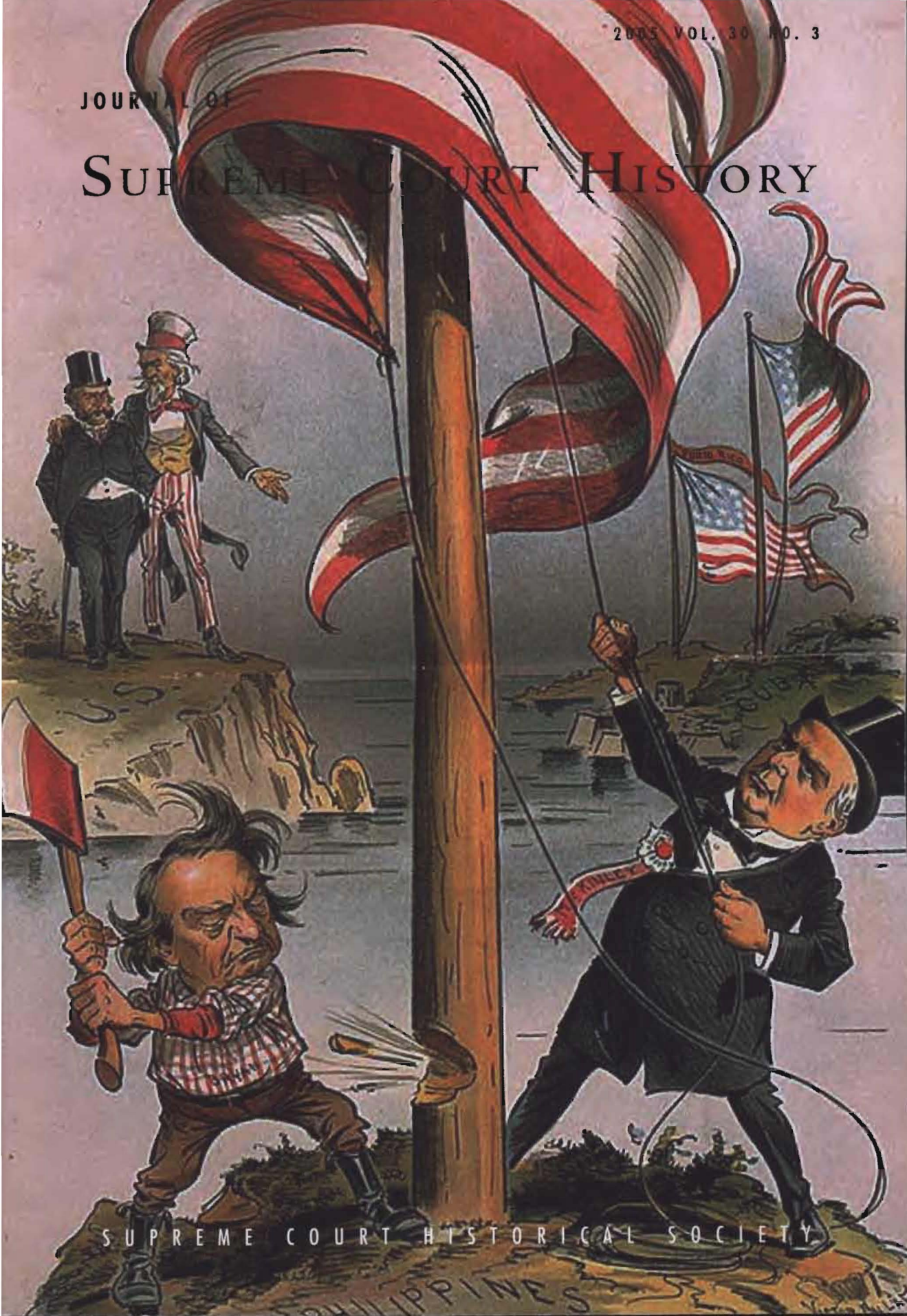


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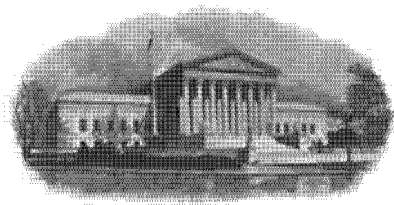
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The Society, a private non-profit organization, is dedicated to the collection and preservation of the history of the Supreme Court of the United States. Incorporated in the District of Columbia in 1974, it was founded by Chief Justice Warren E. Burger, 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 judicial 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.org, 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 exhibitions 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.

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JOURNAL OF

SUPREME COURT HISTORY

2005, vol. 30, no. 3

INTRODUCTION

Melvin I. Urofsky

v

ARTICLES

The Public Response to Controversial Supreme Court Decisions:
The Insular Cases

Bartholomew H. Sparrow

197

Courtroom to Classroom: Justice Harlan's Lectures at
George Washington University Law School

Andrew Novak

211

Terrorism and Habeas Corpus: A Jurisdictional Escape

Morad Fakhimi

226

Biased Justice: James C. McReynolds of the Supreme Court
of the United States

Albert Lawrence

244

The *Graver Tank* Litigation in the Supreme Court

Timothy B. Dyk

271

The Judicial Bookshelf

D. Grier Stephenson, Jr.

284

CONTRIBUTORS

303

PHOTO CREDITS

304

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Introduction

Melvin I. Urofsky

The articles in this issue cover a wide variety of topics, but no more so than any of the recent Terms of the Supreme Court. Matters of foreign policy, habeas corpus, patent law, and the like were on the Court's docket in the October 2004 Term, and no doubt some future editor of this *Journal* will be treating those cases.

The first article requires some truth in advertising on my part. A book that I am editing contains forty essays on the public response to controversial Supreme Court decisions, starting with *M'Culloch v. Maryland* (1819) and ending with *McConnell v. Federal Election Commission* (2003). This book aims to show the Court's decisions in a wider perspective than that of the law itself. These decisions do have an impact, even if that impact is not always as dramatic as, for example, the striking down of segregation in *Brown v. Board of Education* (1954). The decisions of the Court affect public policy and the public's perception of that policy. They make people think about—and often rethink—assumptions they may have held on particular issues. At the turn of the last century, as the United States became

a world power and joined other Western nations in holding overseas territories as possessions, a very important public policy question was how we would treat those territories and their peoples under the Constitution. This was not just a matter for lawyers: it would affect how Congress passed laws for the governance of those territories and how the President would direct their administration. The Supreme Court played a particularly important role in this debate, because in the end the Insular Cases did determine just how far the Constitution would follow the flag. People cared about this issue. We are pleased to be able to present this piece on the subject by Bartholomew Sparrow of the University of Texas.

There have been only a few law professors on the High Court. One thinks particularly of Joseph Story and Felix Frankfurter. But many Justices right down to the present have done some teaching as part of their extrajudicial activities. For some, it is restricted to the summers when the Court is not in session, but in older days Justices often taught during the time when the Court sat. One of

the most famous of these law professors was the first Justice John Marshall Harlan. As we know from Linda Przybyszewski's wonderful biography, this teaching meant a great deal to Harlan. Andrew Novak's article gives us a far better idea of what Harlan taught and how he viewed that teaching.

The war on terror has raised a whole host of questions, some of which have already confronted the Court and many others, that will eventually have to be resolved by the judiciary. But the Court rarely writes on a blank slate. By its nature, the Court looks to related precedent, to see how prior Courts have dealt, if not with the same issue, then with related matters. In Morad Fakhimi's piece, we get a careful exploration of the judiciary's earlier experiences in this area. While certainly not designed as a proposal for the present, Fakhimi's article reminds us that in terms of the Constitution, there is rarely anything totally new under the sun, and we need to understand how constitutional issues have played out in other periods of our history.

Fortunately for the Court and its members, interpersonal relations among the Justices have, for the most part, been collegial. A few years ago, in addressing a group of high school students, Justice Thomas noted that the debates within the Court are often heated—and rightly so, because important principles are involved. But these debates, no matter how intense, are carried out in an air of civility, because the Justices know that there will be other issues facing them on which they will have to work as

colleagues. That is why, he said, a dissent is always "respectfully submitted." There have, of course, been some famous feuds on the Court, such as those between Felix Frankfurter and William O. Douglas, but there have usually not been nasty people with deeply ingrained prejudices on the Bench. The exception, of course, is James Clark McReynolds, appointed to the Bench by Woodrow Wilson, supposedly to get him out of the Cabinet. Albert Lawrence provides us with a new, less-than-flattering portrait of McReynolds, who served on the Court from 1914 to 1941.

Patent law is an area that, I must admit, has always confounded me, despite the fact that when I was in high school I entertained hopes of becoming an engineer. Like admiralty, it is one of the most technical aspects of the law, requiring of its practitioners not only a keen legal mind but also an understanding of science and engineering far beyond that of the ordinary person. The Constitution provides for patent and copyright, and so it is not surprising that such cases come before the Supreme Court. We are fortunate that in Judge Timothy B. Dyk we have someone who is able to express the intricacies of patent law—and how the Justices interpreted it—in a manner which we can understand and appreciate.

Finally, but certainly not least, Grier Stephenson's "Judicial Bookshelf" gives us an idea of some of the many books that have come out recently on the Court and its members.

As always, this issue of the *Journal* presents a feast. I hope you will all enjoy it.

The Public Response to Controversial Supreme Court Decisions: The Insular Cases

BARTHOLOMEW H. SPARROW

In the Insular Cases, the Supreme Court established a new category of areas and persons coming under the sovereignty of the United States. Added to (1) the member states of the Union and (2) the existing territories (and states to be), was (3) territory "belonging to" the United States, but not a part of it. Justice Edward White proposed this doctrine—that territories were of two types, "incorporated" territories, those fit to be states, and non-incorporated territories, to be the property of the United States—in his concurring opinion in *Downes v. Bidwell*.¹ Congress could govern these latter territories as it wished, subject to "fundamental" protections under the Constitution, those protecting individual liberties rather than those granting political participation.

Only a handful of the some thirty-five Insular Cases decided between 1901 and 1922 provoked the lion's share of popular and scholarly reaction, and it is to those that we turn.

In *De Lima v. Bidwell*² the Supreme Court held that Puerto Rico was part of the United States for the purpose of the Uniformity Clause. The military, under orders from the White House, could not collect duties on imports from Puerto Rico since Puerto Rico had been annexed to the United States according to the terms of the 1899 peace treaty with Spain. In *Downes v. Bidwell*, however, which was decided the same time, the Court

found that Congress could tax trade between Puerto Rico and the states. Puerto Rico was thus *not* a part of the United States for tariff purposes—contrary to the Uniformity Clause. Chief Justice Melville Fuller and Justice John Marshall Harlan dissented vigorously on the grounds that once new territory was part of the United States, the Constitution applied in full.

In *Dooley v. United States*,³ decided six months later, a majority of the Court held that Congress could tax goods shipped from the states to Puerto Rico. Neither the Uniformity Clause nor the Constitution's prohibition



In the early twentieth century, the Supreme Court heard a series of cases debating whether Puerto Rico, which had just been annexed from Spain, was part of the United States for tariff purposes. Above is a residential street in San Juan.

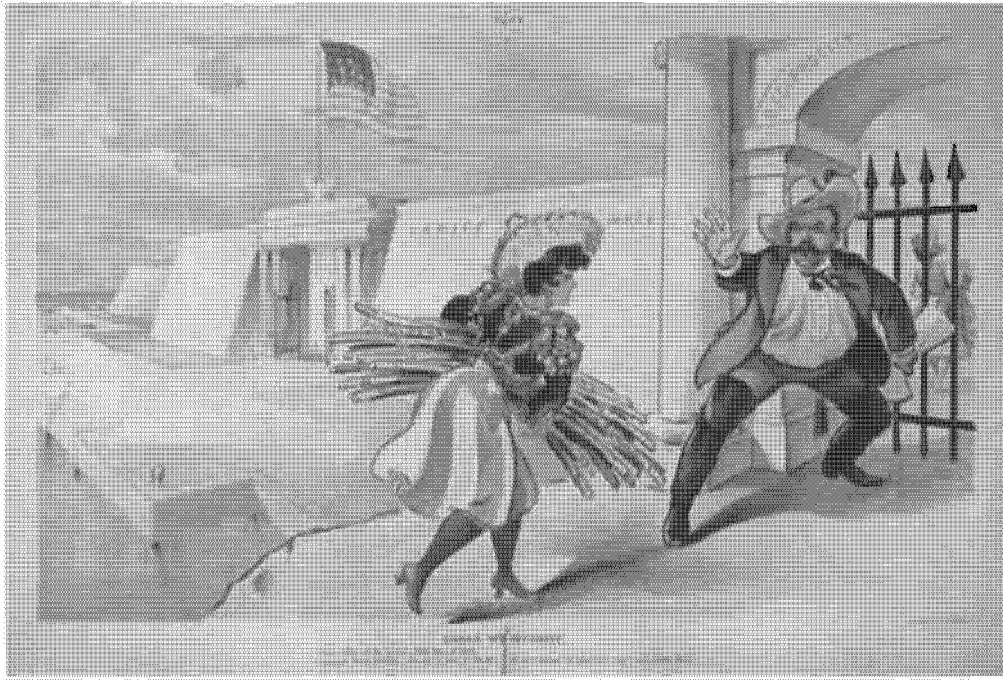
of taxes on exports applied, once Congress acted under its authority under the Territory Clause. And in *Fourteen Diamond Rings*,⁴ the Supreme Court ruled that Congress could not tax trade between the Philippines and the states, since the Philippines were also annexed by the terms of the 1899 Treaty of Paris. All four cases of 1901 were five-to-four decisions.

In *Hawaii v. Mankichi*,⁵ the Court ruled that Hawaiian residents were not entitled to jury trial, despite the fact that the Newlands Resolution had annexed Hawaii shortly after hostilities had ended with Spain. And in *Dorr v. United States*⁶ the Court ruled that Philippine residents, too, could be denied jury trial, despite the annexation and the fact that the Islands had an organized government (as of July 1, 1902); the Philippines were still "unincorporated." Alaska, though, *was* incorporated, despite Alaska's absence of a territorial government and minimal population (*Rasmussen v. United States*⁷). Finally, the Supreme Court ruled unanimously in *Balzac v. Porto Rico*⁸ that

Puerto Ricans, though U.S. citizens under the 1917 Jones Act and with a fully organized territorial government, were not guaranteed jury trial.

The U.S. government had always implicitly had plenary power over its territories by virtue of its authority to hold territories as territories and to delay their admission as states virtually indefinitely, to dispose of the land within the territories, and to set territorial boundaries. With the Insular Cases and with the United States' acquisition of Puerto Rico, the Philippines, and Guam after the Spanish-American War—each densely populated by non-white inhabitants—however, the Court made Congress's power explicit. The U.S. Constitution did not operate *ex proprio vigore*—that is, by its own force.

The Insular Cases provoked intense reactions. The Supreme Court reached its decisions issued in the Insular Cases of 1901 "after one of the most spirited discussions ever held within the sacred circle of the Supreme Court



This cartoon shows a U.S. sugar grower barring Cuba's sugar trade with the United States, an allusion to Puerto Rico's trade benefits through annexation.

bench," the Associated Press reported.⁹ And people gathered to hear the rulings.

No such crowd either as to numbers or distinguished personnel has been seen in the Supreme Court room as that assembled there today. The hour for the Court to meet is noon, but long before that time arrived the little elliptical chamber was jammed with spectators representing every phase of life at the national capital, and long lines of eager people stretched in both directions from the doors down the gloomy corridors of the great Capitol Building. The colored bailiffs at the door had all they could do to hold the anxious throng on the outside in check, and thus protect the solemn dignity of the august tribunal from being rudely shocked. The bare rumor that the court would render its decision in the insular test suits was sufficient to create an interest among all sorts and conditions of

people in Washington that sent them to the Capitol in a frenzy of excitement. They realized that no such momentous issues affecting the growth and progress of the nation are likely again to come before the tribunal of last resort for arbitrament, and every man who was fortunate enough to gain access to the chamber during the delivery of the opinions appreciated that he was witnessing one of the most tremendous events in the nation's life.¹⁰

And once the Supreme Court announced its decisions, "Nothing else was talked of at the national capital to-day but the triumph of the government."¹¹

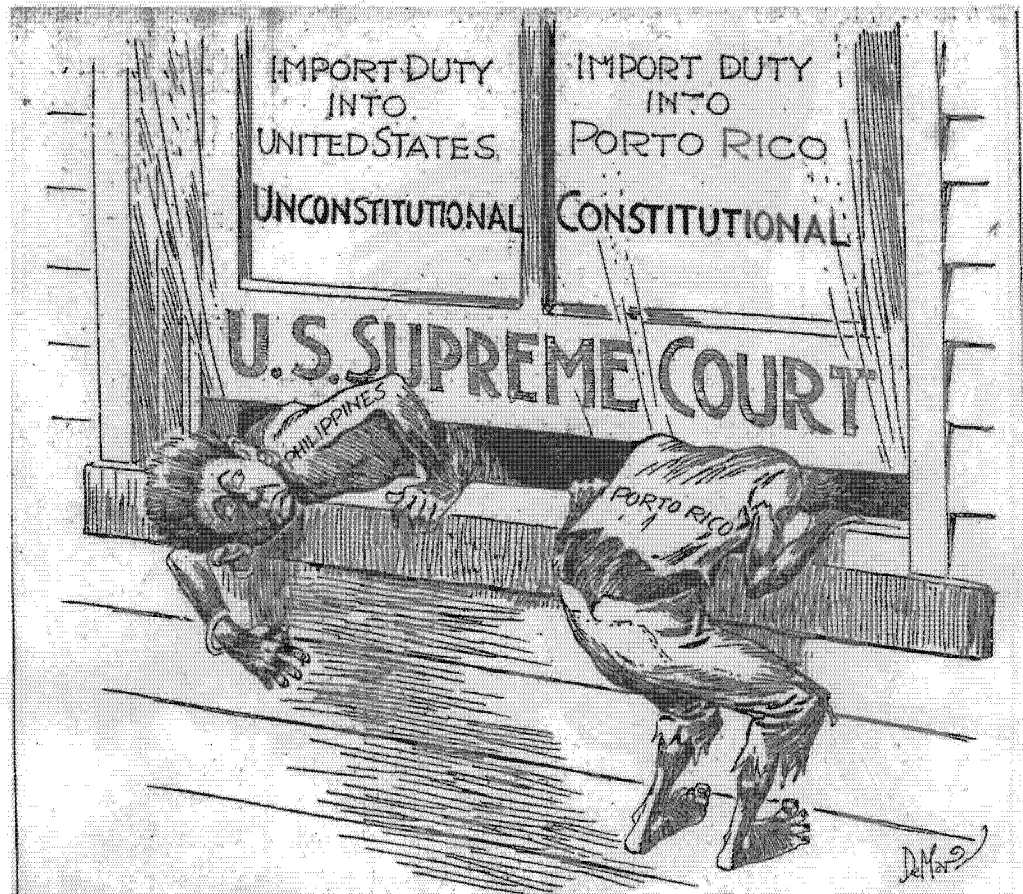
The "President and the Cabinet officers were elated over their victory, although they have never doubted that the decision would be in favor of the government."¹² As former Attorney General John Griggs (who had argued the cases for the U.S. government) stated, "It was a complete victory for the



Poor old Constitution—"Phew! 'It's a merry time I'll have now, following the flag!'"

nature of a military necessity and valid on that account; that from and after the ratification of the treaty of peace it was no longer foreign but domestic territory within the meaning of our tariff laws according to which tariff duties can be collected only on importations from foreign countries, and that consequently the duties collected on imports from

Porto Rico after the ratification of the treaty of peace and prior to April 12, 1900, when Congress first legislated, were illegally collected, however, not because Congress was without constitutional power to impose such duties on importations from Porto Rico, but because during that period Congress had not so legislated.



"Which is in and which is out?"

The third proposition decided by the court and the one of supreme importance was that Porto Rico being a territory of the United States is not a part of the United States, but only territory belonging to the United States, and that it is, therefore, within the constitutional power of Congress to so legislate with respect to it including the imposition of tariff duties as it may see fit, and that Congress having so legislated on April 12, 1900, the provisions of that law are valid and to be upheld and enforced; in other words, the effect of the decision is that the Constitution does not follow the flag and that Congress has plenary power under the constitution to govern our

insular acquisitions according to their respective necessities. . . .

In the House of Representatives, Charles Grosvenor of Ohio, "the recognized spokesman of the administration" as the *New York Tribune* described him, stated that "the insular test cases sustained all of the contentions and arguments of the Republican members of the House and Senate concerning all questions which were discussed and voted upon in Congress. Now there is nothing to do but to go ahead and legislate."¹⁵ Joseph Cannon of Illinois, the chairman of the Committee on Appropriations, remarked, too: "It appears to me that the court did just the proper thing. If Congress has not the right to legislate for the territory acquired by the

United States, then the United States has no right to acquire the territory."¹⁶

The architect of the United States' insular policy, Secretary of War Elihu Root, agreed: "Unquestionably the decision of the court sustains the contentions, theories and the policy adopted by the administration in conducting the affairs of the Spanish islands since the ratification of the Paris Treaty. The upholding of the Foraker act signifies that Congress had the power to legislate without being limited by the provisional contingencies of the constitution."¹⁷

William Randolph Hearst's *San Francisco Examiner*, though, saw the decisions as restrictive of presidential power, preventing "a President assuming the powers of a dictator":

In ordering the return of the duties collected on Porto Rican products before the passage of the Foraker act, the court reduced the President once and for all to his proper position as the head of a republic governed by written laws. By putting Porto Rico and the Philippines on the same footing with other territories, the decision deprived the Porto Ricans and the Filipinos of the feeling that they were discriminated against and treated as inferior races. At the same time, by conceding to Congress large discretionary powers in dealing with the territories, subject to the constitutional guarantees of civil liberty, the court made it possible to legislate for each new territory in accordance with its special needs, and so smoothed the way for expansion. . . .

On November, 16, 1898, long before the treaty of Paris had been ratified, the editor of the *Examiner* telegraphed from San Francisco to the *New York Journal*:

"EXPANSION WITHOUT IMPERIALISM has been the policy and the practice of the United States since

the original thirteen states first set up housekeeping for themselves. . . .

We must make our acquired territories what we have made of our acquired territories heretofore. We have met our race problems previously and some have proved difficult of solution, but not beyond the skill of the American mind to conquer. What we must avoid is ANY ATTEMPT AT IMPERIALISM. We want NO FOREIGN COLONIES to be plundered by a President's favorite; to be ruled by statesmen's incompetent sons. We want our new possessions to be TAUGHT TO GOVERN THEMSELVES. That is a continuation of the American policy which has won its way from Manhattan to the Klondike."

That was printed before a shot was fired in the Philippines and before we had incurred any of the troubles we have suffered from the attempt to apply an imperialistic policy to our new possessions. . . .

But the decision of the Supreme Court has cleared the last snags out of the road of expansion without imperialism.¹⁸

Still others saw the Supreme Court's decisions as an endorsement of imperialism. George S. Boutwell, a former congressman, U.S. Treasury Secretary and U.S. senator, as well as the first chairman of the Anti-Imperialist League (1898-1905), remarked: "The opinion of the majority seems to justify the conclusion that *the power of acquiring territories is an indefinite power*. If this conclusion shall be justified by further reading of the opinion, there will then remain no legal obstacle to the transformation of this republic into an empire, with unlimited powers to acquire and with unlimited power to rule."¹⁹

The *New York Herald*, for its part, consistently opposed the Administration's policies:

In the most important of the insular cases decided yesterday and the most momentous opinion rendered since the foundation of the government the United States Supreme Court by a bare majority of one holds that the constitution is supreme only in the States, and that a million square miles, or one-fourth of the national domain, and ten million people are subject to no law but the will of Congress. . . .

It can hardly be said that either the Court or the country is to be congratulated on a decision which four of its members say 'overthrows the basis of our constitutional law and asserts that the States, and not the people, created the government.'²⁰

The next day the *Herald* wrote of the "lack of unanimity," "vulnerability," and "inherent weakness" of the Supreme Court's decision:

No decision of more far reaching consequence has ever been rendered by the United States Supreme Court than that in the *Downes* case, and no great constitutional opinion of that tribunal has rested on a basis more insecure. It is not only opposed by the largest minority of which the Court is capable, who declare through the Chief Justice that it 'overthrows the basis of our constitutional law,' but even the majority, while coinciding in the conclusion, could not agree in the reasoning by which it was reached. In view of all these considerations and the fact that the majority that rendered the opinion may be turned into a minority by the accession of the next new member to the Bench, how long can the judgment withstand the onslaught which its own weakness will invite in the future?²¹

Denver Post wrote, too, that the "epoch making" *Downes* decision "at one fell swoop" brought the United States "into the ownership of colonies and putting us into the rank of the land-grabbing nations of Europe. We are now following the footsteps of England, not in planting colonies as it did in Australia, but in conquering and ruling unwilling alien races at it did in India and incidentally exploiting them." The *Post* concluded:

No pronouncement of the supreme court since Chief Justice Taney's decision in the *Dred Scott* case is likely to provoke more widespread discussion, and none which has been rendered since the days of Marshall is likely to have a tithe of its wide reaching consequences. But colonies are now part of the possessions of the United States; they must go through a period of probation more or less, if not indefinitely, prolonged before they rise to the dignity of statehood or even reach the equivocal position of territories. . . . Therefore the question no longer is whether or not the constitution follows the flag, whether we shall have colonies, but what methods congress shall adopt to government them—only this and nothing more.²²

Probably the most famous response was Mr. Dooley's comment: "No matter whether th' constitution follows th' flag or not, th' supreme court follows th' illiction returns."²³ McKinley, after all, had been reelected in a landslide against William Jennings Bryan in November 1900, just months before the Supreme Court issued its decisions.

Subsequent public responses were just as divided. Eugene Stevenson, the outgoing president of the New Jersey Bar Association, endorsed Justice Brown's position.

"The Constitution of the United States . . . expresses the will and is maintained by the force of the inhabitants of the forty-five States of the Union," Stevenson argued, and "it neither expresses the will nor is it maintained

by the force of the inhabitants of the District of Columbia or of the territories of New Mexico and Arizona, or of Alaska, Porto Rico, the Sandwich Islands or the Philippine Islands." Stevenson held that "all the territories of the United States, including the District of Columbia, occupy a position of absolute *political servitude* to the inhabitants of the forty-five States who compose the great body politic and who of themselves have the power to enact and re-enact and alter and amend from time to time the supreme law of the land which governs so much of the land as the lawgiver sees fit to include within the operation of his law."²⁴

Stevenson warned:

If the minority of these learned Justices are right and no distinction can be drawn between Porto Rico on the one hand and the Philippine Islands and possible slices of China and Africa on the other, this would be the result: The treaty-making power composed of the President and Senate, could secretly effect the addition of fifty millions of Chinamen to the citizenship of the United States, all of whom would become voters upon establishing a residence in any State.²⁵

Judge L. S. Rowe, though, a later president of the American Academy of Political and Social Science, favored Justice White's argument.

His views give evidence of a desire to formulate a principle at once simple and readily intelligible. Whether we agree or disagree with his conclusions they furnish a clear and definite rule by which the political organs of the government may guide their conduct in dealing with newly acquired territory. The principle of interpretation as laid down gives to them complete power over such territory until, by express legislative enactment or by acquiescence in a rule contained in a treaty of cession, such acquired ter-

ritory is made a part of the United States. Until such action is taken by Congress, the territory remains subject to the jurisdiction of the United States, but does not become a part thereof, and the only limitations upon the power of Congress are those prohibitions of the Constitution which go to the very root of the power of Congress."²⁶

But Charles E. Littlefield, a former congressman, was less sanguine. "The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without parallel in our judicial history," Littlefield wrote in the *Harvard Law Review*.²⁷ The political scientist John W. Burgess was similarly critical. "The judgment in the Downes case is . . . nothing but an arbitrary bit of patchwork," he wrote. "Its purpose is to satisfy a certain demand of fancied political expediency in the work of imperial expansion. It is based upon the narrowest possible view of that expediency."²⁸

Nor did the cases settle matters, as several editors pointed out. "The decision . . . will probably emphasize and intensify rather than settled the political issues arising from the acquisition of our new possessions," wrote the *St. Louis Post-Dispatch*.²⁹ The *New York Herald*, too, found that "Amid the conflict and confusion of so many opinions it is not easy to define the limitations or the scope of what the Court has decided. But it is plain that vital issues are still unsettled and left to future discussion and determination."³⁰ And the *Philadelphia Record* cautioned: "The self-congratulations of the Imperialists" over the Court's decisions are "rather premature. What is clear is that a mutilated Constitution does follow the flag until Congress shall have determined to the contrary."³¹

On December 2, 1901, the Court issued its decisions in the two delayed cases, *Fourteen Diamond Rings v. United States*, and *Dooley v.*

by the force of the inhabitants of the District of Columbia or of the territories of New Mexico and Arizona, or of Alaska, Porto Rico, the Sandwich Islands or the Philippine Islands." Stevenson held that "all the territories of the United States, including the District of Columbia, occupy a position of absolute *political servitude* to the inhabitants of the forty-five States who compose the great body politic and who of themselves have the power to enact and re-enact and alter and amend from time to time the supreme law of the land which governs so much of the land as the lawgiver sees fit to include within the operation of his law."²⁴

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United States. "Politically, and in respect to its broad measures of policy, the Executive Department of the Government is sustained by the decision of the court," the *New York Times* wrote. "It is not sustained in its contention, and it was not sustained in that contention in the Porto Rico cases, that it had power to levy and collect duties under military administration without the legislative authority of Congress. It made no difference that our occupation of Porto Rico was unresisted, while a great insurrection made our occupation of the Philippines costly and troublesome. For the purposes of this decision, cession and possession are held to be identical." The *Times* pointed out, too, "The reasoning and decision are identical with those of the De Lima case . . . but it is plainly intimated by the Court that the principle of the Downes cases must control so soon as Congress authorizes the collection of duties on Philippine merchandise." At the same time, the *Dooley* decision "again confirms the constitutionality of the Foraker act and lays down once more the principle that our new territorial possessions are not a part of the United States within the revenue clauses of the Constitution. The judicial branch of the Government has in all the insular cases sustained the policy of the Executive branch."³²

The *Chicago Record-Herald* of December 3, 1901, commented more pointedly on the cases: "To-day Justice Brown was again the pivot in still another most important case—one of greater importance, so far as the future is concerned, than the Philippine case. This was the *Dooley* case, in which the constitutionality of the Foraker act was attacked, not upon the ground that Porto Rico was 'a part of the United States,' but on the ground that the tax levied at San Juan on goods going from the United States into Porto Rico was in violation of that clause of the Constitution declaring that 'no tax or duty shall be levied on articles exported from any state.' The paper added: "But here Justice Brown joins forces with Justices Gray, Shiras, White and McKenna, whom he could not agree with in the Philippine case, and

forces the chief justice and his three colleagues to become again the dissenting minority. By another vote of 5 to 4 the court holds that such a tax is not an export tax and is therefore constitutional."

Chief Justice Fuller, his three colleagues, and Justice Brown "made short work" of the point that the status of the United States in the Philippines was different from that in Puerto Rico "because in the former an insurrection was still going on," the *Record-Herald* reported. The Court's decisions at once meant "a government defeat" in the Philippine tariff case and "a decided victory for the McKINLEY administration" in *Dooley*, thanks to the "acrobatic Justice BROWN."³³

Rep. Grosvenor, though, believed that the Court's rulings in the *Fourteen Diamond Rings* and *Dooley* cases resolved matters:

The decisions, taken together and added to the decisions of last spring, fully sustain all the points insisted upon by the Ways and Means Committee of the House of Representatives, and which became the position of the Republicans in Congress and the Administration. The net result of the whole business is that by the treaty of Paris we acquired the islands without terms and with no stipulations controlling this Government in its relation to the new possessions. That while the treaty terminated the sovereignty of Spain and made the territory the property of the United States, yet it placed no limitations upon the power of Congress to legislate on the new territory as it might deem wise and for the best interest of the islands. . . . The Supreme Court, after these great contests have ended, placed the court where Webster and Burton and Lincoln and the Republican platform of 1860 placed it.³⁴

Senator John Spooner, author of the Philippine resolution and a Senate leader,

commented that the two decisions "certainly establish the proposition that Congress may levy a tariff for the benefit and support of the Philippine government upon articles going from the United States to the Philippines and coming from the Philippines to the United States. The decisions surely clear the way for intelligent action by Congress in devising a system of taxation which will provide for the support of the Philippine government, its schools, etc."³⁵

The *Philadelphia Record*, though—and the *Record* had a daily circulation of over 180,000 newspapers in the nation's third largest city at the time—despaired of the Court's rulings: the "learned Justices of the Court . . . do not agree among themselves, and the people of the United States, while bowing to the determination of the Court, cannot be expected to understand the why and wherefore."³⁶

With both cases decided by "a bare majority of one" and with the bitter differences among politicians and the public over the United States' island territories, the outcome of any future Insular Cases was thrown into doubt when Justice Horace Gray announced his retirement. President Roosevelt wrote his friend, Sen. Henry Cabot Lodge, about the opening on the Bench:

The majority of the present Court, who have . . . upheld the policies of President McKinley and the Republican party in Congress, have rendered a great service to mankind and to this nation. The minority—a minority so large as to lack but one vote of being a majority—have stood for such reactionary folly as would have hampered well-nigh hopelessly this people in doing efficient and honorable work for the national welfare, and for the welfare of the islands themselves, in Porto Rico and the Philippines. No doubt they have possessed excellent motives and without doubt they are

men of excellent personal character; but this no more excuses them than the same conditions excused the various upright and honorable men who took part in the wicked folly of secession in 1860 and 1861.

Now I should like to know that Judge Holmes was in entire sympathy with our views, that is with our views and mine and Judge Gray's. . . . I should hold myself as guilty of an irreparable wrong to the nation if I should put in his place any man who was not absolutely sane and sound on the great national policies for which we stand in public life.³⁷

Lodge promptly reassured the President that Holmes was safe on expansion and a good Republican. Then, in early 1903, Roosevelt appointed William Day in the place of Justice Shiras, another appointment he thought to be sound on these issues.

Just a few months later, Court issued its decision in *Hawaii v. Mankichi*. "The Constitution was not extended over Hawaii by the mere act of annexation," the *Philadelphia Inquirer* explained, "nor were local laws by that act suspended or abolished, or the Hawaiians would have been left without any kind of government."

But what was the effect of the provision embodied in the Newlands resolution by which Hawaiian laws not contrary to the Constitution shall remain in force? Did that involve the elimination of all laws that were contrary to the Constitution? This is really the only question with which the court dealt, and it answered it in the negative upon the ground that it cannot reasonably be assumed that Congress intended a construction that would have been attended by so much inconvenience. The legal logic of the conclusion is open to attack, but it accords with good common sense. . . .³⁸

The *New York World* on 5 June 1903 reacted more critically:

By the usual vote of five to four the Supreme Court...has decided that the Constitution did not follow the flag to Hawaii, but waited to be shipped there by Congress along with the baggage of the territorial government. Again it is affirmed that the creature is greater than the creator... It is as if a Council of Ministers appointed by the Czar of Russia should annex a territory and then decide whether or not the Czar's authority should have any standing in it.

We owe all possible respect to the Supreme Court, but when the Supreme Court makes a decision by a majority of one, with the Chief-Justice and some of his ablest associates in the minority, it is permissible to doubt whether the judgment is the final voice of inspired wisdom....

The minority dissenting from this decision is composed of Chief-Justice Fuller and Justices Harlan, Brewer and Peckham—beyond question four of the strongest justices on the bench. Of the majority—Justices Brown, White, McKenna, Holmes and Day—it is said that Justice McKenna is certainly not the strongest member of the court, that Justice Day was Secretary of State at the time the imperialist policy was adopted, and that he and Justice Holmes are the newest recruits to the bench.³⁹

A year later, the Supreme Court issued its decision in *Dorr v. United States*. According to the *Philadelphia Inquirer* of June 2, 1904, the Supreme Court:

decided that the Constitution does not of its own force penetrate into any country covered by the American

flag. This is not a new doctrine. It was enunciated three years ago in the Philippine cases, where the tariff was solely in contention.... The doctrine that the Constitution is not for the States, but for all of the Federal territory, was originated by [John C.] Calhoun a little over fifty years ago,...[who] invented the theory in order to claim for slavery all of the public domain, and...the Supreme Court in the Dred Scott decision held that he was right.... That decision has been overturned not only by the courts, but by the trend of events. Ordinarily, we think that trial by jury is a right, and for most of us it is, but it is not a natural right, but only a guarantee given to those who live in the various States or specifically granted to inhabitants of some of the Territories. The Supreme Court has decided in accordance with the law and the facts of the case. Trial by jury is a boon granted by legislation, and not inherent in the flag.⁴⁰

The *Buffalo Evening News and Telegraph*—and Buffalo was the eighth largest city in the United States at the time—also supported the majority opinion:

The method of trial by jury, as established in England and America, is founded in common sense after long experience of ways of distributing justice. One of the conclusions formed after an experience of ages in that the system cannot be worked among the half-civilized races. The Supreme Court of the United States has just held that the jury system does not attach to our control of the Philippines until Congress establishes it by statute. That is so clearly the common sense view that one is constrained to wonder how there

could be a contrary opinion in the Court.

On the legal side of the prevailing opinion the Court shows a disposition to reach solid ground in the provisions of the Constitution that the Congress has power to make rules and regulations for the territory of the United States without limit except within the ordinary guarantees of life, liberty and property secured by that instrument. The doctrine that the Constitution follows the flag is perfectly true, but only in the limited sense that Congress has power over territories as soon as the flag is raised in them permanently. The Supreme Court is slowly settling down to bedrock on territorial questions.⁴¹

The *New York Herald* on the same day saw otherwise. "NO TRIAL BY JURY IN THE PHILIPPINES," read its news headline, with successively smaller headlines running beneath: "Supreme Court Holds That Right Was Withheld by Congress on Account of Incapacity of the People"; "OPINION CALLED DANGEROUS"; and "Justice Harlan Says It Is an Amendment to the Constitution 'by Judicial Construction.'" As the *Herald* commented in its editorial:

The constitutional doctrine affirmed by a bare majority of the court in this and the preceding insular cases is that the constitution does not apply to the nation's outlying possessions unless and until Congress expressly so declares. Of course authority to make such declaration carries authority to withhold it. This puts Congress above the constitution throughout a large part of the national domain. It concedes to that body supreme power to govern at will not only the present insular possessions but any that may be hereafter acquired. Congress under this ruling may, for example, abolish

the jury system, as . . . in the Hawaiian case, and nullify all the other guarantees of personal rights and liberty. It may set up despotism in the administration of justice and even in the government itself.⁴²

"The plain lesson" of *Dorr*, David K. Watson, a former Ohio congressman, wrote in the *American Law Review*, "is that the Constitution applies to ceded territory which has been incorporated into the United States, but it does not apply to territory which has been annexed but not incorporated into the United States."⁴³ In *Rasmussen v. United States*, Watson added, the issue "came before the Court for a last time."⁴⁴

The *Rasmussen* decision attracted almost no public response, though, and neither did the last of the Insular Cases, *Balzac v. Porto Rico*. But as the noted international lawyer Frederic Coudert wrote in 1926—and it was Coudert, who with his associates in Coudert Brothers, had argued for the plaintiffs in *De Lima*, *Downes*, and *Hawaii v. Mankichi*—*Rasmussen* established that Alaska was incorporated, even though it had no organized territorial government; Alaskan citizens were therefore guaranteed jury trial. "It was not, however, until 1922, in *Balzac v. Porto Rico*," Coudert wrote, "that an opinion by a unanimous court unequivocally adopted the incorporation doctrine as part of our constitutional law."⁴⁵

Although the Insular Cases were highly controversial at the turn of the twentieth century—every bit as controversial as the *Dred Scott* decision to some contemporary observers—interest in the cases faded away, except among Puerto Ricans. Hence the absence for some time of the Insular Cases from almost all constitutional law casebooks. And if the *Insular Cases* have attracted notice from biographers of Justice White, Justice Harlan, and Chief Justice Fuller, and from a handful of legal historians, few others have paid notice. Fortunately, recent scholarship by Sanford

Levinson, Efrén Rivera Ramos, T. Alexander Aleinikoff, Gerald Neuman, Rogers Smith, Sarah Cleveland, E. Robert Statham, and the contributors to Christina Duffy Burnett and Burke Marshall's edited volume, **Domestic in a Foreign Sense** (2001),⁴⁶ have helped to put the *Insular Cases* back into the legal canon.

ENDNOTES

- ¹*Downes v. Bidwell*, 182 U.S. 244 (1901).
- ²*De Lima v. Bidwell*, 182 U.S. 1 (1901).
- ³*Dooley v. United States*, 183 U.S. 151 (1901).
- ⁴*Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).
- ⁵*Hawaii v. Mankichi*, 190 U.S. 197 (1903).
- ⁶*Dorr v. United States*, 195 U.S. 138 (1904).
- ⁷*Rasmussen v. United States*, 197 U.S. 516 (1905).
- ⁸*Balzac v. Porto Rico*, 258 U.S. 298 (1922).
- ⁹*Buffalo Evening News and Telegraph*, 28 May 1901.
- ¹⁰*New York Daily Tribune*, 28 May 1901.
- ¹¹*Chicago Record-Herald*, 28 May 1901.
- ¹²*Washington Post*, 28 May 1901.
- ¹³*New York Daily Tribune*, 28 May 1901.
- ¹⁴*Ibid.*
- ¹⁵*Ibid.*
- ¹⁶*San Francisco Examiner*, 29 May 1901.
- ¹⁷*New York Daily Tribune*, 28 May 1901.
- ¹⁸*San Francisco Examiner*, 29 May 1901.
- ¹⁹*New York Daily Tribune*, 29 May 1901.
- ²⁰*New York Herald*, 28 May 1901.
- ²¹*Ibid.*, 29 May 1901.
- ²²*Denver Post*, 28 May 1901.
- ²³Finley Peter Dunne, *Mr. Dooley's Opinions*, New York: R.H. Russell, 1901, 26.
- ²⁴Eugene Stevenson, "The Relation of the Nation to Its Dependencies," 36 *American Law Review* 366, at 374, 375 (1902); emphasis in original.
- ²⁵*Ibid.*, 385.
- ²⁶L.S. Rowe, "The Supreme Court and the Insular Cases," 5 *Annals of the American Academy of Political and Social Science* 226, 248–49.
- ²⁷Charles E. Littlefield, "The Insular Tariff Cases in the Supreme Court," 15 *Harvard Law Review* 168, 170 (1901).
- ²⁸John W. Burgess, "The Decisions of the Supreme Court in the Insular Cases," 16 *Political Science Quarterly* 486, 504 (1901).
- ²⁹*St. Louis Post-Dispatch*, 28 May 1901.
- ³⁰*The New York Herald*, 29 May 1901.
- ³¹*Philadelphia Record*, 28 May 1901.
- ³²*New York Times*, 3 December 1901.
- ³³*Ibid.*
- ³⁴*San Francisco Examiner*, 4 December 1901.
- ³⁵*Ibid.*
- ³⁶*Philadelphia Record*, 3 December 1901.
- ³⁷Theodore Roosevelt to Henry Cabot Lodge, 10 July 1902, **Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge**, Henry Cabot Lodge and Charles F. Redmond, eds., 2 vols., New York: Da Capo Press, 1971, 1:518–19.
- ³⁸*Philadelphia Inquirer*, 4 June 1903.
- ³⁹*New York World*, 5 June 1903.
- ⁴⁰*Philadelphia Inquirer*, 2 June 1904.
- ⁴¹*Buffalo Evening News and Telegraph*, 1 June 1904.
- ⁴²*New York Herald*, 1 June 1904.
- ⁴³David K. Watson, "Acquisition and Government of National Domain," 41 *American Law Review* 239, 253 (1907).
- ⁴⁴*Ibid.*
- ⁴⁵Frederic R. Coudert, "The Evolution of the Doctrine of Territorial Incorporation," 26 *Columbia Law Review* 823, 842–44, 847 (1926).
- ⁴⁶See Sanford Levinson, "Why the Canon Should Be Expanded to It The Insular Cases and the Saga of American Expansionism 17 *Constitutional Commentary* 241 (2000); Efrén Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (Washington, D.C.: American Psychological Association, 2001); T. Alexander Aleinikoff, **Semblances of Sovereignty: The Constitution, the State, and American Citizenship** (Cambridge: Harvard University Press, 2002); Gerald Neuman, **Strangers to the Constitution: Immigrants, Borders, and Fundamental Law** (Princeton: Princeton University Press, 1996); Rogers M. Smith, **Civic Ideals: Conflicting Visions of Citizenship in U.S. History** (New Haven: Yale University Press, 1997); Sarah H. Cleveland, "Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs," *Texas Law Review* 81 No. 1(2002), 1–284; E. Robert Statham, **Colonial Constitutionalism: The Tyranny of United States' Offshore Territorial Policy and Relations** (Lanham, Md.: Lexington Books, 2002); Christina Duffy Burnett and Burke Marshall, eds., **Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution** (Durham: Duke University Press, 2001).

Courtroom to Classroom: Justice Harlan's Lectures at George Washington University Law School

ANDREW NOVAK

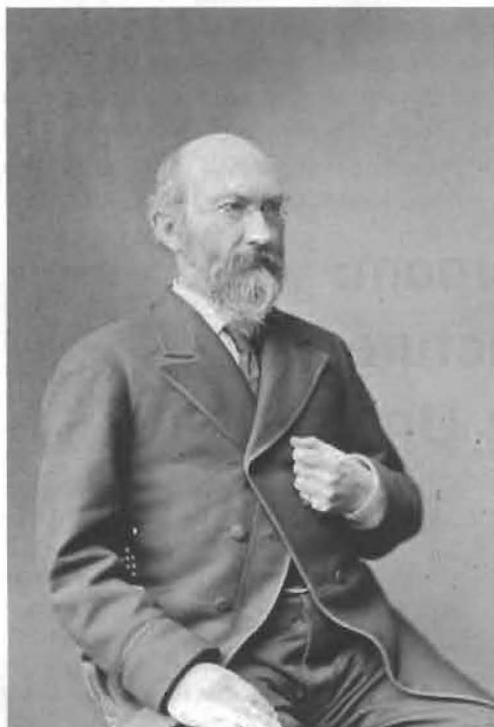
John Marshall Harlan had a singularly successful legal career as an Associate Justice of the Supreme Court that spanned thirty-three years, from 1877 to 1911, one of the longest terms in history. For twenty-one of those years on the Court he also distinguished himself as a professor of constitutional law at George Washington University. Along with his colleague on the Bench and on the faculty, Associate Justice David J. Brewer, Harlan carried a full course load, teaching just about every subject: evidence, torts, property law, corporation law, commercial law, international law, and his specialty, constitutional law.

Justice Harlan began his teaching career at Columbian University (renamed George Washington University in 1904) in 1889. It was the twilight of the presidency of the eminent and scholarly James Clark Welling, who had ably led the University through Reconstruction after the Civil War, a particularly tumultuous time for what was then a tiny college. In his twenty-three-year tenure, Welling, with the keenest foresight, meticulously constructed a prominent institution from very little, shaping the school so greatly that his lengthy shadow is still visible. But his successors would squander that promise and their mismanagement would

eventually trigger Professor Harlan's premature retirement from teaching.

A New School of Jurisprudence and Diplomacy

It was meant to be a class prank. The sophomores planned on creating a ruckus by breaking up a meeting of the freshman class, the first of the school year. The meeting was to take place in Jurisprudence Hall, the largest of the three lecture halls in the building, extending across the first floor with seats enough for 300 people and a ceiling reaching twenty feet in the



James Clark Welling was an eminent scholar who ably led George Washington University (then named Colombian College) in the late nineteenth century and built it into a respected institution.

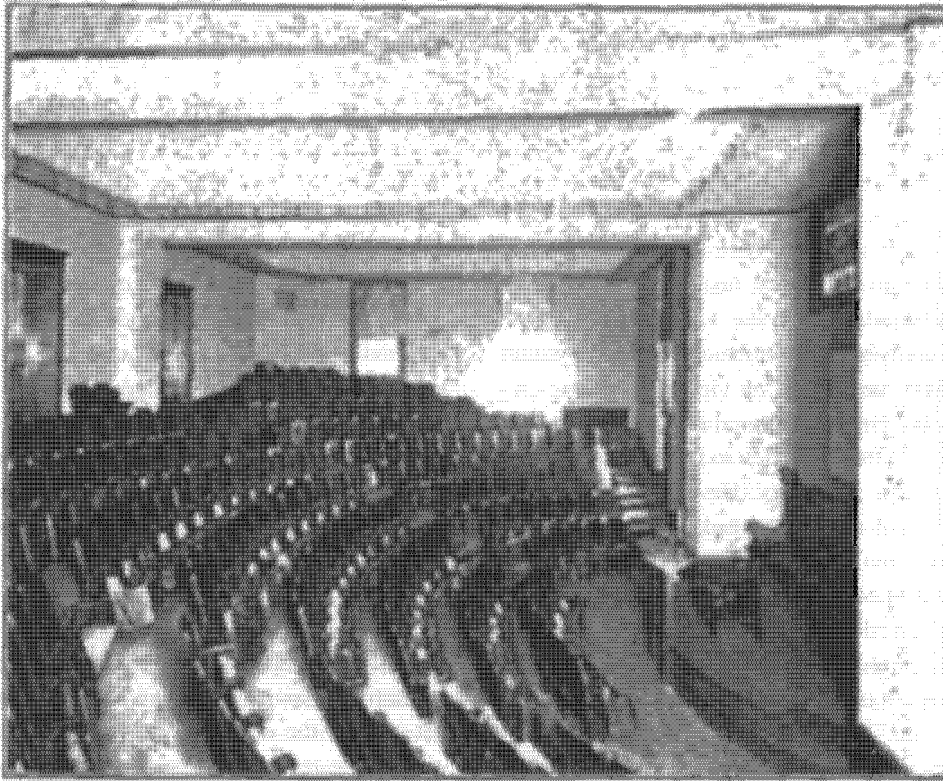
air. As the mob of sophomores charged toward the main door of the Hall, they accidentally caught the sixty-nine-year-old Justice Harlan off-guard. Harlan's height and build were legendary, and at six foot six he towered over the students, a vigorous and active golfer in excellent health.

As soon as the large Kentucky jurist realized the situation, he shouted in a loud, authoritative tone, "Stop this; stop this at once, or I'll have you all arrested!" His booming voice startled the sophomores and they retreated momentarily, frustrated in their attempt to have a little fun at the freshmen's expense. The rowdy sophomores immediately began a second assault on the freshman meeting and Justice Harlan responded with a "plan of compulsory arbitration," as the *Washington Times* called it, reaching over the heads of the sophomores and seizing the leader of the mob by the coat collar. Harlan dragged the student back, "twirling him about, much as a bandmaster

twirls his baton." Although the student tried to wrestle away, he found himself helpless under Justice Harlan's strong grip, bound by a "physical restraining order of the court." The Justice directed the sophomores to disperse, and this time they obeyed his injunction.¹

In 1902, Jurisprudence Hall, where the freshman class meeting continued uninterrupted, was a newly-built, state-of-the-art facility within the School of Law and Diplomacy. It housed both the law school, the oldest in the District of Columbia, rechristened in 1865 after several unsuccessful births earlier in the century, and the graduate School of Jurisprudence and Diplomacy, which had opened with great fanfare in 1898. Most professors, including Justices Brewer and Harlan, taught both law students and diplomacy students. The School of Jurisprudence and Diplomacy, envisioned as a training facility for the diplomats and Foreign Service officials of the United States, was the final wish of the late President Welling. His successor, the Baptist Reverend Benaiah L. Whitman, whose short term at the close of the nineteenth century is otherwise unremarkable, oversaw the building and opening of the new School. The timing was excellent: war with Spain was imminent and the United States' heretofore isolationist foreign policy was collapsing. The School would remain popular throughout its twelve-year history, but it ran such an enormous deficit that it jeopardized the entire institution.²

Justices Harlan and Brewer both spoke at the opening ceremony of the School of Jurisprudence and Diplomacy: Brewer as the first of several guest speakers, Harlan as the last. The assembled audience included U.S. President William McKinley and Canadian Prime Minister Sir Wilfrid Laurier, as well as a host of dignitaries, diplomats, and officials. "God has made big bodies to carry big souls," said President Whitman in introducing Harlan to the podium. After the rapturous applause died down, Whitman continued: "There, I knew you would know who I meant without mentioning any name." Harlan spoke on the importance of the Constitutional



Welling's final act was to oversee the construction of Jurisprudence Hall (pictured), a state-of-the-art facility within the School of Law and Diplomacy, in 1902. It housed both the Law School, the oldest in the District of Columbia, rechristened in 1865 after several unsuccessful births earlier in the century, and the graduate School of Jurisprudence and Diplomacy, which had opened with great fanfare in 1898. Most professors, including Harlan, taught both law students and diplomacy students.

lawyer to American society; "as usual his utterances were forceful, holding, as he always does, the Constitution of the United States above all things," *The Washington Post* reported.³ For the School itself, many citizens expressed praise: "In such an institution as this Washington may feel a justifiable pride," a *Post* editorial read.⁴ The new School's opening had made the pages of nearly every major newspaper around the country, lauding the mission upon which the unique school embarked.

Fundraising Efforts

The School's most vociferous supporter was Columbian University Trustee and prominent Washington lawyer Charles Willis Needham, who would succeed Rev. Whitman as president in 1902. Whitman had attempted to salvage the deteriorating financial situation of the

University by making the institution's informal Baptist affiliation a formal one, hoping that it could attract money and endowment from Baptist sources. But the gamble did not pay off and the Baptist affiliation was discontinued. Needham, following Whitman in an effort to secure support for the University in general and his beloved School of Diplomacy in particular, began to look for creative avenues for fundraising.

He turned to the George Washington Memorial Association, an organization founded in 1898 to raise money for the building of a national university named after the first U.S. President. The agreement was simple: Columbian University would change its name to the George Washington University, and the Memorial Association would help raise money for the institution, the embodiment of General Washington's stipulation in his will providing

shares of canal stock for the establishment of a university in the District of Columbia.

In February 1904, the George Washington University was born, or, more accurately, born again, with the approval of the U.S. Congress to re-charter the institution that had received its first congressional charter in 1821 as Columbian College, renewed in 1873 as Columbian University. Justice Brewer gave the keynote address at the George Washington University's first commencement in the winter of 1905, celebrated on George Washington's birthday. Brewer summed up the hope and anticipation that many felt in fulfilling the dream of a great university. He spoke of the glorious road that lay ahead, praising "George Washington the testator, the people of the United States the executor, the bequest a university, its domicile the District, its field of toil the Republic, the reach of its ever-increasing influence and glory the boundaries of space and time."⁵ The student newspaper reported, "Justice Brewer was cheered to the echo when he concluded his address."⁶ Few onlookers realized at the time that there was an additional barrier in the University's future besides the "boundaries of space and time": the lack of an endowment.

Despite the name change, the accounting books did not bode well for the institution's future. In 1902, though the law school ran an enormous budget surplus and the Corcoran Scientific School and the Graduate School ran modest surpluses, the College of Arts and Sciences and the School of Jurisprudence and Diplomacy ran shocking deficits so large that the surpluses created by the smaller units were entirely swallowed up.⁷ The treasurer of the University explained the dire situation to the Board of Trustees: "For a number of years the University has been run at a loss, partially by reason as the fact that two of our schools are weak in membership, yet expensive to operate." He added, "From a business standpoint this loss cannot be sustained many years without serious embarrassment to the entire institution."⁸ The University was in the red.

The situation did not improve. The College of Arts and Sciences and the School of Diplomacy still ran tremendous deficits in 1904, while Medicine, Dentistry, and especially Law ran surpluses. The next year, it was only Diplomacy that continued to run a deficit, but the shortfall was growing ever larger from year to year. By 1907, it was clear that reorganization was necessary; Needham's brainchild, the School of Diplomacy, could not survive. Almost all units of the University were running deficits by the end of the decade.⁹ Each successive year the budget grew redder; Needham "warned his Board [of Trustees] about incurring debts, but kept on spending."¹⁰ Disaster loomed ahead.

Harlan's Lectures

Harlan's regular Tuesday evening lectures on constitutional law were always well-attended, most notably the one at the beginning of the spring semester on the decisions of Chief Justice John Marshall, whose name Harlan shared.¹¹ Though he taught many courses: domestic relations, commercial law, law of evidence, torts, property, and, in the School of Diplomacy, conflict of laws, Harlan was most renowned for his most ardent interest, constitutional law. He did not hesitate to discuss in the classroom the contentious legal disputes that he himself had dealt with as a jurist or that were now before the Supreme Court. The application of the Constitution to the citizens of the newly acquired territories of Hawaii, the Philippines, and Puerto Rico, was a favorite subject. Harlan's experience was palpable, and the benefit to law students of participating in actual cases before an actual judge was incalculable.

Many of Professor Harlan's lecture notes from his law classes are still extant, as the Justice always planned to retire and write a textbook. He never did retire, remaining an active member of the Court until his death in 1911, and the textbook plans remained an unfulfilled dream. He left behind his notes on the history of the Constitution, an assorted

collection of exams, reading lists, and pages torn out of law books with his notes scrawled in the margins, as well as excerpts of state constitutions, papers written by his students, and even copies of his own opinions and dissents. This large collection of material gives an insightful glance into the classroom life of Justice Harlan.

His course on constitutional law started with the origins of the document and the lives of the drafters. "We the People of the United States," is penned at the beginning of his notes, underlined twice, with the word "Preamble" scrawled next to it.¹² His first lectures each semester included discussions of the Constitutional Convention, the Articles of Confederation of 1781, and the powers granted to the states and to the federal government. His lectures analyzed the role each institution of government played in the larger machine as a whole, accompanied by the processes that allowed the government to function effectively and in accordance with the rights enumerated in the Constitution.

His exams were all-encompassing and lengthy. "What does *interstate commerce* embrace?" he asked his students. "Define piracy." "What testimony is requisite to a conviction of treason?" "What is meant by *prima facie* evidence?" "State as far as you can recall what powers are *expressly* or *specifically* granted to Congress?" And he continued, adding questions about trial by jury, the jurisdiction of the federal court system, due process requirements, governance of the District of Columbia, impeachments of presidents, and declarations of war.¹³

Some of his notes on individual cases have also survived: *Dorr v. United States* (1904), *Dooley v. United States* (1901), *Delma v. Bidwell* (1899), and dozens of others. When discussing recent cases, he held his own dissents in hand. For a discussion of *Dorr v. United States*, for instance, a case involving the application of constitutional protections to citizens of the Philippine Islands, he read his dissent to the class.¹⁴ When discussing *Hawaii v. Mankichi*, a similar case involving the citizens

of the Hawaiian territory, Professor Harlan told his students: "The decisive question in this case was weather, consistently with the Constitution of the United States, Mankicki [sic.] could be tried in Hawaii for an infamous crime and be sentenced to imprisonment . . . after all the rights and sovereignty of Hawaii had been acquired by the United States."¹⁵

Harlan's lecture notes from his commercial law classes have survived as well. His precision and diligence are evident in his discussion on commerce "among the several States," the constitutional provision granting Congress the right to regulate interstate commerce. "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed," he wrote. "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."¹⁶ Harlan's sense of humor was always entertaining; when he would read one of his sole dissenting opinions, he would pause for a moment and then add: "But of course I was wrong."¹⁷

The *Columbian Call*, the student newspaper published in the late 1890s, wrote of Justice Harlan's legendary law courses. "In the lecture hall he is, to a certain extent, at his best," the paper wrote. "His figure, heavy and well proportioned, is the one that your fancy paints as belonging to a man of power. His voice is resonant, penetrating, and not 'flat and unprofitable' to the ear. When he delivers himself of a conviction his strong jaws seem to close over the words as though steel bars would not spring them apart."¹⁸

Harlan was more than a prominent judge with a successful career. He was also a unique personality, raised a Whig in the mold of Senator Henry Clay, a fellow Kentuckian. When the threat of Civil War brought a collapse of the Whig party, Harlan joined the American party, remembered by history as the "Know-Nothings," with a xenophobic, anti-Catholic platform. He remained loyal to the Union and served as Kentucky's attorney general during and after the Civil War. During

Reconstruction, he became a Republican, twice ran for governor of Kentucky, and, in 1877, was appointed by President Rutherford B. Hayes to the U.S. Supreme Court.¹⁹

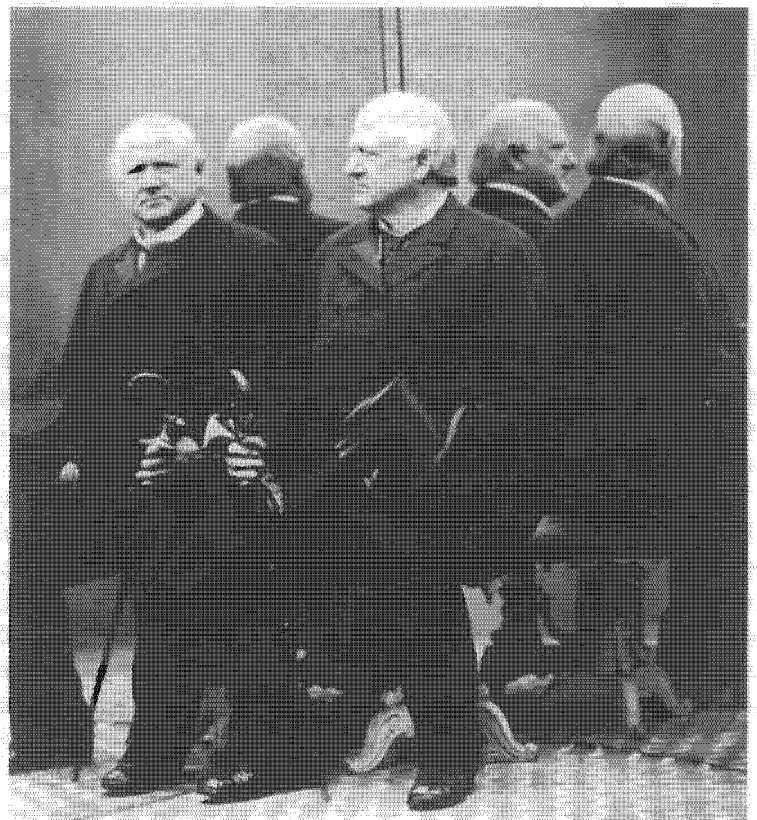
"Judge Harlan lectured to our class of two hundred members," one student later recalled. "The spontaneity of the applause that frequently marked the beginning and close of his sessions, was sufficient evidence of the appreciation the members had of him." The student remembered the Justice's confidence and sincerity when a student asked a question to which Harlan did not know the answer; Harlan responded that he would look into the question and reply definitively in the next class session.²⁰

Justice Brewer in the Classroom

Both Justices Harlan and Brewer participated in university life outside of the classroom, to

the extent that their busy lives would allow. Harlan occasionally participated as a judge of the law school, debating society's public debate forums.²¹ Justice Brewer, a short, slight man who looked like Harlan's physical opposite, wrote book reviews for the student newspaper on works related to the procedures and history of the Supreme Court.²² Brewer, a former probate judge, Kansas Supreme Court justice, and circuit court judge, was, like Harlan, an independent voice on the Court. As Brewer's biographer recounts: "Of all the members of the Court during the [Chief Justice Melville] Fuller era, Harlan entered the most dissents, 283. Brewer was second with 219."²³

"In his lectures on corporation law to Columbian students he is always accorded the most respectful attention, and the classes are out to a man," the student newspaper wrote of Professor Brewer, who also taught international law to both law and diplomacy students



The *Columbian Call*, the student newspaper published in the late 1890s, wrote of Justice Harlan's legendary law courses: "In the lecture hall he is, to a certain extent, at his best." Justice Harlan is pictured posing by a mirror.



Justice David J. Brewer (left) also taught a variety of courses at the law school. When Harlan (right) was out of town, Brewer substituted in his constitutional law class. Justice Brewer and Justice Harlan are pictured strolling near George Washington University.

and occasionally took over for Harlan's Constitutional law class when his colleague was out of town.²⁴ "The subject is not one that gives a man much play for lighter talk, there is but little humor to it, and yet he tells at times a pat story that seems to fix the conclusion in your mind better than heavy logic. Justice Brewer is a true wit," the paper added, noting how his eyes twinkle when he tells a joke.²⁵ Brewer vastly enjoyed teaching, finding the students' questions stimulating. He once reflected that it was "a satisfaction to . . . be able to do them some good."²⁶

Though Harlan had sat on the Bench for more than twelve years before Brewer was appointed and would outlive Brewer by a year and a half, the younger Justice was surely as accomplished as Harlan. Brewer had the most judicial experience prior to his Supreme Court appointment of any of the Justices, and his experience in international law, especially as president of the commission to arbitrate the border dispute between Venezuela and British

Guiana in South America, added a real-life element to his coursework in the law school.

The two Justices also gave up smoking and chewing tobacco around the same time, though Brewer later resumed. Justice Harlan joked with his law school students that smoking cigarettes and chewing tobacco were not "conducive to the development of legal acumen," the student newspaper reported. "I may be wrong, of course I am wrong, the other judges being in the majority, but that is my opinion."²⁷ Whether it was lecturing students on the law or on how to be good lawyers and citizens, Harlan surely felt as much at home in the halls of education as he did in the halls of justice. He did not know the great distress the future would bring, either for him or for the university life of which he was a part.

Harlan's Son to the Rescue?

The University administration, in desperation over its lack of funds, turned to Professor



With the school's finances in dire straits, Justice Harlan arranged for George Washington University to hire his eldest son, Dr. Richard Davenport Harlan, as its fundraiser. Pictured here, the Justice (left) poses with Richard (right) and their wives on the steps of Lake Forest College, of which the younger Harlan served as president for a short time.

Harlan for rescue. Harlan recommended that they appoint his eldest son, Dr. Richard Davenport Harlan, to direct a fundraising initiative to guarantee the institution's survival. Richard alone among Justice Harlan's three sons had chosen against a profession in the law. The family was devoutly Presbyterian, and the Justice was supportive of his oldest son's decision to become a minister. Harlan "considered the clergy's spiritual leadership of the people as important to civic virtue as the work of liberty loving lawyers."²⁸ All three sons graduated from Princeton, but Richard was valedictorian while the younger two, James and John Maynard, graduated only with difficulty and prodding from their father. Richard was ordained a minister after his graduation from

Princeton Theological Seminary in 1886, and would serve both the First Presbyterian Church in New York City and the Third Presbyterian Church in Rochester, New York.

Of all the qualities that Richard inherited from his father, perhaps the most profound was his liberalism, his devotion to a socially just, egalitarian philosophy. He also remained close to his Princeton colleagues; Princeton University Trustee Cyrus McCormick, who made his fortune in the agriculture sector, was also at the time the president of the Board of Trustees of Lake Forest College in Chicago, a college with Presbyterian roots. McCormick and his allies were seeking someone who shared their liberal conception of education to place in the presidency of Lake Forest. The Reverend

Harlan seemed like a natural choice. McCormick and his colleagues were also determined that when the presidency of Princeton University opened up, they would place a great liberal in that position: Woodrow Wilson.

Richard Harlan came to the Lake Forest College presidency determined to break the hold the elite fraternities had over the social life of the student body. His efforts to force the fraternities to vacate their independent housing and move to campus, as well as the building of a dining hall to accommodate all male students, faced resistance from the sons of privilege. These efforts, "conceived as a way of promoting a kinship of college spirit, [were] clearly egalitarian in motive and effect" and on those grounds were met with hostility.²⁹ President Harlan had difficulties with the faculty too: in 1905, the popular head of the English Department went so far as to resign his professorship and his chairmanship in protest of Harlan's policies.

Disappointed with his unsuccessful efforts to implement his reformist agenda at Lake Forest, Richard resigned in December 1906. His short term had made a lasting mark, turning a socially divided college with elite students living in fraternity housing and students on scholarship living on campus, into a fully residential institution. Later presidents of Lake Forest would follow Harlan's lead. Though history has vindicated Richard Harlan's legacy, at the time his separation from the school was bitter. Thanks to his father, however, he was not unemployed: he would be appointed head of the "George Washington University Movement," as President Needham's efforts to raise much-needed funds were called, at the university where his father taught and his brother James Harlan and cousin James Cleveland received law degrees. According to historian Tinsley Yarbrough, "the justice's hand in the school's choice was clearly evident."³⁰

The students were welcoming of Dr. Harlan: "The University is most fortunate in securing the assistance of one so well fitted for this work," the student newspaper

wrote. Harlan will receive "world-wide honor as a prime factor in the establishing of a national university in the capital of the United States."³¹ The French ambassador praised the endowment campaign, offering encouragement to Richard Harlan; "The George Washington University cannot hesitate and has no choice—it will become famous and be of use to the country as a nursery of magistrates, statesmen, and diplomats."³² Such lofty goals, such grandiose visions. When the prophesies were not fulfilled, however, the well-connected, wealthy benefactors turned away from the struggling school. Only the most dedicated stuck by.

In the fall of 1908, Richard Harlan revealed to the Board of Trustees the reasons he accepted the job. Of course, the tasks he performed in fundraising did not match his experience, but the position "offered possibilities of indefinite usefulness here in Washington, near my parents." He also hoped to become a professor himself someday, to teach in the classroom, and he thought his service to George Washington University would be a stepping-stone. However, he added, "the determining factor in my decision to accept this appointment" was the opportunity to add "a fairly substantial sum to my little estate."³³ He had received a poor severance package from Lake Forest College, and was dependent on his wife's inheritance; he was desperate for a job, and did not hesitate to use his father's connections.

Harlan also laid out his plan for achieving the ultimate goal: \$25,000 for the endowment of the School of Comparative Jurisprudence and Diplomacy (renamed in 1905 the School of Politics and Diplomacy and in 1907 the College of the Political Sciences, both reorganizations reflect an attempt to balance the budget of the struggling department). Harlan's hope was pinned on a piece of congressional legislation, the Gallinger-Boutell Amendment to the Morrill Acts of 1862, which originally provided land to be sold to raise funds for public colleges in each of the states. The

Gallinger-Boutell Amendment would extend the scope of the Morrill Act to the District of Columbia, and designate George Washington University as the benefactor.

Harlan deeply invested time and energy to get the Gallinger-Boutell Amendment passed, personally lobbying members of Congress to return to the District of Columbia the taxes paid by its citizenry on par with the residents of Maryland and Virginia, across the border. There were several obvious problems with the Amendment's application to George Washington University. First, the Columbian University had attempted to reconstitute itself as a sectarian Baptist institution from 1898 to 1904, an initiative that resoundingly failed. Second, the University was, by tradition, a whites-only institution, rejecting its first black applicant in 1899. Third, the law school still prohibited women from enrolling. A sectarian, exclusive school was ineligible to apply for Morrill Act funds, and Richard Harlan and President Needham went to great lengths to prove that the new 1904 Congressional Charter was nonsectarian in nature, even prohibiting a majority of the Board of Trustees from representing a single religious denomination. Still, the fact that not all of the District's citizens would be able to make use of the Morrill Act funds hampered the institution's efforts to apply for recognition.

The student newspaper repeatedly ran editorials urging the passage of the Amendment, noting that even Hawaii and Puerto Rico, two newly acquired territories, received funds under the Morrill Act. "The District has a just and equitable claim for the appropriation; and George Washington University has an equally just and equitable claim to be designated as a depository for the District," the students wrote.³⁴ The bill passed the Senate unanimously and passed a House committee, but the opponents of the Amendment, led by President Edmund James of the University of Illinois and the Association of State Universities, lobbied Congress instead to designate funds for a new university in the District of Columbia,

independent of either George Washington or Howard Universities, the two schools at the time seeking Morrill funds. Richard Harlan's dedication to the cause was praiseworthy, but he devoted a great deal of time and effort to something that achieved poor results. He did manage to collect \$1,000 from J.P. Morgan and other donations from alumni and prominent individuals, but these hardly covered the costs of Harlan's setbacks, let alone operating expenses for the institution.

And setbacks there were: the Gallinger-Boutell Amendment would have provided \$40,000 to the George Washington University for the first year, \$45,000 the second year, and \$50,000 each year thereafter, a sum which surely would have saved the school. The Amendment died with the end of the congressional session, and there was little hope for its revival after the financial situation of the University became public. Decades later, the Morrill Act would be extended to Washington, DC, but with the University of the District of Columbia as the recipient of funds, not George Washington. The failure of the Amendment in Congress sealed the University's fate as the first decade of the twentieth century came to close: catastrophe was now certain. The University could no longer assure faculty tenure and pensions, even for those professors who had served the school faithfully for years. The Trustees were forced to sell the property donated by the George Washington Memorial Association in 1904; in response, the Memorial Association cancelled its promise with the University to raise \$250,000. Perhaps it was for the best: at the time the agreement was made in 1904, the Association had only raised \$16,000. Many wondered if the initiative to rename the school after the first president and the idea to start a college for training diplomats and politicians had been mistakes.

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The forced retirement of several professors caused the Andrew Carnegie Foundation for the Advancement of Teaching to revoke its donations to the University, a particular blow to Richard Harlan who had

successfully courted Carnegie's philanthropic support while president of Lake Forest College. Each setback caused a round of resignations from the Board of Trustees. "The days of the administration, maybe even of the University itself, seemed numbered. . . . The sad state of the institution's financial structure was now generally known and publicly discussed."³⁵ The deficit for the 1909-1910 school year was approaching \$50,000. It eventually became obvious that President Needham was not being candid about the state of the University, even giving grossly inflated figures to the Carnegie Foundation in an attempt to renew the relationship with the benefactor. He was covering up his poor planning and frivolous spending with his vivid illusions about the importance of his mission.

A House of Representatives resolution authorized the Attorney General to investigate the situation at George Washington. President Needham resigned at once. All property was sold, salaries were cut, and a wide host of administrative and professional positions were abolished, among them the position Richard Harlan held. This came at a time when he was in a crisis of his own after squandering \$110,000 of his wife's trust on poor bets in the stock market.³⁶ Perhaps Richard Harlan had not been the right man for the job after all.

Harlan Resigns from Teaching

On May 28, 1910, an elderly Justice Harlan graded his last papers for the students in his Constitutional law classes. "I am conscious that I may have made some mistakes. The examination of the papers sent me has given me very great trouble," he wrote to the dean of the Law School.³⁷ Though in his late 70s, he looked forward to teaching his twenty-second school year. He was not yet ready to give it up.

After President Needham's resignation the University sold the properties at 15th and H Streets. The humble brick building, three-stories square, that served as the law school of George Washington University, was also sold.

The University underwent tremendous reorganization. Ernest G. Lorenzen became dean-elect of the law school, though he did not last for more than several months. Trustee Harry Snow was offered the acting presidency, but he refused it in favor of Admiral Charles Stockton, an old Civil War veteran, who became the ninth president of George Washington University in November 1910. However, Snow's wife had not been fond of Justice Harlan, and she sent him a rude and sloppy letter telling Harlan of the "extreme idiocy" of the University administrators and her husband's efforts to save the institution "if it is saved." Then, she made a personal attack on Justice Harlan: "You all thought we were to be patronized when we came here. *Why* only you know. My father, *who made law* . . . was greater than all of the judges who ever sat on the bench put together," she wrote.³⁸ Closely following Margaret Snow's letter was one from Dean Lorenzen requesting each law school faculty member, including Harlan, to make a donation to pay a secretary.

Both letters caused Harlan to feel personally insulted. "I had supposed that the law branch of the University more than paid its way and that it would not be necessary to call upon the Faculty to aid it," Harlan responded to Lorenzen's request for money.³⁹ The only explanation is that Justice Harlan did not know the extremely dire state the University was in (even the law school was now running a large deficit). Perhaps even Richard Harlan did not know how bad the situation was, for he surely would have explained it to his father if he did. President Needham had warned Justice Harlan in a letter the previous September asking for a reduction in Harlan's salary, but Needham, characteristically, was hardly forthcoming with the reality of the situation.⁴⁰ Though he had other important leadership qualities, it was Needham's delusion about the financial stability of the University that was responsible for the institution's bankruptcy.

A personal letter from a colleague on the faculty begged Harlan to be understanding of the financial situation: "Won't you do the best



George Washington University was forced to sell its law school (small building to the left of George Washington University) in 1910 in the wake of years of gross financial mismanagement and in the face of an investigation called for by Congress. Justice Harlan retired prematurely rather than take a considerable pay cut.

you can for us, Judge, and remain with us just as long as you feel that you can give us the benefit of those lectures on Constitutional Law which I remember with so much pleasure from my own student days in the University?"⁴¹ Two days later, Lorenzen sent Justice Harlan a letter asking for a reduction in salary from \$2,400 to \$1,500: "We lament the necessity of this step, but we see no alternative."⁴² Given the state of the University at that point, this may have been the most truthful statement uttered by an administrator.

Harlan could not accept the offer immediately, he told Lorenzen and several other colleagues; he needed time to think the proposition over, to reassess his financial situation and to reconsider the satisfaction teaching brought him. Still, one colleague desperately tried to persuade Harlan to accept: "We *cannot* lose you. It means too much. But you can see the situation. The University is in a very critical state. But we believe that the law school can

support itself if we all consent to make the necessary sacrifice."⁴³ Justice Harlan's son John Maynard Harlan telegraphed his father telling him not to accept until receiving the letter he just put in the mail. John Maynard's letter was rushed and severe: "I do not know any of the details of the proposal made to you, or indeed whether any definite and precise proposal has been made," he wrote. "But I understand from Richard . . . that they wished further and very materially to reduce your salary, and even for the reduced amount you to be satisfied with some certainty as to payment." Again, John Maynard's analysis is off the mark, telling his father that the law department ran a surplus and could afford to pay him: "I decidedly object to their getting your services at your time of life for a beggarly compensation, and using, not merely the surplus of what the law school produces, but also a part of what should go to you as salary, for the support of other departments." The fact of the matter was, however,

that there was no surplus. In fact, there was not even a law school building anymore; the University was renting the top two floors of the Masonic Temple in Washington, DC.

John Maynard Harlan urged his father to refuse to take a cut in salary, to demand that the law school not support the finances of the University administration in any way, and to be strict in making sure that the University followed the letter of his contract. "It will not do at all to allow Snow or his termagant wife (who I think is crazy) to have the impression that he or the present management (of which apparently he is the active and controlling person) has prescribed the terms for your continuing in the law school," John Maynard wrote. "You may rely upon it that any yielding upon your part would be seized upon by that crazy woman and her cowed husband and a wrong face to put upon it to others."⁴⁴ Four days later, Justice Harlan issued his resignation.

One board member expressed regret at Harlan's decision, but noted that it was "both wise and just for you to husband your strength," in retiring from law school work. Harlan shot back: "This is a mistake. My health is good and I had intended to continue my work as Lecturer on Constitutional Law as long as it was possible to do so, or as long as the University wished my services. The work interested me greatly, and after nearly twenty years of service as Lecturer I had come to feel great interest in the future of the University," he replied.⁴⁵ But Margaret Snow's letter, the forced resignation of Richard Harlan from his position, and the reduced salary had convinced him that he was no longer wanted. The new chairman of the Board of Trustees, John Bell Larner, was blunt in his reply to Harlan's resignation over the reduced salary: "It was merely a question of doing this or closing the Law School."⁴⁶

The George Washington University nearly failed in 1910 because of singularly weak leadership. But a new generation of administrators, with Admiral Stockton as President (who served without compensation), John Bell Larner as Chairman of the Board, and Charles

Noble Gregory, who replaced Lorenzen as dean of the law school in 1911, would turn things around. Suffice it to say that there is no building today named after Needham, but Stockton Hall has been the prestigious home of the law school for more than seventy-five years.

But the insult inflicted on a senior member of the Supreme Court by an administration that continuously misjudged and misrepresented the truth until it unraveled is surely one of the darker episodes in the University's history. After Harlan's resignation, the law school students wrote a glowing article in the student newspaper praising probably the most renowned professor in the history of the institution:

His personality was invigorating. His way of putting things was unique. Coming students at the Law School will miss, although they may not know it, the stories by way of illustration with which Justice Harlan enlivened the lecture hour, the shots at the British aristocracy—as an institution—the kindly sarcasms, apropos of cigarette smoking, tardiness, and other vices to which college students are peculiarly prone. It was all worth having, for in all of it one felt the fearlessness of speech, the rugged independence, the plain and kindly manners, the simplicity and solidity of thought which made the students respect and like him. Justice Harlan stands for good, old-fashioned Americanism. [...]

But we are not writing a eulogy. . . . We salute you, sir. Here's hoping you may be the next Chief Justice of the Supreme Court.⁴⁷

CONCLUSION

Both Charles Needham and Charles Stockton served for eight years at the helm of the George

Washington University. But the two men could not have been more different: Needham was a young, idealistic dreamer; Stockton was an elderly war veteran, a builder. Stockton meticulously saved money, cut expenses, and moved the University to a new home in Foggy Bottom on borrowed money, where the University, as a testament to Stockton's resilience, still survives today. On his watch, the specter of war became war itself, and still he continued to build, to save, to defend the embodiment of George Washington's will and the establishment of a national university. His successors had a great legacy to build upon.

The modern University is also a testament to the commitment and dream of Justice Harlan and his colleagues on the faculty who endured great sacrifices during the direst moments in the institution's history. Harlan's legacy is not only in the courtroom; it is also in the classroom: his commitment to teaching led him to carry a full-time load as a professor while he was a sitting member of the Supreme Court. And an analysis of Harlan's teaching is further evidence of his profound commitment to the Constitution of the United States.

"The work which I have done, as one of the lecturers in the University, has always been a labor of love," Harlan later reflected.⁴⁸ Perhaps he received no greater compliment in his career than when a young student with bright, warm eyes approached him after one of his Constitutional law lectures one evening and said: "Sometimes, Justice, I am not, perhaps, as good an American as I should be, but after one of your talks the man doesn't live who can excel in honest love for my country and her people."⁴⁹

ENDNOTES

¹"Arbitration of Class Trouble At Columbian." *Washington Times*. October 23, 1902. See also, "Stopped A Fight: Justice Harlan Overpowers Belligerent Students." *Washington Post*. October 24, 1902.

²Kayser, Elmer Louis. *Bricks Without Straw: The Evolution of the George Washington University*. New York: Appleton Century Crofts, 1971.

³Announcement of Opening of School of Jurisprudence and Diplomacy. *The Washington Post*. Nov. 16, 1898.

⁴Editorial. *The Washington Post*. Sept. 18, 1898.

⁵Brewer, David J. "Shall George Washington's Will Be Executed?" Convocation address. Feb. 22, 1905.

⁶"Winter Convocation." *The University Hatchet*. March 1, 1905. pp. 7-8.

⁷See Budget Summary, Board of Trustees Minutes, Volume 6. June 18, 1902.

⁸Report of S.W. Woodward, Treasurer. Board of Trustees minutes, Volume 6. June 18, 1902.

⁹See Budget Summaries, Board of Trustees Minutes, Volume 6. Nov. 3, 1903, Nov. 16, 1904, Oct. 16, 1907, June 5, 1907, June 3, 1908, October 15, 1908.

¹⁰Kayser, Op. Cit. p. 211.

¹¹"Lecture on Marshall: Justice Harlan Reviews Great Jurist's Decisions." *The Morning Post*. Feb. 2, 1901.

¹²See Harlan's lecture notes. Harlan Papers, University of Louisville. On microfilm at George Washington University Law School.

¹³See Harlan's exams on microfilm. Harlan Papers, Library of Congress Manuscript Division.

¹⁴Harlan, John Marshall. Dissent in *Dorr v. United States*, 195 US 138 (1904).

¹⁵See Harlan's lecture notes on *Hawaii v. Mankichi*, 190 US 197 (1903). Harlan Papers, Library of Congress.

¹⁶Commercial law notes. Harlan Papers, Library of Congress.

¹⁷Almon C. Kellogg to Richard D. Harlan. May 27, 1930. Harlan Papers, University of Louisville.

¹⁸"Justice Harlan: Sketch of the Kentucky Lawyer Now an Honored Member of the U.S. Supreme Court." *Columbian Call*. (Vol. 1, No. 8) Jan. 9, 1896.

¹⁹Yarbrough, Tinsley E. *Judicial Enigma: The First Justice Harlan*. New York: Oxford University Press, 1995.

²⁰Almon C. Kellogg to Richard D. Harlan. May 27, 1930. Harlan Papers, University of Louisville.

²¹"First Public Debate." *The Washington Post*. Nov. 24, 1901.

²²"Book Reviews." *The University Hatchet*. December 21, 1905. p. 1.

²³Brodhead, Michael J. *David J. Brewer: The Life of a Supreme Court Justice, 1837-1910*. Carbondale: Southern Illinois University Press, 1994. p. 80.

²⁴"Law." *The University Hatchet*. Dec. 10, 1908. p. 5.

²⁵"Sketch of the Man Who Lectures to Columbian Law School on Corporation Law." *Columbian Call*. (Vol. 1, No. 10) Jan. 23, 1896. p. 1.

²⁶Brodhead, Op. Cit. p. 132.

²⁷"Law." *The University Hatchet*. Oct. 15, 1908.

²⁸Przybylski, Linda. *The Republic According to John Marshall Harlan*. Chapel Hill: University of North Carolina Press, 1999. p. 199.

²⁹Schulze, Franz, Rosemary Cowler, & Arthur Miller. *30 Miles North: A History of Lake Forest College, Its*

Town and Its City of Chicago. Lake Forest, IL: Lake Forest College and University of Chicago Press, 2000. p. 86.

³⁰Yarbrough, *Op. Cit.* p. 206.

³¹"Dr. Richard D. Harlan To Conduct A Campaign For Funds for the New Site," *The University Hatchet*. April 11, 1907. p. 1.

³²"M. Jusserand Writes of Encouragement to Dr. Harlan." *The University Hatchet*. May 30, 1907. p. 6.

³³Letter from Richard Harlan to Board of Trustees. Board of Trustees Minutes, Volume 6. Nov. 10, 1908.

³⁴Editorial. *The University Hatchet*. Dec. 9, 1909. p. 4.

³⁵Kayser, *Op. Cit.* p. 203.

³⁶Przybyszewski, *Op. Cit.* p. 199.

³⁷Letter from John M. Harlan to Dean Vance. May 28, 1910. Harlan Papers, University of Louisville.

³⁸Letter from Margaret Snow to John M. Harlan. May 26, 1910. Harlan Papers, University of Louisville.

³⁹Letter from E.G. Lorenzen to J.M. Harlan, June 22, 1910. See also, letter from J.M. Harlan to Lorenzen, June 24, 1910. Harlan Papers, Library of Congress.

⁴⁰Letter from C. Needham to J.M. Harlan. Sept. 17, 1909. Harlan Papers, University of Louisville.

⁴¹Letter from Walter C. Clephane to J.M. Harlan. June 25, 1910. Harlan Papers, Library of Congress.

⁴²Letter from E.G. Lorenzen to J.M. Harlan. June 27, 1910. Harlan Papers, Library of Congress.

⁴³Letter from Walter C. Clephane to J.M. Harlan, July 1, 1910. Harlan Papers, Library of Congress.

⁴⁴Letter from John Maynard Harlan to John Marshall Harlan. July 19, 1910. Harlan Papers, Library of Congress.

⁴⁵Letter from A.B. Browne to J.M. Harlan, July 26, 1910. See also, letter from J.M. Harlan to A.B. Browne, July 29, 1910.

⁴⁶Letter from J.B. Larner to J.M. Harlan, July 26, 1910. Harlan Papers, University of Louisville.

⁴⁷"Justice Harlan." Editorial. *The George Washington News*. October 28, 1910, p. 2. (Note: for one academic year, 1910-1911, the *University Hatchet* changed its name to *The George Washington News*.)

⁴⁸Letter of John M. Harlan to Richard Cobb. Jan. 9, 1911. Harlan Papers, Library of Congress.

⁴⁹"Justice Harlan: Sketch of the Kentucky Lawyer Now an Honored Member of the U.S. Supreme Court." *Columbian Call*. (Vol. 1, No. 8) Jan. 9, 1896.

Terrorism and Habeas Corpus: A Jurisdictional Escape

MORAD FAKHIMI

Following the events of September 11, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons."¹ Considering this surprising grant of authority, a question naturally surfaces as to whether a person whom the President has determined to have planned, authorized, committed or aided the attacks has an absolute right to challenge this determination in a judicial forum through habeas corpus proceedings, regardless of issues such as nationality, venue, next-friend standing for those held incommunicado, and jurisdictional barriers based on the place of imprisonment.

With just a few exceptions throughout the course of our history, American judicial and executive authorities seem to have come into conflict over the right of making determinations as to life and liberty only during times of national emergency. It is a fundamental proposition that since the law is the final arbiter of every person's life and liberty, the courts of justice should at all times be open for redress of injuries.² In light of this, it would be illustrative to examine the evolution of this conflict over the making of such determinations in troubled times. It should be noted at the outset that under such circumstances the government has always pleaded necessity—and the contrary to that position, of course, would maintain that any dispute as to the legality of imprisonment

under the purported authority of the United States must be resolved by the courts of the United States.

Fundamentally speaking, the rights of persons can be divided into those which are absolute and those which are relative, where the former category refers to those rights "which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it."³ These absolute rights can be "reduced to three principal or primary articles; the right of personal security; the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will,

but by the infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense."⁴ As to the right of personal liberty, it is simply expounded as "removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."⁵ The long-recognized importance of preserving this liberty is illustrated by pointing out that "some have thought that unjust attacks, even upon life or property, at the arbitrary will . . . are less dangerous to the commonwealth, than such as are made upon the personal liberty . . . [T]o bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom . . . but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government."⁶ Furthermore, as long ago declared by statute, the "pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority without the consent of parliament, is illegal."⁷ It should finally be noted that the "original power of judicature, by the fundamental principles of society, is lodged in the society at large"; and that justice is not derived from the government or the courts, but rather, they are "the steward of the public, to dispense it to whom it is due."⁸

Accordingly, a violation of this right would necessarily be effected by the injury of false imprisonment, which the law has always viewed as criminal and has also afforded private remedies to the party in removing the actual confinement and subjecting the offender to a civil action.⁹ Traditionally, there have been four writs available to remove this injury,¹⁰ but "the great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*."¹¹ This writ is described

as a "writ of right," in that wherever it could be shown that a party was imprisoned without just cause, the writ could not be denied, but must be granted to every man imprisoned or otherwise restrained, even if by order of the king or his council.¹² From the fifteenth century, prior to which the writ had existed as a "merely procedural" instrument, the common law courts began to use it to assert their jurisdiction against rival courts such as Chancery, Admiralty, the Council, and the High Commission, and as such, the King's Bench and Common Pleas would bring before them and release prisoners if they believed the rival courts had acted beyond their jurisdiction, and by the time of the celebrated constitutional controversies of the seventeenth century, the writ had gained eminence in constitutional law; when Selden, in his argument at the conference between the Lords and Commons in 1628 calls it, "the highest remedy in law for any man that is imprisoned."¹³

The English understanding of absolute rights followed the colonists to America, where they always claimed to possess "all the rights, liberties, and immunities of free and natural-born subjects within the realm."¹⁴ And in almost every colonial charter, declaratory acts acknowledging and confirming these rights and immunities were insisted upon.¹⁵ In Connecticut, in 1650, it was enacted that life, honor, reputation, liberty, and property were to be free from governmental assault unless by virtue of law, as determined by a court.¹⁶ In Massachusetts, in 1689, application was made for a writ of habeas corpus to Judge Dudley, who was later sued for having arbitrarily refused it.¹⁷ In New York, in 1707, two Presbyterian ministers were arrested on a warrant from the Governor for preaching without a license, and on refusing to provide bond and security that they would preach no more were sent to prison.¹⁸ An application was made to Judge Mompesson, said to be the best lawyer in America, for a writ of habeas corpus, which he granted on the basis that the warrant under which the prisoners were confined did not

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The drafters of the federal Constitution adopted a provision allowing for suspension of the privilege of the writ of habeas corpus in cases of rebellion and invasion if the public safety requires it. Within twenty years, the Senate sought to exercise the suspension power in response to the reported conspiracy of Colonel Aaron Burr. Burr is pictured dueling with Alexander Hamilton.

specify any offense.¹⁹ In New Jersey, in 1710, Judge Pinhorne was denounced by the Assembly for corruptly refusing an application for a writ of habeas corpus, which was declared by the assemblage to be the "undoubted right and great privilege."²⁰

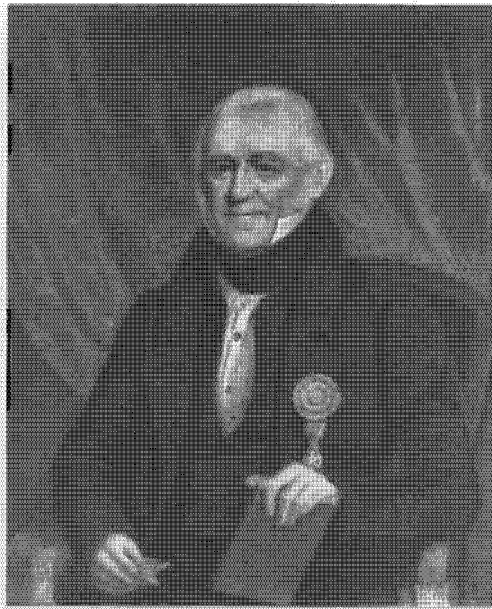
The Articles of Confederation contained no provision regarding the writ, and since they had been found otherwise inadequate, a convention was assembled at Philadelphia to revise them. Of the many drafts proposed for the new Federal Constitution, most contained provisions that acted to limit—and, in a few cases, prohibit—suspension of the writ.²¹ Mr. Jefferson was among those of the opinion that the writ should never be suspended, asking on one occasion, "Why suspend the writ of habeas corpus in insurrections and rebellions[?] . . . [I]f the public safety requires that the government

should have a man imprisoned on less probable testimony in those, than in other emergencies, let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages."²² The provision that was finally adopted allowed for suspension of the privilege of the writ in cases of rebellion and invasion if the public safety requires it; and within twenty years, the Senate sought to exercise the suspension power in response to the reported conspiracy of Colonel Aaron Burr.²³

Under the new Constitution, it was quickly determined that the Supreme Court could grant the writ.²⁴ In 1806, a case came before it by way of a petition for writ of habeas corpus directly to the Court, by a prisoner confined in the District of Columbia, asking that his cause of confinement be scrutinized and its legality

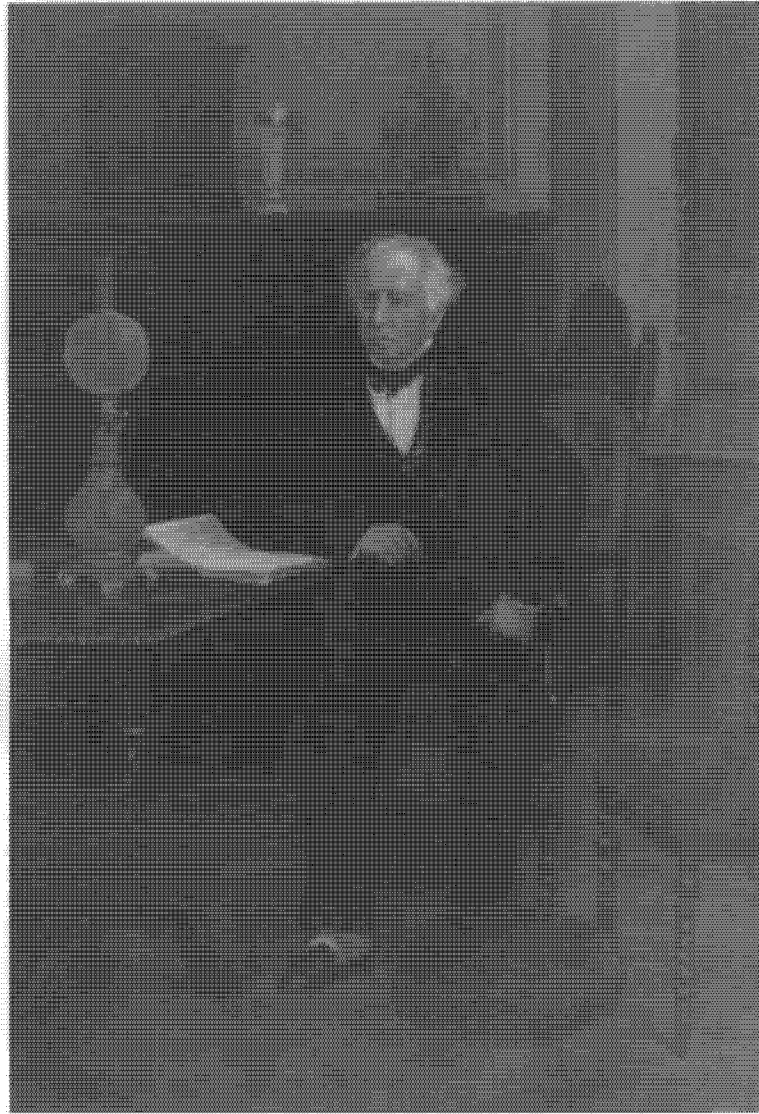
considered.²⁵ The Court, ordering the prisoner discharged, noted that he had not been charged with any crime and was confined pursuant to an oppressive order requiring sureties for his good behavior for life, and that "if the prisoner had broken jail, it would have been no escape, for the marshal is not answerable, unless a cause certain be contained in the warrant."²⁶ Just one month earlier, the Court had considered the case of a militia officer sued by a justice of the peace for breaking into his home to collect fines imposed by a court-martial. The Court held that "a court martial has no jurisdiction over a justice of the peace . . . and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it . . . the court and the officer are all trespassers."²⁷ In 1807, the Court found itself again questioning its habeas jurisdiction, this time in light of certain statutory principles.²⁸ The case was a petition for habeas relief by two prisoners, committed on charges of treason; and the Court, answering its jurisdictional question in the affirmative, discharged the prisoners on grounds of insufficient evidence, explaining that "this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done."²⁹

In June 1813, Samuel Stacy, Jr., a natural-born citizen, was arrested as a spy by military order, kept in confinement, and not informed of the cause of his arrest and detention.³⁰ He petitioned the Supreme Court of Judicature of New York for a writ of habeas corpus, which was granted and directed to Morgan Lewis, commander of the troops of the United States, who simply returned "that the within-named Samuel Stacy, Jr., is not in my custody."³¹ This was found evasive by the court, reasoning that "he ought to have stated, if he meant to excuse himself for the non-production of the body of the party, that Stacy was not in his possession or power."³² The court went on to characterize the government's suggestion that Stacy was a spy and a traitor as irrelevant, stating that



When Samuel Stacy, Jr. was arrested as a spy by military order in the War of 1812, kept in confinement, and not informed of the cause of his arrest and detention, he successfully petitioned the Supreme Court of Judicature of New York for a writ of habeas corpus. But Morgan Lewis (pictured), commander of the troops of the United States and to whom the writ was directed, simply replied that Stacy was not in his custody.

"the pretended charge of treason . . . without being founded upon oath . . . and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement."³³ In a case similar to *Wise v. Withers*, the Supreme Court of New York, holding in favor of another citizen who had brought an action for assault and battery as well as false imprisonment against his military jailor, observed that none of the offenses under which the prisoner was charged were cognizable by a court-martial.³⁴ The court further stated that the "rights and the responsibility of the defendant must be governed by the rules of law, applicable to courts of special and limited jurisdiction . . . [W]here such a court has neither jurisdiction of the subject matter, nor of the person, everything done is absolutely void, and all are trespassers who are concerned in the proceedings."³⁵ In 1814, under threat of invasion, the legislature

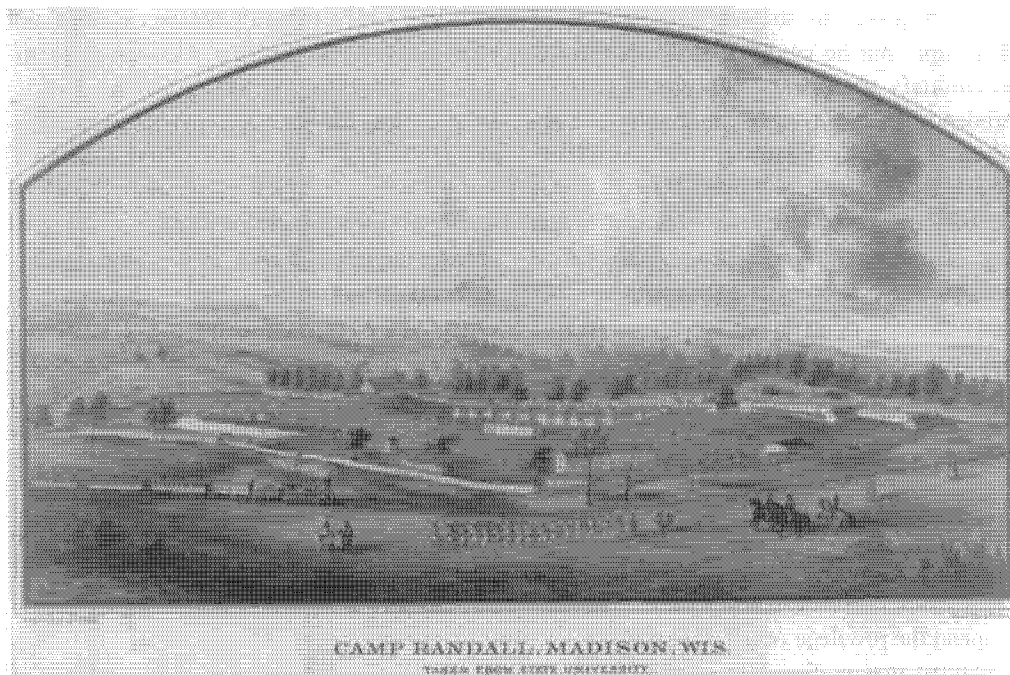


James Kent served on the New York Supreme Court during the War of 1812 when many noteworthy cases arose with regards to habeas jurisdiction. In *Stacy*, Kent expressly approved of habeas petitioners naming a respondent that had the power of control over them, rather than one simply having immediate custody.

of Louisiana considered a suspension of the writ. Unable to wait for their deliberation, General Jackson placed their city under martial law, thereby placing in effect a practical suspension of the privilege of the writ.³⁶ He then proceeded to arrest for an alleged act of mutiny a member of the legislature, who subsequently applied for and was granted a writ of habeas corpus by Judge Hall of the United States Court.³⁷ Considering obedience to the writ as an interference with his jurisdiction under martial law, the General ordered the arrest of Judge Hall and directed that he be removed

from the city.³⁸ After the repeal of martial law, Judge Hall summoned General Jackson to answer for the contempt of arresting a judge, and fined him one thousand dollars.³⁹

Shortly after the outbreak of the Civil War, an application for the writ was made and granted in the name of a Maryland resident who was seized in his home by an armed force and summarily imprisoned by military authority that subsequently refused to show obedience to the habeas corpus.⁴⁰ Chief Justice Taney was astounded by the government's claim that not only was the President invested



In 1862, the Supreme Court of Wisconsin heard cases from soldiers who had been arrested in a riot at Camp Randall. After taking consolation in the fact that the Supreme Court would remedy any error it might commit, the state supreme court held that the President had no power to suspend the writ of habeas corpus and subject the citizens of Wisconsin, by martial law, to punishment by military commission for resisting enforcement of the draft.

before the U.S. Supreme Court, was found offensive.⁵³ The Court went on to hold that not only was the military commission without jurisdiction and not authorized by Congress, but that it was not even within the power of Congress to authorize the Executive to conduct such a tribunal, delegating powers to the President which were invested by the Constitution in the judiciary.⁵⁴

In 1867, the Court, by way of a motion to dismiss an appeal, considered whether, under the Act of February 5, 1867,⁵⁵ it was vested with appellate jurisdiction over the original action of a circuit court in a habeas corpus proceeding.⁵⁶ The Court maintained that any substantive question that a circuit court might decide upon, including its own jurisdiction, could be revisited in the Supreme Court on appeal from its final judgment.⁵⁷ Two years later, the Court again expressly held that, under the Act of March 27, 1868⁵⁸ and the Judiciary

Act of 1789,⁵⁹ in all circuit court cases involving an exercise of original jurisdiction, where a prisoner was brought for an inquiry into the cause of his detention and remanded to the custody from which he was taken, the Supreme Court, in the exercise of its appellate jurisdiction, might by habeas corpus and certiorari review the decision of the circuit court and relieve the prisoner from the restraint to which he was remanded.⁶⁰

In 1872, nine years after the decision of the Wisconsin supreme court in *Kemp*, the U.S. Supreme Court considered whether state judicial officers should have jurisdiction to issue writs of habeas corpus and order the discharge of persons held under color of authority of the United States.⁶¹ The Court held that the judicial power assumed in order to conduct a habeas proceeding in state court with regards to a federal prisoner has never been conferred on state judges by the United States, and since

the states themselves do not have such a power to delegate, state courts are not authorized to issue the writ as to federal prisoners.⁶² A more generous approach was submitted by the dissent, claiming that a denial of the right of state courts to issue the writ was never within the contemplation of the Framers of the Constitution and might amount to a suspension "in a large class of cases."⁶³

Having established that state courts could no longer inquire into the legality of federal detentions by habeas proceedings, the Court, in 1890, reserved for the national government the inverse of that same power as to federal officers in state custody, upholding the release of a federal officer from state custody by a writ of habeas corpus issued from a U.S. Circuit Court.⁶⁴ The reasoning submitted by the dissent, however, claimed that "if a prisoner is in the custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because it is believed [there that] he is not guilty of the offence for which he is held."⁶⁵

In 1901, the distinction between custody and control in the context of habeas proceedings was addressed again in New York through a child custody case, where the party whose release was sought was outside the state.⁶⁶ In a statement peripheral to its holding, the New York court stated that if "the person whose release is sought is without the State, nevertheless, the court has jurisdiction to issue the writ if the facts show that the person to whom it is directed may have the control of the person confined, or may be able to obey the command of the court by producing him."⁶⁷

The following year, the U.S. Supreme Court considered a challenge to the jurisdiction of a court-martial by a petition for habeas corpus in federal court.⁶⁸ The Court held that the prisoner should be released since Congress had placed members of the volunteer army outside the jurisdiction of courts-martial; and

there having been no jurisdiction over the person of the volunteer officer or the subject matter of the charges against him, the Court expressly held that consent could confer no such jurisdiction.⁶⁹ During this period, a new class of habeas corpus cases involving the rights of persons of Chinese ancestry to enter or re-enter the country arose in the federal system.⁷⁰ Generally, they stood against the proposition that the President was invested with any authority to render or delegate final adjudication regarding life or liberty. In *Sing Tuck*, however, the Court narrowed the scope of habeas jurisdiction by holding that before a writ would issue, the court had to be satisfied that the petitioner could make out a prima facie case.⁷¹ The dissent in that case advocated the traditional scope of habeas jurisdiction, pointing out that it would be wrong to deny a party a hearing on the grounds that the court did not believe it probable that he could establish the claim he made.⁷²

In 1938, the Court of Appeals for the District of Columbia considered the distinction between custody and control in the context of habeas proceedings.⁷³ In considering whether a writ may issue in an instance where the confinement occurred outside the territorial jurisdiction of the issuing court, the D.C. court held that the place of confinement is not relevant to habeas relief; all that matters is that someone be found within the reach of service of process such that "by the power of the court he can be compelled to release his grasp."⁷⁴

In 1942, the Court considered the denial of applications filed in the District Court for the District of Columbia for leave to file petitions for habeas corpus by prisoners challenging the jurisdiction of the military commission under the authority of which they were subjected to imprisonment and trial.⁷⁵ The Court, acknowledging that the customary procedure had been to issue the writ and to hear and dispose of the matter on the return, chose instead to consider and determine whether the facts alleged by the petition, if true, would justify release of the

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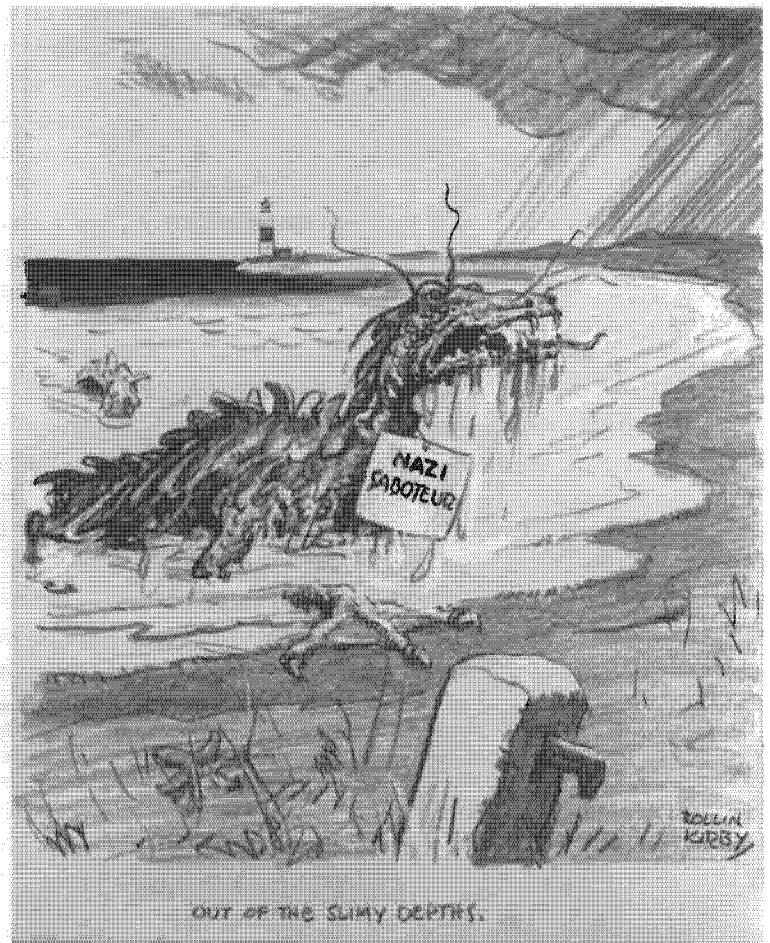
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The Nazi saboteurs conceded that they had been dropped off by German submarines under orders from the German High Command to commit acts of espionage, but pleaded that they had neither committed nor intended to carry out any such acts, raising questions of habeas corpus. This cartoon features a sea monster labeled "Nazi Saboteur" coming ashore in June 1942.



prisoners without issuing the writ.⁷⁶ The Court determined that, as the commission would undoubtedly have jurisdiction to try enemy belligerents for acts in violation of the laws of war, jurisdiction should attach to the prisoners simply by virtue of their status as enemy belligerents, caught behind our defenses "in civilian dress and with a hostile purpose," regardless of their allegations that the hostile purpose had not existed.⁷⁷ The reasoning in *Quirin* represented a further constriction of habeas jurisdiction, allowing military jurisdiction to attach simply by virtue of the charge that was tendered and regardless of the petitioners' challenges to the government's determination as to their status as saboteurs or spies. This was a significant departure from the ap-

proach taken by the Court the previous year in *Walker*.

During the following two years, the Court consistently held that imposition of military curfews and exclusion orders against persons of Japanese ancestry were permissible exercises of the war power, because the circumstances of the war afforded a substantial basis for the military's conclusion that persons of Japanese ancestry required differentiation from others.⁷⁸ As these various denials of personal liberty were being affirmed, no issue of habeas jurisdiction arose until the government's activities concerning Japanese Americans matured into internment and detention. In 1944, the Court considered a denial of a writ of habeas corpus sought by a Japanese



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American who was "evacuated" from her home in Sacramento and subsequently detained in military custody pursuant to Executive Order No. 9066.⁷⁹ The Court viewed the issue, not in terms of the validity of the regulations themselves, but in terms of their applicability to the petitioner. As such, it considered her habeas petition in light of the purpose of the regulations and ordered her unconditional release due to the fact that she was a *concededly* loyal citizen.⁸⁰ From a jurisdictional standpoint, the result in *Endo* turned on the fact that the regulations under which Endo was detained were designed to ferret out Japanese Americans who were disloyal; thus, the government could not detain her pursuant to those regulations and at the same time concede that she was loyal.

In February 1946, the Court rejected an application for leave to file a petition for writs of habeas corpus and prohibition challenging

the jurisdiction of a military commission that had proffered charges for an omission by a commander of the Japanese army, rather than an act, that it determined amounted to a violation of the laws of war.⁸¹ The petitioner's procedural complaints did not convince the Court that due process of law applied to *any person* accused of a crime by the United States.⁸² A few weeks later, the Court repudiated the assertions of jurisdiction by military commissions in the trials of two civilians charged with civil crimes in Hawaii, affirming the district court's finding that there was no necessity for their trials by military rather than civilian courts, and ordered the prisoners discharged.⁸³ The Court held that the term "martial law," as employed in the Hawaiian Organic Act⁸⁴ and under which the commissions operated, did not contemplate the "supplanting of courts by military tribunals."⁸⁵

Two years later, the Court considered the reach of a federal district court's habeas jurisdiction with regards to petitioners detained beyond the territorial jurisdiction of the district court but under the control of someone found within the court's service of process.⁸⁶ The Court held that, in light of certain statutory provisions,⁸⁷ the district court would not have jurisdiction to issue the writ if the petitioner was outside the court's territorial limits, regardless of where a respondent might be found.⁸⁸ Later that year, the Court considered applications for leave to file petitions for habeas corpus by a number of citizens and residents of Japan. It denied habeas jurisdiction on grounds that the tribunal that had sentenced them was composed by General MacArthur in his capacity as Supreme Commander of the Allied Powers.⁸⁹ Satisfied that the tribunal that sentenced the petitioners was not one constituted solely under the authority of the United States, the Court denied itself jurisdiction to review that tribunal's judgments and sentences.⁹⁰

The following year, on behalf of himself and twenty-one others in the same situation, a prisoner in U.S. Army custody in Germany filed a petition for writs of habeas corpus in the District Court for the District of Columbia, naming the Secretary of Defense and others as respondents. As the prisoners were confined outside the United States, the district court dismissed the action based on the authority of *Ahrens*, and the Court of Appeals reversed.⁹¹ The Court of Appeals approached the issue by considering: (a) whether the petitioners were entitled to the writ as a matter of right; (b) if so, whether a federal jurisdictional statute could deny them the benefit; and (c) if they were not deprived by the statute, in which court their petition would lie.⁹² Its answers were: (a) that any person who could show that their liberty had been denied in violation of the Constitution by officials of the United States was entitled to the writ;⁹³ (b) that if a person had a right to the writ, it could not be denied due to "an omission in a federal jurisdictional statute";⁹⁴ and (c) accordingly, if a person is detained outside

the territorial jurisdiction of any district court, the petition should be considered in the district court that has territorial jurisdiction over a person with directive power over the immediate custodian.⁹⁵ This was a remarkable opinion in that the petition did not specifically dispute the jurisdiction of the military commission regarding their person or the subject matter of the charges. This court essentially held that since they were imprisoned by officers acting under color of United States authority, the final determination of their case should be made in a court of the United States, and that any measures taken by the government of the United States in regards to them should be subject to the limitations expressed in the Constitution.

The next year, the Supreme Court reversed.⁹⁶ In doing so, the Court rejected every component reasoning of the Court of Appeals, holding instead: (a) that the right to sue, including habeas petitions, in courts of the United States had never been recognized for enemy aliens and that allowing "such trials would hamper the war effort and bring aid and comfort to the enemy"; (b) that a *resident* enemy alien would only be entitled to a judicial hearing to determine whether he was really an alien enemy; and (c) that a *nonresident* enemy alien did not have any access to our courts.⁹⁷ Furthermore, since the Court found no basis for the invocation of federal judicial power in any district, it did not consider the issue as to which court would be appropriate for habeas proceedings regarding an extraterritorially detained petitioner.⁹⁸

In 1973, a case arose that compelled the Court to modify the territoriality requirement it was though to have mandated in *Ahrens*. In so doing, it stated that *Ahrens* no longer stood for any broader proposition than that the appropriate forum to entertain the applications of prisoners on Ellis Island would be the Eastern District of New York, rather than the District of Columbia.⁹⁹ The Court held that a literal reading of 28 U.S.C. § 2241(a) required only that the court issuing the writ have jurisdiction over the custodian, and that as long as he could be

reached by the court's service of process, the court could issue the writ even if the prisoner was outside its territorial limits.¹⁰⁰

Thus, it appears that somewhere along the way two divergent views have developed as to how one ought to view occasions on which the government claims it necessary to detain individuals without due process of law. The view taken by the Court of Appeals in *Eisentrager v. Forrestal*¹⁰¹ would extend habeas jurisdiction to any individual detained under authority of the United States, regardless of where that detention takes place. Since that view has been soundly rejected, extraterritorial imprisonment alone would seem to afford the President final authority regarding the life or liberty of anyone who may find themselves detained in such a manner.¹⁰²

It would seem that given the right set of circumstances, a large part of the historic efficacy of the "great writ" may become subject to summary destruction. Under such circumstances—which are not entirely beyond the imagination—it is not unreasonable to wonder if even a remedial Act of Congress could, in the words of Henry Hallam discussing the intended effect of the habeas corpus statute of Charles II, serve to "cut off abuses by which the government's lust of power, and the servile subtlety of [its] lawyers, had impaired so fundamental a privilege."¹⁰³

ENDNOTES

¹Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (Sept. 18, 2001) (Authorization for Use of United States Armed Forces).

²¹William Blackstone, *Commentaries* 137 (quoting from the Second of Sir Edward Coke's *Institutes of the Laws of England*, commenting on *Magna Carta* at c. 39: "[A]nd therefore every subject for injury done to him . . . without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without denial, and speedily without delay").

³Blackstone, *supra* note 2, at 119.

⁴*Id.* at 125.

⁵*Id.* at 130–31 (citing *Magna Carta* at c. 39: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon

him, except by the lawful judgment of his peers or by the law of the land").

⁶*Id.* at 131–32.

⁷*Id.* at 138 (citing 1 W. & M. st. 2 c. 2, and further pointing out that "not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament: for if once those outworks were demolished, there would be no inlet to all manner of innovation in the body of law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established form of the common law").

⁸*Id.* at 257 (quoting Bracton, l. 3. tr. l. c. 9, "*Ad hoc autem creatus est et electus, ut justitiam faciat universis*," for the proposition regarding the king: that he was created and elected for this very purpose, in order that he render justice to all).

⁹*Id.* at 127–28.

¹⁰*Id.* at 128–30 (enumerating them as: the writ of *main-prize*, used when a prisoner was held for a bailable offense and bail had been refused; the writ *de odio et atia*, used to inquire whether a prisoner charged with murder, the only nonbailable offense, was held upon just cause or suspicion, or merely *propter odium et atiam*, for hatred and ill-will; the writ *de homine replegiando*, originally a writ to "replevy" a man out of prison, though almost entirely antiquated by Blackstone's day; and, "the most celebrated writ in the English law," the writ of *habeas corpus*, of which there have been several varieties: *habeas corpus ad respondendum*, a method of removing prisoners from one court to another; *habeas corpus ad satisfaciendum*, used for the removal of a prisoner who has a judgment against him, to a higher court for execution of the judgment; *habeas corpus ad prosequendum, testificandum, deliberandum, &c.* used to remove a prisoner who is to prosecute or give testimony in any court, or to be tried in the jurisdiction where the events occurred; *habeas corpus ad faciendum et recipiendum*, issuing out of the courts of Westminster Hall as a command to the judge of an inferior court to produce the body of the defendant sued therein, who desires to remove the case into the superior court).

¹¹*Id.* at 131 (explaining the writ as "directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf").

¹²*Id.* at 133.

¹³William S. Holdsworth, *A History of English Law* (17 Vols.) (7th Ed. Revised 1956) (1903) at 227.

¹⁴Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 92–93 (Da Capo Press 1972) (1815).

¹⁵Joseph Story, *Commentaries on the Constitution of the United States* § 122.

¹⁶Hurd, *supra* note 13, at 93 (citing 1 Col. Rec. of Conn. 509, "No man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be arrested, restrained, banished, dismembered nor any ways punished; no man shall be deprived of his wife or children, no man's goods or estate shall be taken away from him, nor any ways indamaged under color of law or countenance of authority, unless it be by virtue or equity of some express law of the country, warranting the same, established by a general court and sufficiently published").

¹⁷*Id.* at 96 (citing Washburn, *Judicial History of Massachusetts* at 195, "which shows that the right to the writ was regarded as one of the existing privileges of the colonists").

¹⁸*Id.* at 100.

¹⁹*Id.* at 100–101 (relating that the warrant was later reformed to specify an offence, the prisoners were admitted to bail, and the only one indicted of the charge was tried and acquitted).

²⁰*Id.* at 100.

²¹*Id.* at 107–10 (citing 1 *Elliot's Debates* 375 and 2 *Elliot's Debates* 108: A May 29th draft from Mr. Pinkney of South Carolina provided, "nor shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion"; an August 6th draft was proposed without any reference to the writ; an August 28th draft stated, "the privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding 12 months"; one delegate, future Supreme Court Justice John Rutledge, believed the writ to be inviolate, and could not conceive any circumstance that would warrant suspension by the national government; another delegate, and also a future Supreme Court Justice, James Wilson, doubted that suspension could be necessary in any case, and that the discretion should always rest with a judge; and finally, the clause, as it was eventually adopted, was introduced on the motion of Gouverneur Morris of Pennsylvania, and stated that, "the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it").

²²Story, *supra* note 14, at § 1342 (citing 2 *Jefferson's Correspondence* 344).

²³Hurd, *supra* note 13 at 117–18 (citing 3 *Benton's Abr. Debates* 490, 504, 515: on January 22, 1807, President Jefferson sent the Senate a message, reporting Colonel Burr's conspiracy, and complaining that one of the apprehended conspirators had been released by habeas corpus; the Senate acted quickly, and passed a bill authorizing a three-month suspension of the privilege in certain cases, and communicated the passage of the bill "in confidence" to the House on the 26th, requesting their quick action; the House received the Senate's bill and message in secret

session, but as soon as it became aware of the nature of the proceeding, by a vote of 123 to 3, the doors were opened to the public, and a motion was made for rejection of the bill as unworthy of consideration, which prevailed by a vote of 113 to 19).

²⁴*U.S. v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795) (Wilson, J.).

²⁵*Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449–51 (1806) (Marshall, C.J.) (relating the case of John Burford, who, having been arrested and brought before Judge Thompson, was committed to prison and required to pay four thousand dollars as a bond for his good behavior for life before he could be released; the Circuit Court for the District of Columbia, upon hearing his case, remanded the prisoner to jail, reducing the bond to one thousand dollars).

²⁶*Id.* at 452–53 (citing Sir Edward Coke's *Second Institute* at 52, 53).

²⁷*Wise v. Withers*, 7 U.S. (3 Cranch) 331, 336–37 (1806) (Marshall, C.J.).

²⁸*Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–101 (1807) (Marshall, C.J.) (reviewing the question in light of the 14th section of the Judiciary Act of September 24, 1789, 1 Stat. 81, stating in relevant part "that all the aforementioned courts of the United States shall have power to issue any writs . . . which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law . . . and that either of the justices of the supreme court . . . shall have power to grant writs of habeas corpus"; and this was accordingly construed by the Court not to limit its power as a whole, but to give the power to grant writs to the individual Justices as well).

²⁹*Id.* at 93–100, 114, 135–37.

³⁰*In re Stacy*, 10 Johns. 328, 328 (N.Y. Sup. Ct. 1813) (Kent, C.J.).

³¹*Id.* at 331–34.

³²*Id.* at 331–34 (responding to the faulty return, the court issued an attachment and a copy of the opinion so that the sheriff would know "not to serve the same, if General Morgan Lewis shall forthwith, upon service of a copy of this rule upon him, discharge the said Samuel Stacy, Jr., or shall cause him to be brought . . . in obedience to the habeas corpus").

³³*Id.* at 333. It should be noted that Chief Justice Kent was, in 1813, not satisfied with a return to a writ that denied custody but failed to mention control. It is unclear how this became such a contentious issue 130 years later during World War II.

³⁴*Smith v. Shaw*, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815). The defendant unsuccessfully argued that he had at least the authority to detain Shaw, conduct an investigation, and then transfer him to civilian authorities to be charged with treason, and that this was vital to public safety. *Id.* at 260.

³⁵*Id.* at 265.

³⁶Hurd, *supra* note 13 at 118.

³⁷*Id.*

38/*Id.*

39/*Id.* The fine was later refunded by Congress. *Id.*

40/*Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487) (Taney, Circuit Justice) (relating that John Merryman was arrested on general charges of treason and rebellion, and confined on an order that contained no evidence, no indication of the existence of witnesses, or any other specification of the acts, which in the reasoning of the officer may have constituted these crimes; subsequently, the commanding officer refused to show obedience to the court on grounds that he was duly authorized by the President to suspend the writ).

41/*Id.* at 148 (stating that "no official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power . . . for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion . . . that the privilege of the writ could not be suspended, except by act of congress").

42/*Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

43/*Merryman*, *supra* note 40, at 148, 152.

44/*Id.* at 149. Chief Justice Taney went on to emphatically state that "from the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of habeas corpus, to bring his case before the king's bench; if no specific offence were charged against him in the warrant of commitment, he was entitled to be forthwith discharged." *Id.* at 150.

45/*Id.* at 151 (quoting 3 *Hallam's Constitutional History* 19: "[I]t is a common mistake that the statute of Car. II enlarged in great degree our liberties . . . [I]t introduced no new principle, nor conferred any right . . . [F]rom the earliest records of the English law, no freeman could be detained in prison except upon a criminal charge or conviction . . . [T]he statute of Car. II was enacted . . . but to cut off the abuses by which the government's lust of power, and the servile subtlety of the crown lawyers, had impaired so fundamental a privilege").

46/*Id.* at 153.

47/*Hurd*, *supra* note 13, at 137.

48/*In re Kemp*, 16 Wis. 359, 359-61 (Wis. 1863) (regarding a petition for habeas corpus filed on behalf of Nicholas Kemp alleging that his imprisonment in Camp Randall was illegal because he was not committed or detained pursuant to a final judgment or order of any competent court of criminal or civil jurisdiction, nor based on any affidavit accusing him of any crime under state or federal law, and furthermore, that he had been illegally removed from the county in which the alleged wrongdoing had taken place).

49/*Id.* at 367, 373-76.

50/*Id.* at 371, 379.

51/*Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107, 132-34 (1866) (relating the case of Lambdin Milligan, arrested and detained under authority of the Act of Congress of March 3, 1863, 12 Stat. 731, which had authorized sus-

pension of the writ of habeas corpus throughout the country by the President during the course of the rebellion; the Act also required that citizens of states where the operation of the federal courts was uninterrupted, and who were detained by the President's authority, have the benefit of having their cases heard in the federal courts; and that lists of the names of such detainees must be kept and furnished within twenty days of the arrest, and subsequently the prisoners must be brought before the federal court for indictment or discharge).

52/*Id.* 107, 108-09.

53/*Id.* at 118-19, 121-22, 124-26, 131 (similarly rejecting the rest of the government's arguments: the government argued that the tribunal had jurisdiction under the laws and usages of war; the Court held that these usages could never be applied to a citizen when the courts are open and their process unobstructed; the government argued that martial law covered the proceedings of the commission, subjecting citizens as well as soldiers to the will of the military, the Court held that, if true, this would render republican government a failure, and signify an end to liberty regulated by law; the government argued finally that the detainee was a prisoner of war, and exempt from the privileges of the Act of March 3, 1863, 12 Stat. 731; the Court held that as a citizen of Indiana, if he had "conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana . . . [W]hen tried for the offence [he] cannot plead the rights of war . . . [I]f he cannot enjoy the immunities attaching to the character of prisoner of war, how can he be subject to their pains and penalties?").

54/*Id.* at 136 (Chase, C.J., dissenting). This last holding was the only grounds on which four Justices dissented. *Cf. Ex parte Mason*, 105 U.S. 696, 699 (1881); *Johnson v. Sayre*, 158 U.S. 109, 118 (1895) (holding that if a court-martial has jurisdiction as to the person accused, of the offence charged, and acts within the scope of its lawful powers, its judgment cannot be reviewed by habeas corpus or any other exercise of the civil courts); and *Kurtz v. Moffitt*, 115 U.S. 487, 500, 505 (1885) (upholding a writ of habeas corpus that was granted to discharge an alleged deserter from the U.S. Army who was detained without warrant by San Francisco police officers, holding that the supposed charge was the exclusive province of a court-martial).

55/14 Stat. 385.

56/*Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 318, 324-26 (1868) (Chase, C.J.) (explaining that the right of appeal attached equally to all judgments of the circuit court and that the Act of 1867, 14 Stat. 385, "brings within the habeas jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws"; thus, under the government's argument that the Supreme Court's appellate jurisdiction only extends to judgments of the circuit courts rendered on appeal, as opposed to those rendered

on original jurisdiction, then the petitioner in a habeas proceeding in a circuit court would have no recourse of appeal whatsoever).

⁵⁷*Id.* at 327.

⁵⁸15 Stat. 44.

⁵⁹1 Stat. 81.

⁶⁰*Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) (Chase, C.J.).

⁶¹*In re Turble*, 80 U.S. (13 Wall.) 397, 402 (1872). A petition for a writ of habeas corpus was granted by a court commissioner of Dane County, Wisconsin on behalf of an underage recruit, restrained of his liberty by military custody, on grounds that the military lacked jurisdiction over him due to the illegality of his enlistment; the grant of the writ was upheld by the Wisconsin Supreme Court. *Id.* at 397.

⁶²*Id.* at 405, 409 (reversing the judgment of the Wisconsin supreme court, which had asserted the right of a state court to inquire into the legality of detention under federal authority).

⁶³*Id.* at 412–13 (Chase, C.J., dissenting) (maintaining that there was no doubt of the “right of a state court to inquire into the jurisdiction of a federal court upon habeas corpus,” and “still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States”).

⁶⁴*In re Neagle*, 135 U.S. 1, 41–55, 74–76 (1890) (relating the case of a federal officer, assigned to protect U.S. Supreme Court Justice Field, who was arrested by a sheriff in California for shooting former Chief Justice Terry of the California supreme court, who was reportedly trying to kill Justice Field; the federal officer was ordered to be released from state custody by the U.S. Circuit Court on grounds that he was acting within the scope of his duties, to which no state criminal liability could attach; the Supreme Court affirmed).

⁶⁵*Id.* at 76 (Lamar, J., Fuller, C.J., dissenting). The dissent further contended that since the federal government did not have jurisdiction to charge the federal officer for that alleged crime in that particular circumstance, it was consequently not empowered to release him from trial and make him immune from liability to trial in that same circumstance. *Id.* at 99.

⁶⁶*New York ex. rel. Billotti v. N.Y. Juvenile Asylum*, 57 A.D. 383, 383–86 (N.Y. App. Div. 1901).

⁶⁷*Id.* at 384.

⁶⁸*McClaghry v. Deming*, 186 U.S. 49 (1902).

⁶⁹*McClaghry*, 186 U.S. at 59, 62–67, 69–70 (1902) (citing the Act of 1898, 30 Stat. 361; and, Act of 1899, 30 Stat. 977).

⁷⁰*United States v. Wong Kim Ark*, 169 U.S. 649, 666–67, 675, 694 (1898) (affirming the issuance of a writ of habeas corpus on behalf of a person of Chinese ancestry, who alleged that he was a natural-born U.S. citizen and whom

the government had sought to refuse entry to the country under the Chinese Exclusion Acts of May 6, 1882, c. 126, 22 Stat. 58; July 5, 1884, c. 220, 23 Stat. 115; September 13, 1888, c. 1015; October 1, 1888, c. 1064, 25 Stat. 476, 504; May 5, 1892, c. 60, 27 Stat. 25; and August 18, 1894, c. 301, 28 Stat. 390; the Court, rejecting the government’s argument that citizenship followed the parents, maintained that a child born in the United States to immigrant parents residing here in a nondiplomatic capacity becomes a citizen of the United States, by virtue of the first Clause of the Fourteenth Amendment of the Constitution); *Ex parte Fong Yim*, 134 F. 938, 941–42 (S.D.N.Y. 1905) (granting a writ of habeas corpus on behalf of two children of Chinese ancestry, denied entry to the country by decision of the Secretary of Commerce and Labor, citing *Turner v. Williams*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring) for the proposition that it is not “within the power of Congress to give ministerial officers a final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts”); *Lem Moon Sing v. United States*, 158 U.S. 538, 548–50 (1895) (denying a writ of habeas corpus on behalf of a merchant of Chinese ancestry who was refused entry to the country by a customs official, for want of jurisdiction due to the fact that he did not take a statutory appeal of the decision to the Secretary of the Treasury—the Court declined to reach the question as to what would have happened had the administrative remedy been exhausted); *United States v. Sing Tuck*, 194 U.S. 161, 166–67, 170 (1904) (Holmes, J.) (relating the case of thirty-two persons of Chinese ancestry who were denied entry into the country from Canada; while in detention, and awaiting deportation, without having appealed to the Secretary, a petition for habeas corpus was filed on their behalf, claiming they were natural-born citizens of the United States; the Court held the writ should not have been granted, reasoning that “a petition for habeas corpus ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a prima facie case . . . [M]ere allegation of citizenship is not enough”); but see *id.* at 173 (Brewer, Peckham, J.J., dissenting) (advancing the proposition that someone claiming to be a citizen cannot be presumed to be an alien and that the courts cannot deny a party a hearing on the grounds that they do not believe it probable that he could establish the claim he makes).

⁷¹*Sing Tuck*, 194 U.S. at 170 (Holmes, J.).

⁷²*Sing Tuck*, 194 U.S. at 173 (Brewer, Peckham, J.J., dissenting).

⁷³*Sanders v. Allen*, 100 F.2d 717, 718 (D.C. Cir. 1938) (*per curiam*) (considering an appeal from an order denying a writ of habeas corpus; the prisoner was tried in the Police Court and fined \$100 for public intoxication, which she was unable to pay, she was sentenced to spend sixty days in the city jail but was soon thereafter transported to a workhouse twenty miles outside the city; her petition

alleged that she had not been drunk, but suffering from the effects of a drug that had been administered to her without her knowledge, and consequently, she had been unable to understand the charge or put forth a defense).

⁷⁴*Id.* (citing *In re Jackson*, 15 Mich. 417, 440 (Mich. 1867)); see also *In re Emerson*, 108 P.2d 866, 867-68 (Colo. 1940) (holding extraterritorial detention no bar to habeas corpus if it appears that respondent is able to produce the party, citing 29 C.J. § 113) (emphasis added); *Fielder v. Sudler*, 18 S.E.2d 486, 486 (Ga. 1942) (holding that illegal detention exists where the "power of control is exercised").

⁷⁵*Ex parte Quirin*, 317 U.S. 1, 18-25 (1942). Seven German-born men were arrested in the U.S., subjected to military jurisdiction, and tried as spies and saboteurs. *Id.* at 20-24. The prisoners stipulated to the fact that they were ordered by the German High Command to commit acts of espionage and sabotage, and that they were delivered to these shores, via German submarine for that purpose; but pleaded that they had neither committed nor intended to carry out any such acts at all. *Id.* at 38. As such, they argued that the basis for military jurisdiction over their alleged offenses became open to attack by habeas corpus in a court whose service of process could reach someone with the power of control over them. *Id.* at 24. The military commission, exercising jurisdiction over them for violations of the laws of war, was convened by order of the President, the order for which stated additionally that all such prisoners be denied access to the courts. *Id.* at 22-24. Their trial before the commission continued to progress as their applications for leave to file petitions for habeas corpus were denied by the district court, and subsequently filed, along with petitions for certiorari to review the order of the district court in the U.S. Supreme Court. *Id.* at 18-24. The Court met in Special Term, heard arguments of counsel, and two days later issued a *per curiam* opinion (in which Justice Murphy did not participate) affirming the order of the district court; it filed its full opinion three months later.

⁷⁶*Id.* at 24 (citing *Walker v. Johnson*, 312 U.S. 275, 284 (1941) in support of the procedural approach). Oddly enough, the view taken by the Court in *Walker* with regards to habeas jurisdiction suggested an approach more analogous to the one advocated by Justice Brewer in *Sing Tuck* than the one employed in *Quirin*. The *Walker* Court, holding in favor of a habeas petitioner who had challenged the constitutionality of his conviction through several allegations that were denied in affidavits filed with the return, held that "the denials only serve to make the issues which must be resolved by evidence taken in the usual way... [T]he witnesses who made them must be subjected to examination... [T]he Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence... [I]t is his right to be heard." *Id.* at 286-87 (emphasis added). Note that the opinion in *Quirin* curi-

ously ignored the thrust of *Walker's* holding as to habeas jurisdiction.

⁷⁷*Quirin*, 317 U.S. at 38.

⁷⁸*Hirabayashi v. U.S.*, 320 U.S. 81, 95-99, 100-02 (1943). The petitioner appealed from a conviction for violation of a curfew applicable only to people of Japanese ancestry. *Id.* In affirming the conviction, it did not go without mention that "today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry." *Id.* at 111, 114 (Murphy, J., concurring) (pointing out that under this curfew, 70,000 American citizens had been denied their liberty, but that national security and military necessity must nevertheless be allowed to temporarily take priority). See also *Korematsu v. U.S.*, 323 U.S. 214, 216-20, 223-24 (1944) (upholding the conviction of the petitioner for violating a subsequent exclusion order, holding that "compulsory exclusion of groups of citizens from their homes" is permissible under these "circumstances of direst emergency and peril," and that the exclusion order and conviction for the violation thereof were justified by war and the threat to national security); but see *id.* at 233 (Murphy, J., dissenting) (stating that, in the absence of martial law, this policy goes beyond the constitutional power and "falls into the ugly abyss of racism").

⁷⁹*Ex parte Endo*, 323 U.S. 283, 284-85, 294 (1944). Executive Order No. 9066, 7 Fed. Reg. 1407, authorized and directed prescription of military areas from which anyone might be excluded or to which anyone might be confined, with the power to grant permission to enter or leave being vested at first in the Secretary of War and then later in the War Relocation Authority. *Id.* at 286, 290. Mitsue Endo, who was detained at such a location, filed her petition for habeas corpus, alleging that she was detained arbitrarily and against her will and that no charge had been made against her; the district court denied her petition on the ground, among others, that she had failed to exhaust her administrative remedies. *Id.* at 294.

⁸⁰*Endo*, 323 U.S. at 294, 297, 302.

⁸¹*In re Yamashita*, 327 U.S. 4-6, 13-15, 26 (1946). The language in question was from the Annex to the Fourth Hague Convention of 1907, Article I of which states that in order for the members of an armed force to be considered lawful combatants they must be commanded by someone responsible for their subordinates. This was construed by the Court to impose a duty on the General to prevent acts by his subordinates that would constitute violations of the laws of war. *Id.* at 15-16. The Court refused to "appraise the evidence on which the petitioner was convicted": since it decided that the Commission had jurisdiction over him by virtue of the charge proffered, the Court simply asserted that any procedural defects alleged against the Commission were not able to be reviewed by the civil courts. *Id.* at 17, 23.

⁸²*Yamashita*, 327 U.S. at 26–28 (Murphy, J., dissenting) (maintaining that since hostilities had ceased, and the petitioner had voluntarily surrendered, he was entitled “to be treated fairly and justly, according to the accepted rules of law and procedure”; instead, there was a rush to trial, an improper charge, lack of notice, denial of fundamental rules of evidence, and a summary death sentence; and further stating that “such a procedure is unworthy of the traditions of our people”); *id.* at 41–42 (Rutledge, J., dissenting) (maintaining that due to the termination of hostilities, there was no reason not to restore adherence to the “due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents”).

⁸³*Duncan v. Kahanamoku*, 327 U.S. 304, 307–13, 318, 324 (1946) (relating that petitioners were separately convicted of civil crimes, embezzlement and brawling, by military tribunals, and subsequently filed petitions for habeas corpus in the district court, which in both cases ordered that the prisoners be set free, and held that the tribunals had operated outside their jurisdiction; the Court of Appeals for the Ninth Circuit reversed, and the Supreme Court granted certiorari).

⁸⁴31 Stat. 141, 153.

⁸⁵*Duncan*, 327 U.S. at 324; *cf. id.* at 325 (Murphy, J., concurring) (maintaining that the trials were forbidden by the Bill of Rights of the Constitution of the United States, let alone the martial law terms of the Hawaiian Organic Act).

⁸⁶*Ahrens v. Clark*, 335 U.S. 188, 189 (1948) (relating that the petitioners were 120 Germans held in New York by deportation order of the Attorney General, under authority derived from Presidential Proclamation 2655, 10 Fed. Reg. 8947, pursuant to the Alien Enemy Act of 1798, 50 U.S.C. § 21; the petitions for writs of habeas corpus were filed in the District Court for the District of Columbia, alleging that they were “subject to the custody and control” of the respondent Attorney General).

⁸⁷*Id.* at 189–91 (citing 28 U.S.C. § 452, which provided in relevant part that the Justices of the Supreme Court, and the judges of the Circuit Courts of Appeal, and of the District Courts shall, within their respective jurisdictions, have power to grant writs of habeas corpus, which the Court construed to necessitate the presence of the prisoner within the district from which the writ was to issue).

⁸⁸*Ahrens*, 335 U.S. at 193; *but see id.* at 195 (Rutledge, Black, and Murphy, J.J., dissenting) (maintaining that if the Court’s opinion “is or is to become the law . . . it would seem that a great contraction of the writ’s classic scope and exposition have taken place and much of its historic efficacy may have been destroyed”).

⁸⁹*Hirota v. MacArthur*, 338 U.S. 197, 197 (1948) (*per curiam*).

⁹⁰*Hirota*, 338 U.S. at 197.

⁹¹*Eisenstrager v. Forrestal*, 174 F.2d 961, 962–63, 968 (D.C. Cir. 1949) (relating that petitioners were civilian employees of the German government in China, and were served with charges, tried, and sentenced by a military commission for violations of the laws of war, namely, that they had engaged in dissemination of information regarding American forces in China, before the surrender of Japan but after the surrender of Germany).

⁹²*Id.* at 963, 964 (citing 28 U.S.C.A. § 2241, Act of June 25, 1948, ch. 646, based on 28 U.S.C. §§ 451, 452, &c., that federal district court judges shall, within their respective jurisdictions, have power to grant writs of habeas corpus . . .).

⁹³*Eisenstrager*, 174 F.2d at 963–65.

⁹⁴The court reasoned that if a federal jurisdictional statute would, due to an omission, deprive a person who has the right to a writ the benefit of that writ, that would amount to a suspension of the writ absent a rebellion or invasion; and since Congress cannot bring about by omission that which it could not effectuate by affirmative action, the “act would be unconstitutional” and it “should be construed, if possible, to avoid that result.” *Eisenstrager*, 174 F.2d at 965–66.

⁹⁵*Eisenstrager*, 174 F.2d at 964–67; *cf. Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949) (affirming the district court’s dismissal of a habeas petition for want of jurisdiction; prisoners were sentenced by an international tribunal, the decision of which was beyond the review of the courts of the United States).

⁹⁶*Johnson v. Eisenstrager*, 339 U.S. 763, 791 (1950) (Jackson, J.).

⁹⁷*Johnson*, 339 U.S. at 776, 777–79, 784.

⁹⁸*Johnson*, 339 U.S. at 790–91; *but see id.* at 797–98 (Black, Douglas, and Burton, J.J., dissenting) (maintaining that the Court was taking the indefensible position that, by deciding where prisoners would be kept, the Executive could “deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations,” and quoting Tacitus for the proposition that “our people chose to maintain their greatness by justice rather than violence”) (internal quotation marks omitted); *see also Burns v. Wilson*, 346 U.S. 137, 153–55 (1953) (Douglas and Black, J.J., dissenting) (maintaining that if someone well within the jurisdiction of a military tribunal were denied due process in the course of that trial, then the trial would become “an empty ritual” and a petitioner should be afforded relief by habeas corpus).

⁹⁹*Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 485–87, 495, 500 (1973) (considering whether the lack of physical presence of the prisoner within the territorial jurisdiction of the district court and the language in 28 U.S.C. § 2241(a) specifying “within their respective jurisdictions” would disqualify the district court

from considering the petitioner's application; the case was that of a petitioner, who, while serving a sentence in Alabama, applied to a federal court in Kentucky for a writ of habeas corpus, alleging a denial of his right to a speedy trial and asking the court to order the respondent state court to grant him an immediate trial on a several-year-old indictment).

¹⁰⁰*Braden*, 410 U.S. at 495.

¹⁰¹*Eisentrager v. Forrestal*, 174 F.2d 961, 962-63, 963-66 (D.C. Cir. 1949).

¹⁰²*Johnson v. Eisentrager*, 339 U.S. 763, 776, 777-79, 784 (1950).

¹⁰³Henry Hallam, *The Constitutional History of England* 12 (8th. ed.) (John Murray, London 1867). See also *Ex parte Merryman*, 17 F. Cas. 144, 151 (C.C.D. Md. 1861) (No. 9,487).

Biased Justice: James C. McReynolds of the Supreme Court of the United States

ALBERT LAWRENCE

James Clark McReynolds was a man who people only spoke of in superlatives—most of them unflattering.

McReynolds was appointed to the Supreme Court in 1914 by President Woodrow Wilson, an early example of what is now known as “the Peter Principle.” Wilson allegedly had McReynolds “kicked upstairs” to get him out of the President’s cabinet.¹ He served on the High Court for nearly 27 years, retiring in bitterness in 1941. McReynolds is often called the most conservative Justice who ever sat on the Court. That might be the only compliment ever paid him, and, of course, that is only considered flattering by conservatives. Those of a different political bent called him a reactionary and one of the Court’s “Four Horsemen.” He was also labeled a racist, an anti-Semite, a misogynist, lazy, irascible, an obstructionist and unpleasant. Even by the standards of a more Eurocentric, less diverse, less politically correct era, he was considered an extremely bigoted and generally odious man. A person so openly biased sitting on the bench—not to mention the

highest court in the land—seems unthinkable today. How these personal predilections may have colored the decision-making of one of nine persons entrusted with passing on some of the most critical issues of the day is worthy of contemplation.

BACKGROUND

James Clark McReynolds was born on February 3, 1862, in Elkton, Kentucky, a sparsely populated mountain town near the Tennessee border.² His ethnic background was Scotch-Irish;³ he came from a Presbyterian family that joined the Disciples of Christ when they migrated from Pennsylvania and Virginia to Kentucky. His autocratic father, John Oliver McReynolds, was a physician who was referred to in Elkton as “The Pope” because he believed himself infallible.⁴ Justice McReynolds apparently inherited his father’s

personality; the father was also described as snobbish and staunchly conservative,⁵ narrow in his opinions and activities.⁶ He taught his son the value of hard work and, believing that every man should know how to use his hands, had him apprentice as a carpenter.⁷ Dr. McReynolds objected to the notion of free, public education. "He felt that those who had a capacity for education would somehow find the means of obtaining it. Those who were unsuccessful in the quest, or who lacked the initiative to undertake it, by that fact demonstrated the lack in themselves of the capacity to benefit by it."⁸ As a result, his son was educated in a private school run by a cousin and, later, at a military academy.⁹

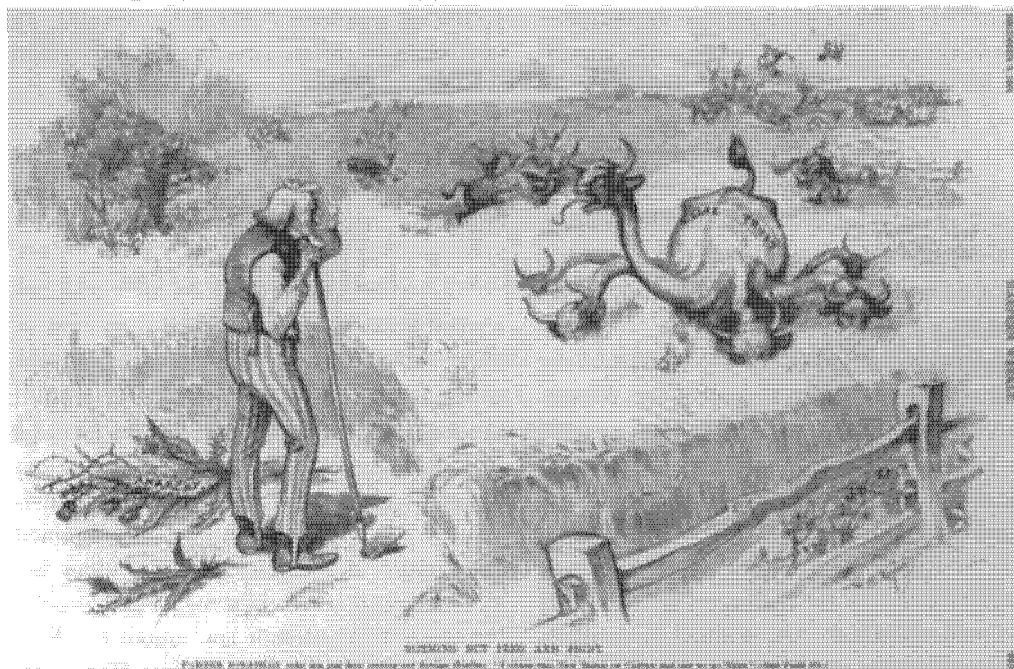
McReynolds' mother, Ellen Reeves McReynolds, was domineering, devoutly religious and kindly. She instilled the qualities of independent thought and action in her children.¹⁰ Her son had few close friends; his hobby was the study of plants and birds.¹¹ In college, McReynolds was known for his strict study habits. He did not drink and wasn't interested in sports.¹² He graduated first in his class of 100 from Vanderbilt University in 1882. He began graduate study in science at Vanderbilt but soon departed for the law school at the University of Virginia, graduating in 1884.¹³ In law school, he was a disciple of John B. Minor, who emphasized the need to keep government from infringing upon property rights.¹⁴ Throughout his life, McReynolds kept a photograph of Minor hanging in his home.¹⁵ Tributes to Minor abound at the University of Virginia. Some of its other famous alumni, including Robert F. Kennedy, are honored by busts and portraits throughout the halls of the law school. But there is no recognition of its only graduate to sit on the Supreme Court, James C. McReynolds.

As a man, McReynolds stood at slightly more than six feet. His blue eyes were described as "piercing." A slender man, he stood erect and carried himself regally. He spoke in a high-pitched voice.¹⁶ His favorite form of

recreation was long walks in the woods.¹⁷ In later years, he suffered from gout¹⁸ and walked with a cane.¹⁹ McReynolds never married. He remained true to Will Ella Pearson, who died in 1885, when both she and McReynolds were in their mid-twenties, although his lifetime loyalty to her memory was not known until after his death.²⁰

A product of the Old South²¹ who described himself as a conservative Democrat, McReynolds did not leave the region permanently until he was forty-one.²² He worked for a short time as an assistant to Senator Howell E. Jackson of Tennessee before starting a lucrative law practice and real estate business in Nashville.²³ As a lawyer, he gained a reputation as a careful and meticulous but weak advocate who was arrogant and aloof.²⁴ He taught at Vanderbilt law school for three years.²⁵ Also on the faculty was Horace H. Lurton, whom McReynolds later replaced on the Supreme Court.²⁶ McReynolds' only foray into elective politics was in 1896, when he ran unsuccessfully for Congress as a "Gold Democrat."²⁷ McReynolds never expected to win but ran on the principle that the plan to convert to silver coins was a fraud being perpetrated by the owners of silver mines to threaten the worth of those who held gold.²⁸ He was defeated, but the race was a close one.²⁹

A seeming contradiction to his conservative, pro-business leanings, McReynolds made a name for himself in the emerging field of anti-trust regulation. He did make it to Washington in 1903, when President Theodore Roosevelt appointed him assistant to the Attorney General. After the Roosevelt administration, he practiced law in New York but returned to the Justice Department in 1910.³⁰ He was recruited to help in the "trust-busting" prosecution of the American Tobacco Company. When the department and the company agreed on a settlement decree the following year, McReynolds resigned in anger, claiming the settlement was too favorable to the "Tobacco Trust."³¹



McReynolds came to the attention of President Woodrow Wilson for his vigorous prosecution of the tobacco trust. Known as a "trust buster," McReynolds was appointed Attorney General in 1913.

His reputation as a "trust buster" eventually won him the attention of President Woodrow Wilson, who named McReynolds Attorney General of the United States in 1913, after he had engaged in another short stint of practicing law in New York.³² Perhaps to his later regret, Louis D. Brandeis, then a Boston lawyer who had been rejected for the post himself,³³ supported the nomination. Brandeis had met McReynolds during the tobacco trust litigation. "I have the highest opinion of his ability and character and should think the country would indeed be fortunate to have him fill the position of Attorney General," Brandeis wrote to another lawyer at the time.³⁴ To McReynolds himself, Brandeis wrote, "In deciding upon you for Attorney General President Wilson has made the wisest possible choice. Your record in trust prosecutions will assure the country that the President's trust policy will be carried out promptly and efficiently, and business be freed at last."³⁵ McReynolds had not yet displayed his feelings of anti-

Semitism toward Brandeis.³⁶ But his treatment of Brandeis would not be so kind when the two eventually sat together on the Court for twenty-three years.

During a brief tenure as the nation's chief law enforcement officer, McReynolds battled with the Union Pacific Railroad, the American Telephone and Telegraph Company and the New York, New Haven and Hartford Railroad Company. Ironically, his "trust-busting" career led some to fear that he was a radical.³⁷ But his opposition to monopolies was, in fact, based upon his conservative belief in competition.³⁸ His interest in breaking up the great monopolies of the time was founded in a "fundamental agrarianism as well as in his dislike and distrust of 'bigness' generally."³⁹

As Attorney General, McReynolds quickly antagonized members of Congress. "He was too addicted to frank speech, sometimes very blunt speech, to prosper in an atmosphere of delicate relations such as constantly surrounds the members of a



Not happy in his job, Attorney General McReynolds feuded with Treasury Secretary William McAdoo (pictured) and only communicated with him through intermediaries.

president's cabinet."⁴⁰ He was suspected of "maintaining a corps of spies who investigated federal judges to influence their decisions, a charge he vigorously denied."⁴¹ He also made enemies within the administration. A feud with Treasury Secretary William G. McAdoo reached such proportions that they communicated only through intermediaries in the White House.⁴² And it appears that McReynolds wasn't happy with the job. After meeting with him in December 1913, Brandeis wrote that the Attorney General seemed "very tired and I think must look back longingly to the days of obscurity."⁴³ In February 1914, Brandeis wrote that a meeting with McReynolds was "not exciting." "He is weary & I think almost wishes he were out of the job."⁴⁴ But his greatest controversy as Attorney General involved a man who was accused of violating the Mann Act, which banned the transportation of women across state lines for immoral purposes. McReynolds was accused of delaying the prosecution as a favor to the defendant's father-in-law, who was a high government official. Nothing ever came of the scandal,

but McReynolds' temperamental and abrasive way of handling the issue caused the President embarrassment.⁴⁵ By August 1914, Wilson wanted McReynolds out of the cabinet, and he nominated him for the seat left vacant by the death of Justice Lurton.⁴⁶ McReynolds was the first of Wilson's three appointments to the Court.⁴⁷ Wilson had a "tinge of doubt" about his nominee, but, because of his trust-busting bent, Wilson believed that McReynolds would be a progressive on the Court.⁴⁸ His roots in the South may also have been a factor in his selection.⁴⁹

McReynolds ran into staunch opposition in the Senate, particularly from George W. Norris, who led the attack from a couch on the Senate floor.⁵⁰ There was doubt about his qualifications,⁵¹ but he was backed by Democrats in the Senate, and, in ten days, he was confirmed, by a vote of 44 to 6, to a lifetime appointment on the high court.⁵² Henry J. Abraham calls him the first of five weak nominees to have "slipped through" the Senate.⁵³ With no judicial experience, McReynolds, then fifty-two years of age, took the oath of office on September 5, 1914.⁵⁴



Having known him as a vigorous opponent of monopolies, Brandeis (pictured) initially praised McReynolds' nomination to the Court. But Brandeis came to view him as a lazy and infantile Justice.

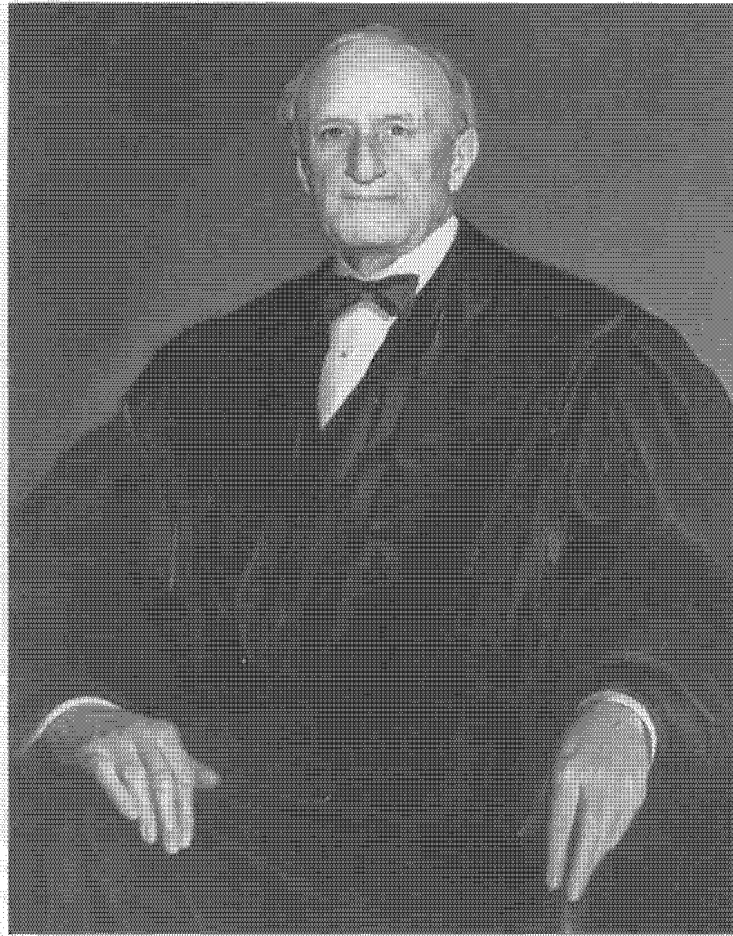
PERSONAL BEHAVIOR ON THE BENCH

In a collegial body of only nine, McReynolds' behavior was appallingly discomfiting. He became the Court's "problem child."⁵⁵ A man of "numerous and abrasive personal idiosyncracies"⁵⁶ and "considerable egotism,"⁵⁷ he was an obstacle to judicial teamwork who tried the patience of other Justices.⁵⁸ He was gruff with the other Justices, both on the bench and during the conferences at which the members of the Court discussed their cases; he did not laugh or joke.⁵⁹ Justice Oliver Wendell Holmes, Jr., who served with McReynolds from 1914 to 1932, called him "a savage, with all the irrational impulses of a savage."⁶⁰ Brandeis eventually concluded that he was lazy and, at times, acted like "an infantile moron."⁶¹ Former President William Howard Taft, who took over as Chief Justice in 1921, wrote, "McReynolds has a masterful, domi-

neering, inconsiderate and bitter nature."⁶² He called McReynolds the Court's greatest censor and most irresponsible member. He was "selfish to the last degree, . . . fuller of prejudice than any man I have ever known, . . . one who delights in making others uncomfortable. He has no sense of duty. He is a continual grouch; and . . . really seems to have less of a loyal spirit to the Court than anybody."⁶³ Taft also called him "too stiff-necked and too rambunctious."⁶⁴ Edward D. White, the first Chief under whom McReynolds served, had no control over him, but Taft was able to mitigate his behavior somewhat.⁶⁵ Taft could take him in hand, according to Brandeis.⁶⁶ Nonetheless, Taft had his troubles with the troublesome Justice. In 1924, for instance, McReynolds threatened to retire when Taft reassigned an important case to another Justice.⁶⁷

The third Chief during McReynolds' tenure, Charles Evans Hughes, was the only member of the Court to whom McReynolds would defer.⁶⁸ Hughes, who took the center chair on the bench in 1930, was known for his efficiency. However, even he had difficulty getting McReynolds' cooperation. One morning, as the Justices assembled in the robing room to line up to take the bench, Hughes became impatient because McReynolds was late. He sent a messenger to the chambers of the tardy justice. Trembling, the messenger bowed and said, "Mr. Justice, the Chief Justice says you should come at once and put on your robe." McReynolds snapped, "Tell the Chief Justice that I do not work for him." He arrived to take the Bench with his eight waiting colleagues 30 minutes later.⁶⁹

Throughout his tenure on the Court, McReynolds refused to sit for photographs unless a particular photographer was employed.⁷⁰ When he retired, the Court was compelled to notify news agencies that he would not allow himself to be photographed. McReynolds persistently refused to sit for a portrait; the one hanging in the Supreme Court had to be constructed from a photograph.⁷¹



McReynolds did not like to be photographed. He even refused to sit for an official portrait. This one, which hangs in the Supreme Court, was painted from a photograph.

He was not one of the Court's great workhorses. Taft said that he was "always trying to escape work" and took more time off than other justices.⁷² Taft's biographer called him "[s]trongly addicted to vacations."⁷³ When he became bored during the justices' conferences, he would leave the table and retire to a soft chair in the conference room.⁷⁴ He often disappeared around Thanksgiving when duck-hunting season commenced. In 1925, he left the Court unannounced without handing in his dissenting opinion in a case. Taft was furious; he had wanted to announce the Court's decision in the matter. McReynolds returned to town with a few ducks.⁷⁵ In 1929, McReynolds asked the Chief to deliver his opinions for him, claiming "an imperious voice has called me out of town. I don't think my sudden illness will

prove fatal, but strange things sometimes happen around Thanksgiving."⁷⁶

Known as "Mac"⁷⁷ and, by Douglas's time, as "Old Mac,"⁷⁸ McReynolds lived in a thirteen-room Washington apartment at 2400 16th Street, N.W., where he and his law clerks did most of their work, even after the new Supreme Court building opened in 1935.⁷⁹ Despite his crotchety nature, he entertained frequently, most often at Sunday-morning pancake breakfasts. He passed out cigarettes liberally, although he objected to the other justices smoking during Court conferences.⁸⁰ Justice McReynolds was often an escort for socially prominent Washington widows.⁸¹ He maintained a great formality about the exchange of calling cards in Washington society.⁸² He was a member of the Chevy Chase Country Club

McReynolds was a member of the Chevy Chase Club and played golf there with Justice William O. Douglas. He was too slow at golf for Douglas, taking his time putting and taking a great many shots. McReynolds also refused to allow others to play through.

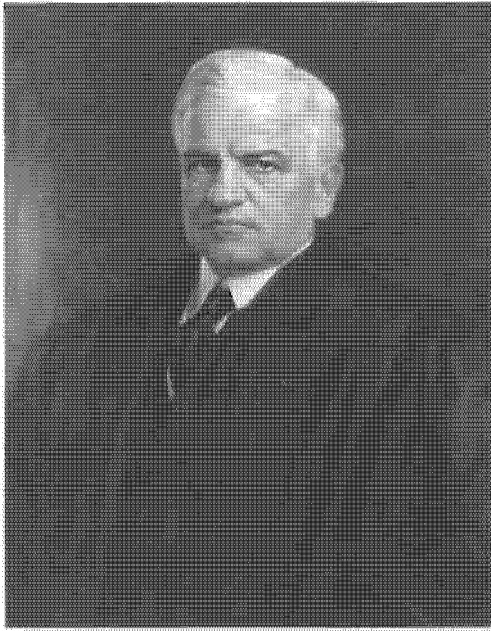


and played golf there with Justice William O. Douglas. He was too slow at golf for Douglas, taking his time putting and taking a great many shots. And he refused to allow others to play through.⁸³ Ironically, Douglas, who is considered one of the most liberal Justices, had a special relationship with McReynolds. They had a mutual acquaintance, and, when Douglas joined the Court in 1939, McReynolds went out of his way to get to know Douglas. He greeted Douglas with less than his ordinary gruffness, the junior justice said in his memoirs.⁸⁴ However, even Douglas saw his bad side. The senior justice "lit into" Douglas for *dictum* that he had written in his first decision for the Court.⁸⁵ Douglas invented a card game and named it after McReynolds; he called it "Son of a Bitch."⁸⁶

This was the kind of treatment that Court personnel, other justices and lawyers appear-

ing before the Court got on a regular basis. McReynolds had nineteen law clerks during his twenty-seven years on the bench; they stayed "as long as they could stand it."⁸⁷ He refused to hire applicants for clerkships in his chambers if they were smokers, drinkers, Jewish, married or engaged.⁸⁸ He insisted that his clerks take apartments in the same exclusive building in which he lived so as to be available to him at all times.⁸⁹ Although they worked in the Justice's apartment, they were not allowed to eat there or to remove their jackets when he was present, even in sultry Washington in the days before air conditioning. If the Justice called the apartment and found a clerk unavailable, he was fired.⁹⁰

McReynolds' "personal demeanor on the bench was a disgrace to the Court."⁹¹ He sometimes "took picayunish issue with matters of dress and personal mannerism" by



McReynolds expected John Clarke (pictured) to be his protégé when he joined the Court in 1916. But Clarke showed independence, and McReynolds harassed him to such a degree that he resigned in 1922.

lawyers appearing before the Court.⁹² He heckled and sneered at Felix Frankfurter, then a Harvard law professor and later a colleague on the Court, when Frankfurter argued two cases in January of 1917.⁹³ When Joseph F. Rutherford appeared before the Court representing a Jehovah's Witness, McReynolds had a "fit of temper" on the bench. "Counsel, why did this lady that was circulating religious literature for Jehovah's Witnesses not get a license? If she had only got a license, then she would not have had this problem." When Rutherford replied that "Jehovah's God" had advised her not to get a license, McReynolds slammed down the book that he was holding, stormed off the bench and did not return that day.⁹⁴

His colleagues on the bench got no better treatment. McReynolds "carped" at nearly every opinion written by Justice Harlan Fiske Stone.⁹⁵ Justice Stone once remarked to McReynolds that a lawyer's brief had been particularly dull. McReynolds responded, "The only duller thing I can think of is to hear you read one of your opinions."⁹⁶ Justice

Mahlon Pitney was one of the victims of his hatred; he "used to say the cruelest things" to Pitney, according to Justice Brandeis.⁹⁷ He treated Justice John H. Clarke, who took the bench in 1916, with such hatred that he is believed to have forced Clarke to retire in 1922. McReynolds had supported Clarke's first appointment as a federal district court judge and believed that, when he came to the Supreme Court, he should have become McReynolds' ideological protégé.⁹⁸ When that didn't happen, McReynolds' took after his junior with a vengeance. Clarke was so cowed by McReynolds' temper that he once asked Taft to suggest changes to an opinion that McReynolds was drafting for the Court; he wouldn't dare to do such a thing himself, Clarke told Taft.⁹⁹ After announcing his retirement, Clarke wrote to the former President who had appointed him: "McReynolds as you know is the most reactionary judge on the Court. There were many other things which had better not be set down in black and white which made the situation to me deplorable and harassing to such a degree that I thought myself not called on to sacrifice what of health and strength I may have left in a futile struggle against constantly increasing odds."¹⁰⁰ When Clarke left the Court, McReynolds refused to sign the customary proclamation. Taft called this spiteful act "a fair sample of McReynolds' personal character and the difficulty of getting along with him."¹⁰¹

In spite of the extent to which Justice McReynolds endeavored to protect the reputation and dignity of the Court and demanded for it the honor he felt to be due it, his statements from the bench and those included in his opinions detracted from the faith and trust he sought to promote. His frequent jibes at the majority with whom he differed, his unwillingness to yield to changing social demands, and the unfavorable attention drawn to himself by petty word and churlish deed did nothing to enhance public

respect for the court of which he was a member.¹⁰²

Nonetheless, there was another side to the man. He could be charitable to the Court's pages and tender toward children.¹⁰³

It can be stated that he was, among those close to him on a personal basis, gracious, polite, unfailingly generous, humorous, and considerate; but to those not included in this group or closely and compatibly associated with him in a professional capacity, McReynolds was an entirely different person. In truth, he was a different man to different people.¹⁰⁴

BIGOTRY

His most boorish behavior was reserved for the members of the Court who were Jewish. Brandeis, his great champion when McReynolds was named Attorney General, was the longest suffering; they sat on the Court together for 23 years. On January 28, 1916, shortly before Brandeis's appointment, he and McReynolds were at a dinner for the President.¹⁰⁵ "Noting McReynolds's hostility to Brandeis, Wilson took him by the arm and said, 'Permit me to introduce you to Mr. Brandeis, your next colleague on the Bench.'"¹⁰⁶ McReynolds refused to speak to Brandeis during their first three years on the bench¹⁰⁷ and "practically never" addressed him thereafter.¹⁰⁸ He refused to sit for the Court's portrait in 1924 because it would have required him to sit next to Brandeis, so no portrait of the members was taken that year.¹⁰⁹ Two years earlier, he had refused to accompany the Court on a ceremonial trip to Philadelphia. He wrote Taft, "As you know, I am not always to be found when there is a Hebrew aboard."¹¹⁰ When Brandeis retired in 1939, McReynolds' name was again conspicuously absent from the Court's congratulatory proclamation. "Mr. Justice McReynolds, who had been an ideological opponent of LDB since 1916 and

the only member of the Court ever to display a marked anti-Semitism, refused to sign."¹¹¹

McReynolds routinely turned his back on another Jewish justice, Benjamin Cardozo.¹¹² During Cardozo's swearing-in ceremony, he openly read a newspaper, muttering, "Another one."¹¹³ He refused to attend Justice Frankfurter's robing ceremony when he was named to the Court in 1939.¹¹⁴ He remarked, "My God, another Jew on the Court."¹¹⁵ This antipathy even carried over to the household staffs of the Justices.¹¹⁶ When Cardozo died in 1938 after suffering a heart attack and stroke, McReynolds absented himself from the bench while the other justices expressed their sorrow.¹¹⁷ In his generally charitable dissertation on McReynolds, Stephen Tyree Early, Jr., has called the justice "poorly understood," however.¹¹⁸ His "strong aversion" to Brandeis and Cardozo was "partly, at least, a matter of the social and political philosophy for which they stood."¹¹⁹ But even this writer acknowledges, "His dislike of Justice Frankfurter, however, approximated that toward Justices Cardozo and Brandeis; and his characterizations of the former were often couched in language approximating defamation."¹²⁰

Henry Abraham has called McReynolds a "confirmed misogynist,"¹²¹ although, of course, there were no women on the bench during McReynolds' time and few practicing at the Supreme Court bar. When a woman did appear before the high court, she got the cold shoulder from McReynolds: he typically left the Bench.¹²²

There were no African-American justices until long after McReynolds left the Court, but McReynolds exhibited his disdain for black attorneys. In 1938, Charles Houston, a Howard University law professor and mentor to Thurgood Marshall, argued for the NAACP in a case involving the admission of blacks to the State University of Missouri School of Law. McReynolds turned his back to Houston and sat facing the curtain behind the bench throughout the black lawyer's argument. Robert L. Carter, then a Howard law student

and later a federal judge, witnessed this display: "Thus . . . my first view of the Supreme Court was of justice turning its back on black people and manifesting indifference to their needs and aspirations."¹²³

There was a black barber in the courthouse named Gates. While getting a cut one day, McReynolds asked him, "Gates, tell me, where is this nigger university in Washington, D.C.?" Gates removed the cloth from his customer's lap and, with dignity, replied, "Mr. Justice, I am shocked that any justice would call a Negro a nigger. There is a Negro college in Washington, D.C. Its name is Howard University, and we are very proud of it." McReynolds mumbled some kind of apology, and Gates silently went back to work.¹²⁴

In 1937, the Justice was criticized for his public remarks about "darkies" in cases before the Court.¹²⁵

DECISIONS

If President Wilson expected McReynolds to be a progressive on the Court, he was soon disappointed. Wilson wanted "a persuasive and powerful spokesman for constitutional experimentation and reform; his first appointment, Justice McReynolds, was clearly not willing to perform that function."¹²⁶ He soon proved to be the antithesis of everything in which Wilson believed.¹²⁷ Taft quoted Wilson as being "greatly disappointed" in McReynolds's interpretation of the Constitution.¹²⁸ He came to be referred to as "Wilson's mistake."¹²⁹ In his twenty-seven years on the high bench, McReynolds "never took a position in accord with Wilson's views on any important regulatory case."¹³⁰

In the course of his long career, McReynolds wrote relatively few majority opinions: 503, or an average of 19 per calendar year.¹³¹ When he did, they were usually in support of the property or contract rights of businesses.¹³² He is better remembered for his dissents, particularly those at the end of his career.¹³³ "The opinions written by Jus-

tice McReynolds reflect the directness, in some instances the abruptness, of his personality. Pungent language was a frequent characteristic, particularly of those written in dissent."¹³⁴ In general, McReynolds thought the Court's opinions too long, and he strove to keep his concise.¹³⁵ "Very few *dicta* found their way into his opinions. It was not, in his estimation, the proper function of an appellate judge to indulge in philosophic speculation, but to declare the law for the guidance of lower courts and the bar. He rarely yielded to the temptation to expound."¹³⁶ McReynolds had a "lawyerly understanding of jurisdictional issues," but his decisions on substantive matters were "brutally slashing, or more frequently, offhand . . . and nearly always arbitrary and indiscriminating. McReynolds was not one to be reasoned with, and he would listen least of all to anything coming from Brandeis."¹³⁷

Although he had no special training or experience in it,¹³⁸ McReynolds claimed familiarity with admiralty law. Taft, as Chief, assigned him most of the Court's admiralty opinions but was skeptical of his expertise: "I don't know how deep it is. Perhaps he is more familiar with the constitutional features of that branch of jurisdiction than he is with the everyday details and questions arising."¹³⁹ Even in this arcane area of the law, McReynolds was considered a reactionary. One of his law clerks quotes Justice Stone as remarking, "McReynolds has set the law of admiralty back a full century!"¹⁴⁰

McReynolds immediately allied himself with the most conservative members of the Court. "He viewed the Constitution as an immutable body of principles that should be interpreted chiefly as limitations on the exercise of governmental power. A believer in *stare decisis*, he apparently never wrote an opinion that reversed a judgment."¹⁴¹ "I feel as if we ought not to have too many men on the Court who are as reactionary on the subject of the Constitution as McReynolds," Taft wrote to Elihu Root in 1922.¹⁴² During his first term on the Court, McReynolds voted

against protection for union members from discrimination by their employers, quickly giving pause to Wilson about his first nominee to the Court. Two years later, he took another anti-union position, holding that a federal statute mandating an eight-hour day for workers was unconstitutional.¹⁴³ In 1923, he voted with the majority of five Justices in declaring unconstitutional a minimum-wage law in the District of Columbia.¹⁴⁴

In 1926, when he dissented with two others in a case involving Wilson's removal of the postmaster general from the cabinet, Taft angrily retorted that the minority justices "have no loyalty to the Court and sacrifice almost everything to the gratification of their own publicity. . . ."¹⁴⁵

Despite his reputation as a trust-buster, McReynolds could not be counted on to vote in favor of the government's efforts to break up the monopolies. When the country's largest companies were the defendants in these cases, McReynolds often voted in their favor, but he frequently supported breaking up combinations of smaller businesses. Perhaps this was because the real purpose of the anti-trust laws was always to clear the way for the big companies by eliminating competition by cabals of smaller firms. As Gary W. Potter maintains in his work on white-collar crime:

The history of government regulation of white-collar crime is one of white-collar criminals regulating themselves for their own benefit. The earliest white-collar crime laws were the antitrust acts of the late 1800s. These laws were in fact initiated and supported by the very businesses they ostensibly regulated. Legal prohibitions against monopolies and price-fixing were used by the robber barons to stabilize the market and to make the economy more predictable. Concurrently, these laws were also useful for driving smaller competitors out of business by denying them the use of the same unethical and illegal tactics

that the large corporations had used in creating their dominant economic positions.¹⁴⁶

McReynolds dissented in 1921 when the Court upheld, although modified, the Federal Trade Commission's order requiring the giant food and gum manufacturer, Beech-Nut, to cease and desist from refusing to sell its products to customers and dealers who would not agree to resell them at prices that the company had established. The company had been accused of keeping records of recalcitrant dealers in their vertical chain of distribution and of cutting them off as "undesirables" for selling below the company's "suggested" resale prices. The majority found that this violated public policy: "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the Anti-Trust Acts to maintain."¹⁴⁷ McReynolds declined, however, to take such a broad view of the public policy against anti-competitive business practices. There was no contract fixing prices, he noted.

There is no question of monopoly. Acting alone, [Beech-Nut] certainly had the clear right freely to select its customers—to refuse to deal when and as it saw fit—and to announce that future sales would be limited to those whose conduct met with its approval. . . . Having the undoubted right to sell to whom it will why should [Beech-Nut] be enjoined from writing down the names of dealers regarded as undesirable customers? . . . And the exercise of this right does not become an unfair method of competition merely because some dealers cannot obtain goods which they desire, and others may be deterred from selling at reduced prices.¹⁴⁸

McReynolds was in the majority in 1923 when the Court held for the Curtis Publishing Co. The FTC had ordered the publisher

to desist from fixing prices for its newspapers and magazines with 1,982 individuals, partnerships and corporations, most of whom trained and supervised "school boys" who distributed the company's publications. McReynolds' opinion concluded that the contracts with the distributors created an agency relationship that was not covered by the Clayton Act. Thus, competition and the creation of a monopoly were not involved, as the FTC had concluded. "The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice," McReynolds wrote for the Court. "Effective competition requires that traders have large freedom of action when conducting their own affairs."¹⁴⁹

McReynolds did not sanction such "freedom of action" by combinations of smaller businesses, however, lending credence to Potter's contention that the anti-trust laws were designed only to inhibit them. In 1924, the Court ruled in favor of small corporations who had founded a trade association, the Maple Flooring Association. Its twenty-two members, who produced seventy percent of the maple flooring in the country, regularly computed and distributed costs and prices of their products, which the Justice Department argued tended to create uniformity in prices. The association constituted a combination in restraint of trade, in violation of the Sherman Act, according to the government. However, the majority found no uniformity of prices for the products sold by the members of the association and no evidence to support that they had used the association's statistics as the basis for fixing prices among them. The members had no intention to fix prices, and their activities did not inevitably lead to that result, the Court said.¹⁵⁰ McReynolds would have held otherwise; in this case and a similar one heard the same day, he voiced the trust-buster's concern for public policy against anti-competitive mea-

sures by this group of smaller businesses. He saw

carefully developed plans to cut down normal competition in interstate trade and commerce. Long impelled by this purpose, [the associations in each case] have adopted various expedients through which they evidently hoped to defeat the policy of the law without subjecting themselves to punishment. . . . It seems to me that ordinary knowledge of human nature and of the impelling force of greed ought to permit no serious doubt concerning the ultimate outcome of the arrangements.¹⁵¹

McReynolds wrote for the majority in 1926, when the Court found a violation of the Sherman Act in an agreement between several millwork manufacturers and their unions that prevented workers from handling millwork produced by non-union labor and imported from out-of-state competitors. The practice intentionally cut down and impeded both interstate and intrastate commerce, he found.¹⁵²

Similarly, when the Western Meat Company of California merged with a competitor, the Nevada Packing Company, and the FTC found a violation of the Clayton Act, McReynolds upheld the government's action against the small firm. The FTC had ordered Western to divest itself of all capital stock, the plant and all property of Nevada. Western argued that the Clayton Act permitted it only to order the company to divest itself of all stock in the merged company. Writing for the Court in the 1926 decision, McReynolds adopted a more liberal view of the intent of the statute than he had in *Beech-Nut*. He wrote,

Without doubt the Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose and applied with a view to effectuate such purpose. Preservation of

established competition was the great end which the legislature sought to secure. . . . The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property.¹⁵³

McREYNOLDS AND THE NEW DEAL

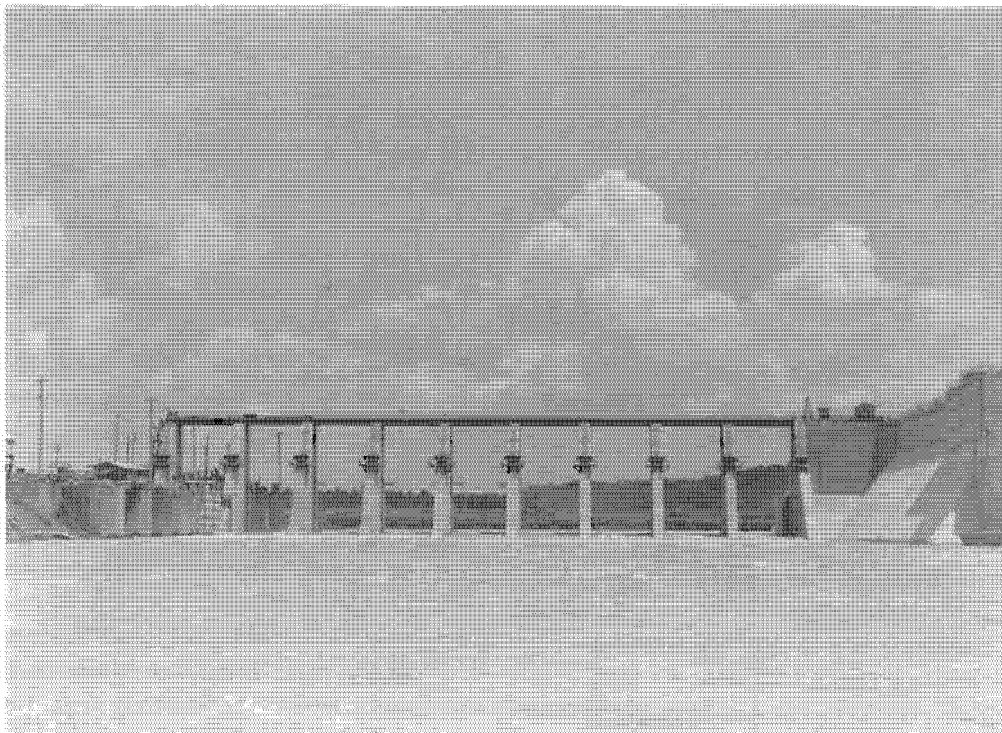
But it was during Franklin Delano Roosevelt's New Deal that Justice McReynolds established his reputation as the staunch opponent of governmental power and social programs. He became one of the "Four Horsemen" on the Court, with Justices Willis Van Devanter, George Sutherland and Pierce Butler.¹⁵⁴ The reference was to the Four Horsemen of the Apocalypse—conquest, slaughter, famine, and death—appearing in the Bible as personifications of the evils of war. A novel and two movies have carried the title.¹⁵⁵ Judge Learned Hand of New York referred to them as "the Four Mastiffs."¹⁵⁶ McReynolds became the horsemen's "loudest, most cantankerous, sarcastic, aggressive, intemperate, and reactionary representative."¹⁵⁷

He despised FDR.¹⁵⁸ In private letters, the Justice called the President "a fool," "utterly incompetent," and "bad through and through."¹⁵⁹ Douglas, the Roosevelt nominee with whom McReynolds had a special relationship, was continually questioned by "Old Mac" concerning the President. McReynolds wondered about FDR's sanity. When Douglas told the senior justice that he thought he would like Roosevelt, McReynolds would snort and walk away.¹⁶⁰ "Roosevelt, for his part, found McReynolds obnoxious. When in 1937 the president submitted his scheme to 'pack' the Supreme Court, he took particular pleasure in the fact that it was based on a similar proposal McReynolds had advanced when he was attorney general."¹⁶¹

In 1935, the "Gold Clauses Cases" came before the Court, challenging Congress's deci-

sion to take the country off the gold standard and to outlaw all private and public contracts calling for payment of debts in gold rather than paper currency. The Court sustained the invalidation of the private but not the public debts.¹⁶² McReynolds angrily dissented from the Bench.¹⁶³ "The Constitution as many of us have understood it, the Constitution that has meant so much, is gone . . . Horrible dishonesty! . . . Shame and humiliation are upon us."¹⁶⁴ "This is Nero at his worst," he exclaimed. "This language proved too vitriolic for the formal record and was excised."¹⁶⁵

Joined by Justice Owen Roberts, the Four Horsemen blocked many of the New Deal programs through the end of 1936.¹⁶⁶ When the tides began to turn and the Court began sustaining the New Deal initiatives, McReynolds found himself in the minority. In 1936, when the Court upheld sections of the Social Security Act, McReynolds dissented harshly. An Alabama corporation had objected to being forced to pay a new tax to fund unemployment compensation on the grounds that it took company property without due process of law and that, by providing funds to the states to induce them to provide unemployment insurance benefits, the federal government was interfering with the rights of the states to provide for the health, safety and welfare of its inhabitants, in violation of the Tenth Amendment. The majority held that the federal government was providing a motive for state action, not coercing it.¹⁶⁷ McReynolds strongly felt otherwise: The states should be "free to exercise governmental powers, not delegated or prohibited, without interference by the federal government through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory. . . . By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the states will retain genuine independence of action. And without independent states a Federal Union



After Justice Van Devanter's retirement, the conservative majority on the Court weakened, and the Justices sustained a contract of the federal government's Tennessee Valley Authority in 1937 with McReynolds alone in dissent.

as contemplated by the Constitution becomes impossible."¹⁶⁸ He was right, of course, that, for better or worse, the federal government's "power of the purse" would become the vehicle for its increasing involvement in matters of education, health and criminal justice that had been traditionally contemplated as coming within the state's police powers.

In 1937, when the Court sustained a contract of the federal government's Tennessee Valley Authority, McReynolds was alone in dissent.¹⁶⁹ Also in 1937, the Court sustained the constitutionality of Roosevelt's National Labor Relations Act, establishing for the first time in this country the right of private workers to organize into unions and bargain collectively.¹⁷⁰ McReynolds dissented in an opinion joined by the other "horsemen." Relying upon the Court's decision two years earlier invalidating Roosevelt's first attempt to create a labor board,¹⁷¹ he concluded that the steel

company was not subject to federal regulation inasmuch as it was not significantly involved in interstate commerce. The employees involved were engaged in the manufacture of goods, which was a "local" operation, McReynolds found, even though they worked with raw materials procured from outside the state and produced products shipped outside the state.¹⁷² Furthermore, they had never engaged in any job actions that had an effect on the free flow of commerce outside the state.

[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority

would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.¹⁷³

The manufacturing employees' connection to interstate commerce was remote and indirect, he concluded, and so was the likelihood that any strike in which they might engage might impede commerce among the states.¹⁷⁴ Reverting to an aged analysis that organizing employees violated anti-trust statutes by "conspiring" to restrain trade, McReynolds declared, "There is no conspiracy to interfere with commerce unless it can be said to exist among the employees who became members of the union."¹⁷⁵

McReynolds rejected the notion that the Constitution is a "living" document and that its meaning evolves over time.¹⁷⁶ If the Constitution was to be changed, it should be done through the formal amendment process, not by judicial interpretation, he felt.¹⁷⁷ As the Court changed and, with it, its interpretation of the Constitution, McReynolds departed more frequently "from the outwardly calm detachment of the judge."¹⁷⁸

Justice McReynolds used logic and established formulae mechanically, uncritically, and almost exclusively, as premises to support conclusions previously reached which closely approximated prejudices. He seemingly rejected the assumption that constitutional principles, as the instruments and the products of decisions, have a social relevance and dimension to which they were initially sensitive and to which they should be kept sensitive.¹⁷⁹

Between January 1935 and June 1936, Roosevelt's New Deal was challenged in twelve crucial cases. McReynolds was the only one of the nine Justices to vote against the administration in every case.¹⁸⁰ He wrote 146 dissents after 1932, compared to only 164 in his

previous seventeen years.¹⁸¹ Thirty-five percent of all the dissents that he authored in his nearly twenty-seven years came during his last five years on the Bench.¹⁸² On February 5, 1937, when Roosevelt proposed his infamous "court-packing" plan, McReynolds was one of the targets. The bill proposed adding a Justice to the Court for every sitting Justice who was more than seventy years old to give it "younger blood" and to "vitalize the courts." All four of the horsemen were older than seventy at the time, as were Hughes and Brandeis. The plan was similar to one that McReynolds had proposed as Attorney General in order to provide substitutes for disabled judges during the Wilson administration.¹⁸³

This time, however, McReynolds objected.¹⁸⁴ He and the other "horsemen" met regularly at his home to develop a strategy to defeat the plan. Their favored approach was to have Justice Van Devanter resign in order to give Roosevelt the opportunity to replace him and to strengthen his support on the nine-member Court.¹⁸⁵ McReynolds also broke with protocol and publicly criticized the plan.¹⁸⁶ This brought him considerable public disapproval. He was called "Scrooge," and, in the press, "he was variously characterized as a man of 'sheer ugliness of disposition' who 'seemed to nurse a gnawing grudge against mankind', the 'Supreme Court's greatest human tragedy', 'a tragic lonely figure.'"¹⁸⁷ "Elsewhere he was described as 'vine-grisly conservative', 'the narrowest, rudest, and laziest man on the bench', a 'man with a dry heart'. *Time Magazine* called him 'anti-semitic', 'intolerably rude', 'savagely sarcastic', 'incredibly reactionary', 'Puritanical', and 'prejudiced'. An unsigned article in *Fortune* attributed to him a 'flauntingly disagreeable character.'"¹⁸⁸ The Justice's personal correspondence became so hostile and threatening that he withdrew to his study and spent time every day burning letters in his fireplace.¹⁸⁹

The Court-packing plan failed, but Roosevelt got his way. In 1937, Justice Van Devanter left the Court and was replaced by the

NEW YORK HERALD TRIBUNE



McReynolds was vilified in the press for being the only Justice to publicly oppose Roosevelt's plan to pack the Court with additional Justices.

first of Roosevelt's appointees, Hugo L. Black. The politics of the Court started to change and not in McReynolds' favor. Sutherland left in 1938, and Butler in 1939, leaving McReynolds the only survivor of the Four Horsemen.¹⁹⁰ By the time he left the Bench two years later, he held the record for the number of dissents recorded by a single Justice.¹⁹¹

CIVIL RIGHTS AND CIVIL LIBERTIES

During McReynolds' tenure, the business of the Supreme Court was business. It was not for ten or more years after he retired that the Court's attention shifted to interpreting and ex-

panding the personal civil liberties guaranteed by the Bill of Rights. From 1914 to 1941, the Court's primary attention was given to interpretations of the federal government's authority over interstate commerce. The bulk of the cases concerned the regulation of the railroads, contract rights of companies involved in interstate commerce and—what were considered McReynolds' special interests—admiralty and anti-trust regulation.

In a twenty-seven-year span, the Court could not avoid handling some matters of national import that raised questions of criminal procedure and other individual rights. Predictably, McReynolds' votes were not often in favor of expanding civil rights and civil

liberties. "His on-bench votes evinced no compassion or understanding, whatsoever, for the travails of underdogs."¹⁹² Instead, he believed that the rich were benevolent and efficient.¹⁹³

Only one of McReynolds' opinions for the majority of the Court is still read by law students today, *Pierce v. Society of Sisters*. The case involved an Oregon statute which required the compulsory education of children between the ages of eight and sixteen in *public* schools. The Society of Sisters was an Oregon corporation that cared for and educated orphans in elementary and high schools and ran junior colleges. It sought to have the courts enjoin enforcement of the law on the ground that it impaired or destroyed the company's profits, thereby taking its property without due process of law, in violation of the Fourteenth Amendment. The similar interests of a private military school were also joined in the case.¹⁹⁴ Even this civil-liberties issue involved the civil

liberties of a corporation and its business interests.

However, in an opinion that even Justice Douglas called liberal,¹⁹⁵ McReynolds broadened the issue to one of the liberty rights of parents to choose the proper education for their children. McReynolds acknowledged the state's right to regulate all schools but held that it

unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . [R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any



In McReynolds' one landmark opinion, *Pierce v. Society of Sisters* (1924), he upheld a challenge by an Oregon corporation that educated orphans in elementary and high schools to a state law requiring children between the ages of 8 and 16 to be educated in public schools on the ground that it impaired or destroyed the company's profits.

general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁹⁶

The private schools were entitled to an injunction to prevent irreparable harm to their businesses.¹⁹⁷ Of course, this rationale also fit McReynolds' conservative goals of limiting state power and protecting business interests. It may also have been influenced by his father's conviction that all education should be private.

The *Pierce* decision cited and followed the rationale of an earlier McReynolds opinion, *Meyer v. State of Nebraska*. In *Meyer*, a teacher challenged a post-World War I statute which prohibited the teaching in any school of a foreign language to pupils younger than high school. The teacher had been convicted of a misdemeanor for teaching German to a child in eighth grade. According to the Nebraska Supreme Court, the law was designed to prevent "foreigners, who had taken residence in this country" to think in their native languages and "to inculcate in them the ideas and sentiments foreign to the best interests of this country."¹⁹⁸ On behalf of the majority, McReynolds' opinion held that the state exceeded its powers through an arbitrary statute that denied the liberty of parents and teachers. The American people have always considered education of supreme importance, and parents have the right and duty to determine the suitability of various educational alternatives for their children, he stated. The state had shown no emergency or adequate reason for imposing such a prohibition during a time of peace, McReynolds wrote.

...[T]here seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is

well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.¹⁹⁹

McReynolds was not so generous, however, in extending individual rights to citizens who had been accused of crimes, particularly when the defendants were of color. He dissented in one of the most famous of these cases, *Powell v. Alabama*, the first of what are known as the "Scottsboro Boys" cases. The majority of the Court held that seven black men charged with the rape of two white girls were entitled to court-appointed counsel because they were "young, ignorant, illiterate, surrounded by hostile sentiment"²⁰⁰ and needed effective assistance of counsel in order to guarantee their fundamental right to due process of law.²⁰¹ This was the first case in which the Court reversed a state conviction on the basis of a procedural irregularity.²⁰² McReynolds disagreed but did not write a dissent.²⁰³ In an earlier case, he had dissented in a similar vein when the Court granted a writ of habeas corpus to five blacks convicted of murder and sentenced to death after a trial that they alleged had been driven by the threat of mob violence and had been administered by both grand and petit juries from which blacks had been systematically excluded. The majority held that the district court erred in refusing to issue a federal writ without making a record as to the allegations in the affidavits of the five defendants and four other persons, including two whites.²⁰⁴ McReynolds objected, asserting that the findings of the state courts were sufficient basis for the federal judge to deny the application for the writ. "The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the ex parte affidavits of three other negroes who had pleaded guilty and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men—low villains

according to their own admissions," the Justice wrote. If every defendant might get heard in federal court by swearing to an affidavit, "another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe."²⁰⁵

It is difficult to find a single case in which McReynolds wrote an opinion upholding the rights of an African-American litigant.

An early decision, in which he spoke for the majority, required an interpretation of the Thirteenth Amendment, which prohibits slavery. Florida had passed a law requiring every able-bodied resident under the age of forty-five to work a minimum of sixty hours a year on the public roads and bridges without compensation unless they could afford to pay a substitute to perform the duty for them.²⁰⁶ Although the decision does not mention the race of the plaintiff and does not phrase the issue in terms of race, it seems fair to conclude that these "volunteer" road crews were primarily comprised of poor black men who either couldn't afford to pay for a substitute or who found the pay for such labor attractive. The Thirteenth Amendment prohibited no such "public service," McReynolds said for the Court; it was intended only "to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce undesirable results."²⁰⁷ Nor did the labor of those conscripted constitute property taken in violation of the Due Process Clause, the Court concluded.²⁰⁸

Standing alone and objecting even to the opinion of Justice Van Devanter, McReynolds dissented in a New York case involving the Ku Klux Klan. Against a Fourteenth Amendment challenge in 1928, the Court upheld a state statute which required any organization, except labor and benevolent associations, to file its constitution, by-laws, rules and regulations and a roster of its membership with the Secretary of State. Any person who joined an association that had not complied was guilty

of a misdemeanor, the law said. A member of the KKK in Buffalo was convicted under the statute. The majority held that the law did not violate the Privileges and Immunities Clause, the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.²⁰⁹ McReynolds argued in dissent, however, that there was no federal question in the petition; neither the federal constitution nor any federal statute had been mentioned, he said. The only mention of a federal violation in the courts below was in the Appellate Division decision, which was not enough to give the Supreme Court jurisdiction, said McReynolds.²¹⁰

In *Aldridge v. United States*, the issue was whether defense counsel should be allowed to question prospective jurors about the possibility of bias against blacks. The defendant was a black man accused of killing a white police officer. The trial judge would not permit the questioning. The majority held that such questions must be allowed in order to ensure a fair trial: "We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute."²¹¹ McReynolds thought otherwise. He suggested that the defense should have to prove racial prejudice without the opportunity to ask the questions, and he used the occasion to rail against the problems of crime in society in general:

Solely because of the refusal of the trial judge to propound an undisclosed question "relative to racial prejudice" (whatever that may be), we are asked to upset a judgment approved by the judges of both local courts who, it is fair to presume, understand conditions in the District [of Columbia] better than we do.

Nothing is revealed by the record which tends to show that any juror

entertained prejudice which might have impaired his ability fairly to pass upon the issues. It is not even argued that considering the evidence presented there was room for reasonable doubt of guilt. . . .

Unhappily, the enforcement of our criminal laws is scandalously ineffective. Crimes of violence multiply; punishment walks lamely. Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material; to promote order and not to hinder it by excessive theorizing or by magnifying what in practice is not really important.²¹²

In 1926, McReynolds did vote with the majority in invalidating a Texas statute that prohibited blacks from voting in party primaries; the law violated the equal protection clause, the Court held.²¹³ However, when the state refashioned the law in an attempt to find a way around the Court's ruling, McReynolds and the other "horsemen" supported Texas. In the new version, it wasn't the state that prohibited blacks from voting in primaries; it merely allowed the political parties themselves to do so. The new statute left it to the parties themselves to determine who was qualified to vote in their primaries. When the Democratic party promptly adopted a resolution giving the primary vote only to whites, the state argued that the parties were voluntary associations of private persons and that there was no constitutional violation because there was no state action. The Supreme Court disagreed, holding that the party itself was given its power by the state and that the state had also conferred upon the party the right to determine the qualifications of voters in primaries. This was enough to make them "organs of the state itself, the repositories of official power," the Court held.²¹⁴ In his dissent, McReynolds acknowledged that Texas was overwhelmingly

Democratic and that, normally, there was no contest for election at all other than in the primaries.²¹⁵ But the statute was neutral on its face, he argued. "The act now challenged withholds nothing from any negro; it makes no discrimination. It recognizes power in every political party, acting through its executive committee, to prescribe qualifications for membership. . . ."²¹⁶ Political parties are voluntary associations of individuals, not governmental instrumentalities, McReynolds maintained. "Their members are not state officials; they are chosen by those who compose the party; they receive nothing from the state."²¹⁷ While he acknowledged that the state might regulate party primaries to ensure "fair methods and fair expression by their members of their preference in the selection of their nominees . . . [w]here there is no unlawful purpose, citizens may create [political parties] at will and limit their membership as seems wise."²¹⁸ The majority's contrary ruling, McReynolds scolded, "really imputes to the Legislature an attempt indirectly to circumvent the judgment of this Court [in *Nixon v. Herndon*]. We should repel this gratuitous imputation; it is vindicated by no significant fact."²¹⁹

Toward the end of his tenure, another significant case involving race came before the Court. The State University of Missouri had denied a black applicant admission to its School of Law. Because the state had agreed to arrange for the man, Lloyd Gaines, to be educated in a neighboring state and had agreed to pay his tuition, the state argued that it had not denied him a privilege available to other residents of the state, in violation of the Equal Protection Clause. The majority held that the state must either admit him to its law school or create a separate one for blacks within the state: "The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of

tuition fees in another State does not remove the discrimination."²²⁰ McReynolds's dissent offers a contrary view, as well as a gratuitous remark that casts aspersions on Gaines' motives in bringing the lawsuit. "The State has offered to provide the negro petitioner opportunity for the study of law—if perchance that is the thing really desired—by paying his tuition at some nearby school of good standing."²²¹ The state had a legitimate interest in protecting its white citizens by barring blacks from the law school, McReynolds posited:

For a long time Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school and thereby disadvantage her white citizens without improving [Gaines']

opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races.²²²

In *Gaines*, he made it clear that he believed that the races were better off separated. In *New Negro Alliance v. Sanitary Grocery Co.*, he made it clear that he thought that employers were entitled to discriminate against blacks. The New Negro Alliance was a charitable organization formed for the purpose of advancing the interests of black citizens; it did not engage in commerce. The Sanitary Grocery Co. ran 255 stores. The alliance organized picketing of one of its new stores in Washington, D.C., urging patrons to boycott the business because it refused to hire blacks as managers.²²³ The company sought an injunction restraining the picketing; the alliance



When the New Negro Alliance, a charitable organization formed for the purpose of advancing the interests of black citizens, organized a boycott of a grocery chain's new store because it refused to hire black managers, the Court upheld the Alliance's right to do so even though its members were not store employees. McReynolds made it clear in his dissent, however, that he thought that employers were entitled to discriminate against blacks.

argued that its activities were protected by the Norris-LaGuardia Labor Relations Act. The majority of the Court agreed with the alliance. The act protects peaceful picketing in connection with a dispute over the terms and conditions of employment, and this was such a dispute, even though the picketers were not employees or any individuals involved in competitive commerce.

It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business should be lawful . . . [and] those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices.²²⁴

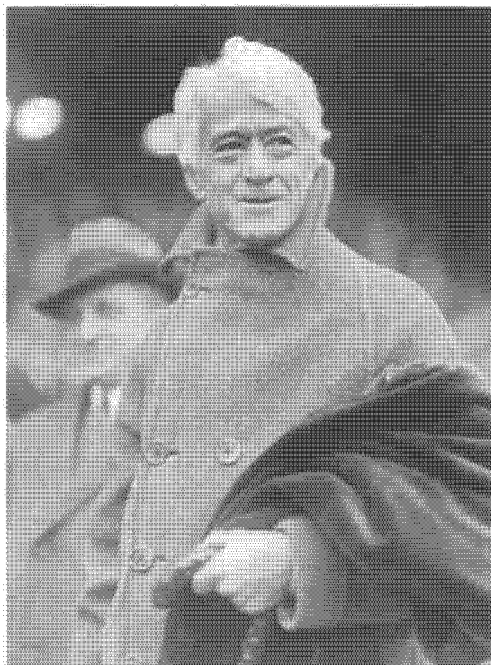
In his dissent, McReynolds called the picketing by the black alliance "mobbish interference with the individual's liberty of action. . . . Under the tortured meaning now attributed to the words 'labor dispute,' no employer—merchant, manufacturer, builder, cobbler, housekeeper or whatnot—who prefers helpers of one color or class can find adequate safeguard against intolerable violations of his freedom if members of some other class, religion, race or color demand that he give them precedence."²²⁵

DISQUALIFICATION?

Today, lawyers might ask a judge with such a reputation for bigotry to disqualify himself from any case in which race or ethnic background figured prominently in the dispute. But even today, in the Supreme Court, it would

be up to the Justice to determine whether he or she would step aside. There is no higher authority to which to appeal, and there is no independent disciplinary authority to determine whether a Justice of the Supreme Court acted in a biased manner. How would Justice McReynolds have felt about a motion to disqualify him from a case? Probably not kindly, if his views in *Berger v. United States* are any indication.

In *Berger*, three defendants of German and Austrian heritage who were charged with violations of the Espionage Act attempted to have Judge Kenesaw Mountain Landis of the federal district court for the Northern District of Illinois removed from their cases on the basis of remarks that cast serious doubt on his impartiality. Judge Landis challenged his listeners to find anyone who had ever said



In a 1921 case involving three defendants of German and Austrian heritage charged with violations of the Espionage Act, district court Judge Kenesaw Mountain Landis (pictured) was accused of impartiality for having made biased remarks against German Americans. McReynolds dissented from the majority's upholding of Landis's removal from the case, on the ground that he was not prejudiced against the individuals themselves but against a class of individuals.

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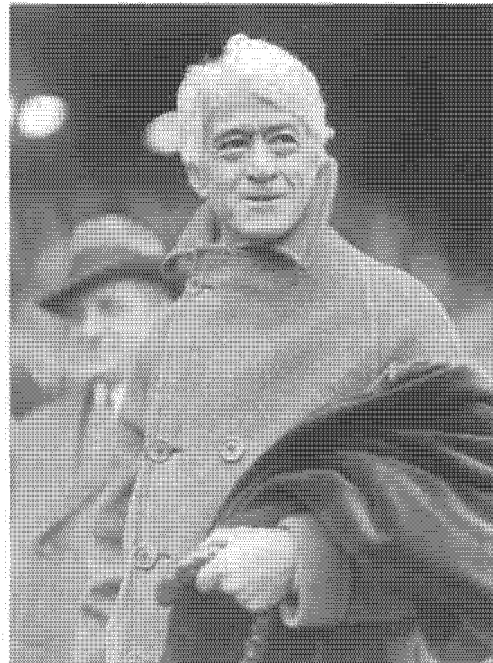
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anything worse than he about "the Germans." In their affidavits, they alleged that Landis had declared, "'One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda, and it has been spread until it has affected practically all the Germans in this country.'" ²²⁶ The majority ordered him removed from the case for violating the federal Judicial Code, which required a judge to "proceed no further" when an attorney filed an affidavit alleging personal bias by the presiding judge and that another judge be designated to continue with the case. McReynolds dissented, arguing that the judicial code only applied to bias against an individual, not a class of like individuals:

Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives, who unhappily, had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws.... Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. ²²⁷

Perhaps. Unfortunately, the litigants, the public at large and, possibly, not even the judge himself can ever be sure that justice is rendered free of prejudice when a litigant belongs to a class that the judge dislikes so intensely. That reasonable doubt about his impartiality is exactly why the judge must recuse himself.

THE END

In his last few years, it was thought that McReynolds was holding on only so that Roosevelt could not name his successor. ²²⁸ In 1937, he refused to attend a dinner with the President given annually for the Court, and, in 1939, he did not attend the Court's traditional courtesy call to the President upon the opening of the session. When Roosevelt was inaugurated for an unprecedented third term, McReynolds promptly resigned. His letter to the President was only two sentences. On February 1, 1941, he left the Bench. ²²⁹ He was the last of the Four Horsemen. ²³⁰ He acknowledged that he had considered leaving nine years earlier, ²³¹ and he bitterly lamented that he had tried to protect the country but "any country that elects Roosevelt three times deserves no protection." ²³² He had earned a reputation as "an American primitive, resisting all or nearly all that was not as he had known it..." ²³³ Upon McReynolds' retirement, Chief Justice Charles Evans Hughes proclaimed,

Forthright, independent, maintaining with strength and tenacity of conviction, his conceptions of constitutional right, he has served with distinction upon this bench for upwards of twenty-six years and has left a deep impression upon the jurisprudence of the Court. It is hoped that, relieved of the burden of active service, he will long enjoy his accustomed vigor of body and mind. ²³⁴

McReynolds was two days shy of his 79th birthday. ²³⁵

Calvin P. Jones offers this analysis of the Justice's long career.

It is interesting to speculate on what caused McReynolds, without question a scholarly and gifted attorney, to change from a progressive of the Theodore Roosevelt era and a liberal of Woodrow Wilson's time to an

arch-conservative during the New Deal period. Perhaps it was not he who changed but rather the spirit of the age, and he was either unwilling or unable to change with it. Perhaps changing from the executive branch to the judicial branch of government gave him a different perspective of the law. Perhaps as the liberal of yesterday, he became the conservative of today, and the reactionary of tomorrow. Perhaps he was simply not the right person at the right place at the right time. Perhaps his interpretations of the Constitution were correct and the so-called "reforms" brought about by New Deal legislation were really perversions of the law as it had originally been intended and as it had always been interpreted previously. Perhaps changing industrial and economic conditions had made new legal interpretations inevitable and Justice McReynolds simply was unable to understand or to accept these changing conditions.²³⁶

McReynolds died on August 24, 1946, at age 84, "alone and embittered" as he had lived.²³⁷ Death came at Walter Reed Hospital in Washington, where he was being treated for stomach cancer, bronchopneumonia and a heart condition.²³⁸ Announcing his passing at the opening of the Court's term that fall, Chief Justice Fred Vinson declared, "He was a vigorous, capable, determined, and forthright member. His death brought to a close a distinguished career and a life of devotion to duty."²³⁹ McReynolds was buried with his family in his Kentucky hometown.²⁴⁰ No representatives of the Court that he had served for twenty-seven years attended the funeral, as was customary.²⁴¹ Known to have been fond of children,²⁴² he left the bulk of his estate to charities, including \$100,000 to the Children's Hospital in Washington and to the Salva-

tion Army.²⁴³ His bequests also benefited the Kentucky Female Orphans School and Centre College "to promote instruction of girls in domestic affairs."²⁴⁴ His will revealed that he had "adopted" thirty-three British children who were victims of the Nazi blitzes during World War II.²⁴⁵ Before his death, he had corresponded with and provided financial support for the children.²⁴⁶

In a ceremony at the Court marking McReynolds' passing, Solicitor General Philip B. Perlman captured the essence of the cantankerous and conservative Justice's role during a pivotal point in the nation's history. Perlman's remarks could be taken as a tribute to principle or an indictment of recalcitrance: "It was not James Clark McReynolds who changed. It was the times, the country, the prevailing constitutional views and the Supreme Court that changed."²⁴⁷

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- ¹⁸¹Early, *supra* note 4, at 101.
- ¹⁸²*Id.* at 104.
- ¹⁸³Hendel, *supra* note 165, at 249–50.
- ¹⁸⁴Early, *supra* note 4, at 134.
- ¹⁸⁵*Id.* at 102 n. 18.
- ¹⁸⁶*Id.* at 83.
- ¹⁸⁷*Id.* at 84–85 (footnotes omitted).
- ¹⁸⁸*Id.* (footnotes omitted).
- ¹⁸⁹Hutchinson and Garrow, *supra* note 79, at 173, 174.
- ¹⁹⁰Hendel, *supra* note 165, at 306 n. 3.
- ¹⁹¹Early, *supra* note 4, at 99.
- ¹⁹²Abraham, *supra* note 1, at 177.
- ¹⁹³Douglas, *supra* note 59, at 163.
- ¹⁹⁴*Pierce v. Society of Sisters*, 268 U.S. 510, 529–30 (1924).

- ¹⁹⁵Douglas, *supra* note 59, at 15; for a novel argument that McReynolds and the other "horsemen" were "closet liberals" who supported "left-liberal agendas" in many low-profile cases during their tenures, see Cushman, Barry, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559, 560-61 (1997).
- ¹⁹⁶*Pierce*, 268 U.S. at 534-35.
- ¹⁹⁷*Id.* 268 U.S. at 536.
- ¹⁹⁸*Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 626 (1923), quoting 107 Neb. 657, 187 N.W. 100.
- ¹⁹⁹*Id.* 43 S.Ct. at 628.
- ²⁰⁰*Powell v. Alabama*, 287 U.S. 45, 57-58 (1932).
- ²⁰¹*Id.* 287 U.S. at 68-69.
- ²⁰²Lieberman, *supra* note 162, at 469.
- ²⁰³*Powell v. Alabama*, 287 U.S. at 77.
- ²⁰⁴*Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265 (1923).
- ²⁰⁵*Id.* 43 S.Ct. at 267 (McReynolds, J., dissenting).
- ²⁰⁶*Butler v. Perry*, 240 U.S. 328, 36 S.Ct. 258 (1916).
- ²⁰⁷*Id.* 36 S.Ct. at 259.
- ²⁰⁸*Id.* 36 S.Ct. at 259-60.
- ²⁰⁹*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61 (1928).
- ²¹⁰*Id.* 49 S.Ct. at 66-68 (McReynolds, J., dissenting).
- ²¹¹*Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 473 (1931).
- ²¹²*Id.* 51 S.Ct. at 474 (McReynolds, J., dissenting).
- ²¹³*Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446 (1926).
- ²¹⁴*Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 487 (1932).
- ²¹⁵*Id.* 52 S.Ct. at 488 (McReynolds, J., dissenting).
- ²¹⁶*Id.* 52 S.Ct. at 489.
- ²¹⁷*Id.* 52 S.Ct. at 490, 491.
- ²¹⁸*Id.* 52 S.Ct. at 491, 493.
- ²¹⁹*Id.* 52 S.Ct. at 493.
- ²²⁰*Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-50 (1938).
- ²²¹*Id.* 305 U.S. at 353 (McReynolds, J., dissenting).
- ²²²*Id.*
- ²²³*New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 555-56 (1938).
- ²²⁴*Id.* 303 U.S. at 562-63.
- ²²⁵*Id.* 303 U.S. at 563-64 (McReynolds, J., dissenting) (footnote omitted).
- ²²⁶*Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 231 (1921).
- ²²⁷*Id.* 41 S.Ct. at 236 (McReynolds, J., dissenting).
- ²²⁸Early, *supra* note 4, at 175-76.
- ²²⁹Biography Resource Center, *supra* note 16, at 3.
- ²³⁰Abraham, *supra* note 1, at 201.
- ²³¹Early, *supra* note 4, at 174.
- ²³²Abraham, *supra* note 1, at 227, citing 5 Supreme Court Historical Society Q. 4 (Winter 1983).
- ²³³Bickel, *supra* note 56, at 244.
- ²³⁴Retirement of Mr. Justice McReynolds, 312 U.S. v (Feb. 3, 1941).
- ²³⁵Biography Resource Center, *supra* note 16, at 3.
- ²³⁶Jones, *supra* note 7, at 29-30.
- ²³⁷Abraham, *supra* note 1, at 227.
- ²³⁸Hutchinson and Garrow, *supra* note 79, at 262-63; Biography Resource Center, *supra* note 16, at 3.
- ²³⁹Death of Mr. Justice McReynolds, 329 U.S. vii (Oct. 7, 1946).
- ²⁴⁰Biography Resource Center, *supra* note 16, at 3.
- ²⁴¹Cushman, *supra* note 2, at 330.
- ²⁴²Douglas, *supra* note 59.
- ²⁴³Abraham, *supra* note 1, at 227-28.
- ²⁴⁴Biography Resource Center, *supra* note 16, at 3.
- ²⁴⁵Abraham, *supra* note 1, at 227.
- ²⁴⁶Wolf, *supra* note 3, at 299.
- ²⁴⁷quoted in Bickel, *supra* note 56.

The *Graver Tank* Litigation in the Supreme Court

TIMOTHY B. DYK*

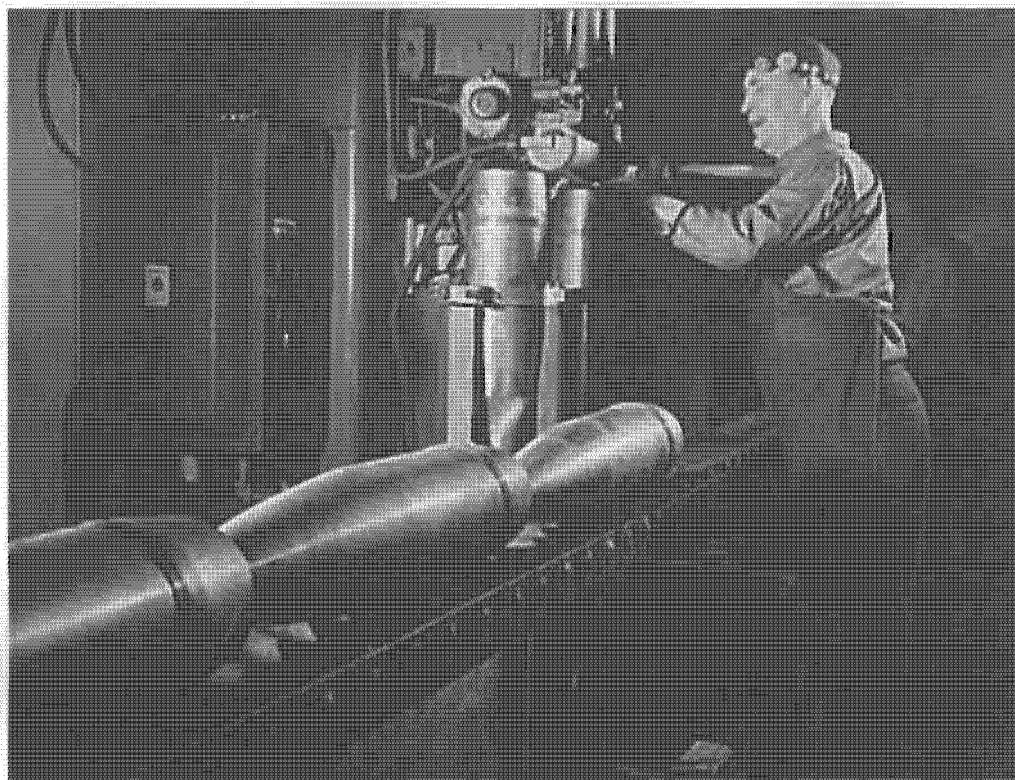
The very generality of the patent statutes in American law places a heavy burden on the courts and the patent bar for the development of patent law and policy. It is particularly important that we examine periodically how well the courts have performed that function and how well the bar has supported that effort. This article will focus on an earlier era in patent law—in particular the process surrounding the second *Graver Tank* decision, in the 1949 Term of the Supreme Court—to see what lessons that experience may hold for present day.¹

The second *Graver Tank* decision is the foundation for the modern doctrine of equivalents. Generally a patent confers a right on the patent holder to bar others from producing products that literally infringe the terms of the patent grant. The doctrine of equivalents is designed to prevent infringers from avoiding liability by making insubstantial changes in the product to avoid the literal scope of the patent. An insubstantially different product is held to be "equivalent" and therefore infringing. Today, more than half a century later, the scope of the doctrine of equivalents continues to be a topic of intense debate, and *Graver Tank* is one of the Supreme Court's most frequently cited patent decisions.²

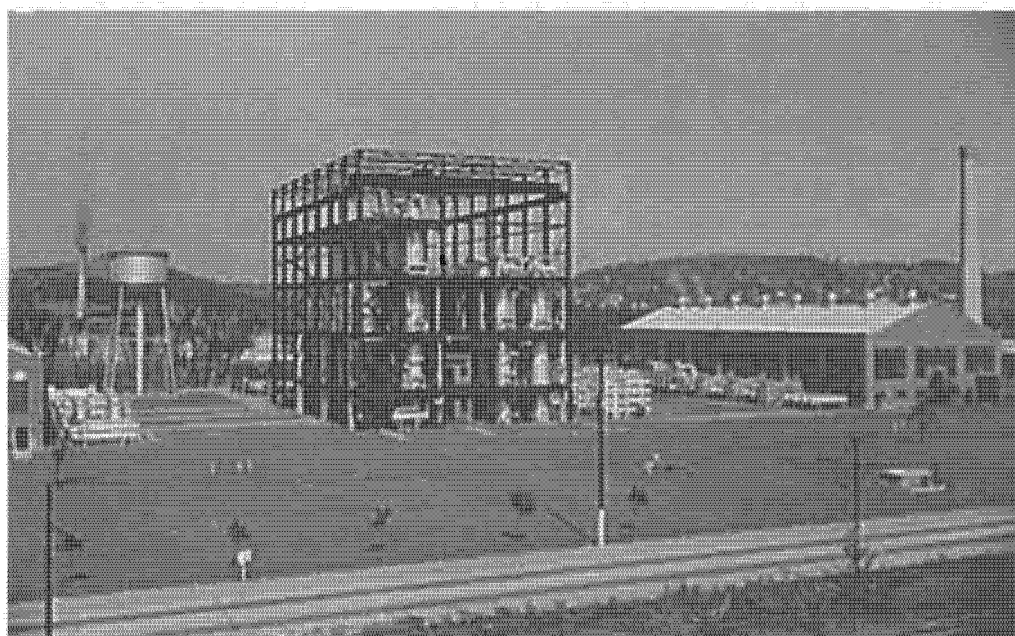
Given the continuing relevance of *Graver Tank*, it is appropriate to look back at the environment in which the case arose, and the

process by which it was decided. While there is a monumental study of the *Graver Tank* litigation by Paul Janicke that appeared in the *AIPLA Quarterly Journal* in 1996,³ for which I am much indebted, so far as I am aware there has been relatively little attention paid to the decisional process of the Supreme Court.

The *Graver Tank* patent was for a new welding method and companion welding fluxes. There seems to be little question that the patent covered a significant invention.⁴ The discovery allowed for solid welds of plates more than five times thicker than previous methods and at rates more than five times as fast.⁵ In 1933 the inventors assigned all rights to Union Carbide, the parent company of Linde Air Products.⁶ By 1947, the patent generated more than six million dollars in yearly royalties for Linde; licensees included GM,



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In 1933, the inventors of the patent assigned all rights to Union Carbide, the parent company of Linde Air Products. By 1947, the patent was generating more than six million dollars in royalties yearly for Linde. Pictured is a Union Carbide plant in West Virginia.



Licensees for the *Graver Tank* patent included GM, Chrysler, Ford, the Army, and the Navy. It was used to make critical welds for U.S. military ships, including liberty ships such as this one, being made on Mare Island, a naval shipyard, in 1942.

Chrysler, Ford, the Army, and the Navy; and uses included critical welds for the U.S. military ships, including the liberty ships.⁷

Graver Tank was a user of welding materials that purchased fluxes from Lincoln Electric Company.⁸ The litigation began in 1945 when Linde filed suit against Lincoln and Graver Tank, in the Northern District of Indiana, claiming infringement on 29 patent claims.⁹ In the course of the litigation all the process claims were held invalid by the district court as well as the Supreme Court, as were four of the product claims, leaving only four valid product claims.¹⁰ In the interest of simplicity, I will not describe the details of the litigation over invalidity, which can be found in the Janicke article. For present purposes what is significant is that the question of infringement often was lost in the morass of argument over validity,¹¹ and second, that the patentee would, as a result

of the holding of invalidity, secure no benefit from the invention unless the four remaining product claims were held to have infringed. The desire to compensate the patentee, given the significance of the invention, was no doubt influential in the outcome of the case.

The problem as to infringement was that the claims required "alkaline earth metal silicates,"¹² but the infringing product used manganese silicate, which was not an alkaline earth metal silicate.¹³ There was thus no literal infringement of the patent.¹⁴ The specification, however, suggested the use of possible fluxes beyond those covered by the literal language of the claims: "We have used calcium silicate and silicates of . . . manganese . . . [as the flux]."¹⁵

With respect to the four valid flux claims, the district court found infringement.¹⁶ The district court noted that the accused flux "[did]

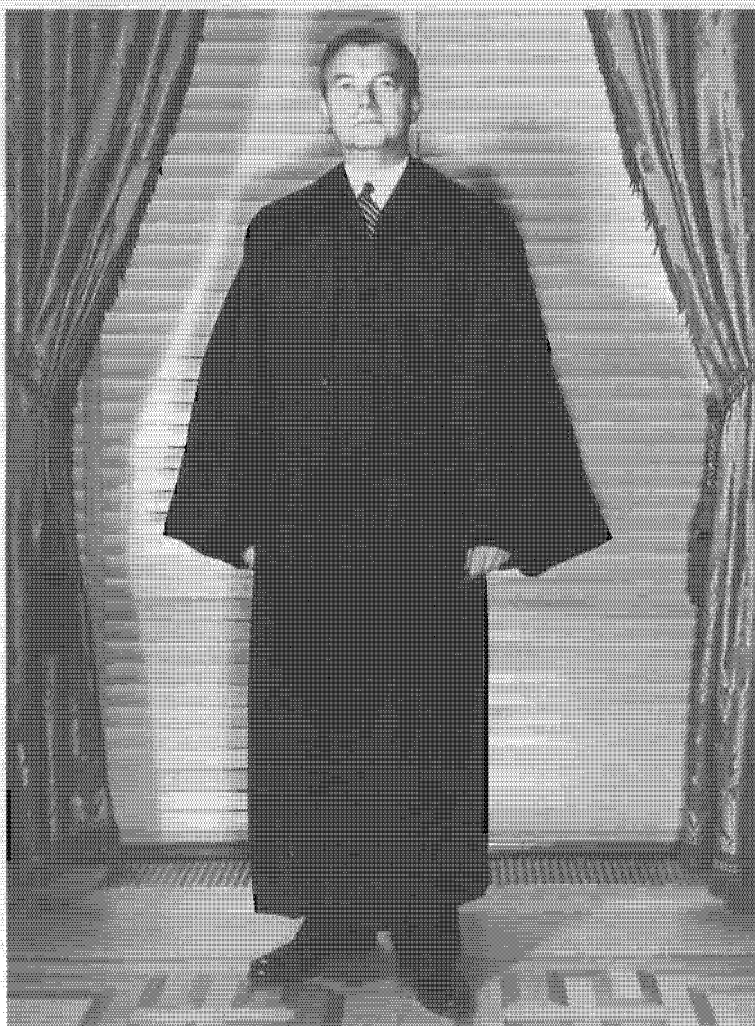
not literally infringe," but found infringement under the doctrine of equivalents, relying exclusively on the specification to conclude that manganese silicate was "equivalent" to alkaline earth metal silicates.¹⁷

On appeal, the Seventh Circuit overturned all of the district court's invalidity findings, while affirming the lower court's validity and infringement findings for the four valid flux claims.¹⁸ With respect to these four flux claims, the court of appeals did not mention the doctrine of equivalents and did little more than repeat the district court's findings, holding that "[t]hese questions of fact are supported by substantial evidence and we may not disturb them."¹⁹ The appeals court stated "The

[district] court further found that . . . their accused composition . . . is substantially identical in operation and result with that of the patent . . . [and] that no evidence was introduced to show that the accused flux was derived from the prior art or by independent experiment, or from any other source other than the teaching of the patent in suit."²⁰

Lincoln and Graver Tank petitioned for Supreme Court review.²¹ The Court granted certiorari on October 11, 1948;²² the case was argued on January 5 and 6, 1949,²³ and decided soon thereafter on February 28, 1949, in an opinion by Justice Robert H. Jackson.²⁴ The majority opinion was less than ten pages long.²⁵ The speed with which it was rendered,

Robert H. Jackson's majority opinion in the first *Graver Tank* decision was cursory and routine, and it made no reference to the doctrine of equivalents. In an unusual move, the Court agreed to hear a re-argument the following term.



the length of the majority opinion, and the absence of dissent suggest that it was viewed as routine; and indeed it was. The opinion decided little of significance beyond resolving the particular case, devoting most of the discussion to the Court's reversal of the court of appeals on validity issues.²⁶

Curiously, on the issue of infringement there was no mention of the doctrine of equivalents, perhaps because the doctrine received only cursory and rather belated treatment in the parties' briefs. The failure to mention the doctrine is particularly curious given the fact that just seven years earlier, in *Exhibit Supply*, the Court (which included Justice Jackson), had specifically reserved the question whether the doctrine of equivalents was consistent with the statutory requirements "that the patent shall describe the invention."²⁷ As to infringement of the four valid flux claims, the opinion simply noted that the district court had found the Lincoln flux to be "substantially identical" to the patented Linde products and concluded that the Court "[found] no cause for reversal."²⁸ Justices Black wrote a separate concurrence directed solely to the issue of validity, which Justice Douglas joined.²⁹

In virtually every Supreme Court case the Court's involvement ends with the issuance of its opinion. Petitions for rehearing are often filed, but they are rarely granted. The leading Supreme Court treatise identifies only a handful of cases in which the Court has granted rehearing: *Graver Tank* was one of those rare cases.³⁰

The case was argued again in the next Term of Court and resulted in what is now known as the *Graver Tank* opinion.³¹ Again the opinion was rendered in less than two months.³² Again it was short.³³ But this time there was a vigorous dissent.³⁴ And this time the opinion was a significant one. The doctrine of equivalents was front and center in the Court's decision, again written by Justice Jackson.³⁵ In this opinion, Jackson reviewed the history of the doctrine, characterizing the doctrine of equivalents as an impor-

tant companion to literal infringement necessary to adequately protect patent rights, and holding that the flux claims were infringed under the doctrine of equivalents.³⁶ There was no recognition that the Court seven years earlier had questioned the doctrine's continued validity.

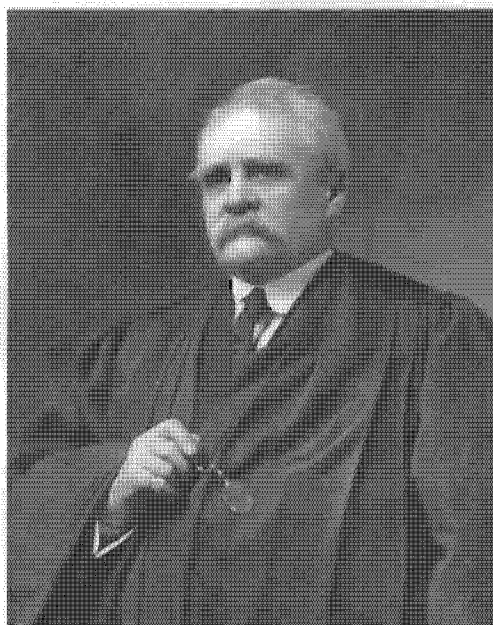
Justices Hugo L. Black and William O. Douglas dissented. Justice Douglas wrote a short dissent asserting that the patentee had dedicated manganese silicate to the public when it disclosed the equivalent in the specification and failed to claim it.³⁷ Douglas's dissent also (correctly) noted that even were the doctrine of equivalents a viable rule, it had been improperly applied in this case because the allegedly infringing flux had been disclosed in a prior patent, and a patent cannot cover claims not disclosed in the specification.³⁸ Justice Black's dissent was longer, and Justice Douglas joined this opinion as well.³⁹ Justice Black vociferously denounced the doctrine of equivalents as a judicial emasculation of the definitive claiming requirement.⁴⁰ Justice Black concluded by accusing the majority of departing from precedent, that he believed treated the patent grant as a "narrow exception to our competitive enterprise system."⁴¹

This brief history suggests a central question: Why did the Court grant a rehearing when the result was reaffirmed?

The Court in 1949 was composed of a set of interesting personalities. The Chief Justice was Fred M. Vinson, and the Associate Justices were Hugo L. Black, Stanley F. Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, Wiley B. Rutledge, and Harold H. Burton. When the case was reargued, the Court was the same except that Justice Murphy had died and been replaced by Justice Sherman Minton, and Justice Rutledge had been replaced by Justice Tom C. Clark. Justice Minton did not participate because he had sat on the Seventh Circuit panel that had ruled in favor of the patent holder.⁴²

The main protagonists were Justices Black, Douglas, Frankfurter and Jackson. Justice Black had, of course, been a Senator from Alabama, and a strong supporter of the New Deal, wounded at the time of his appointment by allegations of membership in the Klan.⁴³ Douglas had been the Chairman of the SEC, and again a strong supporter of the New Deal.⁴⁴ Frankfurter had been a professor at the Harvard Law School who had made himself unpopular with his colleagues by lecturing them at every opportunity and on every possible subject.⁴⁵ Justice Potter Stewart later would say that Justice Frankfurter's lectures at the Court's conference always lasted fifty minutes—no more and no less—because this was the length of a lecture at the Harvard Law School. And Jackson, Attorney General under Roosevelt, was now returned from his stint as the chief United States prosecutor in the Nuremburg war crimes trials.⁴⁶

It is not a simple matter to unpack what happened at the Court beginning with the petition for rehearing. Even with respect to cases



Unfortunately, there is no recording of the rehearing argument for *Graver Tank*. Thankfully, however, Justice Harold H. Burton kept careful conference notes and archived his conference agendas with some handwritten notations in the margin.

as thoroughly studied as *Brown v. Board of Education*,⁴⁷ there is still uncertainty and controversy as to the details of what happened within the Court. The problems of reconstruction are daunting. The records of some Justices, such as Justice Jackson, were not organized, to put it charitably, in a meticulous way. Other records were destroyed. For example, Justice Black before his death ordered the destruction of his conference notes.⁴⁸ The records of Chief Justice Vinson and Justice Reed are archived at the University of Kentucky, which has been helpful in supplying copies of pertinent files. Thankfully, Justice Burton kept careful conference notes and archived his conference agendas with some handwritten notations in the margin. Unfortunately, there is no recording of the rehearing argument. Nonetheless, based on what is available, the outlines of what happened are reasonably clear.

Lincoln and Graver Tank filed a petition for rehearing on March 12, 1949.⁴⁹ While the petition never mentioned the doctrine of equivalents, its argument necessarily repudiated the doctrine as a valid rule in patent law.⁵⁰ Lincoln asserted that the Court had erroneously treated the trial court's finding of infringement as a finding of fact when infringement rested in truth on a conclusion of law.⁵¹ Lincoln noted that the trial court had relied exclusively and improperly on the specification in order to determine whether Lincoln's flux infringed on the Linde patent, thereby reading the specification into the claim.⁵² This, Lincoln argued, was directly contrary to the Court's requirement that the "claims measure the grant."⁵³

Linde waived its right to file a response, likely believing there was little chance the Court would be interested in rehearing a case on four flux claims on which the district court, the Seventh Circuit, and the Supreme Court itself had already agreed were infringed.⁵⁴ The petition was scheduled for conference on April 2 and then again at three succeeding conferences on April 16, 23 and 30.⁵⁵ Justice Burton's notes record what happened. At the

April 2 conference a vote was apparently delayed at the request of Justices Black and (curiously) Jackson because of concern about the "infringement point."⁵⁶ At the next conference a vote was taken.⁵⁷ Six members of the court voted to deny the petition.⁵⁸ Only Black and Douglas voted to grant; and Rutledge abstained.⁵⁹ But again at the request of Black and Jackson, action was deferred because of concern "as to whether infringement is properly settled."⁶⁰ The case was passed again on April 23rd—Justice Burton's conference notes record: "Hold for [Black] & [Douglas]."

Shortly after the April 23rd conference, on April 27, Justice Douglas circulated his views to the Court.⁶¹ Douglas's views took the form of a draft dissent from a presumed denial of a rehearing.⁶² Douglas noted that the important principle that "the claims measure the grant" may have been violated by the Court's initial opinion.⁶³ Douglas noted that the claims now held infringed were limited to earth silicates and that the infringing product was not an earth silicate, although found to have been "substantially identical in operation and result" with the claimed composition.⁶⁴ The opinion did not mention the doctrine of equivalents by name.⁶⁵ Justice Douglas's opinion also mentioned—almost as an afterthought—that it also appeared as though prior patents anticipated the four flux claims as written.⁶⁶ On April 27, Justice Black agreed to join Douglas's opinion.⁶⁷

Just two days after Douglas circulated his views to the rest of the Court, Linde, apparently worried about the Court's delay, filed a belated response.⁶⁸ Unlike the petition, the April 28th response directly addressed the doctrine of equivalents, arguing that a valid patent is entitled to a "range of equivalents."⁶⁹ Linde supported the Court's prior decision by distinguishing between claim construction, in which reference to the specification could not be used to expand the claims, and infringement by equivalents, in which reference to the specification to understand equivalence was proper.⁷⁰

At the April 30th conference the case was "held for further memo,"⁷¹ apparently a reference to the memorandum being prepared by Justice Jackson, which he eventually circulated on May 6th.⁷² Perhaps armed with Linde's belated response, Jackson's memorandum was a detailed rejoinder to Justice Douglas. It went through several drafts, including a preliminary review by Justice Frankfurter.⁷³ For the first time, Jackson's memorandum addressed the doctrine of equivalents in detail, citing the Court's 1853 decision in *Winans v. Denmead* as support for the doctrine.⁷⁴ The memorandum started off gently enough, "[a] petition for rehearing . . . is supported by an opinion [presumably the draft Douglas dissent] which requires careful consideration, and perhaps an opinion, to avoid misunderstanding . . ."⁷⁵ Jackson noted that he had "not the slightest objection" to reconsideration in order to address the question "which is inherent in the result" laid down in the prior decision.⁷⁶ This civility was short lived, however. The memo immediately attacked the basis for the Douglas opinion, taxing Black and Douglas for supporting the original result and now questioning it.⁷⁷ Jackson continued his attack, observing that those calling for rehearing could do so "upon the ground that they have now changed their view and now believe that they were in error . . . or . . . that they were not aware of what they were agreeing to But it cannot be attributed to any inconsistency in this Court's opinion . . . if the doctrine of equivalents is still the law."⁷⁸

Jackson spent the remainder of the memorandum reviewing the doctrine of equivalents and its role in determining infringement and not claim validity.⁷⁹ Of the doctrine's lack of mention in his own opinion in the case, Jackson blandly stated, "the doctrine of equivalents was so clearly exposed by the courts below that in absence of questioning it . . . I saw no occasion to prolong the opinion by discussing matters amply covered . . ."⁸⁰ Nonetheless, in concluding, Jackson conceded that "[t]his is a good case to review

the doctrine of equivalents, if the Court desires to do so."⁸¹

On May 7, the day after Jackson's memorandum circulated, the Court voted five to three to grant the petition, with Murphy apparently abstaining.⁸² The five to grant were Vinson, Black, Reed, Douglas and Rutledge, with Rutledge shifting at the last minute from an abstention to a grant.⁸³ Frankfurter, Jackson, and Burton voted to deny.⁸⁴ The decision granting rehearing, which issued on May 16, limited the issue to the question of infringement of the four flux claims and requested argument on the applicability of the doctrine of equivalents.⁸⁵

The reasons for the rehearing vote can probably be gleaned from Justice Reed's notes.⁸⁶ Justice Reed was first concerned as to whether the doctrine of equivalents point had been properly raised. Apparently satisfied that it had been, he concluded: "I think there was probably a doctrine of equivalents applied by the [district court] as a matter of fact, not a legal determination that specifications can be read into claims. If this is correct, it is factual & [Jackson] is correct. . . . If it was such a legal determination parties are entitled to rehearing."⁸⁷ This suggests concern that the district court may have improperly treated the doctrine of equivalents question as a legal question—expanding the scope of the claims to encompass disclosures reflected in the specification but not in the language of the claims themselves.

After formal briefing and oral argument, the majority opinion issued—again written by Justice Jackson, and joined by five other members of the Court. The opinion is noteworthy for what it did not do.

First, the majority opinion failed to grapple with arguments concerning the downsides of the doctrine of equivalents—the uncertainty that it creates; the evasion of the examination process that it permits; and the failure of the doctrine to give adequate notice to the public of the patent's coverage. The opinion focused entirely on the benefits of the doctrine, but, even then, did not discuss the argument that the doctrine of equivalents was unnecessary, given

the fact that the applicant can simply draft the claims to explicitly cover the entire invention.

Second, the opinion assumed that perpetuation of the doctrine of equivalents was required by *stare decisis* without consideration of whether the 1853 *Winans* decision, on which it rested, had been eroded by statutory change or changes in the approach to patent drafting. The opinion did not recognize the Court's questioning of the doctrine in the 1942 *Exhibit Supply* case (indeed, the opinion does not cite *Exhibit Supply*).⁸⁸

Third, the opinion did not make clear the scope of the doctrine—suggesting perhaps that only intentional copying was prohibited. Fourth, it did not respond to the dissent's suggestion that the disclosure of the equivalent in the specification constituted surrender. (However, the Jackson opinion did not, as did the district court, rely on the specification's disclosure in support of the finding of equivalence.) Finally, the patent did not discuss the argument that the prior art covered the very equivalent now being allowed.

There may have been a number of reasons for this lack of engagement. First, it seems likely that Jackson was seriously embarrassed by the original opinion's evident mistake in holding that the four flux claims were literally infringed. Despite his willingness to consider rehearing expressed in his memorandum to the Court (and his claim that the original opinion was in fact based on the doctrine of equivalents), Jackson plainly wished to avoid rehearing and, once rehearing was granted, was hardly open to arguments that would require a different result and that would have enhanced the embarrassment. It is reasonable to assume that other members of the original majority probably felt the same way.

Second, the *Graver Tank* dispute has a personal quality to it. On the side of the dissenters, one is left with the distinct impression that they enjoyed embarrassing Jackson by pointing out the sloppy quality of the original decision. If the dissenters' objective had been simply to bring about a thorough reexamination of the doctrine of equivalents, it seems likely that they

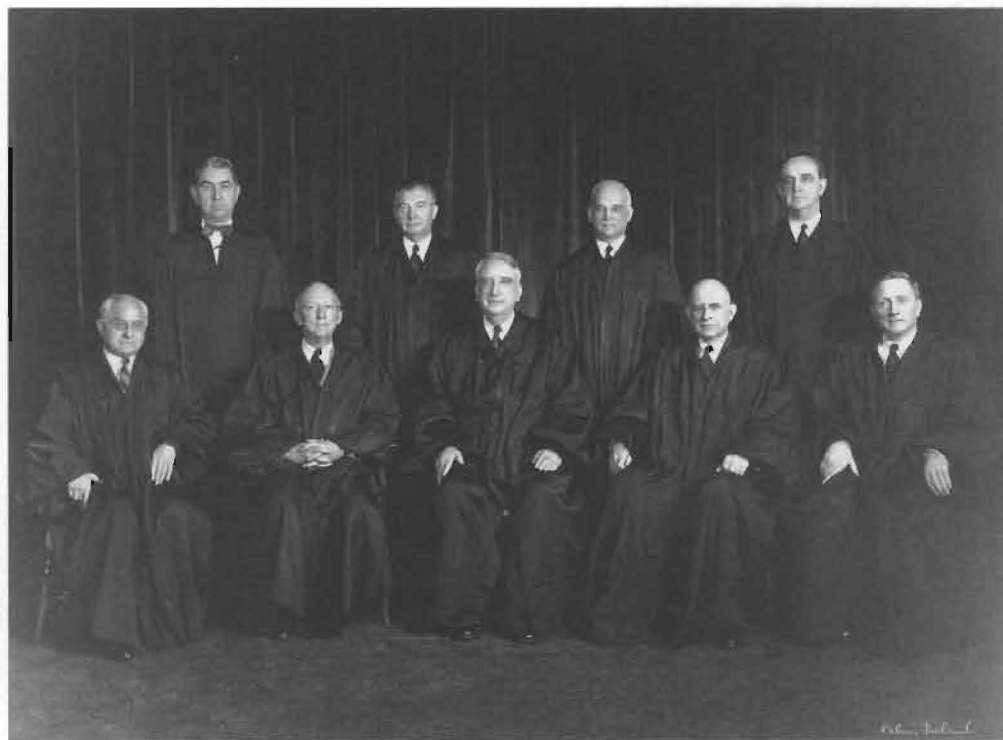
would have waited for another case unencumbered by the baggage of an initial adverse decision by the Court.

The same was true on Jackson's side. For example, Frankfurter's response to Jackson's memorandum stated, "Bob, Your memo on *Graver Tank* petition for rehearing is a perfect piece of exquisite devastation. My decent nature thinks this will put an end to this foolish business—my meaner side hopes for public exposure!"⁸⁹ And a note from Jackson's clerk to the Justice stated "I think you have taken care of Douglas but Good."⁹⁰

There was, in other words, a lack of collegiality in the discussion. The reasons for this are not difficult to discover. There was longstanding personal animosity between Jackson (and Frankfurter) on the one hand and Black and Douglas on the other.⁹¹ President Franklin D. Roosevelt had toyed with Jackson when he initially appointed him to the Court in 1941.

That no doubt helped to make Jackson particularly sensitive on the question of his advancement within the Court to the position of Chief Justice, which he much desired. When in 1946 Chief Justice Harlan Fiske Stone had died (and Jackson was away in Nuremberg), Jackson hoped that he would be named as Chief Justice and believed that he had been promised the position by Roosevelt.⁹² He was not promoted, and Jackson attributed his loss, probably unfairly, to Justice Black.⁹³ Jackson retaliated by publicly attacking Black for sitting on a case involving his former law partner.⁹⁴ It has been said that "[t]here was no doubt in any one's mind that there was a war taking place on the Court during the 1940s and 1950s."⁹⁵ As with any war there was collateral damage, here to the decisional process.

A third and more significant difficulty arose from the fact Jackson and Frankfurter on the one hand and Black and Douglas on the



This picture reflects the composition of the Vinson Court the year that the second *Graver Tank* opinion was handed down. Justices Jackson (standing, second from left) and Frankfurter (seated at left) on the one hand, and Justices Black (seated, second from left) and Douglas (seated at right) on the other hand, had fundamentally different views of patents.

other hand had fundamentally different views of patents. In the years before *Graver Tank*, patent issues were an important component of the Court's docket.⁹⁶ A central issue was the appropriate scope of the patent monopoly. This issue arose in a number of different contexts, including antitrust; the patentability of particular subject matter; and invalidity, anticipation and obviousness. The majority in some cases was patent-friendly. In others it was not. Where patents were invalidated, Black and Douglas were almost always with the majority while Frankfurter and Jackson sometimes dissented, with Jackson in one case stating, "[T]he only patent that is valid is one which this Court has not been able to get its hands on."⁹⁷ Not infrequently, when the Court upheld a patent, Black and Douglas forcefully dissented, doing so in more than eight patent cases during the period between Jackson's joining the Court and the *Graver Tank* decision.⁹⁸ For them, extending the patent monopoly was not merely a misconstruction of the statute, but a misconstruction of the Constitution itself.

A fourth (and somewhat contradictory) factor was that, despite the strongly held views concerning the merits of patents, most members of the Court were simply not interested in the details of patent law. I can testify from personal experience, for example, that Justice Burton had little interest in patent cases. I clerked for Justice Burton, and he was fond of telling the story of one of his earlier clerks coming into the Justice's chambers with a big smile on his face. The Justice asked him why he was smiling, and the clerk said that he had just discovered that the Justice was recused in a patent case that had been assigned to him for authorship. The Justice, justifying the clerk's smile, confessed that he too viewed this as a banner day during his tenure on the Court.

Fifth, closely related to the lack of interest was a perceived lack of institutional competence. In one prescient opinion, Justice Frankfurter questioned the ability of the courts to properly address and decide patent cases: "It is an old observation that the training of

Anglo-American judges ill fits them to discharge the duties cast upon them by patent legislation."⁹⁹ Justice Jackson's clerk at the time, James Marsh, confirmed that Jackson shared these concerns.¹⁰⁰

Finally, the Court in *Graver Tank* received poor assistance from the bar. The government was not invited to file and did not file an amicus brief. The quality of advocacy by the private bar was less than stellar. The party briefs often buried the pertinent issues among pages of technical material, concentrated heavily on validity during the initial hearing, and failed to highlight the doctrine of equivalents as an important issue on appeal.

Some of the institutional problems reflected in *Graver Tank* have no modern counterparts. We are unlikely to see another Supreme Court rehearing in a patent case, and the personal conflicts within the *Graver Tank* Court are long gone. There is no indication that the modern Supreme Court Justices are deeply divided over the role of patents in a competitive economy.

But some of the concerns are still valid. In particular, some might argue that Justice Frankfurter had a point in questioning the institutional competence of courts in patent cases. This concern about institutional competence probably extends to other technological areas, but historically, and particularly in the past two decades, the Court has resolved this problem with what is now known as the *Chevron* doctrine—requiring deference to administrative agencies with greater institutional competence.¹⁰¹ That solution is not available with respect to patent law, because Congress has not assigned an adjudicatory or substantive rulemaking role—the predicate for *Chevron* deference to the Patent and Trademark Office in infringement litigation.

Congress thought that the creation of our court, the United States Court of Appeals for the Federal Circuit, in 1982, might help to solve the expertise problem. But Supreme Court review remains important, and that review must be as informed as possible. Moreover, the

responsibility for ensuring that the Court is properly informed not only rests with the Federal Circuit, but also with the district courts, the private bar, and the government as amicus. In *Graver Tank*, the Court evidently did not receive the assistance that it needed. There is reason to think that the responsible entities today provide better assistance. But, it is fair to ask whether any one of us has yet earned an exceptional grade for the state of affairs fifty years after *Graver Tank*.

*This article is based on a speech at the American Intellectual Property Law Association Mid-Winter Institute on January 28, 2005.

Note: The attempted reconstruction of the process by which the Supreme Court decided *Graver Tank* would not have been possible without the excellent work of my intern, Stephanie Roy, then a student at The George Washington University Law School, who made many contributions. The foremost of these was scouring the depository libraries and reviewing the papers of the Justices who sat on *Graver Tank*.

ENDNOTES

¹*Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605 (1950), *adhering on reh'g*, 336 U.S. 271 (1949).

²A Shepard's report on the 1950 *Graver Tank* decision shows that the case has been cited in more than 1,800 case decisions and 430 law review and periodical articles.

³Paul M. Janicke, "Heat of Passion: What Really Happened in *Graver Tank*," 24 *AIPLA Q. J.* 1 (1996).

⁴See generally U.S. Patent No. 2,043,960 (filed Oct. 9, 1935).

⁵*Id.*

⁶Janicke, *supra* note 3, at 30.

⁷*Id.* at 44.

⁸*Id.* at 6.

⁹*Id.* at 75.

¹⁰See *Linde Air Prods. Co. v. Graver Tank & Mfg. Co.*, 86 F. Supp. 191, 196-99 (N.D. Ind. 1947), *aff'd in part, rev'd in part*, 167 F.2d 531 (7th Cir. 1948), *aff'd in part, rev'd in part*, 336 U.S. 271 (1949), *adhered to on reh'g*, 339 U.S. 605 (1950).

¹¹See, e.g., *id.* at 192-201 (dedicating less than 2 of the 10 pages of analysis to the question of infringement).

¹²*Id.* at 198.

¹³*Id.* at 199.

¹⁴*Id.*

¹⁵U.S. Patent No. 2,043,960, at [4] col.1, ll.62-65 (filed Oct. 9, 1935).

¹⁶*Linde Air Prods. Co.*, 86 F. Supp. at 199.

¹⁷*Id.* at 199-200.

¹⁸*Linde Air Prods. Co. v. Graver Tank & Mfg. Co.*, 167 F.2d 531, 539 (7th Cir. 1948).

¹⁹*Id.*

²⁰*Id.* at 538-39.

²¹Petition for Writ of Certiorari, *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 335 U.S. 810 (1948) (No. 48-185).

²²*Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 335 U.S. 810 (1948) (No. 48-185).

²³*Graver Tank & Mfg. Co. v. Linde Air Products*, 336 U.S. 271, 271 (1949); see also Justice William O. Douglas, Conference Notes (Jan. 8, 1949) (Container 185, William O. Douglas, Manuscript Division, Library of Congress).

²⁴*Id.* at 271, 272.

²⁵*Id.* at 272-80.

²⁶See *id.* at 276-79.

²⁷*Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 136 (1942).

²⁸*Graver Tank & Mfg. Co.*, 336 U.S. at 276.

²⁹*Id.* at 280-81 (Black, J., concurring).

³⁰*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 337 U.S. 910 (1949).

³¹*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950).

³²The case was argued on March 30, 1950, and the decision rendered on May 29, 1950. *Graver Tank & Mfg. Co.*, 339 U.S. at 605; see also Justice Robert H. Jackson, Conference Notes (Apr. 2, 1949) (Container 158, Robert Houghwout Jackson, Manuscript Division, Library of Congress).

³³*Graver Tank & Mfg. Co.*, 339 U.S. at 606-612.

³⁴*Id.* at 612-18 (Black, J. and Douglas, J., dissenting).

³⁵*Id.* at 606-12; see also *Graver Tank & Mfg. Co.*, 337 U.S. 910 (limiting the issue on rehearing to the question of infringement of flux claims 18, 20, 22, and 23, and requesting argument on the applicability of the doctrine of equivalents).

³⁶*Graver Tank & Mfg. Co.*, 339 U.S. at 608, 612.

³⁷*Id.* at 618 (Douglas, J., dissenting).

³⁸*Id.*

³⁹See *id.* at 612-18 (Black, J., dissenting).

⁴⁰*Id.* at 613-14 (Black, J., dissenting).

⁴¹*Id.* at 617 (Black, J., dissenting).

⁴²See *Linde Air Products Co. v. Graver Tank & Mfg. Co.*, 167 F.2d 531, 539 (7th Cir. 1948).

⁴³See, e.g., Henry J. Abraham, *Justices & Presidents* 200-01 (1974).

⁴⁴*Id.* at 210.

⁴⁵See, e.g., Howard Ball, *Hugo L. Black: Cold Steel Warrior* 139-41 (1996).

⁴⁶ABRAHAM, *supra* note 43, at 218-19.

⁴⁷*Brown v. Board of Education*, 347 U.S. 483 (1954).

⁴⁸See Roger K. Newman, **Hugo Black: A Biography** 610 (1994) (chronicling Justice's Black distrust of such confidential, yet informal records as true representatives of history).

⁴⁹Petitioners's Petition for Rehearing, *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950) (No. 49-2). At the time the petition for rehearing was filed, the case was still referenced as Nos. 184-185 from the 1948 October Term, but after the rehearing grant the case was renumbered to No. 2 for the 1949 October Term.

⁵⁰*Id.* at 3-7.

⁵¹*Id.* at 6-7.

⁵²*Id.* at 3.

⁵³*Id.* at 4-5.

⁵⁴See Letter from John T. Cahill (Attorney for Respondent) to the Clerk of Court, United States Supreme Court (Apr. 28, 1949), as found in Douglas, *supra* note 23. The letter accompanied the belated Respondent's Answer to Petition for Rehearing, which was filed with the Court on April 29, 1949.

⁵⁵See Justice Burton's Conference Notes for April 2, April 16, April 23, April 30, and May 7, 1949. Justice Harold Burton, Conference Notes October Term 1948 (Container 166, Harold Burton, Manuscript Division, Library of Congress).

⁵⁶See *id.* at List 1 Sheet 2 (Apr. 2, 1949).

⁵⁷See *id.* at List 2 Sheet 2 (Apr. 16, 1949).

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹See Justice William O. Douglas, Opinion of Mr. Justice Douglas on Petition for Rehearing (Container 185, William O. Douglas, Manuscript Division, Library of Congress). Circulation notes on the back of the opinion date the circulated copies to April 27, 1949. See, e.g., *id.* Marginalia by Justice Douglas at 2 (back).

⁶²See *id.* at 1-2. The opinion was never given a final date or publicly reported at the time, presumably because Justice Douglas garnered a rehearing for the case, but its premises would reappear in Justices Black and Douglas's dissents from the final decision.

⁶³See *id.* at 1.

⁶⁴*Id.* at 2.

⁶⁵*Id.* at 1-2.

⁶⁶*Id.* at 2 ("[Manganese silicate] had probably been pre-empted by prior patents.").

⁶⁷See *id.* Marginalia by Justice Black at 2 (back).

⁶⁸Respondent's Answer to Petition for Rehearing, *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950) (No. 49-2).

⁶⁹*Id.* at 3.

⁷⁰*Id.*

⁷¹See Burton, *supra* note 34, at Apr. 30, 1949 List 2 Sheet 1.

⁷²Memorandum for the Conference by Mr. Justice Jackson, Container 115, Stanley F. Reed, Public Policy Archives, University of Kentucky, Lexington, Ky. Circulation notes on the back of the opinion date the circulated copies to May 6, 1949. See, e.g., *id.* Marginalia by Justice Jackson at 1.

⁷³See generally Container 158, Robert Houghwout Jackson, Manuscript Division, Library of Congress, Washington, D.C.

⁷⁴See Jackson, *supra* note 72, at 4 (citing *Winans v. Denmead*, 15 How. 330, 343 (1853)).

⁷⁵*Id.* at 1.

⁷⁶*Id.* at 2.

⁷⁷*Id.* at 2.

⁷⁸*Id.*

⁷⁹*Id.* at 2-5.

⁸⁰*Id.* at 3-4.

⁸¹*Id.* at 5.

⁸²See Douglas, *supra* note 23.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 337 U.S. 910 (1949).

⁸⁶Justice Stanley F. Reed, Marginalia attributed to Justice Reed on Memorandum for the Conference by Justice Jackson (Container 115, Stanley F. Reed, Public Policy Archives, University of Kentucky). Circulation notes on the back of the opinion date the circulated copies to May 6, 1949.

⁸⁷*Id.*

⁸⁸See *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 608 (1950); see also *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 41-42 (1929) (finding infringement when accused product was substantially the same as the patented device).

⁸⁹Note from Felix Frankfurter, Justice, United States Supreme Court to Robert Jackson, Justice, United States Supreme Court (Saturday) (Container 158, Robert Houghwout Jackson, Manuscript Division, Library of Congress). The note was dated only "Saturday," presumably the Saturday of May 7, the date of the conference vote on rehearing.

⁹⁰Note from James M. Marsh, Clerk to Justice Robert H. Jackson, United States Supreme Court, to Robert H. Jackson, Justice, United States Supreme Court (undated) (Container 158, Robert Houghwout Jackson, Manuscript Division, Library of Congress). (Referencing the Memorandum for the Conference).

⁹¹See, e.g., Abraham, *supra* note 43, at 219; Ball, *supra* note 45, at 146-47.

⁹²See Ball, *supra* note 45, at 147-49.

⁹³See *id.*

⁹⁴*Id.*

⁹⁵Howard Ball & Phillip J. Cooper, **Of Power and Right** 87 (1992).

⁹⁶The Court heard at least sixty cases dealing with wither patent validity or patent misuse in the eight years preceding the second *Graver Tank* decision. See author file, 1940s Patent Cases.

⁹⁷*Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949) (Jackson, J., dissenting) (majority opinion by Reed, J.).

⁹⁸See author file, *supra* note 96.

⁹⁹*Marconi Wireless Telegraph Co. of America v. United States*, 320 U.S. 1, 60-61 (1943) (Frankfurter, J., dissenting) (majority opinion by Stone, C.J.).

¹⁰⁰Telephone Interview with James M. Marsh, Clerk to Justice Robert H. Jackson 1948-1949, United States Supreme Court (Jan. 21, 2005).

¹⁰¹See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Americans were reminded last January 20, as they are every four years, of the central moment at the Inauguration: the swearing in of the president. In this republican rite, the new or continuing chief executive publicly subordinates himself to the fundamental law of the land. As the Constitution dictates, "[b]efore he enters on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"¹ Justices of the Supreme Court, other federal judges, legislators and officials, as well as state officeholders, likewise govern only upon making a similar pledge. "Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."² And for added emphasis, protection, and insurance, the Constitution crowns itself, national statutes, and treaties as "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."³ Parallel drama unfolds in other venues too. In the half century since all nominees to the Supreme Court have routinely appeared before the Senate Judiciary Committee, it would be difficult to find an example of a would-be Justice who, through one combination of words or another, did not promise senators that she or he would faithfully interpret and apply the Constitution.

These displays of fealty pose an intriguing question: what is "the Constitution" that is to be administered, construed, "preserve[d], protect[ed], and defend[ed]"? What is meant by "this Constitution" that binds all executive, judicial, and legislative officers? For the framers at the Philadelphia Convention in the summer of 1787, the answer would perhaps have been simple: the system of government arising from

the words of the document they drafted. After all, they had designed a framework, crafted operational rules, conferred powers, and imposed limits. The result was an experiment to determine whether a strong government, accountable in various ways to the governed, could exercise sufficient power over a large geographical area without endangering individual liberty. A key to the success of a ratified

Constitution would therefore be adherence by all officials to what it contained. Future Chief Justice John Jay "seemed to suggest as much at the New York ratifying convention" in Poughkeepsie. "The meaning of the Constitution would involve 'no sophistry, no construction, no false glosses, but simple inferences from the obvious operation of things.'"⁴

Intervening experience between that day and ours, however, has made the answer more complex, so that, practically speaking, there may be several constitutions operating at once, or at least contending views about what the Constitution *is*. That was undoubtedly true even by the time the Supreme Court handed down its decision in *Gibbons v. Ogden*,⁵ the Steamboat Case, in 1824. From the perspective of the beneficiaries of the monopoly that the state of New York had conferred, the Constitution embodied only modest authority over interstate commerce, while a competing vision more friendly to opponents of the monopoly contemplated a far grander power. "It has been said that these powers [of Congress] ought to be construed strictly. But why ought they to be so construed?" asked Chief Justice John Marshall with a nod toward nationalism. "Is there one sentence in the constitution which gives countenance to this rule?" Instead, "the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."⁶ Such debates over the nature of the nation's fundamental charter, fueled by the fact that the document is "one of enumeration, and not of definition,"⁷ may have led Woodrow Wilson to observe more than a half century and one civil war later that "a very wayward fortune had presided over the history of the Constitution, . . . inasmuch as that great federal charter has been alternately violated by its friends and defended by its enemies."⁸

Aside from differences about construction, the Constitution may also be *less* than its text. There are, after all, parts of the text (the privileges and immunities clause of the Four-

teenth Amendment or the guarantee clause of Article IV, for instance) that the Supreme Court has largely, if not entirely, neglected or forsworn, leaving them standing more as civic aspirations than as judicially enforceable legal principles.⁹ Moreover, tension exists between some provisions of the text. How does one satisfy fully both the safeguards of free exercise (freedom *for* religion) and nonestablishment (freedom *from* religion) that the First Amendment guarantees?

The Constitution may also encompass *more* than the text because judges may seek its meaning apart from the text itself. One justice may turn to the intent of those who drafted and ratified its provisions. Another might look to documents of the period that describe the kind of system the framers established. Still another may look to rulings by courts of other lands.¹⁰ One has only to consider the many shapes judicially imposed on the due process clauses in the Fifth and Fourteenth amendments to realize that the Constitution is often much more than the sum of its parts.

Even custom seems to count at times as part of the Constitution. "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions," the Court noted in the Pocket Veto Case in 1929.¹¹ Similarly, in the Steel Seizure Case of 1952, Justice Felix Frankfurter argued in a concurring opinion that "a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on the 'executive Power' vested in the President. . . ."¹² Practice may not make perfect, but it may strengthen the case for its own legitimacy.

So a macro or cosmic way of thinking of the Constitution is to consider it as the embodiment of the political system itself. This presumably was what Woodrow Wilson had in

mind in his commentary on American politics in the mid-1880s. "The Constitution in operation," he wrote, "is manifestly a very different thing from the Constitution of the books."¹³ The future twenty-eighth American president was disheartened to find that the degree and quality of executive leadership promised and promoted by Alexander Hamilton¹⁴ and attained by several chief executives prior to Ulysses Grant had been eclipsed and displaced by the dominance of congressional committees. The American "model [of] government is no longer conformable with its own original pattern,"¹⁵ Wilson contended. Indeed, the shift of power had become so complete that it seemed anachronistic to think of the president any longer as an elected political official. "Except in so far as his power of veto constitutes him a part of the legislature, the President might, not inconveniently, be a permanent officer; the first official of a carefully-graded and impartially regulated civil service system, through whose sure series of merit-promotions the youngest clerk might rise even to the chief magistracy."¹⁶ In this Wilsonian conception, the Constitution is in a nearly constant state of metamorphosis, even though the formal language of the document changes but little from decade to decade. Several recent books about the Supreme Court illustrate this chameleon quality of the American constitutional system.¹⁷

Anyone familiar with the history of the Supreme Court realizes that the Court of, say, the 1850s was already considerably different from the Court of the 1790s. Furthermore, the record demonstrates that those changes had only very partly to do with the impact of constitutional or statutory alterations—of which there were few.¹⁸ Instead, change had more to do with the impact of personalities such as Marshall, Joseph Story, and Roger Brooke Taney and with the need for a "balance-wheel"¹⁹ in the political system to manage the numerous and largely unanticipated legal conflicts between national and state authority.²⁰ Such a comparison is facilitated by a vast re-

search and publication project that is now into its third decade: **The Documentary History of the Supreme Court of the United States, 1789–1800**. Much of what contemporary readers know about the Court of the 1790s is (or will be) attributable directly or indirectly to the *Documentary History's* first six volumes.²¹ Students of the Court will therefore be pleased to know that volume seven, under the general editorship of historian Maeva Marcus, has recently appeared.²² The contents of this latest installment relate almost entirely to the cases the Court decided during 1796 and 1797. The eighth and final volume in the series, now in preparation, will presumably focus on what remains: the cases decided in 1798, 1799, and 1800.

The primary objective of the *Documentary History* project has been to rescue the Court of the pre-Marshall era from the obscurity it has long endured. Until lately at least, this era has been treated by writers as more of a prelude to a play, with the first act commencing with Marshall's arrival in 1801. Little wonder that a popular misconception persists: that Marshall was the first Chief Justice. Even the massive first volume of the Holmes Devise *History* reserved only three chapters for the Supreme Court as such.²³ Reasons often cited for the routine inattention the pre-Marshall period has long received include a smaller number of cases, the rapid turnover in personnel, and a yet-to-be-formed institutional identity. Of course the business of the Court in its first decade, certainly in volume, tends to pale alongside what soon was to come. Equally true is the fact that staffing problems abounded. Following President George Washington's six initial appointments, he and President John Adams placed an additional seven persons on the Court prior to the latter's appointment of Marshall. And the combination of these two realities combined with absenteeism retarded development of an institutional persona. Establishing a persona would be one of the accomplishments of the Marshall Court. That it took a while to appear should not

be surprising. Of the three branches of government, the Supreme Court was the only one without some degree of national parallel under the Articles of Confederation. To be sure, that first national constitution also lacked a separate executive, but the Articles Congress performed executive functions. What was novel after 1789 was the presence of an adjudicatory with a national jurisdiction.

The **Documentary History** has moved a long way toward rectifying the pre- versus post-1801 imbalance. Sponsored from the beginning by the Supreme Court Historical Society, with encouragement in its inception by then Chief Justice Warren Burger and others on the Court, and with additional support from various foundations, the project has both amply demonstrated that the years 1789–1800 merit study on their own and facilitated that study. Much life has been found stirring beneath what hitherto had been a skimpy historical record. When the author of this review essay examined the first volume of the **Documentary History** nearly two decades ago,²⁴ he noted a promise made by editors Marcus and James R. Perry: that the set “will constitute a collection of materials that no individual scholar could hope to duplicate.”²⁵ Even with the final volume yet to be seen, that pledge has been more than fulfilled. What was true of volumes one through six remains true for volume seven. Many valuable materials are being published for the first time, and for the first time such materials are gathered together and published in one place.

Julius Goebel called the first of the two years covered in volume seven “the Supreme Court’s first year of abundance.”²⁶ That appraisal certainly seems accurate in terms of the number of decisions. Together, volume seven provides introductory commentary and documents relating to some 33 cases.²⁷ To ferret relevant source materials, the editor and her associates combed not only the expected manuscript collections but virtually every contemporaneous printed source that could possibly contain pertinent items. The state-by-state

list of newspapers and journals, for example, totals about 150 (and reveals that printed matter was far more common in some regions of the country than in others). The description of repositories for other sources reads like the outline for a scholarly scavenger hunt.²⁸

It was also in 1796, soon after Connecticut Senator Oliver Ellsworth became Chief Justice, that the Court began to speak frequently through an opinion of the Court by the Chief Justice, “on occasions where they probably once would have fashioned seriatim opinions.”²⁹ Ellsworth himself presumably deserved credit for this innovation, since it was a custom on the Connecticut bench with which the new Chief would have been familiar.³⁰ In Marcus’s judgment, “[w]hen the Court spoke as one, rather than through multiple voices, the effect was to project a spirit of unity and cohesion” and, one suspects, clarity of reasoning for the judgment at hand. Overall, she finds, the Justices accomplished “a great deal” during these two years, “particularly when their heavy circuit riding duties are taken into account.”³¹

Goebel’s estimate of “abundance” also seems accurate in terms of the significance of some of the work during 1796 and 1797.³² The February 1796 Term, for instance, included decisions in both *Ware v. Hylton*³³ and *Hylton v. United States*.³⁴ Most would probably concur with Marcus’s conclusion that these decisions “rank, with *Chisholm v. Georgia* and *Calder v. Bull*, as the most momentous of the entire decade.”³⁵ Reflecting their importance, *Ware v. Hylton* and *Hylton v. United States* (although they involved distinctly different questions, the same Daniel Hylton, a merchant from Richmond, Virginia, was a litigant in each) by themselves consume some 300 pages in volume seven, or about one-third of the main body of the book (excluding bibliography and index).

Ware, the only case John Marshall ever argued before the Supreme Court, involved the economically and politically sensitive issue of recovery of pre-war debts that Americans owed to British creditors. Although the fighting had



In *Hylton v. United States*, the first clear-cut instance in which the Supreme Court acknowledged an assumed power of judicial review, Daniel Hylton claimed that a tax on carriages and other public conveyances that had been imposed by Congress was a "direct tax" and so violated Article I, Section 9.

ended well over a decade before, the problem of unpaid debts remained very much alive in the mid-1790s. Indeed, *Ware* was decided amidst the uproar over the Jay Treaty which, ratified in 1795, attempted to defuse tensions with Great Britain over remaining unpaid debts, sequestration of estates of Loyalists, and trade. In *Ware*, a wartime statute enacted by Virginia effectively confiscated the debt and made payment to the state treasury a lawful discharge of the obligation. The Treaty of Paris of 1783, which had formally ended the conflict, stipulated that creditors were to meet with no legal impediments. For Hylton, Marshall contended that the treaty could not revive Hylton's debt, but the Supreme Court rejected that position. In choosing the force of the treaty under the supremacy clause of Article VI over the authority of the Old Dominion's statute, the case marked the High Court's first invalidation of a state law on federal grounds. The decision also shored up the central government's position in

international affairs by lending credibility to its covenants in situations where the national view conflicted with the preferences of a state. A contrary ruling would have cast doubt on whether the United States could truly maintain a foreign policy for the whole without risk that it would be undermined by one of its parts.

As point man against the thrust of national power, Daniel Hylton was no more successful in *Hylton v. United States*, the first clear-cut instance in which the United States Supreme Court acknowledged an assumed power of judicial review, an accolade usually reserved for Chief Justice Marshall's opinion in *Marbury v. Madison*.³⁶ (In subordinating a state to the jurisdiction of the federal courts in a suit brought by a citizen of another state, *Chisholm v. Georgia*, decided three years before *Hylton*, was the Court's first exercise of constitutional interpretation, but not of judicial review.) Hylton's case thrust judicial review to the foreground because he claimed that a tax

on carriages and other public conveyances that had been imposed by Congress³⁷ was a "direct tax" and so violated the stipulation of Article I, section 9, that direct taxes be imposed not uniformly, as Congress had done, but "in Proportion to the Census or Enumeration herein before directed to be taken." The case exemplified an order of things that would typify contentious matters in later years: Objections to the tax on policy and constitutional grounds that had gone unheeded when Congress enacted the law were transposed into legal arguments before the courts.

Interested persons on both sides of the question surely realized what was at stake. "[T]he question [is] the greatest one that ever came before that Court," insisted Attorney General William Bradford, Jr. in a letter to Alexander Hamilton, whom the United States engaged to present its case in the Supreme Court. "[I]t is of the last importance not only that the act should be supported, but supported by the unanimous opinion of the Judges and on grounds that will bear the public inspection."³⁸ As Hylton's attorney, John Taylor (of Caroline) had secured a divided ruling in the circuit court and advised Hylton to present no case to the Justices but rather to let them proceed as they deemed best. Bradford realized the effect that a Supreme Court decision not based on full argument might have, and so the government declined to appear as well when the case came up before the Justices at the August 1795 Term. At worse, the Court might proceed on the basis of the arguments in circuit court which by then had become available in pamphlet form. Hylton soon relented, however, and agreed to have the government hire eminent counsel to argue on his behalf, to avoid the situation where, as James Madison noted, there would be no "professional appearance" for Hylton but instead only advocacy "by junior & unskilled volunteers."³⁹

Justice James Iredell did not participate in *Ware*, but he was one of three Justices who decided the carriage tax case.⁴⁰ It is fortunate that he was present. Iredell took careful and

fulsome notes during the arguments;⁴¹ otherwise, with no equally detailed record surviving, readers today could largely only imagine what transpired when Alexander Campbell, U.S. Attorney in Virginia, and Pennsylvania's Attorney General Jared Ingersoll spoke for Hylton and Alexander Hamilton and Charles Lee, who had become Attorney General after Bradford's death, spoke for the United States. What is striking from the distance of more than two centuries is that judicial review, implicit in the litigation, received scant attention at argument. Almost all of Iredell's notes concern varieties of taxes and whether the carriage tax was a direct or indirect tax. The Supreme Court's authority to set aside an act of Congress received only brief, and noncontentious, mention and seemed to be assumed by all present. For example, on February 23, 1796, the first day of argument, Iredell recorded these points from remarks by counsel for Hylton:

1. Right of Judges to declare the Constitutionality of An Act of the Legislature. . .

Presumes it admitted.

Sentiments of the Judges individually.⁴²

Necessary incident to a limited Constitution.

2. Whether Law unconstitutional & void, if exceeding the limits.

3. Whether this Law exceeds the limits, &c.⁴³

A short time later, Attorney General Lee addressed the same points from the other side, but on the question of judicial review, adopted the same position:

Two questions

1. Whether a Court of Justice can declare an Act of Congress void.

If the Constitution could not controul the Laws the Legislature might repeal a fundamental Constitution.

6 Article, in pursuance of &

c...[.]⁴⁴

2. Whether this Act be unconstitutional...⁴⁵

On the following day, Hamilton began his presentation:

Admits a Law inconsistent with the Constitution, void[.]

Power to be exercised with great moderation[.]⁴⁶

In seriatim opinions the participating Justices upheld the constitutionality of the carriage tax, with the consensus being that direct taxes included only taxes on persons and land. Only Justice Samuel Chase spoke to judicial review directly and then only in a few words. Justice Iredell went to great lengths in his opinion to demonstrate by way of an arithmetical demonstration, how unworkable and unjust an apportioned carriage tax would be. All three implicitly accepted the premise that the Court *could have* invalidated the statute had they found the tax to be direct.

Yet, suppose for a moment that the "could have" had been the reality. Leaving aside the implications of a contrary decision for fiscal policy, the carriage tax law, not section 13 of the Judiciary Act of 1789, would have been the first congressional enactment struck down by the Supreme Court. Had that occurred, it would have been superfluous for Chief Justice Marshall in *Marbury* to have offered, as he did, a defense of the power. His opinion instead would have established the conflict between section 13 and Article III, merely citing *Hylton* as authority that the latter trumped the former. *Marbury* would be only a footnote at most in constitutional law texts. As for *Hylton*, because both sides conceded the legitimacy of judicial review, there presumably would have been no need for any lengthy *Marbury*-like discourse on the justification of judicial review. That would presumably have been delayed until some occasion when a judicial negative of a statute stoked a political fire.

Ninety-nine years after *Hylton*, in the rehearing in *Pollock v. Farmers' Loan & Trust Co.*,⁴⁷ five Justices rejected the authority of the 1796 decision as to the proper distinction between direct and indirect taxes, and invalidated the income tax law of 1894, thus, it was said with respect to *Hylton*, correcting a "century of error."⁴⁸ In his opinion for the Court, Chief Justice Melville Weston Fuller discounted the wisdom of *Hylton* in part because the "case is badly reported,"⁴⁹ apparently making it difficult to perceive who made what arguments for what reasons and upon what authorities. One suspects that had Fuller and the four colleagues who joined his opinion had at hand the 148 pages of carefully edited materials on *Hylton* supplied by the **Documentary History**, the Supreme Court might have spared itself from an instance of what former Justice and future Chief Justice Charles Evans Hughes later called "self-inflicted wounds."⁵⁰

Hughes's list included two other such wounds: *Scott v. Sandford*⁵¹ and the Legal Tender Cases,⁵² decisions which also had brought the "Court into disesteem."⁵³ Ironically, the Court over which Hughes presided in the 1930s contributed its own examples of such "wounds" to the list.⁵⁴ The occasion of course was the confrontation between the Court and President Franklin Roosevelt that climaxed in the famous "Court-packing" fight in 1937, the Constitution's sesquicentennial year. The circumstances of that struggle and its results are the subject of **Franklin D. Roosevelt and the Transformation of the Supreme Court**, edited by political scientist Stephen K. Shaw of Northwest Nazarene University, political scientist William D. Pederson of Louisiana State University at Shreveport, and Rhode Island Chief Justice Frank J. Williams.⁵⁵ As volume three in the M.E. Sharpe Library of Franklin D. Roosevelt Studies, the book contains an introduction by Shaw plus ten scholarly essays organized into three categories: "The Supreme Court: Image and Reality," "The Roosevelt Court, Law, and Politics," and "Constitutional Law as Applied to Politics: The Roosevelt

Legacy." The collection derives from a conference on "FDR After 50 Years" held a decade ago at editor Pederson's campus. The essays leave little doubt that the years 1935-1940 amount to the most constitutionally significant period of twentieth-century American history.

The story should by now be familiar to most. In the midst of the Great Depression, a majority of the Supreme Court in a dozen decisions found eleven of the president's New Deal measures constitutionally defective at least in part. Roosevelt saw himself not only as the agent of the people, particularly after his landslide reelection in 1936, but "in a real sense an anointed agent of Providence."⁵⁶ Accordingly the president felt compelled to save the country from that "Court of Methuselahs"⁵⁷ who "had planted themselves squarely in the path of progress."⁵⁸ Roosevelt's judicial reorganization plan, unveiled on February 5, 1937, called for the appointment of an additional justice, up to a bench size of 15, for any justice who did not retire within six months of his 70th birthday. Applied to the Court of 1937, the plan would create six vacancies, compared to the total absence of Court vacancies during FDR's first term. Yet, even though the president enjoyed unparalleled Democratic majorities in Congress,⁵⁹ the proposal ran into immediate opposition. By summer, when the Senate voted to recommit the measure to the Judiciary Committee, the bill was dead. But also by the summer, the Supreme Court, in the famous "switch in time," had begun to display greater tolerance for the New Deal and similar measures at the state level.⁶⁰ By 1940, naturally occurring departures from the Court had allowed FDR to make five appointments, thus permitting the president to construct "his" Court.⁶¹

The Court-packing fight unfolded not only in Washington but across the country. In part it was a battle for public opinion, particularly the views of what political scientists call the "attentive public," those who follow current affairs closely and who are most likely to make their opinions known to elected officials. Was the Court a monster that needed to

be tamed, or was the president improperly trying to refashion the Court into his own image? Historian James C. Duram of Wichita State University examines one part of this public opinion tug of war in his essay in *Roosevelt* entitled "The Battle to Save the Court."⁶² His piece is a study of editorial content during 1937 of forty-six daily and weekly newspapers in Kansas, home to Governor Alf Landon who as the Republican presidential nominee in 1936 bested FDR only in Maine and Vermont. In the 1930s, newspapers were leading molders of opinion, occupying a place of importance similar to television today. With broadcast journalism in its infancy, radio was only beginning to develop as a major news source in the mid-1930s. Radio's emphasis was still on special events and entertainment.⁶³

Almost solidly Republican in outlook, these newspapers may not have persuaded a majority of Kansans to vote for Landon (as they tried to do), but they apparently succeeded in casting Roosevelt as a threat to the Republic once the move against the Court began.⁶⁴ Indeed, one of the reasons Roosevelt lost the battle of 1937 is that he lost the war of labels: nearly instantly the term "Court-packing"—not "judicial reorganization" or "judicial efficiency" or something similarly friendly to the administration—sank into the public consciousness and defined his intentions. And to talk of Court-packing smacked of the unholy.

Editorials in the Kansas papers after February 5 fell into two categories. Some attacked the plan in general while the others focused on the "specific events of the struggle over its passage."⁶⁵ Those in the first group insisted that the plan, especially in the context of a compliant Congress, was the final step toward FDR's complete control of the federal government. For readers who admired Roosevelt, editorials reminded them that the plan set a bad precedent; similar measures might be pushed by presidents in the future whom they did not like. Parallels were drawn as well to dictatorships abroad, with fears expressed about a loss of legitimacy for the



One essay in *Franklin D. Roosevelt and the Transformation of the Supreme Court* studies the reaction of local newspapers to Roosevelt's Court reorganization plan and concludes that once the term "Court-packing" prevailed over, for example, "judicial reorganization," Roosevelt had lost the battle in the public's mind. Roosevelt is pictured defending the plan in a radio broadcast on March 9, 1937.

Court were it to be perceived as a pawn of the executive.⁶⁶

Editorials in the second group stressed FDR's "strategic deceit" in launching so major an initiative without having urged it in the previous fall's election campaign. As the measure was being debated in the Senate, editorials tended to highlight criticisms leveled by Democrats and to muffle Republican objections in order to cast the struggle in a nonpartisan light. Accordingly, Democrats who questioned the wisdom or merits of the bill were portrayed as patriots willing to sacrifice their political careers for the good of the country. Not surprisingly, Chief Justice Hughes's tactically timed letter of March 22 showing that the Court was abreast of its docket received considerable publicity as further evidence of what

the editors perceived as the president's sinister intentions.

The Court's decision on April 12 in *N.L.R.B. v. Jones & Laughlin Steel Corporation*,⁶⁷ however, understandably gave them some difficulty. This early indication of the "switch in time" not only approved the kind of recklessly experimental legislation that the editors had railed against since 1934 but seemed to suggest that the Constitution was not the bedrock foundation it had hitherto seemed to be. So editors made the best of the situation by commending the Court for its flexibility and pointing to the decision as evidence that the Court was not hostile to all social legislation. Besides, the ruling undercut any need for personnel changes on the bench. Finally, after the plan's defeat and Justice Willis Van

Devanter's retirement, the editors aimed their pens at newly appointed Justice Hugo L. Black. Particularly after Black's Ku Klux Klan connection came to light in the fall of 1937, the editors condemned the president and called for the Justice's resignation. "The fact that Black had accepted Klan support and later resigned was cited as evidence of his political opportunism and lack of character."⁶⁸ "No satisfactory speech is possible," exclaimed the *Iola Daily Register* on October 2, after Black's famous radio address on the matter. "Either he was not serious when he took the Klan oath or he is not now. His character is painfully lacking in traits necessary to be a justice."⁶⁹

Overall, the essays in *Roosevelt* capture the change that occurred—both internally with Chief Justice Hughes and Justice Owen J. Roberts, and externally because of the new arrivals in addition to Black. The magnitude of what transpired probably exceeded even Roosevelt's expectations. First, a majority of the justices soon revealed that they had abandoned a half-century or more of jurisprudence that accorded property rights and, to a lesser extent, state prerogatives a preferred place in the hierarchy of constitutional values. *United States v. Carolene Products Co.*,⁷⁰ illustrated the judicial metamorphosis that was under way. At issue was the constitutionality of a congressional enactment banning the interstate shipment of "filled milk" (which had vegetable fat such as palm oil substituted for the butterfat). In upholding the statute, Justice Stone explained, "...regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."⁷¹ In other words, the government would no longer have to justify a regulation by convincing the Justices of the need for its enactment. Reasonableness would be assumed from the fact that a legislature had acted. Thus,

an approach to constitutional interpretation going back as far as 1887⁷²—the show-us-why-this-infringement-on-economic-liberty-is-necessary way of thinking—was discarded, not merely relaxed.⁷³

But the constitutional revolution had (and continues to have) a second dimension that was independent of the first: the Court unveiled a new set of constitutional values that would replace the old. An early clue was appended as a footnote to Stone's sentence on the presumption of constitutionality in *Carolene Products*. The footnote's three paragraphs floated three corresponding exceptions to the Court's newly professed tolerance for majority rule, and all three pointed to invigorated judicial protection for nonproprietary civil liberties and civil rights. Under the freshly acquired banner of self-restraint, property rights and state rights would be left to the ballot box. Judicial activism old-style was dead; judicial activism new-style was just around the corner. Thanks in no small measure to Roosevelt, the Court rewrote its job description.

The second of Stone's paragraphs suggested heightened judicial scrutiny for laws "which restrict[] those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation...."⁷⁴ Particularly since 1962, when the Court first acknowledged forthrightly in *Baker v. Carr*⁷⁵ that numerically unequal legislative districts presented a justiciable Fourteenth Amendment question, cases challenging constitutionally dubious election rules and arrangements have been a staple on the Court's docket and have facilitated unprecedented judicial oversight of the electoral process. This (Wilsonian) alteration of the Constitution forms the basis of *The Supreme Court and Election Law*⁷⁶ by Richard L. Hasen of Loyola University Law School in Los Angeles. As he demonstrates, "Supreme Court intervention in the political process has become a regular feature of the American political landscape."⁷⁷

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ten election law cases per decade; during the next forty years, the average number per decade jumped to sixty. The author's data reveal that such cases have commanded a greater share of the Court's time as well. In the first 60 years of the twentieth century, on average, fewer than one percent of the cases the Court decided with full opinion each term were election law cases; during the last forty years of the century, the average grew to 5.3 percent⁷⁸ and shows no sign of abating. The Court's dramatically increased involvement in election law disputes—perhaps the most visible point at which law and political science intersect—troubles Hasen because this part of the Court's business entails interference by electorally unaccountable judges with democratic politics itself. The question then arises whether it is possible, at least with re-

spect to the important subset of election cases that "regulate political equality,"⁷⁹ to devise standards to distinguish between those intrusions that are welcome and those that are not.

In addition to the intellectual stimulus provided by the unexpected judicial conclusion to the contested presidential election of 2000,⁸⁰ Hasen is moved by what he considers the inadequacies of process theory (itself an offspring of Justice Stone's Footnote Four that tries to explain the difference between "good" and "bad" examples of judicial review). At least according to John Hart Ely's elaboration a quarter century ago, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."⁸¹ Thus judges are justified in setting aside majoritarian preferences when the political process that has produced them is tainted or broken. Hasen,



In Richard Hasen's new book, *Election Law*, he argues that in election law cases the Supreme Court should distinguish between two kinds of political equality rights: *core* and *contested*. In this picture, a first-time voter in 1942 is being shown how to use a ballot.

however, finds process theory inadequate in several ways. First, to say that courts should intervene when there is a "political market failure"⁸² leaves open the question of definition and thus removes the very limits on judicial action that process theory is supposed to supply. Second, references to "stoppages" hide the theory's own normative agenda which needs to be laid in the open; third, the theory does not address *what* courts should do when they choose to intervene.⁸³

To address these inadequacies and because he believes (a) that the Court is not about to "march out of the political thicket,"⁸⁴ and (b) that the development of American democracy should largely be left in the hands of the people and their politically accountable representatives,⁸⁵ Hasen begins with a key assumption. In election law cases, the Supreme Court should distinguish between two kinds of political equality rights: *core* and *contested*. The first group has two sources: basic requirements of democratic government that the Court must accept (such as no racial discrimination in defining the franchise), and socially constructed or evolving rights that are a product of societal consensus or near-consensus. Protecting core rights in turn means that the Court must defend three principles: "the 'essential political rights' principle, the 'antiplutocracy' principle, and the 'collective action' principle."⁸⁶ The first prevents government "from interfering with basic political rights and requires equal treatment of votes and voters." The second denies government the authority to condition "meaningful participation in the political process on wealth or money." The third prohibits government "from impeding through unreasonable restrictions the ability of people to organize into groups for political action."⁸⁷

Contested rights in contrast are those which are compelling for some people but which have not yet attained the status of near-consensus. In this category would be a racial minority group's right to proportional representation in legislative bodies. Some people

believe fervently in this principle, but many do not. Because the author does not regard proportional representation as essential for democratic government and because no social consensus about "PR" exists, the right is properly deemed "contested." However, a contested right may over time become part of the core category, as happened to the concept of equally weighted votes after *Baker v. Carr*. Controversial in the early 1960s when decisions such as *Wesberry v. Sanders*⁸⁸ and *Reynolds v. Sims*⁸⁹ came down, the idea of equally weighted votes is now so widely accepted that it can be labeled a core right, in the United States at least.⁹⁰ The same should surely be said for the core right of an individual not to be excluded from the franchise because of race—a concept that took nearly a century to become a reality after its enshrinement in the Fifteenth Amendment after the Civil War.⁹¹ Thus, at least some of what Hasen deems the basic requirements of democratic government (the first source of core rights) are not static but are evolutionary and socially constructed at their roots.

At any particular time, distinguishing "core" rights from "contested" ones, however, is no easy task. Operational difficulties remain, but the distinction is critical for Hasen's prescription for the Court. Where a case involves a core political equality right, the Supreme Court is on firm ground in crafting a "bright-line rule" that makes it clear what policies are permissible and what are not. That is, with core rights the Court should act preemptively and authoritatively. By contrast, when dealing with contested rights, the Court's task is deliberately to craft a "murky (or vague) political rule" that sketches only the outer limits of acceptable policy.⁹² This in turn leaves ample room for legislative bodies to experiment with different political structures and procedures. "[I]t is [then] up to Congress or state and local legislative bodies (or the people, in jurisdictions with an initiative process) to decide whether to expand political equality principles into contested areas. The Court generally should defer

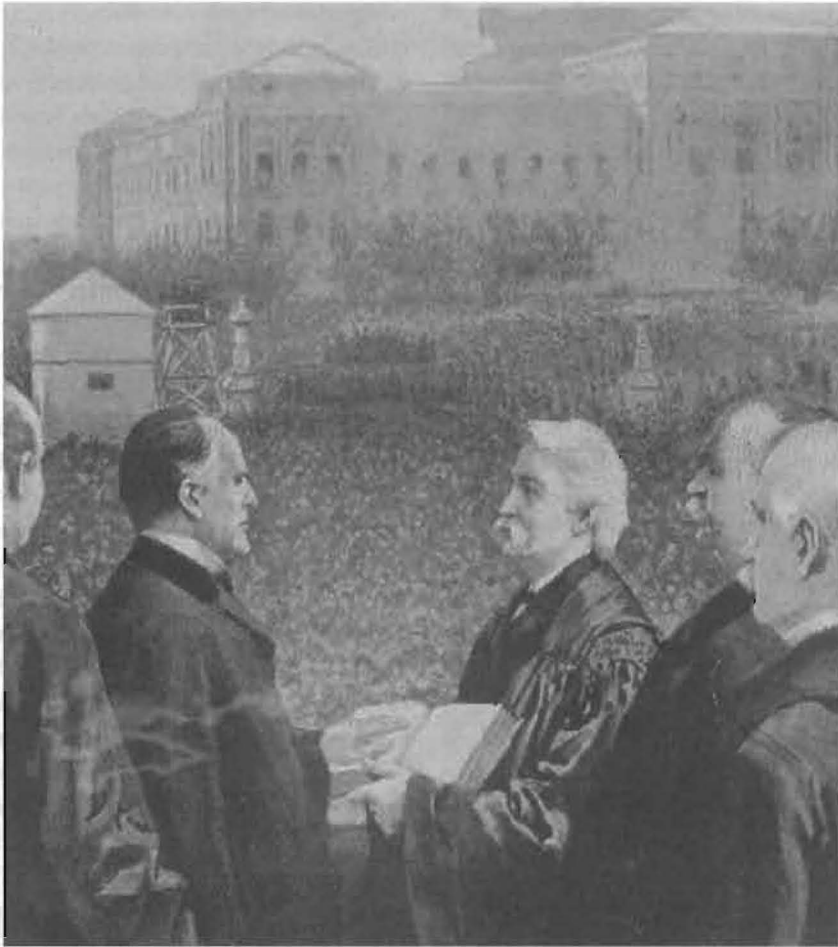
to such decisions, if the Court can be confident that the legislature's intent is to foster equality rather than engage in self-dealing."⁹³

An unexpected bonus of Hasen's provocative monograph are the glimpses he shares of decision-making within the Court in some of the cases he explores, as a way of illustrating the value choices that Justices make. For example, *Harper v. Virginia Board of Elections*⁹⁴ is remembered as the first post-Baker case in the Supreme Court to consider the connection between political equality and wealth. In an opinion by Justice William O. Douglas, with Justices Black, John M. Harlan, and Potter Stewart in dissent, the Court struck down Virginia's poll tax as a condition for voting in state elections. (The Twenty-fourth Amendment, ratified two years earlier, had eliminated poll taxes as a condition for voting in federal elections.) Falling as it did at the high-water mark of Warren Court rulings on civil rights, the decision on March 24, 1966, seemed wholly unremarkable at the time. Hasen shows, however, that the case nearly came down on Virginia's side in 1965. Instead, Justice Black got burned.

At the outset, *Harper* stood as a proposed 6-3 per curiam summary affirmance in the state's favor. Justice Goldberg, joined by Douglas and the Chief Justice, then circulated a proposed dissent to be appended to the per curiam order.⁹⁵ Apparently believing that there were six firm votes for affirmance, Black circulated a memorandum to the Conference asking that the case be listed for plenary treatment. It was, but by the time *Harper* was decided, Abe Fortas had replaced Goldberg, and Justices Brennan, Clark, and White had switched their votes, thus handing the state a 6-3 defeat instead of a 6-3 victory.⁹⁶

In terms of effects on the American political system, the new politics of judicial appointment rivals the Court's acquired enthusiasm for election law cases. Dating most noticeably from President Lyndon Johnson's stormy nomination of Abe Fortas to succeed Justice Goldberg in 1965, the proceedings in

a significant number of instances between the nomination itself and a vote on confirmation in the Senate have been openly ideological, rancorous, drawn-out, and, by twentieth-century standards at least, uncertain as to the ultimate fate of the nominee.⁹⁷ Not surprisingly, such controversy has begat much scholarly writing, with the bulk materializing soon after one contentious nomination or another. Even the first edition of Henry J. Abraham's classic *Justices and Presidents*⁹⁸ was fortuitously published shortly after the whirlwind years between 1968 and 1972 that witnessed the failed nomination of Justice Fortas to be Chief Justice, Fortas's resignation under fire, the appointment of Chief Justice Burger, the failed nominations of Judges Clement F. Haynsworth, Jr., and G. Harrold Carswell, and the easy appointments of Judges Harry A. Blackmun and Lewis F. Powell, Jr., and the more labored one of William H. Rehnquist, as Associate Justices. Nominations during the next twenty-two years produced a mixed pattern where controversy sometimes surged and sometimes remained muted. If the proceedings for Judges John Paul Stevens, Sandra Day O'Connor, and Antonin Scalia were calm, Justice Rehnquist's nomination to succeed Chief Justice Burger was not, even though the outcome was never in doubt. Those events, however, paled alongside the insurmountable obstacles that confronted Judge Robert Bork after Justice Powell retired. Judge David Souter faced closer scrutiny than had Judge Anthony Kennedy who was easily confirmed for Powell's seat. Judge Clarence Thomas's nomination to fill the seat held by Justice Thurgood Marshall proved even more raucous than Bork's, but this time the nomination was approved.⁹⁹ Compared to Thomas's, proceedings for Judges Ruth Bader Ginsburg and Stephen G. Breyer, to fill the vacancies created by the retirements of Justices Byron White and Blackmun, sailed on waters as smooth as those enjoyed by Burger, Blackmun, Powell, Stevens, O'Connor, and Scalia. In varying ways all have received considerable scholarly treatment.¹⁰⁰



The process by which Justices are appointed to the Supreme Court is analyzed in a new book, *Seeking Justices*. Above, Chief Justice Fuller administers the oath of office to President McKinley in 1897.

Authored by political scientist Michael Comiskey of Pennsylvania State University's Fayette Campus, *Seeking Justices*¹⁰¹ revisits the judicial appointment process. Yet, if the literature on the subject already fills a shelf, one might fairly ask what another volume could contribute. The reader soon discovers that Comiskey's book is strategically placed relative both to its predecessors and to the appointment process itself. Appearing a full decade after Justice Blackmun's retirement, *Seeking Justices* benefits from previous studies and offers breadth, perspective, and fresh analysis of familiar and important events and trends. For such reasons, this thoroughly

researched and engagingly written book is well positioned to become the standard reference during the next ten years, a period that might well be marked by much turnover at the High Court.

Aside from some empirically descriptive studies, Comiskey groups the bulk of modern literature on judicial appointments, in terms of whether the contemporary confirmation process is good or bad, into two categories: the legalist school and the political school. The first objects to the "obsessive scrutiny" given a nominee's "politicolegal views by hostile senators, the news media, and the many interest groups. . . . Adherents

of this school . . . suggest[] various reforms to bring about a less political, less sensational confirmation process. Generally, they advocate[] a greater emphasis on nominees' professional legal credentials, less (or no) emphasis on nominees' politicoconstitutional [sic] ideologies, a lesser role for outside interest groups, and a general depublicizing of the process. . . .¹⁰² While not objecting to a publicized and ideological evaluation of nominees, writers in the second camp tend to focus on the institutional imbalance in the current process whereby the president appears to have the advantage over the Senate. And, especially in the case of nominees perceived to be conservative, political school adherents are concerned about the inability of senators to compel nominees to reveal their views on constitutional questions. Accordingly political school adherents propose various reforms to make the Senate a more equal partner.¹⁰³

Comiskey rejects the narrowness of the legal school as well as most changes advocated by the political school. For the author, the modern appointment process is not in need of major repairs, but instead is a fair reflection of current realities of democratic politics itself. One starts with institutional and cultural changes that were already firmly in place by 1965: the impact of the Seventeenth Amendment's decree for a popularly elected Senate; open confirmation proceedings which judicial nominees attend and in which they answer questions; and, a television news industry that is hungry for ratings and that has learned to prosper on controversy.

To this mix must be added the convergence of two key developments. The first has been the growth of ideologically defined parties in Congress that contrasts sharply with the pattern prevalent over much of the twentieth century. Each party, its congressional delegations included, now thrives by appealing and being responsive to its base. Gone is the day when each major party had its own liberal, moderate, and conservative factions and when legislation passed or failed depending on the skill of

congressional leaders in fashioning workable coalitions across party lines.¹⁰⁴ The second is the increased number of politically sensitive questions that have found their way onto the Court's docket. Each party's position and its ability to mobilize its base and to gain electoral ground have in turn become tightly linked with the identify of those who sit on the Supreme Court. As John P. Frank observed at the dawn of the modern Court's now routine engagement of "hot-button" issues, aside from the president a Justice holds "more actual power than any other individual in American public life."¹⁰⁵

Thus, the much-publicized and ideological focus of the confirmation process is unavoidable and, in Comiskey's view, proper. If the president considers ideology in the selection of a nominee, the Senate should as well. Given the power that a largely unaccountable Supreme Court wields, the greater "power sharing"¹⁰⁶ that has come about between the president and the Senate is to be applauded. And that power-sharing forcefully counsels against the selection of nominees from either ideological extreme. While Comiskey believes that the president will always enjoy an advantage over the Senate—because it is the president who winnows the field and makes the nomination—there is little reason to expect the Senate to abdicate a role that it has more or less consistently played for the past 40 years. As for trends, the author anticipates that a greater burden will be placed on the president and the nominee to establish the latter's "suitability for a seat on the Court. This development is the most salutary—perhaps the only salutary—reform of the normally well-functioning High Court confirmation process that Americans could hope for."¹⁰⁷

Throughout, Comiskey reveals himself as very much a small-d "democrat." "The public's approval of senators' ideological scrutiny of nominees is evidence that Americans also understand both the undesirability of political extremity on the Court and the desirability of democratic opposition to nominees about whom there are legitimate concerns about

extremity. Perhaps in this instance those who are deeply interested by processes of American government should listen to the usually good sense of the American people."¹⁰⁸ Thus, no president should be handed the prerogative of using the appointment of the electorally unaccountable as a means of altering the course of the nation. Yet a small-d democrat might then puzzle over the presidential options that remain in situations where the course of the nation has already been judicially altered.

As if it were from a page in **Congressional Government**, the confirmation process has been modified to reflect the ideologically enhanced role of the Supreme Court in the political system. "Democratic institutions are never done," reflected Wilson not long after writing his book about Congress. "[T]hey are like living tissue—always a-making. It is a strenuous thing, this living the life of a free people."¹⁰⁹ As the books appraised here have shown, that observation by a future president encompasses the judiciary as well as other institutions of American government.

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

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ENDNOTES

¹U.S. Constitution, Article II, section 1, paragraph 8.

²*Id.*, Article VI, paragraph 3.

³*Id.*, Article VI, paragraph 2.

⁴Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (14th ed., 2005), 52.

522 U.S. (9 Wheaton) 1 (1824).

⁶*Id.*, 187–188.

⁷*Id.*, 189.

⁸Woodrow Wilson, **Congressional Government: A Study in American Politics** (1885), 1.

⁹With respect to the privileges and immunities clause in the Fourteenth Amendment, however, see *Saenz v. Roe*, 526 U.S. 489 (1999).

¹⁰See, for example, the exchange of views of Justices Antonin Scalia and Stephen Breyer, as summarized in Charles Lane, "The Court Is Open for Discussion," *Washington Post*, January 14, 2005, A-1.

¹¹*Okanogan, Methow (and other) Indian Tribes v. United States*, 279 U.S. 655, 689 (1929).

¹²*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–611 (1952) (concurring opinion).

¹³Wilson, **Congressional Government** 9–10.

¹⁴*The Federalist*, No. 70.

¹⁵Wilson, **Congressional Government** 6.

¹⁶*Id.*, 254.

¹⁷This quality is hardly confined to the judiciary. For a current example, see Nelson W. Polsby, **How Congress Evolves: Social Bases of Institutional Change** (2004).

¹⁸Aside from the jurisdictional change imposed (or clarified) by the Eleventh Amendment (1798), Congress reduced from two to one the number of Justices needed to comprise a circuit court (Act of March 2, 1793, 1 Stat. 333) and temporarily eliminated circuit court duty for Supreme Court Justices in 1801, only to reinstate circuit-riding in 1802 (Judiciary Act of 1801, 2 Stat. 89; Act of March 8, 1802, 2 Stat. 132). Moreover, between 1789 and 1869, Congress adjusted the Court's roster from six to five, from five to six, from six to seven, seven to nine, nine to ten, ten to seven, and seven to nine. D. Grier Stephenson, Jr., "The Supreme Court in American Government," in Stephenson, **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 6. Even by the mid-1870s when Morrison R. Waite became Chief Justice, the Court organizationally had much more in common with the Marshall Court (1801–1835) than with the Fuller Court (1888–1910) that followed the Waite Court. Donald Grier

Stephenson, Jr., "The Waite Court at the Bar of History," 81 *Denver University Law Review* 449, 461 (2003).

¹⁹Wilson, *Congressional Government* 84.

²⁰Alpheus Thomas Mason, "Free Government's Balance Wheel," 1 *Wilson Quarterly* 93 (1977). [Volume 1, No. 3]

²¹In two parts, volume one of the *Documentary History* dealt with appointments and proceedings; volume two with the justices on circuit between 1790 and 1794; volume three with the justices on circuit between 1795 and 1800; volume four with legislation and commentaries on organization of the federal judiciary; and volume five with suits against states. The new volume seven continues the subject undertaken in volume six that dealt with cases between 1790 and 1795.

²²Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800, Volume Seven. Cases: 1796-1797* (2003) (hereafter cited as Marcus vol. 7). Marcus's scholarly interests include not only the early Court but the more modern Court as well. See her *Truman and the Steel Seizure Case* (1977).

²³Julius Goebel, Jr. *Antecedents and Beginnings to 1801*. Vol. 1 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (1971).

²⁴Stephenson, "The Judicial Bookshelf," *Supreme Court Historical Society Yearbook* (1987), 108, 116.

²⁵Maeva Marcus and James R. Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1 (1985), xliii.

²⁶Goebel, *Antecedents and Beginnings* 690.

²⁷Marcus, vol. 7, vii-xix.

²⁸*Id.*, xxxiii-xliv.

²⁹*Id.*, 8.

³⁰William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (1995), 110.

³¹Marcus, 8-9.

³²"Abundance" is surely in the eye of the beholder. Justice James Iredell's biographer treats the 1796 cases in a chapter entitled "Not a Time of Great Decisions." Willis P. Whichard, *Justice James Iredell* (2000), 119.

³³3 U.S. (3 Dallas) 199 (1796).

³⁴3 U.S. (3 Dallas) 171 (1796).

³⁵Marcus, vol. 7, 2. Materials on *Chisholm* [2 U.S. (2 Dallas) 419 (1793)] are contained in volume five of the *Documentary History*; materials on *Calder* [3 U.S. (3 Dallas) 386 (1798)] should appear in the concluding volume eight.

³⁶5 U.S. (1 Cranch) 137 (1803).

³⁷Act of June 5, 1794, 1 Stat. 373. The tax was imposed uniformly across the states but varied according to the particular conveyance. A basic two-wheel contraption was taxed at a rate of one dollar per year, while a fancy coach was assessed ten dollars annually. Marcus, vol. 7, 358. According to Justice Iredell's biographer, the tax and penalty that Hylton owed totaled only sixteen dollars, far less than the jurisdictional threshold for appeals from circuit court.

Both parties, however, agreed to proceed on the basis of the fictitious fact that Hylton owned 125 chariots. In truth he owned but one. Thus the case was not only arranged but arranged in such a way to avoid the Court's recent insistence that it would not issue advisory opinions [David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* (1985), 11-12]. "To avoid detriment to Hylton, it was agreed that if he was adjudged liable, a payment of \$16.00 . . . would discharge the debt [and the penalty]. The recital of this in the official report suggests that the Court was privy to the subterfuge." Whichard, *Justice James Iredell* 127.

³⁸Marcus, vol. 7, 365.

³⁹*Id.*, 366.

⁴⁰The other two participating Justices in *Hylton v. United States* were William Paterson and Samuel Chase who was the Court's most junior member. Justice William Cushing was absent because of illness, and Oliver Ellsworth was not sworn as Chief Justice until March 8, 1796, the day that the decision was announced. James Wilson, who heard the case in circuit court, indicated in a brief statement that he would have taken part had his vote been needed. "I should have thought it proper to join in the decision, though I had before expressed a judicial opinion on the subject in the circuit court of Virginia, did not the unanimity of the other three judges relieve me from the necessity. I shall now, however, only add, that my sentiments, in favor of the constitutionality of the tax in question, have not been changed." 3 U.S. at 184.

⁴¹Iredell's notes are reprinted in Marcus, vol. 7, 468-490.

⁴²This line probably refers to statements made by Justices of the Supreme Court in circuit court or in other contexts supporting the power of judicial review.

⁴³Marcus, vol. 7, 468.

⁴⁴"6 Article" surely was a reference to the supremacy clause in Article VI of the Constitution.

⁴⁵Marcus, vol. 7, 473-474.

⁴⁶*Id.*, 476-477.

⁴⁷158 U.S. 601 (1895). On the first hearing in the case [157 U.S. 429 (1895)], the majority invalidated the 1894 tax as applied to income from municipal bonds and, as a nonapportioned direct tax, as applied to rents on land. However, Justice Howell Jackson was absent because of illness, and the bench split 4-4 on whether the tax could constitutionally be applied to income from personal property (such as stocks and bonds). On the second hearing, with Justice Jackson present, the Court ruled 5 to 4 against the tax, with Jackson aligning himself among the dissenters. This meant that one of the four justices on the first hearing had switched sides. As Charles Evans Hughes later recorded shortly before becoming Chief Justice, "At the time, the most bitter attacks were made upon Justice [George] Shiras, who was popularly supposed to have been the one who changed his vote. He bore the criticism with a calm dignity, but there is good reason to

believe that the charge was without foundation and that he was not the member of the Court whose views were altered on the reargument." Hughes, *The Supreme Court of the United States* (1928), 54. Edward S. Corwin, the late great constitutional scholar at Princeton, agreed, believing furthermore that Justice Horace Gray was the one who had switched positions. Corwin's explanation, written some forty-three years after *Pollock*, bears repeating. "Gray was for years, except for Bradley, the strongest nationalist on the bench. . . . Furthermore, Gray was an old-school judge, a product of the Civil War, and not especially alert to the property question. . . . Also, Gray was a very learned man and a great precedent judge, whereas the Pollock Case played 'ducks and drakes' with the precedents. For all which reasons, the surprising thing would be not that Gray was the last Justice to line up against the act, but that he should have done so at all." Corwin, *Court Over Constitution* (1938), 199–200.

⁴⁸Robert G. McCloskey, *The American Supreme Court* (1960), 94. See the references to this phrase made by counsel in Justice Henry Billings Brown's dissent in *Pollock*, 158 U.S. at 690; and in Justice Edward Douglass White's dissent, 158 U.S. at 709.

⁴⁹158 U.S. at 626.

⁵⁰Hughes, *The Supreme Court of the United States* (1928), 50.

⁵¹60 U.S. (19 Howard) 393 (1856).

⁵²*Knox v. Lee and Parker v. Davis*, 79 U.S. (12 Wallace) 457 (1870).

⁵³Hughes, *The Supreme Court of the United States* 51.

⁵⁴Alpheus Thomas Mason, *The Supreme Court from Taft to Warren* (1958), 38.

⁵⁵Stephen K. Shaw, William D. Pederson, and Frank J. Williams, eds., *Franklin D. Roosevelt and the Transformation of the Supreme Court* (2004) (hereafter cited as Shaw).

⁵⁶Michael Nelson, "The President and the Court: Reinterpreting the Court-packing Episode of 1937," 103 *Political Science Quarterly* 267, 280 (1988).

⁵⁷William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995), 85. Whether biblically referenced as a bench of Methuselahs (according to Genesis 5:27, Methuselah lived 969 years) or referred to as the "Nine Old Men" (the phrase became the title of a gossip book about the Court authored by Drew Pearson and Robert S. Allen in 1937), the term had meaning. At the time of the crisis, the Court was collectively the oldest in history to that point, with the average age being seventy-two and with six of the nine Justices being seventy years of age or older.

⁵⁸Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), 438.

⁵⁹Democrats in the Seventy-fifth Congress outnumbered Republicans nearly four to one in the House, and nearly five to one in the Senate.

⁶⁰For example, see *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), decided March 29, 1937, and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), decided April 12, 1937. The latter ruling made clear that the Court's newfound tolerance for federal power was not limited to large-scale industries such as steel. Chief Justice Hughes's opinion of the Court that decided *Jones & Laughlin* also upheld application of the National Labor Relations Act to smaller concerns, including a trailer company and a men's clothing manufacturer [*NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937), and *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937)].

⁶¹New arrivals Black (1937), Reed (1938), Frankfurter (1939), Douglas (1939), and Murphy (1940) replaced Van Devanter, Sutherland, Cardozo, Brandeis, and Butler, respectively.

⁶²Shaw, 60–74.

⁶³Tom Lewis, *Empire of the Air: The Men Who Made Radio* (1991), 160–185.

⁶⁴Kansas was one of ten states casting its electoral votes for Republican candidate Wendell Wilkie in the presidential race of 1940.

⁶⁵Shaw, 66.

⁶⁶*Id.*, 67.

⁶⁷See note 60.

⁶⁸Shaw, 70–71.

⁶⁹*Id.*, 71. According to Duram, the *Iola newspaper* had a circulation of 2,941. *Id.*, 62.

⁷⁰304 U.S. 144 (1938).

⁷¹*Id.*, 152 (emphasis added).

⁷²See *Mugler v. Kansas*, 123 U.S. 623 (1887), which, although upholding the statute in question, insisted that the need for the statute was to be determined by the Court.

⁷³For example, see *Chicago, Milwaukee & St. Paul R.R. Co. v. Minnesota*, 134 U.S. 418 (1890), and *Lochner v. New York*, 198 U.S. 45 (1905). In terms of the role of the Court as an overseer of economic regulation, compare those rulings with *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁷⁴304 U.S. at 152, fn. 4.

⁷⁵369 U.S. 186 (1962).

⁷⁶Richard L. Hasen, *The Supreme Court and Election Law* (2003) (hereafter cited as Hasen).

⁷⁷*Id.*, 1.

⁷⁸See figures 1.1 and 1.2 in *id.*, 3.

⁷⁹*Id.*, 3.

⁸⁰*Bush v. Gore*, 531 U.S. 98 (2000).

⁸¹John Hart Ely, *Democracy and Distrust* (1980), 117. For background, as well as for comments about Ely's book, see Stephenson, "Recharting the Course: Judicial Review in the 1980's," 26 *New York Law School Law Review* 943 (1981).

⁸²Hasen, 5.

⁸³*Id.*, 6–7.

⁸⁴*Id.*, 9.

⁸⁵*Id.*, 13.

⁸⁶*Id.*, 11.

⁸⁷*Id.*, 11–12; see also *id.*, 81–92.

⁸⁸376 U.S. 1 (1964).

⁸⁹377 U.S. 533 (1964).

⁹⁰Hasen, 7.

⁹¹Ninety-five years separated ratification of the Fifteenth Amendment in 1870 from passage of the Voting Rights Act in 1965 (Act of August 6, 1965; 79 Stat. 437). See Donald Grier Stephenson, Jr., *The Right to Vote: Rights and Liberties Under the Law* (2004), 85–117, 215–220.

⁹²Hasen, 8.

⁹³*Id.*, 12; see also *id.*, 101–137.

⁹⁴383 U.S. 663 (1966).

⁹⁵Hasen reprints Goldberg's draft dissent in its entirety in Appendix 2.

⁹⁶Hasen, 37–38, 157.

⁹⁷In the first two-thirds of the twentieth century, Judge John J. Parker's nomination to the Supreme Court by President Herbert Hoover in 1930 was the only one to fail. In contrast, in the nineteenth century, some twenty-one nominations failed in the Senate for various reasons: postponement, inaction, withdrawal, or outright rejection. John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (1990), Appendix 1, 200–202. Massaro's data demonstrate that a nominee was far more likely to fail in the Senate when one party controlled the Senate and the other the White House and when the nomination fell late in a president's term. *Id.*, 136. Massaro uses ideological difference and partisan difference interchangeably, in situations of divided government; however, in the nineteenth century, a *partisan* difference between the Senate and the White House did not always reflect an *ideological* difference, as the latter term is widely used today.

⁹⁸Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (1st ed., 1974). Second and third editions of Abraham's book followed in 1985 and 1992, respectively. All three were published by Oxford University Press. More recently the book has been updated and reissued by Rowman & Littlefield as *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (1999).

⁹⁹The Senate's vote to confirm Thomas on October 15, 1991, was 52–48, one of the closest on record for a successful Supreme Court nominee. Only the approval of Stanley Matthews by a vote of 24–23 in 1881, also under highly unusual circumstances, had generated a higher percentage of negative votes. Donald Grier Stephenson, Jr., *The Waite Court: Justices, Rulings, and Legacy* (2003), 30–31.

¹⁰⁰Aside from Abraham's *Justices, Presidents, and Senators*, and Massaro's *Supremely Political*, see Ethan

Bronner, *Battle for Justice: How the Bork Nomination Shook America* (1990); Stephen L. Carter, *The Confirmation Mess* (1994); John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (1991); Sheldon Goldman, *Picking Federal Judges* (1997); John A. Maltese, *The Selling of Supreme Court Nominees* (1995); Robert Shogan, *A Question of Judgment: The Fortas Case and the Struggle for the Supreme Court* (1972); Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (1994); and David Alistair Yalof, *Pursuit of Justice: Presidential Politics and the Selection of Supreme Court Nominees* (1999).

¹⁰¹Michael Comiskey, *Seeking Justices* (2004) (hereafter cited as Comiskey).

¹⁰²*Id.*, 2–3.

¹⁰³*Id.*, 3, 185–193.

¹⁰⁴It is sometimes not remembered, for example, that the Civil Rights Act of 1964—the most comprehensive civil rights legislation ever enacted in the United States—could not have passed without considerable support from Republican senators and representatives even though the legislation was championed by President Lyndon Johnson, a Democrat. There were 289 affirmative votes for the bill in the House of Representatives, of which 136 (forty-seven percent) came from Republican members. There were seventy-three affirmative votes in the Senate, of which twenty-seven (thirty-seven percent) came from Republicans, despite the fact that their presidential nominee-apparent Senator Barry Goldwater opposed the bill. “Civil Rights Act of 1964 is Signed Into Law,” *Congressional Quarterly Weekly Report*, July 3, 1964, p. 1331. The Eighty-eighth Congress consisted of 258 Democrats and 177 Republicans in the House, and sixty-six Democrats and thirty-four Republicans in the Senate.

¹⁰⁵John P. Frank, *Marble Palace: The Supreme Court in American Life* (1958), 8–9. Indeed, the difference between the contemporary Court and Courts of an earlier day lies not merely in the *number* of politically sensitive cases, but in the *variety* of politically sensitive issues that now occupy the Court's time every term. True, historically the Supreme Court has been no stranger to controversy. For example, the Court thrust itself into partisan politics in 1857 by engaging Congress's power over slavery in the territories, and it frustrated a president and a Congress in 1935–1936 by denying them a choice of means in coping with the Great Depression. But in both situations, the actual number of issues involved was very small. By contrast today, the list of sensitive issues populating the docket is much longer.

¹⁰⁶Comiskey, 193.

¹⁰⁷*Id.*, 194.

¹⁰⁸*Id.*

¹⁰⁹Woodrow Wilson, *An Old Master and Other Political Essays* (1893), 116.

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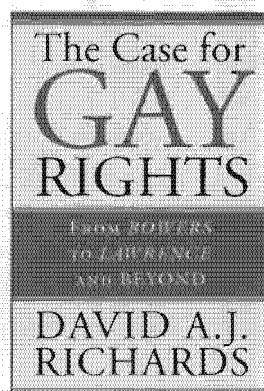
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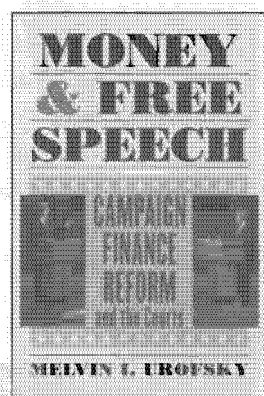
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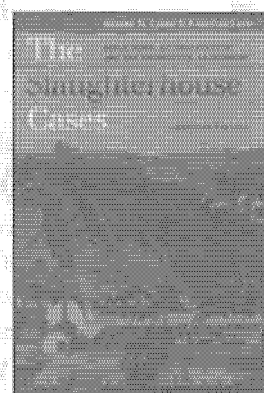
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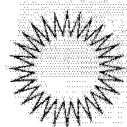
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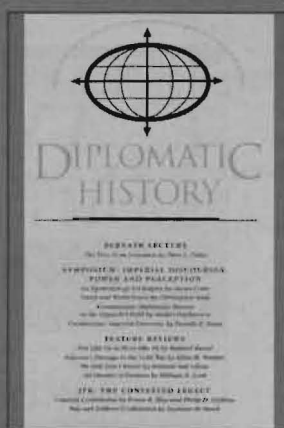
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