court had just decided *Minersville School District v. Gobitis*, the first flag-salute case.[12] Rutledge criticized the eight-Justice majority that had just upheld the salute: "We forget that it is [in] the regimentation of children in the Fascist and Communist salutes that the very freedom for which Jehovah's Witnesses strive has been destroyed."[13] Four months after Rutledge took his seat on the Court, Justice Robert H. Jackson's majestic opinion in *West Virginia v. Barnette*[14] overruled *Gobitis*.

Rutledge was not a cloistered Justice. A clerk noted that "everyone who ever lived in Iowa came through those chambers."[15] Rutledge complained in 1942 that "we talk, eat, drink and sleep law! It's too narrow for my taste, without leavening from other areas."[16] He believed that isolation hurt both judges and the law, so while on the Court he went to dinners, judged moot courts, and—as always—gave speeches. They addressed the war, the future peace, and the appropriate postwar foreign policy, issues dear to his heart (if not necessarily his expertise).

The candor that Rutledge demonstrated attacking *Gobitis* was also a part of his private correspondence. After receiving criticism for a recusal decision, he wrote to Brant: "About all I can say is that whatever one does here, whether to sit or not to sit, decide or not to decide, and how he decides, inevitably brings criticism, very often groundless, sometimes perhaps justified. The only way to survive it is to have a thick skin and move on to the next mistake."[17]

There are five areas of constitutional law in which Rutledge's opinions merit acknowledging: state taxation of interstate commerce, religion, incorporation of the Bill of Rights, equal protection, and the war and its aftermaths. In the first, he became the law almost three decades after his death. In the last, he may prove to be the most instructive jurist for problems we will face for some time.

State taxation was a principal area for working out dormant Commerce Clause problems. The more conservative Justices, led by Frankfurter, took a formalistic approach based on the label a state gave the tax.[18] The liberals wanted a hands-off approach, allowing states to do as they pleased.[19] Rutledge attempted to craft a functional approach, looking at the economic effects of the taxes.[20] He would have maximized state taxes while preventing double taxation of the same transaction. No other Justice joined his approach then, but it was unanimously adopted in *Complete Auto Transit v. Brady* in 1978.[21]

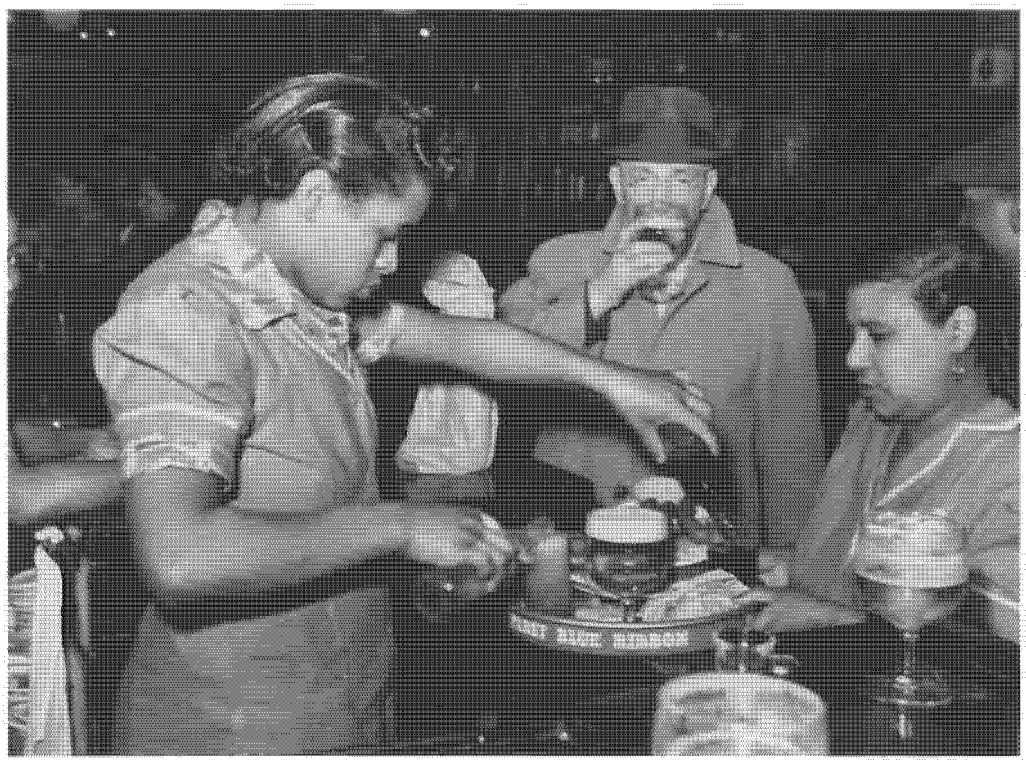
When Rutledge came to the Court, he gave Harlan Fiske Stone, Hugo L. Black, Douglas, and Frank Murphy the fifth vote to overturn *Jones v. Opelika*[22] and the imposition of local license fees on the distribution of Jehovah's Witness literature. But in *Prince v. Massachusetts*,[23] Rutledge wrote for the Court upholding application of the child labor laws to the selling of that literature. Ferren argues that Rutledge saw *Prince* completely as a labor case (because the nine-year-old child was so young that one could not be sure selling the literature was a sufficiently knowing religious act). He had fought so hard against child labor that he could not see *Prince* as "a free exercise case

Rutledge dissented in *Everson v. Board of Education* (1947), agreeing with the majority's wall of separation but willing to find it breached by letting children ride city buses free to Catholic schools. These parochial schoolchildren in Pittsburgh were able to walk home from school in 1941.

at all."[24] On the establishment side, Rutledge wrote a dissent in *Everson v. Board of Education*[25] agreeing with the majority's high wall of separation but willing to find it breached by letting children ride city buses free to Catholic schools. This is about as extreme an Establishment Clause conclusion as can be found,[26] and at its best it seems to be an unblinking application of a contested Protestant theory of the relation of church and state.[27]

Like Black and Douglas, Rutledge believed that the entire Bill of Rights applied to the states,[28] but with Murphy he believed that "[o]ccasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of lack of due process despite the absence of a specific provision in the Bill of Rights."[29] Rutledge was the leader in attacking the Kafkaesque post-trial labyrinth that the Illinois Supreme Court erected.[30] He eventually prevailed.[31] Because of his opinions, the Illinois State Bar demanded the necessary procedural reforms and pushed them through the legislature.[32]

Prior to the Warren Court in the 1960s, the Equal Protection Clause was "the usual last resort of constitutional argument."[33] Rutledge was willing to use it, however, most interestingly in gender-discrimination cases, where he was far ahead of his time. His dissent in *Goesaert v. Cleary*[34] had an easy time with the outrageous Michigan statute that forbade any female to tend bar unless she was the wife or daughter of the male owner of the bar. As Rutledge noted, a "female owner may neither work as a barmaid herself nor employ her daughter in that position, even if a man is always present in the establishment to keep order."[35] But his views went far beyond that. In a speech titled "Women's Rights—Barometer of Democracy," he noted the discrimination against women in the "learned professions" and the lack of women in public office. He believed in equal treatment for both men and women. "There is danger in seeking an

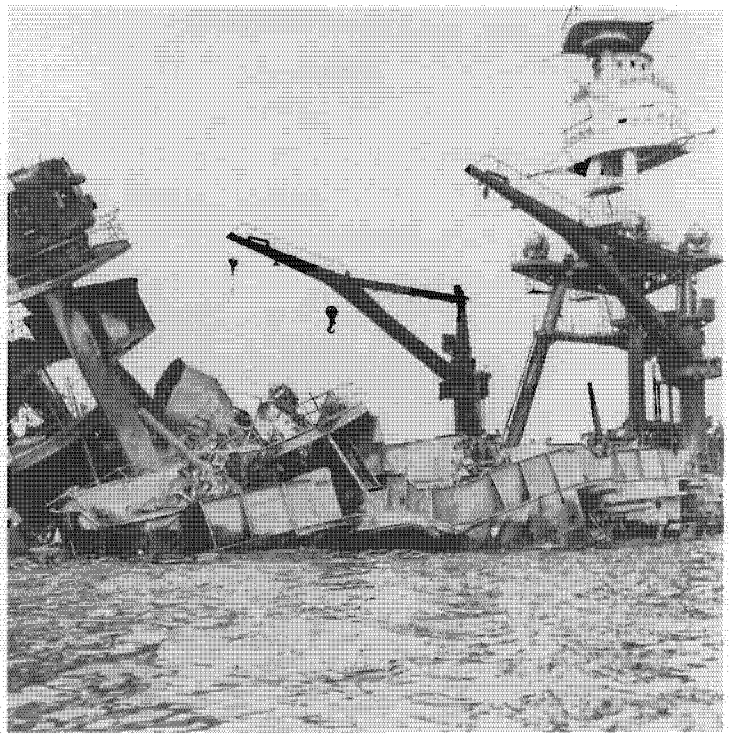


Rutledge dissented in *Goesaert v. Cleary* (1948), which upheld a Michigan statute that forbade any female to tend bar unless she was the wife or daughter of the male bar owner. He supported equal treatment for both men and women and, in a speech, noted the discrimination against women in the "learned professions."

absolute legal identity in disregard of basic physical differences[, but] there is equal danger in permitting specific social and economic discriminations, unjustified by such relevant differences and at war with the fundamental conception of equality and the status of freedom, to go unchallenged and unrectified."[36] For a man, he was way ahead of his time. The one area where Rutledge was reluctant to use equal protection was in voting cases, where he placed an overemphasis on potential disruption of the electoral process.[37]

Rutledge came to the Court in time to participate in *Hirabayashi v. United States*,[38] General John DeWitt's imposition of a curfew on Japanese-Americans on the West Coast. When *Korematsu v. United States*[39] came up, he informed the Brethren "that when swallowing the curfew order he knew that he would have to stomach detention for a reasonably necessary time."[40] However inconsistent this was with his normal stance, with its demand for fairness, he never questioned his votes.[41] The reasons were war and FDR. Rutledge exclaimed to his law clerk: "Pearl Harbor was attacked and more may happen. Who are we to question this? . . . [The] generals have said this is necessary for the preservation and security of the country."[42] Like Douglas, Rutledge had supreme faith in the leadership of the President, both domestically and abroad, and was unwilling to challenge him on such an important issue.

The war was over and Roosevelt dead when the Court decided *Duncan v. Kahanamoku*,[43] involving martial law in Hawaii where the civilian courts were replaced by military tribunals. Subsequently, the courts were allowed to resume civil trials, while criminal trials continued with the military. The Court held that Hawaii's Organic Act did not give the Governor power to supplant the



Rutledge came to the Court in time to participate in many of the landmark World War II cases. This photo shows the wreckage of the *USS Arizona* at Pearl Harbor on December 7, 1941.

civilian courts. This was an implicitly constitutional holding, and one that hardly squares with *Korematsu*, given that Hawaii was truly within the theater of war. With peace, it was time to re-establish constitutional control over the military—at least on American soil.

As the war was ending, Japanese troops in Manila committed extensive atrocities against the civilian population. Their commander, General Tomoyuki Yamashita, was captured and put on trial in the Philippines before a military commission—with no lawyers on the panel—that convicted him and sentenced him to death. It was unclear whether Yamashita actually knew that the atrocities were being committed. There was also uncertainty regarding whether the charges against him were specific enough, and there was no doubt that his lawyer lacked adequate time to rebut the charges, since fifty-nine new counts were added just three days before the trial. It was payback time, and there was a powerful feeling that justice should be swift. Yamashita had surrendered September 3; his trial began October 29 and ended six weeks later. His habeas petition reached the Court two weeks later, oral argument came the first week of January 1946, and the Court handed down its opinion the first Monday in February.[44] Yamashita was executed that month.

Chief Justice Stone wrote for the majority, denying (among other issues) that the Due Process Clause—and therefore the Constitution—had any applicability to the proceedings. Rutledge, by contrast, found that Yamashita had not received a fair trial as required by the Constitution. In the chaotic aftermath of a great war, it was quite a stretch to hold that the judiciary could supervise an American military tribunal prosecuting an enemy combatant on foreign soil for war crimes. Acknowledging that "[w]e enter untrodden ground," Rutledge nevertheless entered therein.[45] From his perspective, the rule of law had to be applicable in the new world order, and the "proceedings in this case veer so far from some of our time-tested road signs" that he could not accept the outcome.[46] Indeed, Rutledge wrote a friend that the "decision was the worst in the Court's history, not even barring *Dred Scott*."[47]

Rutledge bristled at Winston Churchill's "Iron Curtain" speech, because he thought a confrontational stance with the Soviet Union could undo the United Nations and perhaps provoke a new war. Here, Churchill and President Truman arrive at Westminster College in Fulton, Missouri on March 5, 1946.

Ultimately, he concluded that all war-crimes trials were "perversions of the legal process."[48] As he wrote to a friend: "I think the Nuremberg and other proceedings like it and the subsequent administration by the [allied military government] in Germany have done more to destroy any conception of democracy among the German and other European peoples than almost any course we could have pursued."[49]

Rutledge would have liked to extend the Court's review to the war-crimes tribunals in Nuremberg and Tokyo. According to Murphy's notes, Rutledge stated that "[t]his is an international tribunal but if I get over that hump I would act."[50] He "passed" at Conference and began to write a dissent. It would not write, but he never voted in the case.[51] As Ferren notes, Rutledge "had finally come upon a decision where his head and his gut were so irreconcilable that his decision-making ability had become paralyzed."[52]

Rutledge was looking to extend the Court's jurisdiction, but he also believed that America's jurisdiction should be limited. Thinking about the postwar world, he saw the United States as the leader to "establish, through an international organization, the 'basic rights' of 'men of all races, all colors, all creeds, all nationalities' to think and speak freely, to believe in God in one's own way and to earn a 'decent living.'"[53] The United States would necessarily have to "surrender a portion of its sovereignty . . . of limited authority, equal to the essential task [of assuring peace and the rights of man] and no more."[54] It was quite a mouthful for a sitting Justice. Rutledge claimed to be conscious of the necessary limitations on what he could say, but there is no evidence that the "limitations" ever limited him—much as the Constitution failed to do.[55]

Rutledge bristled at Winston Churchill's "Iron Curtain" speech in Fulton, Missouri. He thought a confrontational stance with the Soviet Union could undo the United Nations and perhaps provoke a new war. Rather than

Lucile Lomen, Justice Douglas's law clerk in the 1944 Term, thought highly of Justice Rutledge. "If I were a defendant being tried by a single judge," she said, "I'd rather have Justice Rutledge than any judge I have known."

adopt Churchill's call, Rutledge hearkened to that of Secretary of Commerce Henry A. Wallace, who condemned an English-speaking alliance and believed the U.S. owed an "undying debt of gratitude" to the Soviet Union.[56] Eventually, in the speech that got him fired, Wallace claimed that the United States had no more business in the political affairs of Eastern Europe than "Russia has in the political affairs of Latin America, Western Europe, and the United States."[57] Rutledge agreed, worrying that the United States was doing its best "to set up a situation which may make war almost inevitable."[58] Thus, he opposed aid to Greece and Turkey, holding that their problems—communist-backed civil war—should be worked out through the United Nations. He refused all efforts by his son to determine whether he voted for Wallace or Truman in the 1948 election. He told a friend "I did not desert what I considered the sinking ship."[59] Ferren thinks that means a Truman vote, but for most of the race both Wallace and Truman would have been thought to be sinking.

We can feel fortunate that Rutledge was not in a foreign-policy-making position in the postwar era. He believed too deeply in the goodness of all men to see the world as it was. But we can feel equally fortunate that he left his mark on serious constitutional issues, ones that remain with us today. Late in her life, Justice Douglas's law clerk for the 1944 Term[60] stated: "If I were a defendant being tried by a single judge, I'd rather have Justice Rutledge than any judge I have known."[61] On a Court of great Justices, he was a great judge.[62] I knew Rutledge from a handful of his opinions. Thanks to John Ferren, I wish I had known him in person.

ENDNOTES

[1]For example, what is left of Potter Stewart except "I know it when I see it"? *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring).

[2]John M. Ferren, **Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge.** University of North Carolina Press, 2004.

[3]Fowler V. Harper, **Justice Rutledge and the Bright Constellation** (1965) is more Harper on civil liberties than a biography of Rutledge.

[4]*See* Melvin I. Urofsky, **Division and Discord** (1997).

[5]Nevertheless, he is quite forgotten. On hearing that I was writing a short essay on Rutledge, two of my colleagues (each in their 40s) asked who he was. I sent an email to everyone at the law school asking if they taught any of Rutledge's opinions. It was also posted on the Con Law listserve. Only *Everson v. Board of Education*, 330 U.S. 1, 28 (1947) (dissent) drew more than one response. The others gaining a single mention were *National Mutual Ins. v. Tidewater Transfer*, 337 U.S. 582, 604 (1949) (concurring) (federal courts); *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (dissent) (Con Law); *In re Yamashita*, 327 U.S. 1, 41 (1946) (dissent) (war powers); *Guarantee Trust v. York*, 326 U.S. 99, 112 (1945) (dissent) (civil procedure); and *Yakus v. United States*, 321 U.S. 414, 460 (1944) (dissent) (administrative law).

[6]Ferren, p. 239.

[7]Ferren, p. 219.

[8]In writing back to Thomas Reed Powell after his appointment to the Court, Rutledge offered this frank appraisal: "I'm essentially a dean. Mind you, I say dean, not professor, or scholar or jurist or judge . . . I didn't know how much I liked it. Drudgery and detail, no time for research or writing or study—but every day some kid had a problem, and

once in a while you could help. For purely personal satisfaction, I'd head back to Iowa Law School tomorrow—if there were one and they'd have me. It's something like once a dean always a dean." January 18, 1943. Ferren, p. 219.

[9]Ferren, p. 128.

[10]*Id.*

[11]Ferren, p. 230. After rereading a number of Rutledge opinions for this essay, I can attest to their stylistic deficiencies. In addition to style, two reasons why he did not get good assignments were that he never had seniority and that he took so long to write. The only important majority opinions he wrote in Con Law cases were *Prince v. Massachusetts*, 321 U.S. 158 (1944) (free exercise) and *Prudential Ins. v. Benjamin*, 328 U.S. 408 (1946) (congressional power to authorize state laws that discriminate against interstate commerce).

[12]310 U.S. 586 (1940).

[13]Ferren, p. 188.

[14]319 U.S. 624 (1943).

[15]Ferren, p. 233.

[16]Letter to Emmett Ray Feighner, January 6, 1942. Ferren p. 182.

[17]February 10, 1948. Ferren, p. 388.

[18]*Freeman v. Hewitt*, 329 U.S. 249 (1946).

[19]*Id.* at 259, 283 (Black, Douglas, Murphy dissenting); *Nippert v. City of Richmond*, 327 U.S. 416, 435 (1946) (Black, Douglas, Murphy dissenting).

[20]329 U.S. at 259 (concurring).

[21]430 U.S. 274 (1977).

[22]319 U.S. 103 (1943), overruling 316 U.S. 584 (1942).

[23]321 U.S. 158 (1944).

[24]Ferren, p. 264.

[25]330 U.S. 1, 28 (1947).

[26]Justice John Paul Stevens may have exceeded it dissenting in *Board of Education v. Mergens*, 496 U.S. 226, 270 (1990) and thus concluding it was unconstitutional for Congress to require schools to allow religious groups to meet if they allowed secular groups to do so. Perhaps something wore off on Stevens when he was a Rutledge law clerk.

[27]Ferren asserts that Rutledge was unaffected by the contemporaneous anti-Catholicism, but I am less sure than he is. While Rutledge may have abandoned the hostility to Catholicism that his father preached, just as he abandoned his father's religion, the Unitarian minister who kept him coming to church in D.C. had concluded that "people tired of doing their own thinking" might choose between Roman Catholicism or Stalinism. John T. McGreevy, "Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928–60," 84 *J. Am. Hist.* 97, 98 (1997).

[28]*Adamson v. California*, 332 U.S. 46, 68 (1947).

[29]*Id.* at 124.

[30]*Marino v. Reagan*, 332 U.S. 561, 563 (1947) (concurring); *Parker v. Illinois*, 333 U.S. 571, 577 (1948) (dissent); *Bute v. Illinois*, 333 U.S. 640, 677 (1949) (joining Douglas's dissent).

[31]*Loftus v. Illinois*, 334 U.S. 804 (1948); *Young v. Ragan*, 337 U.S. 235 (1949).

[32]Ferren, p. 372.

[33]*Buck v. Bell*, 274 U.S. 200, 208 (1927).

[34]335 U.S. 464, 467 (1948) (dissent).

[35]*Id.* at 468.

[36]Ferren, p. 389.

[37]*Colegrove v. Green*, 328 U.S. 549, 564 (1946) (concurring).

[38]320 U.S. 81 (1943).

[39]323 U.S. 214 (1944).

[40]J. Woodford Howard, **Mr. Justice Murphy** 333–34 (1968).

[41]Ferren notes that Rutledge's papers and correspondence often show he agonized over a vote, but there is nothing in them on *Korematsu*. Ferren, p. 258.

[42]Ferren, p. 256.

[43]327 U.S. 304 (1946).

[44]*In re Yamashita*, 327 U.S. 1 (1946).

[45]*Id.* at 79.

[46]*Id.* at 43.

[47]Letter to John M. Maguire, March 13, 1946. Ferren, p. 320.

[48]Ferren, p. 400.

[49]Letter to Louise Larrabee, July 5, 1946. Ferren, p. 400.

[50]Ferren, p. 413.

[51]*Hirota v. MacArthur*, 338 U.S. 197, 198 (1949) ("Mr. Justice Rutledge died September 10, 1949, without having announced his vote on this case").

[52]Ferren, p. 414.

[53]Ferren, p. 392.

[54]Ferren, p. 394.

[55]Letter to William P. Lloyd, Jr., September 6, 1943. Ferren, p. 395.

[56]Ferren, p. 396.

[57]Ferren, p. 397.

[58]Letter to Benjamin S. Galland, April 16, 1947. Ferren, p. 398.

[59]Letter to Ralph F. Fuchs, November 8, 1948. Ferren, p. 405.

[60]Lucile Lomen, the first woman law clerk and a future general counsel of General Electric.

[61]Quoted at the front of the book.

[62]As a different Douglas clerk put it: "If Wiley Rutldge was not the Court's greatest 'justice,' in the sense of vision and leadership, he surely was . . . the Court's finest 'judge.'" Ferren, p. 345.

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Decisions by the Supreme Court that are accorded "landmark" status are chiefly remembered for their holdings and effects. Such cases are also typically linked to a particular era of judicial history, as *Marbury v. Madison*[1] was to the Marshall Court and Jefferson's presidency, as *Youngstown Sheet & Tube Co. v. Sawyer*[2] was to the Vinson Court and Truman's presidency, and as *Miranda v. Arizona*[3] was to the Warren Court and the tumultuous 1960s. But probably only serious students of the Court will recall that *Marbury* was decided in 1803, *Youngstown* in 1952, and *Miranda* in 1966. And fewer still will know, without first consulting a reference, that *Marbury* came down on February 24, the Steel Seizure Case on June 2, and *Miranda* on June 13. Scholars typically associate decisions with years, not the day of the month.

Yet there are a few exceptions to this generalization. Activists on both sides of the abortion controversy gather outside the Supreme Court Building each January 22nd, the anniversary of the 1973 decision in *Roe v. Wade*.[4] Students of the presidency associate the transfer of executive power from Richard M. Nixon to Gerald R. Ford with July 24, 1974, when the Watergate tapes case[5] was decided. And probably no date link is stronger than May 17, 1954, the day that *Brown v. Board of Education (I)*[6] came down.[7] That decision a half-century ago not only erased constitutional approval for state-enforced racial segregation in public schools (and, by implication, in all other official settings) but invigorated—jump-started, some would say—the modern civil-rights movement.

Among other major decisions, neither *Roe v. Wade* nor *Brown v. Board* would ever have happened, however, without the Fourteenth Amendment. Ratified in 1868, this constitutional legacy of the Civil War opened the door to substantial change in the relationship between the national and state governments. In combination with the Thirteenth Amendment of 1865, which abolished slavery, and the Fifteenth Amendment of 1870, which formally removed race as a criterion for voting, the Fourteenth Amendment has been called the "second American Constitution."[8] In particular, *Brown* was the end of a journey (and the start of another) that began with that amendment. In different ways, five recent books intersect the story of the Fourteenth Amendment at various points along the way.

The major question surrounding the new Fourteenth Amendment in 1868 was the legal status of four million African Americans who had been slaves before December 1865 and the legal status of nearly half a million people of color, many residing in the middle Atlantic states, who had never been slaves or who had gained their freedom prior to the war. This photo depicts an Alexandria, Virginia slave pen in the 1860s.

In contrast to the single objectives of the Thirteenth and Fifteenth Amendments, the Fourteenth was actually six amendments rolled into one. The first sentence of Section 1 addressed citizenship: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Those twenty-eight words constitutionally consigned to the trash heap of history Chief Justice Roger B. Taney's conclusion in *Scott v. Sandford*[9] that the framers of the Constitution never intended African Americans to be included within the meaning of the word "citizens" and so they could "claim none of the rights and privileges which that instrument provide[d] for and secure[d] to citizens of the United States."[10]

The second sentence of Section 1 proclaimed new, broad, but undefined restrictions on state power:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first clause borrowed language from Article IV of the Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The second clause drew verbatim from the due

process limitation on the national government in the Fifth Amendment. The words of the third clause were new to the Constitution and seemed to tweak the guaranties of the first and second clauses. Taken together, the three evidenced a strong antidiscriminatory purpose.

That second sentence of Section 1 has long been responsible for making the amendment routinely the most litigated part of the Constitution as measured by the number of cases on the Supreme Court's docket. Its words have been practically a full employment provision for the legal profession. More immediately, both parts of Section 1 erased any lingering doubts about the constitutionality of the Civil Rights Act of 1866. This comprehensive statute, designed to augment the abolition of slavery five months earlier, declared all persons born in the United States to be national citizens and, as such, to possess certain basic rights of citizenship:

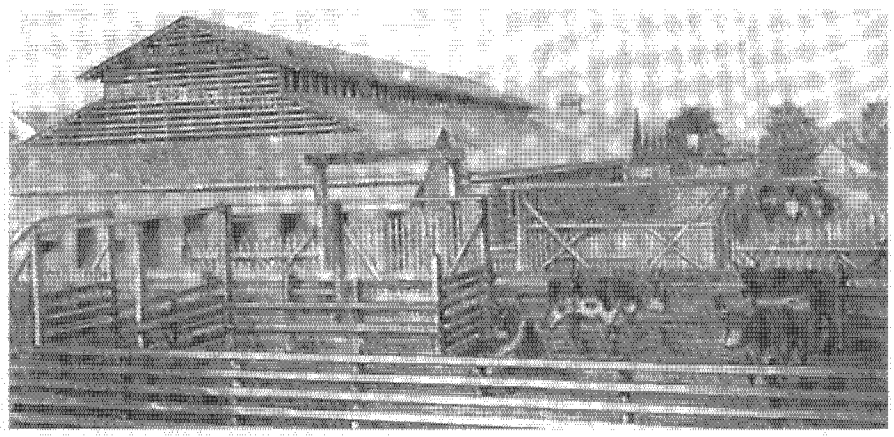
> [S]uch citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory . . . , to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[11]

Constitutionalizing as well as codifying both these guaranties and a new relationship between national and state governments greatly reduced the chance that lawmakers of a later day might textually undo Congress's work.

Section 3 of the Fourteenth Amendment politically disabled former Confederate leaders, Section 4 foreclosed any attempt by nation or state to assume the Confederate debt or to pay compensation to ex-slave owners, and Section 5 (in language taken verbatim from Section II of the Thirteenth Amendment) empowered Congress to enforce the terms of the amendment through "appropriate legislation." Only in Section 2 was there an oblique and curious reference to the politically touchy subject of nationally protected voting rights. In addition to eliminating the Three-Fifth's Compromise, which counted three-fifths of the slave population for purposes of determining representation in the House of Representatives and votes in the electoral college,[12] Section 2 dictated that a state's representation in Congress would be reduced in proportion to the number of "male inhabitants" 21 years of age and older who were denied the right to vote. Although that penalty was never exacted from a state, the amendment directly anticipated—and indirectly allowed—racially based disfranchisement. The origins of the Fifteenth Amendment thus rested in what Fourteenth did *not* do.

But as of 1868, the major question surrounding the new Fourteenth Amendment concerned, not voting, but the meaning and breadth of the protections enshrined in the second sentence of Section 1. A broad reading would create for everyone a national shield against encroachments by the states for a host of basic rights. Echoing ideas from the prewar abolitionist movement, some claimed during debates in Congress over the amendment in 1866 that it would even make provisions of the Bill of Rights as applicable to the states as they had always been operable against the federal government.[13] A narrow reading would confine the amendment to the emergency at hand: the legal status of four million African Americans who had been slaves before December 1865 and of nearly half a million other persons of color, many residing in the middle Atlantic states, who had never been slaves or who had gained their freedom prior to the war.

Not quite five years after the ratification of the Fourteenth Amendment, the Supreme



Historian Jonathon Lurie and political scientist Ronald M. Labbé have written a new book telling the story of the Crescent City Livestock Landing & Slaughter-House Company, which the Louisiana legislature chartered in 1869 with a monopoly on the slaughtering of animals in the city of New Orleans.

Court confronted it for the first time in the *Slaughterhouse Cases*,[14] the subject of a book of the same name by political scientist Ronald M. Labbé, emeritus of the University of Louisiana at Lafayette, and historian Jonathan Lurie of Rutgers University.[15] Their thoroughly researched volume is the first modern book-length study of this landmark litigation and the most revealing analysis of it since an article written by political scientist Loren Beth ninety years after the decision.[16]

Their book tells the story of the Crescent City Livestock Landing & Slaughter-House Company, chartered by the Louisiana legislature in 1869 with a monopoly over the slaughtering of animals in the city of New Orleans and the surrounding area. The Crescent City stockyards and abattoir were situated east of the center of the city, not far from the site of the famed Battle of New Orleans of 1815. Crescent City's monopoly adversely affected hundreds of butchers. Barred from slaughtering on their own premises, they had to use the Crescent City facilities for a fee.[17] In three separate cases, the Butchers' Benevolent Association and others unsuccessfully sought an injunction in the state courts to block the monopoly. When the cases reached the Supreme Court, their attorney, former Justice (and ex-Confederate) John A. Campbell, argued that the legislation was constitutionally defective on four counts: that it created "an involuntary servitude forbidden by the thirteenth article of amendment"; that it abridged "the privileges and immunities of citizens of the United States"; that it denied them "the equal protection of the laws"; and that it deprived them "of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment."[18]

The circumstances of the litigation seemed about as remote as could be from the presumed purpose of the amendments: racial justice. As Labbé and Lurie characterize the irony-rich situation,

> A Reconstruction amendment intended to secure the civil rights of black Americans had been used to secure the property rights of white butchers. The statute they sought to defeat by the amendment had been enacted by a reconstructed, racially integrated legislature. Counsel for the butchers, John Campbell, had a well-earned reputation as an advocate of states' rights. Yet now he called for an expansive interpretation of the rights, privileges, and immunities to be protected as never before by the federal courts.

> Campbell's opponents—including Matthew Carpenter, who had participated in the congressional deliberations leading to the Fourteenth Amendment, and Thomas Durant, whose efforts to help the liberated blacks in Louisiana had resulted in a self-imposed exile from that state—found themselves in a similarly ironic position. To win their case, they had to argue for a narrow interpretation of an amendment cast in very broad language.[19]

The tight 5–4 decision[20] against the butchers and for the state symbolized the lack of consensus over precisely what the Reconstruction amendments were intended to accomplish. "This court," Justice Samuel Freeman Miller momentously observed for the majority, "is thus called upon for the first time to give construction of these articles."[21] "On the most casual examination of the language of these amendments," Miller continued, "no one can fail to be impressed with the one pervading purpose found in them all, . . . and without which none of them would have even been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom. . . . It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, as designed to remedy them as the fifteenth."[22]

As for the constitutional objections alleged by the aggrieved butchers, Miller thought counts one, three, and four merited only the briefest attention. To regard the Louisiana regulation as "involuntary servitude" within the meaning of the Thirteenth Amendment "requires an effort, to say the least of it."[23] Ignoring Chief Justice Taney's arguably analogous use of Fifth Amendment due process in *Dred Scott* and Chief Justice Salmon P. Chase's similar use of it in the first round of the legal-tender litigation in *Hepburn v. Griswold*,[24] Miller perfunctorily dispensed with the butchers' due-process objection. "[U]nder no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by . . . Louisiana . . . be held to be a deprivation of property within the meaning of that provision."[25] Not clear was whether he meant that no "deprivation" had occurred or that no "property" was involved. In either event, he closed the due-process door. As for the equal-protection claim, Miller "doubt[ed] very much whether any action . . . not directed by way of discrimination against the negroes as a class, or on account of their race [neither of which applied in this instance], would ever be held to come within the purview of this provision."[26]

Regarding the second count, Miller seized on the first sentence of Section 1 as a means of virtually dispatching the privileges and immunities clause from the Fourteenth Amendment. That sentence spoke of state citizenship and national citizenship. The second sentence spoke of "the privileges and immunities of citizens of the United States," leading Miller to conclude that one possessed certain privileges and immunities by virtue of state citizenship and others by virtue of national citizenship. The latter consisted of rights created by the national government. The remaining (and larger) category of rights either flowed from state citizenship or pre-dated formation of the national government. These were "fundamental" rights that belonged "to the citizens of all free governments," as Justice Bushrod Washington had written in an 1823 circuit court opinion construing the privileges and immunities clause of Article IV. While declining to enumerate them, Washington suggested "several general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."[27] Accordingly, Miller insisted, any liberties claimed by the butchers—such as a right to pursue a lawful calling—derived from state citizenship and so fell outside the protection of the Fourteenth Amendment. To read

the clause more generously, Miller contended, would make the Supreme Court "a perpetual censor upon all legislation of the States" and "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[28]

The *Slaughterhouse Cases* is rich in its descriptions of life, politics, and commerce in south Louisiana in the immediate post–Civil War years, as well as in its account of the complex monopoly litigation itself.[29] But there is more. Labbé and Lurie challenge appraisals that have consigned either the slaughterhouse statute itself or the Supreme Court's decision to the bin of ill repute.

Part of the unsavory reputation of the *Slaughterhouse Cases* lies in the widely held belief that the law challenged in the litigation "was the result of a corrupt group of carpetbaggers with no legitimate reason to support the new law, other than their own financial interests."[30] Labbé and Lurie devote considerable space to demonstrating that corrective action directed at the slaughtering of animals was sorely needed. There were some 300,000 animals butchered annually in the city and its environs during the 1860s. With no public sewer systems, "wastes were either dumped into uninhabited areas of the city, such as the broad levee of the Mississippi River, or simply emptied into open gutters, as was the practice of the large hotels. Similarly, the offal from the slaughterhouses was thrown either into the river or onto city streets." If one combines those images with the humidity and swampy environment of the area, there is no surprise in learning that physicians "branded it the dirtiest and most unhealthy city in the country."[31] Thus, especially in view of the fact that other cities had sought to rectify such evils through the use of a central facility, the authors conclude that the record amply supports the solution the legislature devised. "[T]he widely perceived linkage between the slaughterhouses and ill health provided the energy to reform, the development of the centralized abattoir elsewhere provided the form, and the public franchise to a private company offered a readily available means of implementation."[32] The charge of corruption did have a factual basis: "elements of it ring true and clearly tend to incriminate." Labbé and Lurie conclude, however, that even that evidence must be put into perspective, noting the observation of one newspaper in 1873 that "rings, bargains for patronage, dealings in depreciated public paper and wasteful contracts are no modern invention in New Orleans."[33] In other words, government in the city and the state had been corrupt before the carpetbag Republicans enjoyed their brief hold on power and it remained after they lost it. Corruption was hardly unique to them.

With respect to Miller's opinion for the Court in particular, Labbé and Lurie are troubled by Laurence Tribe's assessment that "there is considerable consensus among constitutional thinkers that the Supreme Court made a scandalously wrong decision in this case." They most certainly reject the late Charles Black's claim that the majority opinion "is probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court."[34] Labbé and Lurie characterize such assessments as a "modern Whiggish historical interpretation . . . , seen . . . through the eyes of the present rather than of the applicable era."[35] If one conceives of the Fourteenth Amendment in terms of what it has become—a virile and nearly boundless reservoir of federally protected constitutional rights—"of course Miller's narrow holding would appear misguided, if not malevolent."[36]

Yet if certainty is lacking as to the meaning of the second sentence of Section 1 of Fourteenth Amendment, then the caution in Miller's opinion was both prudent and justified, Labbé and Lurie contend. Without a clear mandate that Congress had called for an upending of the federal system, confining the amendment to its most obvious objective—the protection of African Americans—avoided the risk of decreeing what the Constitution had not. The authors agree with scholars such as William Nelson that the language of the

amendment attempted to balance conflicting values of equality and individualism and of federalism and majoritarianism. Its framers "dealt with conflict not by resolving it but by bequeathing it to the future."[37] And it was in that future that the Court turned to the amendment's Due Process Clause as a general restraint on the police power, leaving Miller's constricted view of the privileges and immunities clause largely intact.[38]

Still, in concluding that the most important privileges and immunities inhered in one's state citizenship and thus fell outside the amendment's protection, Miller may have erred too far on the side of caution. True, he affirmed the race-centered purpose of the amendment, but in making sure that many important rights lay beyond the scope of the amendment, he barred federal protection of the very attributes of citizenship that would have allowed the newly freed population to have looked out for themselves more effectively. Labbé and Lurie believe that Miller should have refrained from his excursion into constitutional cosmology and instead rested the holding of the case on the traditional doctrine of state police powers. Doing that, however, might well have led to the result that Miller wanted to avoid: making the Court a general overseer of state commercial legislation. Just as holding that the slaughterhouse monopoly violated the Fourteenth Amendment would have placed similar arrangements elsewhere in constitutional doubt, saying that the centralized slaughterhouse was a reasonable means to a permissible end would have invited other cases that challenged, on different facts, other state policies as unreasonable. At the least, as the Court discovered later, an enlarged jurisdiction would mean an exploding docket. Miller, after all, was writing nearly two decades before Congress handed the Court any control over its docket.[39] Indeed, for cases originating in the circuit courts, as most federal cases did, the Supreme Court of Miller's day was the first and only court of appeals.

Miller himself is the subject of **Justice of Shattered Dreams** by New Orleans attorney and Loyola University historian Michael A. Ross.[40] The appearance of this judicial biography is noteworthy: It is the first book-length study of the thirty-sixth Justice since publication of Charles Fairman's **Mr. Justice Miller and the Supreme Court, 1862–1890** more than six decades ago.[41] At first glance, the title of the newer volume seems puzzling, perhaps even out of place. How could "shattered dreams" accurately be applied to a gifted, Kentucky-reared physician-turned-lawyer who achieved professional prominence in Iowa in the 1850s, became the first trans-Mississippi Justice, and served an acclaimed twenty-eight years on the highest court in the land? Was he not, in Chief Justice Chase's estimate, "beyond question the dominant personality . . . upon the bench, whose mental force and individuality [were] felt by the Court more than any other"?[42]

New Orleans attorney and Loyola University historian Michael A. Ross has written a new biography of Justice Samuel Freeman Miller (above), entitled *Justice of Shattered Dreams*. Ross argues that Miller's "dream" of America was "shattered" during the Gilded Age, as he witnessed the formation of large concentrations of wealth and a corresponding political alienation from government by the people.

On a closer look, however, the title may be entirely apt. The "dreams" that were "shattered" were Miller's visions for America. Ross contends that, "[o]nce sanguine about the prospects for capitalism and democracy, he grew increasingly pessimistic over time. In the process, he became the judicial voice of Americans who were left behind by the postwar economy and felt alienated by the political realignments of the Gilded Age."[43] The economic and political changes that Miller found disturbing included the large concentrations of wealth that became apparent in the latter third of the century. Also worrisome was the growing domination of the Republican party by industrialists and railroad magnates, as well as the restoration of conservative Democrats to positions of power—with the accompanying negative effects on the civil rights of blacks—in the southern states after the end of Reconstruction.

Ross therefore parts company with scholars such as Fairman who, the author believes, depict Miller as an agrarian and nascent populist. Instead, Miller was "an important representative of an understudied wing of the Republican Party" that lost influence after the Civil War. That wing heralded a "free-labor ideology" that preached the right of all Americans to "go as far as their talents and toils could take them."[44] Coupled with this principle was a "western booster ethos," according to which any town in a good location—including Miller's adopted hometown of Keokuk—would thrive so long as its residents worked hard and made sound decisions. "Most Iowans anticipated improving their station and aspired to comfortable prosperity as farmers, shop-keepers, professionals, or small factory owners. The Republican Party's message [initially] reflected their aspirations. It was the party of those who succeeded—or expected to succeed—in the new economy." But as the postwar years demonstrated, growth did not necessarily come where it was expected, and the new economic order left many outside the ranks of the prosperous. In his judicial decisions, "Miller represented the values of this neglected group of Republicans."[45]

Similarly, Ross parts company with scholars who—whether approvingly or disapprovingly—credit Miller as one of the prime movers in the unraveling of Reconstruction, as typified by Miller's opinion in the *Slaughterhouse Cases*.[46] While that 1873 holding does seem in hindsight to portend the snuffing out of civil rights for African Americans, those effects, Ross insists, "were far from certain at the time of the decision." Instead, the "Slaughter-House Cases may be read as a progressive—though ultimately failed—attempt to affirm the authority of the biracial government of Louisiana, to grapple with the horrible sanitary conditions in New Orleans, and to thwart conservatives such as Justice Field, who hoped to defeat state regulation of private property."[47] It was Miller, in his opinion for the Court, who thrust forward racial justice as the primary mission of the Fourteenth Amendment. If Miller went to extremes to reduce the Privileges and Immunities Clause practically to a nullity, he did so to neutralize the efforts of Field and others to turn "the Fourteenth Amendment into a weapon with which they could defend propertied elites."[48]

In Ross's mind, Miller and Field thus stand as the great jurisprudential antagonists of this era of Supreme Court history.[49] As such, Ross's perception of late nineteenth-century jurisprudence reflects the Progressive or New Deal critique that read certain decisions by Field and others as attempts to write laissez-faire dogma into the Constitution.[50] In contrast, certain revisionists insist that Field's more anti-regulatory stance was "not a reflection of laissez-faire thinking but as an instance of justices steeped in free-labor ideology resisting the very idea of unfree labor contracts."[51] Seen in this way, the positions of Miller and Field were, ironically, both offshoots of free-labor ideas—offshoots that veered in opposing directions.

Whatever the assessment of Miller's years on the Court, most would probably agree that he handily illustrates Justice Sandra Day O'Connor comment about judicial selection: one must be "the right person in the right spot at the right time. Stated simply, you must be lucky."[52] For Miller, part of his good fortune lay in the reorganization of the circuits underway in the early 1860s. The circumstances of Miller's appointment consume a chapter in **Shattered Dreams** and therefore merit at least a brief mention here.[53]

In January 1862, after the Senate confirmed Noah H. Swayne, the first of President Lincoln's five appointments to the Court, the seats vacated by the death of Justice Peter Daniel in 1860 and the resignation of Justice John Campbell in 1861 remained unfilled. Both had come from southern circuits, but the southern circuits now existed in name only. Secession thus focused congressional attention on a long-overdue chore: circuit reorganization. Wisconsin, Minnesota, Iowa, Kansas, Florida, Texas, California, and Oregon had been admitted to the union after the last reorganization in 1837. So there were now states in circuits that were not, practically speaking, any longer part of the union, and there were states in the union that were not part of any circuit. Filling the Daniel and Campbell seats would await at least partial completion of this task.

Of course, redrawing circuit boundaries involved much more than questions of judicial efficiency and balance alone. It was also a matter of power and influence. Moreover, representatives and senators eyeing one or more candidates for the Court were fully conscious of how circuit boundaries could boost or sink a prospective nominee's chances. Circuit reorganization presented both an opportunity and a challenge for Miller. Even though there was no legal requirement that a president appoint from within a circuit, that was almost always the practice. Accordingly, if Iowa were placed in a circuit with neighboring Illinois, for example, Miller's chances for a nomination would be slim indeed. If Iowa were joined with Kansas, Minnesota, and Missouri, the combination of Miller's legal reputation on the west bank of the Mississippi and the depth of local support would make him a leading contender. Thus, for Miller and his allies, the prize of a Supreme Court seat required success on two fronts: first, creating a circuit consisting of trans-Mississippi states only; second, persuading Lincoln that Miller was the man to be appointed from that circuit. Efforts on both fronts began soon after the House began work on reorganization in December 1861 and the Senate in January 1862.[54]

Success on the first front was due mainly to Senator James W. Grimes and Representative James F. Wilson of Iowa. Both desired Miller's nomination and worked tirelessly on behalf of a trans-Mississippi circuit. However, congressional horse-trading on circuit juggling during the next six months yielded Senate and House reorganization plans that conflicted in crucial respects as far as Miller's chances were concerned. The Senate version joined Iowa to Illinois; the House version called for a reconfigured Ninth Circuit consisting of Iowa,

Representative James F. Wilson of Iowa (pictured) worked tirelessly in the House to promote the establishment of a trans-Mississippi circuit that would help ensure Miller's nomination to the Supreme Court. Senator James W. Grimes of Iowa pushed for the proper circuit reconfiguration in the Senate.

Kansas, Minnesota, and Missouri. (The Far West states of California and Oregon would be excluded from this reorganization. Each had its own circuit judge who was not a Supreme Court justice.) With adjournment looming, with its prospects of no bill acceptable to both houses, the bills went to conference committee, where Wilson was one of three House members. Even at the risk of jeopardizing reorganization entirely, he insisted on inclusion of the trans-Mississippi circuit as part of the bill reported back to both houses. With Grimes on watch in the Senate, the conference version with its Miller-friendly circuit passed both houses on July 12.[55]

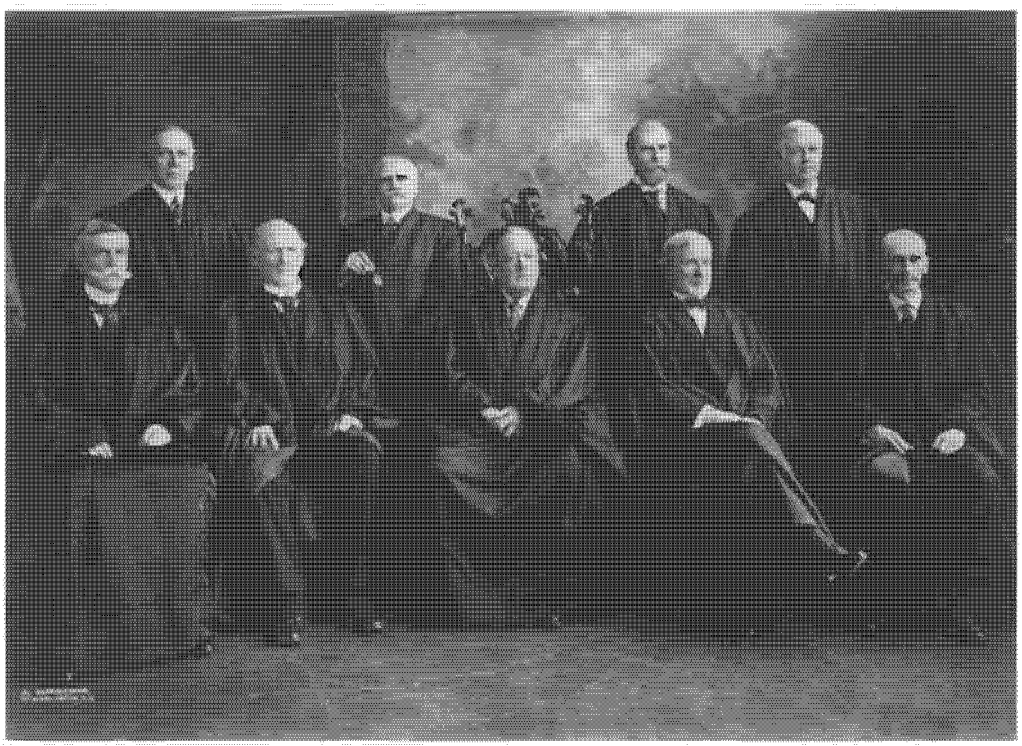
Meanwhile, Miller and his allies stirred up a beehive of activity to make sure that any nomination from a properly reconfigured circuit went to him. Prominent supporters that included Democrats as well as Republicans inundated the White House with appeals for Miller's appointment. Missives extolled Miller's record as a lawyer and informed the president that he had left Kentucky years before because of his opposition to slavery. His devotion to the Union seemed sealed by the fact that he had used his own funds to help outfit a regiment when war began. The Iowa attorney general recommended Miller not only because he was an "earnest Patriot and conscientious Republican" but also—attempting to turn a possible liability into an asset—because he "*has never held a public office.*"[56]

The lobbying campaign soon had its intended effect: Lincoln sent Miller's name to the Senate on July 16 without ever having even met the man.[57] Miller must have had his bags packed: After a speedy confirmation, Chief Justice Taney administered the oath of office to him in Washington on July 21.

Four years after Miller's death in 1890, President Grover Cleveland named Senator Edward Douglass White of Louisiana for the vacancy created by the death of Justice Samuel Blatchford in 1893. Following Cleveland's selection of his Interior Secretary L. Q. C. Lamar of Mississippi in his first administration, White was only the second *native* Southerner to be sworn in as a Justice since President Franklin Pierce picked John Campbell of Alabama in 1853.[58] Thanks to President William Howard Taft, White then became, in 1910, the first sitting Justice to be named Chief Justice of the United States.[59] The beginning of the White Court falls almost exactly halfway between ratification of the Fourteenth Amendment and the Warren Court's decision in *Brown v. Board of Education*.

The White Court by Indiana University (Terra Haute) historian Rebecca S. Shoemaker is among the most recent entries in the Supreme Court Handbooks series published by ABC-CLIO under the general editorship of Peter G. Renstrom.[60] Like the other volumes in this series, this one adheres to a format consisting of two parts. Part one contains four substantive chapters that examine: (1) the Court in the context of its times, including the circumstances surrounding the appointment of each Justice who served with Chief Justice White; (2) the individual Justices in terms of their backgrounds and jurisprudential thought; (3) the significant decisions rendered by the White Court; and (4) the White Court's legacy and impact. Part two, which in **The White Court** consumes about one-third of the pages, includes a variety of useful reference materials and documents that relate to personalities, policies, and events addressed in part one.

Shoemaker depicts the White years as a time of transition in which both the nation and the Court were in the midst of fundamental changes.[61] The former continued its transformation from a largely agrarian land to one that was industrialized and urbanized. The latter saw its caseload still full of economic regulation and other commercial questions that had been a fixture on the docket since the Waite Court (1874–1888) and that would remain so well into the 1930s. But there were signs of new questions as well that would increasingly occupy the Justices' time. It was in the White Court that the first "focused debates on the meaning and extent of civil liberties

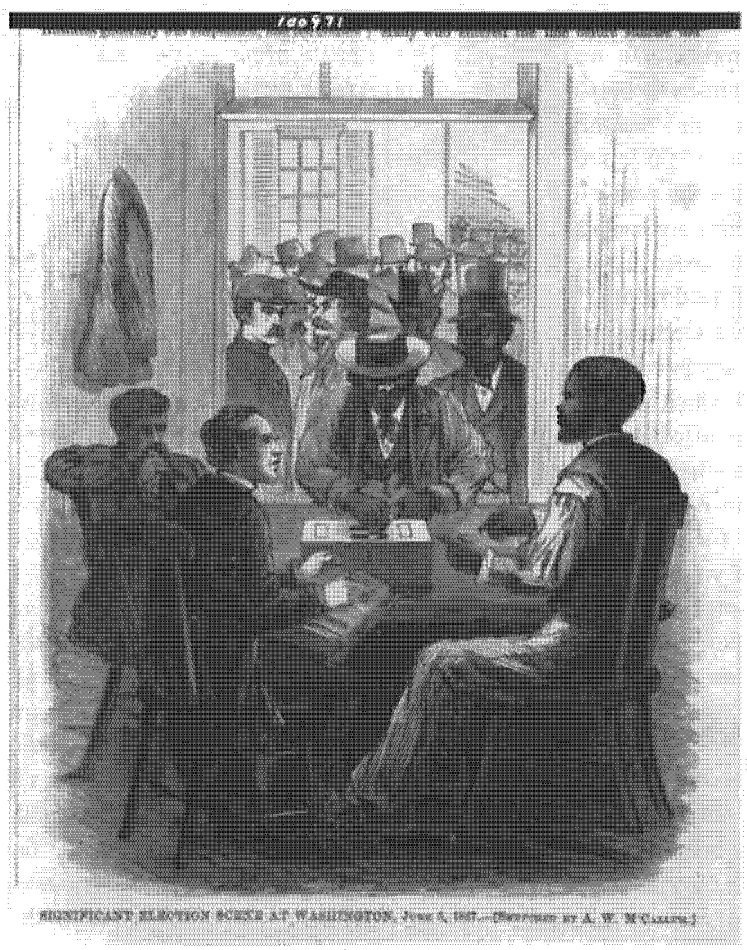


In her new book on the White Court, Indiana University historian Rebecca S. Shoemaker describes how the Court underwent its first expansion of appellate jurisdiction with respect to state courts since 1789. Pictured are the Justices in 1911, with Chief Justice Edward Douglass White at center.

protections guaranteed by the Bill of Rights" arose.[62]

One should add that the White Bench was in an organizational transition as well. White's Court was the first to function entirely under the changes wrought by the Evarts or Judiciary Act of 1891, which created the federal judiciary's first permanent general appellate courts (the circuit courts of appeals) below the Supreme Court and conferred upon the Supreme Court modest discretionary jurisdiction.[63] Fuller had been Chief Justice when the 1891 measure, long in the works, became law, but in the first three years of his tenure the Court operated within a system that had undergone few significant changes since 1789.[64] Moreover, it was on White's watch in 1914 that Congress allowed section 25 appeals from state high courts to qualify for Supreme Court review in instances where the federal claim had been *upheld* by the court below.[65] It was the first expansion of the Supreme Court's appellate jurisdiction with respect to state courts since 1789.

As Shoemaker shows, the White Court also appears transitional in how it dealt with the small number of civil-rights cases it decided.[66] Following passage of several civil-rights acts and ratification of the Fourteenth and Fifteenth Amendments, such cases first arrived in the twilight of the Chase Court (1864–1873),[67] but they were more plentiful during the Waite and Fuller Courts. Indeed, the reaction of the Waite and Fuller Courts to civil-rights claims may partly account for the relatively small number that surfaced during the White years. Between Waite's arrival in 1874 and Fuller's death in 1910, civil-rights claimants only occasionally prevailed.[68] The general judicial pattern was to look with skepticism on federal efforts to protect civil rights and with toleration on state policies that fostered discrimination. The



The White Court invalidated Oklahoma's "grandfather clause," a device used to excuse whites who had been eligible to vote prior to ratification of the Fourteenth and Fifteen Amendments in 1866—or who had an ancestor who had been eligible—from having to pass a literacy test before being allowed to vote. This 1867 illustration shows both blacks and whites placing ballots in a box.

result by 1910 was a situation characterized by a rigid system of legally mandated racial segregation in southern states coupled with a broad-scale disfranchisement of otherwise eligible black voters.[69] The noteworthy fact about the White Court is thus not that there were only a small number of civil-rights cases, but that there were any at all. The records of the Waite and Fuller Courts would have inspired few to look to the federal judiciary as a guardian of civil rights.

The Supreme Court's stance on civil rights was clearly in transition during White's years in the center chair, because civil-rights claimants prevailed more often than not. Several merit attention here. *Bailey v. Alabama*[70] and *United States v. Reynolds*[71] struck down Alabama's debt peonage and criminal surety laws, respectively. Because the statutes allowed a form of involuntary servitude, they were in violation of the Thirteenth Amendment. While each case was decided ostensibly on nonracial grounds, it was certainly common knowledge at the time that those adversely affected by the statutes were almost always poor black laborers.

A year after *Reynolds* was decided, *Guinn v. United States*[72] invalidated Oklahoma's "grandfather clause." The device excused a would-be voter from a literacy test if the person was eligible to vote prior to 1866—that is, before ratification of the Fourteenth and Fifteenth amendments—or had an ancestor who had been eligible prior to the specified date. While the provision was race-neutral in its wording,

its effect was to subject blacks to more onerous voter registration requirements than whites. For Chief Justice White's opinion for the Court, the choice of date, not the statute's race-neutral language, proved dispositive: "[W]e are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view."[73] Symbolically, *Guinn* was important as a victory for black voting rights. The Court actually looked beyond the wording of a statute to consider its purpose and effect. In practice, however, *Guinn* made little difference in the short run. Most states that had adopted such clauses had already abandoned them because they had become embarrassing subterfuges; besides, other devices such as the white primary were being put in place that accomplished the same discriminatory effect. Ironically, even Oklahoma's grandfather clause may have been motivated less by race and more by partisanship. As one Oklahoma Republican wrote President Taft in 1910, the amendment was adopted "for the express purpose of disfranchising negro voters, not because they are black, but because they vote the Republican ticket."[74]

McCabe v. Atchison, T. & S. F. Ry. Co.,[75] decided in the same year as the second Alabama peonage case, was probably the most significant of the White Court's civil-rights decisions. In dispute was the validity of Oklahoma's Separate Coach Law, which, like the Louisiana statute that the Fuller Court had upheld in *Plessy v. Ferguson*,[76] mandated racially separate coaches on passenger trains. But the Oklahoma statute addressed a situation that the earlier statute had not: It allowed railroad companies to provide luxury accommodations such as sleeping and dining cars without providing the same for black passengers. The rationale, of course, was that demand among blacks for the higher priced services was low and so mandating racially duplicate services in this category would be financially prohibitive. Although the Court denied relief in the case because the plaintiffs lacked standing to sue (they had filed their suit before the law went into effect and so were not adversely affected at the time of filing), Justice Hughes's opinion for the majority went out of its way to assert in dicta that the statute was unconstitutional because it "makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one; [when] facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."[77] Alongside *Plessy*, Hughes's construction of the Fourteenth Amendment is noteworthy. The earlier case rested on the Court's conclusion that racial segregation on trains was reasonable, not that the Fourteenth Amendment necessarily required "equal" facilities if they were going to be separate. "Equal but separate" was a requirement of the statute, not of *Plessy* itself.[78] What Hughes seemed to say in *McCabe* was that the equality component had now been made a constitutional expectation. That would leave in future judicial hands the task of deciding what equality in any particular context actually meant.

Analysis of those White Court decisions and much, much more comprise the near-encyclopedic **From Jim Crow to Civil Rights** by legal scholar and historian Michael J. Klarman of the University of Virginia in Charlottesville.[79] Drawing from law, history, political science, and sociology, his study is really three books in one. First, in a thoroughness almost without parallel in the literature, it is a chronicle of Supreme Court cases and other legal, political, and cultural developments affecting civil rights from the Plessy era through the Brown decision and the civil-rights movement of the 1950s and 1960s. Very little

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In his new book, *From Jim Crow to Civil Rights*, Michael J. Klarman examines the change in popular attitudes about race from the 1890s to the 1950s. This 1960 photograph shows segregated waiting rooms at the Atlanta bus station.

Pallbearers carried a casket symbolically burying Jim Crow during a 1944 NAACP march in Detroit.

escapes Klarman's attention. Second, as the author addresses the "what," he also plumbs the "why." "In 1896, most white Americans approved of racial segregation, and most of the Justices of the Supreme Court thought that it was plainly constitutional. In 1954, the Justices unanimously invalidated segregation, and about half of all Americans agreed with that ruling. How should we understand this dramatic shift in popular and legal opinion?"[80] Third, he explores the "whether"—have decisions by the Supreme Court actually "influence[d] the larger world of race relations"?[81] The second and third objectives enrich the first and set Klarman's work apart from most books on civil-rights history. The virtue in Klarman's approach is that the reader can more easily grasp the sweep of change that has occurred—a particular advantage for readers whose educations may have neglected the study of history and even for historians who downplay the importance of big events and leading personalities. Yet the risk is that the substantial attention that the book devotes to racial changes in law and society may overshadow racial difficulties that remain.

Klarman attributes the shift in popular attitudes about race from the 1890s to the 1950s to numerous factors. These include phenomena inside the United States, such as the Great Migration that dramatically boosted the number of African Americans living in states outside the South—states where they could become a critical political mass because they were allowed to vote. His causal list also includes external events, such as America's participation in World Wars I and II. The justification for the latter especially, with its emphasis on defeating tyranny and saving democracy and Western civilization, had its effects on white attitudes toward those who were treated as second-class citizens at home, just as it emboldened American blacks to speak out ever more loudly against that second-class citizenship. Defeating the Nazis abroad made notions of superior and inferior races and racial purity at home not only ring hollow but seem dangerous. Moreover, in the postwar climate of the Cold War, with the United States and the Soviet Union in a contest to win the "hearts and minds"[82] of Third World peoples, continued institutionalization of racism within the United States made discrimination a national security issue.

Klarman begins his assessment of the change in judicial decisions with the hypothesis that, especially on matters of constitutional law, the Supreme Court only rarely departs significantly from mainstream opinion.[83] (When it does depart, Klarman believes, it is more likely to be reflecting opinion that is mainstream within the nation's social and cultural elite). This seems so, he explains, because of the polarity of factors—legal and political—that influence judicial decision-making. Legal ingredients include such things as the text of the Constitution and statutes, precedents construing the text, and "subconstitutional" rules such as stipulations about standing that can determine preliminarily whether a litigant can even raise certain issues. Political ingredients include such things as the personal values of a Justice—that is, his or her predilections—as well as a Justice's perceptions about the Court's place in the governmental structure, conclusions about the opportunities and limitations of judicial power, and the dynamics of decision-making within a small group like the Court.

Thus, as political science literature has long affirmed, there is a "legal axis" and a "political axis" of forces and factors shaping decisions. To the degree that those in the first, such as text and precedent, are determinate—that is, clear and largely uncontroverted—the legal axis will ordinarily dictate the decision unless there are truly powerful emanations from the political axis. To the degree that the law appears indeterminate, judges have more discretion and so elements from the political axis become more influential in the outcome of a case. In 1896, a statute mandating racially segregated facilities appeared neither absolutely forbidden nor permitted by the Fourteenth Amendment. The fact that most of the

Justices and most white Americans at that time thought segregation was wise public policy—an emanation from the political axis—made *Plessy* an easy case to decide.[84] In 1954, the Court construed the same Fourteenth Amendment and reached an opposite conclusion, again because of emanations from the political axis—and, one should add, because of recent decisions along the legal axis, such as *Sweatt v. Painter*,[85] that had left the old separate-but-equal rule dangling by a hair. *Brown* was not "easy" in the way *Plessy* had been, but it was an easier decision to reach in light of what had transpired.[86] Similarly, *Grovey v. Townsend*'s[87] earlier validation of the white primary in 1935 seemed no longer tenable in light of political factors by the time *Smith v. Allwright*[88] laid the white primary to rest in 1944.[89] In short, Klarman concludes, because of the force of dominant opinion the Court is unlikely to be either hero or villain.[90] "Constitutional law much more frequently involves the Court suppressing outliers than rescuing powerless minorities from majoritarian oppression."[91] Surely there must have been power in the argument that blacks only wanted to be treated like everyone else. "[W]hy, of all the multitudinous groups of people in this country," Thurgood Marshall asked the Supreme Court in 1953, "[do] you have to single out Negroes and give them this separate treatment[?]"[92]

As for the consequences and ramifications of *Brown* itself, Klarman rejects the polar positions (1) that *Brown* did little to change race relations and policy and (2) that *Brown* created the modern civil-rights movement. Instead, he adopts a modest middle stance that the ruling was not irrelevant. Brown "plainly raised the salience of school segregation, encouraged blacks to litigate against it, changed the order in which racial practices would otherwise have been contested, mobilized extraordinary resistance to racial change among southern whites, and created concrete occasions for street confrontations and violence."[93]

Two of these points merit brief comment. First, Klarman perceptively notes that in the early 1950s, most blacks were probably more concerned about the quality of their children's education than about the fact that it was a segregated education.[94] They also realized the importance of the ballot that many of them lacked. Even with the death of the white primary in 1944, election officials in some states resorted to other means to keep blacks from polls. *Brown* played legal leapfrog with the order of things: suddenly integration, not the ballot, was the top civil-rights priority. Thus it was hardly surprising that *Brown* was so long in being implemented, especially in areas where blacks were politically the most impotent. In fundamental ways, the franchise empowers people to protect themselves. Justice Ward Hunt had perceptively made this point in his dissent in *United States v. Reese*, early in the Waite Court: "Just so far as the ballot to . . . the freedmen is abridged, in the same degree is their importance and their security diminished."[95] As events of the 1950s demonstrated, those without the ballot are at the mercy of everyone else.

Second, like a decision by the executive or legislative branches, a court decision can have unexpected consequences. With *Brown* there were at least two. The first was the "massive resistance" that met attempts to implement Brown.[96] "Southern whites had eschewed open confrontation with the Court over black jury service and black suffrage, while completely sabotaging those rights through administrative discrimination." But rather than adopt "similarly fraudulent mechanisms to circumvent school desegregation, the white South declared war on the Court, nullified *Brown*, and used state troops and vigilante mobs to block the enforcement of desegregation orders." Such tactics brought about the second unintended result: By forcing everyone else's hand, massive resistance led to combined presidential and congressional measures to make *Brown* a reality. "One cannot know how long token school desegregation might have persisted had white southerners played their hand differently."[97] Massive resistance provoked adoption and

implementation of ameliorative countermeasures that might otherwise never have been adopted.

Anyone familiar with recent judicial literature will not be surprised that *Brown* is the subject of one of the latest case studies to appear in the Landmark Law Cases & 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 now includes some two dozen volumes, most of them treating decisions by the Supreme Court. Nearly as many case studies are promised as "forthcoming."[98] Alongside other case-oriented books that Kansas has published outside the Landmark series,[99] the happy result is an expanding storehouse of information about some of the Court's most important work. Moreover, while the list already counts several volumes on cases decided since *Brown* came down—there are books on *Bakke* and the 1973 abortion cases,[100] for example—the fact that ***Brown v. Board of Education***[101] joins the series in time for the decision's half-century anniversary is symbolic.

Aside from its length, ***Brown*** differs from Klarman's **Jim Crow** in two important respects. First, authors Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware—legal and public-policy scholars at George Washington University, Tulane University, and the University of Delaware, respectively—have written a *Brown*-centered book. As one would expect for an entry in the Landmark series, a sizeable part of the volume recounts the development of the litigation that culminated in the decisions on May 17, 1954, the second round of decisions on relief that followed in 1955,[102] and the immediate aftermath. Thus, the volume is among the more helpful additions to the literature on *Brown* since publication of **Simple Justice**[103] nearly three decades ago, and it has the advantage of the scholarly work of others who labored in the interim. Still, in most respects ***Brown*** follows the **Simple Justice** account of the decision's gestation within the Court between 1952 and 1954. For example, Justice Stanley Reed is depicted as a holdout until persuaded by Chief Justice Earl Warren, practically a week before the case came down, not to dissent.[104] The story of Reed's reluctance may be more complex than that, however, as former Reed clerk John Fassett has insisted in more than one forum.[105]

Second, ***Brown*** reflects more ambivalence than does **Jim Crow** about the relationship between Supreme Court decisions and dominant public opinion. For Klarman, the Court is more often follower than leader, at least with respect to matters of civil liberties and civil rights. The authors of ***Brown*** would probably agree only to a point, with that point being the establishment and maintenance of Jim Crow—hence, the subtitle of their volume: **Caste, Culture, and the Constitution**. "*Brown*," they write, "was about caste. A caste system, or perhaps more accurately an attempt to impose a caste system, had developed in antebellum America. It existed in the North as well as in the South, with differing degrees of intensity in different regions."[106] The question then became whether caste lines could survive the legal and constitutional changes that followed the Civil War. "They could"—and they did so in the form of Jim Crow, a "new legal regime [that] would also receive the support and sanction of the United States Supreme Court."[107]

But in ***Brown***, the reader surmises from Cottrol, Diamond, and Ware, the Court was less follower than leader. In their account, *Brown* was revolutionary because it declared that racial caste lines were no longer compatible with the Constitution and so helped to "precipitate a more assertive civil rights movement in the 1950s and 1960s, a movement that would ultimately bring about far-reaching change in American race relations."[108] In short, the decision was "pivotal."[109] "*Brown*'s importance lay in its setting the nation's law on the path of rejecting the kind of racial exclusion that had made African Americans a people apart since before the nation's founding."[110] Moreover, in a Court-centered subtheme that

the authors develop near the end of the book, *Brown* helped to change the way Americans view the judiciary and their role in the political system. *Brown*'s transformation of the Equal Protection Clause was infectious in that it energized the Warren Court's other rulings that applied most provisions of the Bill of Rights to the states by way of the Fourteenth Amendment and found a new right to privacy within the Constitution.[11]

The interplay between the Fourteenth Amendment and the life of the nation has been, and continues to be, a fascinating story. Probably no nation on earth has a legal saga to equal it. Surely few people, if any, in 1868 when the amendment was ratified, or in 1873 when the *Slaughterhouse Cases* were decided, or in 1896 when *Plessy v. Ferguson* came down, or even on May 17, 1954, when *Brown* was announced, possessed the vision to foresee all that it would become. Thus, the irony of *Brown* and the Fourteenth Amendment: each reflects both the possibilities and the limitations of law in changing states of affairs partly or largely constructed and shored up by law.

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

COTTROL, ROBERT J., RAYMOND T. DIAMOND, AND LELAND B. WARE. ***Brown v. Board of Education*: Caste, Culture, and the Constitution** (Lawrence: University Press of Kansas, 2003). Pp. xi, 292. ISBN: 0-7006-1289-0 (paper).

KLARMAN, MICHAEL J. **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (New York: Oxford University Press, 2004). Pp. xii, 655. ISBN: 0-19-512903-2 (cloth).

LABBÉ, RONALD M., AND JONATHAN LURIE. **The *Slaughterhouse Cases*: Regulation, Reconstruction, and the Fourteenth Amendment** (Lawrence: University Press of Kansas, 2003). Pp. xiv, 295. ISBN: 0-7006-1290-4 (cloth).

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ENDNOTES

[1]5 U.S. (1 Cranch) 137 (1803).

[2]343 U.S. 579 (1952).

[3]384 U.S. 436 (1966).

[4]410 U.S. 113 (1973).

[5]*United States v. Nixon*, 418 U.S. 683 (1974).

[6]347 U.S. 483 (1954).

[7]I recall certain aspects of that day very well. I was 12 years old and near the end of sixth grade. On Mondays, because of extracurricular activities after school, I would walk the six blocks from the schoolhouse to my father's chambers in the Newton County Courthouse, an imposing Victorian structure dating from 1884 that stands on the north side of the square in Covington, Georgia. There I would usually do homework until I rode home with him around five o'clock. In the spring, there were always several retired citizens who whiled away the afternoons in high-back rocking chairs on the spittoon-equipped front porch of the courthouse. When I approached the building on the afternoon of May 17, their usually relaxed conversations were animated. Nearby several county officials stood together with looks of grave concern on their faces. I thought that perhaps a war had begun (and as events progressed, a "war" of sorts had indeed begun). It was only at the dinner table that I learned what had happened in Washington that morning. Six years later I completed high school in the same community in a public school system that remained as racially segregated as it had been on May 17, 1954.

[8]C. Peter Magrath, **Morrison R. Waite: The Triumph of Character** (1963) 313.

[9]60 U.S. (19 Howard) 393 (1857).

[10]*Id.* at 404.

[11]Act of April 9, 1866, sec. 1. 14 Stat. 27.

[12]*See* U.S. Constitution, Article I, Section 2, paragraph 3.

[13]Michael Kent Curtis, **Free Speech, "The People's Darling Privilege"** (2000) 362–63. Chief Justice Marshall's opinion in *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833), had affirmed the common understanding that the Bill of Rights had been adopted to restrain the national government, but not the states.

[14]83 U.S. (16 Wallace) 36 (1873).

[15]Ronald M. Labbé and Jonathan Lurie, **The *Slaughterhouse Cases*: Regulation, Reconstruction, and the Fourteenth Amendment** (2003) (hereafter cited as Labbé and Lurie).

[16]Loren P. Beth, "The *Slaughterhouse Cases* Revisited," 23 *Louisiana Law Review* 487 (1963). Labbé and Lurie, as well as Beth, adhere to the more modern spelling of "Slaughterhouse." In volume 16 of *Wallace's Reports*, the spelling in the heading is "Slaughter-House." However spelled, the *Slaughterhouse Cases* were so named because three different cases (two of which featured the same parties) were combined for a single decision: *The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-stock Landing and Slaughter-house Company*; *Paul Esteben, L. Ruch, J. P. Rouede, W. Maylie, S. Firmberg, B. Beaubay, William Fagan, J. D. Broderick, N. Seibel, M. Lannes, J. Gitzinger, J. P. Aycock, D. Verges, the Live-stock Dealers' and Butchers' Association of New Orleans, and Charles Cavaroc v. The State of Louisiana, ex rel S. Belden, Attorney-general*; *The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-stock Landing and Slaughter-house Company*. All three reached the U.S. Supreme Court on a writ of error to the Supreme Court of Louisiana.

[17]Of course, the same stipulations would advantage a butcher who could afford no facilities of his own.

[18]83 U.S. at 66–67.

[19]Labbé and Lurie, 245.

[20]The *Slaughterhouse Cases* had first been argued during the Court's 1871–1872 Term, but due to ill health, Justice Samuel Nelson missed the argument and conference discussion. After President Ulysses Grant named Ward Hunt to replace him, the Court heard re-argument in early 1873. It seems plausible, as the authors suggest, that without Nelson, the Bench had been evenly divided. Hunt then apparently cast the deciding vote to sustain the statute. *Id.*, 178–79. As chief justice of New York's Court of Appeals, Hunt had written an opinion sustaining the validity of a statute confining slaughtering to one area of New York City. *Metropolitan Board of Health v. Heister*, 37 N.Y. 661 (1868).

[21]83 U.S. at 67.

[22]*Id.*, 71–72.

[23]*Id.*, 70.

[24]75 U.S. (8 Wallace) 603 (1870).

[25]83 U.S. at 81.

[26]*Id.*

[27]*Id.*, 76, quoting from *Corfield v. Coryell*, 4 Washington's Circuit Court 371 (C.C.D.Pa. 1823).

[28]83 U.S. at 78.

[29]The slaughterhouse law was litigated in both the courts of Louisiana, which sustained the act, and in the U.S. circuit court, which invalidated it. The latter tribunal was staffed by recently appointed Justice Joseph Bradley and Circuit Judge William Woods. The circuit court, however, refused to grant relief because of a 1793 statute that barred federal courts from staying proceedings in a state court. Labbé and Lurie, 148. *Live Stock Dealers' and Butchers' Assn. v. Crescent City Live Stock Landing and Slaughterhouse Co.*, 15 Fed. Cas. 649 (C.C.La., 1870). With John Campbell as counsel, the circuit-court proceedings must have been one of the few times that a *former* Supreme Court Justice, a *sitting* Justice, and a *future* Justice were all involved in the same case.

[30]Labbé and Lurie, 9.

[31]*Id.*, 6.

[32]*Id.*, 102.

[33]*Id.*

[34]*Id.*, 2. The Tribe and Black statements appear in Laurence Tribe, "Pursuing the Pursuit of Happiness," *New York Review of Books* (September 24, 1998) 34.

[35]Labbé and Lurie, 3.

[36]*Id.*

[37]*Id.*, 4, n. 8, quoting William Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (1988) 4.

[38]But see *Saenz v. Roe*, 526 U.S. 489 (1999).

[39]*See* the Judiciary Act of 1891 (also called the Circuit Court of Appeals Act or the Evarts Act); Act of March 3, 1891; 26 Stat. 826.

[40]Michael A. Ross, **Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era** (2003) (hereafter cited as Ross).

[41]Charles Fairman, **Mr. Justice Miller and the Supreme Court, 1862–1890** (1939).

[42]Charles N. Gregory, **Samuel Freeman Miller** (1907) 55.

[43]Ross, xiv.

[44]*Id.*, xvi.

[45]*Id.*, xvii.

[46]*See* the discussion in the text, above, between endnote numbers 20 and 28.

[47]Ross, 201. Note that Ross prefers the hyphenated "Slaughter-House," following the usage in *Wallace's Reports*.

[48]Ross, 203.

[49]*Id.*, 242.

[50]Justice Oliver Wendell Holmes gave this perspective its most authoritative genesis in his dissent in *Lochner v. New York*, 198 U.S. 45 (1905), where the Court struck down a state's maximum hours statute for workers in bakeshops. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." *Id.* at 75 (Holmes, J., dissenting).

[51]Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (1997) 7.

[52]Henry J. Abraham, **Justices and Presidents** (3rd ed., 1992) 7.
[53]Ross, ch. 4 (65–96).
[54]*Id.*, 69–74.
[55]*Id.*, 74.
[56]David M. Silver, **Lincoln's Supreme Court** (1998, reissue of 1956 edition) 65, emphasis added.
[57]Ross, 77.
[58]President Rutherford B. Hayes named Judge William Woods of Georgia to the Court in 1880, but Woods had moved to the South only after the Civil War. An Ohioan who was with Union General William Tecumseh Sherman on his infamous "March to the Sea" in 1864, the first circuit judge for the Fifth Circuit obviously lacked southern credentials. To his credit, however, he earned respect and affection in legal circles across the South. *See generally* Thomas E. Baynes, "Yankee from Georgia," 1978 *Supreme Court Historical Society Yearbook* 31.
[59]Thanks to President Warren G. Harding and considerable lobbying by Taft himself, the twenty-seventh president was White's successor as Chief Justice. On Taft's efforts to secure the office he prized more highly than the presidency, see Alpheus Thomas Mason, **William Howard Taft: Chief Justice** (1964) 66–87.
[60]Rebecca S. Shoemaker, **The White Court: Justices, Rulings, and Legacy** (2004) (hereafter cited as Shoemaker). The author of this review essay contributed a volume to the Supreme Court Handbooks series: **The Waite Court: Justices, Rulings, and Legacy** (2003).
[61]Shoemaker, 167.
[62]*Id.*, xiii.
[63]*See* endnote 39.
[64]It would be midway in the Taft Court that the famous "Judges Bill" of 1925 went into effect, moving a sizeable part of the Court's docket into the discretionary column and thus allowing the Justices to engage cases almost entirely of *their* choosing. Act of February 13, 1925; 43 Stat. 936. Like the Supreme Court Building itself—which the Court did not occupy until 1935, after Taft's death—the 1925 act stands a monument to Taft's considerable labors on behalf of the federal judiciary.
[65]Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1928) 197–98. Heretofore, under section 25 of the Judiciary Act of 1789, appeal lay to the Supreme Court from the highest court of a state only where the latter had ruled *against* the federal constitutional claim.
[66]Shoemaker, 139–46, 184–87.
[67]*See Blyew v. United States*, 80 U.S. (13 Wallace) 581 (1872), sometimes called the Supreme Court's first civil-rights case. John R. Howard, **The Shifting Wind** (1999) 4.
[68]Civil-rights victories such as *Strauder v. West Virginia*, 100 U.S. 303 (1880), and *Ex parte Yarbrough*, 110 U.S. 651 (1884), were the exception. Far more typical were decisions rejecting the civil-rights claim, as evidenced by cases such as *United States v. Cruikshank*, 92 U.S. 542 (1876), and *Giles v. Harris*, 189 U.S. 475 (1903).
[69]*See generally* C. Vann Woodward, **The Strange Career of Jim Crow** (2nd rev. ed. 1966).
[70]219 U.S. 219 (1911).
[71]235 U.S. 133 (1914).
[72]238 U.S. 347 (1915).
[73]*Id.*, 365.
[74]Alexander M. Bickel and Benno C. Schmidt, Jr., **History of the Supreme Court of the United States, Volume IX: The Judiciary and Responsible Government, 1910–1921** (1984) 928.
[75]235 U.S. 151 (1914).
[76]163 U.S. 537 (1896).
[77]235 U.S. at 161.
[78]The first section of the 1890 Louisiana statute challenged in *Plessy* specified "that all railway companies carrying passengers in their coaches in this state, shall provide *equal but separate accommodations* for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to." 163 U.S. at 540. Emphasis added.
[79]Michael J. Klarman, **From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality** (2004) (hereafter cited as Klarman).
[80]*Id.*, 443.
[81]*Id.*, 4.
[82]William Safire attributes the phrase to a statement by Theodore Roosevelt in 1906. By the 1960s it had become "a slogan of sorts, as what had to be won in Vietnam." William Safire, **Safire's New Political Dictionary: The Definitive Guide to the New Language of Politics** (1993) 716.
[83]Klarman, 5.
[84]*Id.*, 23.
[85]339 U.S. 629 (1950). In this decision, the Vinson Court found a separate state-run law school for blacks in Texas to be a violation of the Equal Protection Clause. Intangible factors relating to legal education made it practically impossible for racially separate law schools to be equal.
[86]Klarman, 449.
[87]295 U.S. 45 (1935).
[88]321 U.S. 649 (1944).
[89]A variation on the white primary reappeared in *Terry v. Adams*, 345 U.S. 461 (1953), but the Court adamantly interred it as well.
[90]Klarman, 6.
[91]*Id.*, 454.

[92]"Rebuttal Argument on Behalf of Appellants Harry Briggs, Jr., et al., Monday, December 7, 1953," in Leon Friedman, ed., **Argument: The Oral Argument Before the Supreme Court in *Brown v. Board of Education of Topeka*, 1952–1955** (1969) 239.

[93]Klarman, 454.

[94]*Id.*, 455.

[95]92 U.S. 214, 248 (1876) (Hunt, J., dissenting).

[96]The extent of the opposition that developed in the wake of *Brown* was grossly underestimated. In retrospect, even with an allowance for the exuberance of victory, Thurgood Marshall's public comments on May 17, 1954 about the prospects for implementation of the Supreme Court's decision border on the fanciful. *See* Marshall's statements in the several news stories on *Brown* in the *New York Times*, May 18, 1954, at 14, 16.

[97]Klarman, 462.

[98]This information is based on a flier that the author received from the publisher in April 2004. For the current status of the series, including forthcoming titles, consult the website for the University Press of Kansas, http://www.kansaspress.ku.edu (last accessed 17 August 2004).

[99]For example, see Labbé and Lurie's **The *Slaughterhouse Cases***, reviewed above in this essay, and Louis Fisher, **Nazi Saboteurs on Trial: A Military Tribunal and American Law** (2003).

[100]Howard Ball, **The *Bakke* Case: Race, Education, and Affirmative Action** (2000); N. E. H. Hull and Peter Charles Hoffer, ***Roe v. Wade*: The Abortion Rights Controversy in American History** (2001).

[101]Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware, ***Brown v. Board of Education*: Caste, Culture, and the Constitution** (2003) (hereafter cited as Cottrol).

[102]*Brown v. Board of Education (II)*, 349 U.S. 294 (1955).

[103]Richard F. Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality** (1976).

[104]Cottrol, 174–76.

[105]*See* John D. Fassett, "Mr. Justice Reed and *Brown v. The Board of Education*," *Supreme Court Historical Society Yearbook* (1986) 48; Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** (1994) 563–76; Fassett, "A Plea for the Demise of a Stubborn Myth," in Clare Cushman and Melvin I. Urofsky, eds., **Black, White, and Brown** (2004). Fassett's "Plea" essay was published after the Cottrol, Diamond, and Ware book. While his **New Deal Justice** is listed in the **Brown** bibliography (Cottrol, 266), there is no listing in the bibliography of Fassett's 1986 article.

[106]Cottrol, 4–5.

[107]*Id.*, 7.

[108]*Id.*, 8.

[109]*Id.*, 234.

[110]*Id.*, 241.

[111]*Duncan v. Louisiana*, 391 U.S. 145 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* Cottrol, 216.

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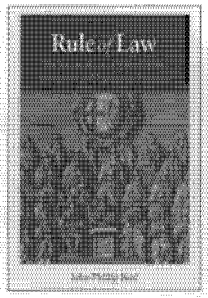

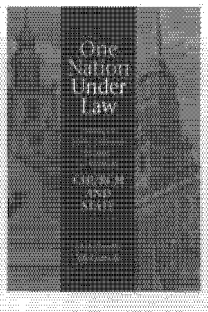

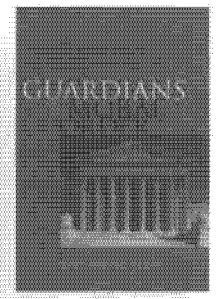

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