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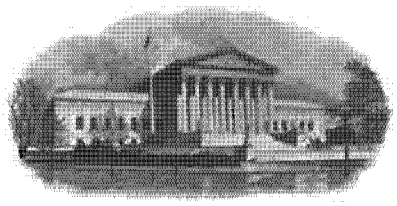

Supreme Court Historical Society

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GENERAL STATEMENT

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

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

The Society maintains an ongoing educational outreach program designed to expand Americans' understanding of the Supreme Court, the Constitution and the 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.

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

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Introduction

Melvin I. Urofsky

As a constitutional historian of a certain age, I often have this little shock of recognition when I am writing, as a scholar, about a case I remember reading about as a citizen. I was a freshman in high school in a small, upstate New York town when the Court handed down its decision in *Brown v. Board of Education* (1954). I recall our civics teacher saying how important it was, but for those of us who had not (yet) traveled far, and certainly not into the South, it meant little.

I was in graduate school in New York City when the Court decided *Engel v. Vitale* (1962), and while it had been a long time since my school day in Liberty had begun with a prayer, the resulting furor could not be missed. It seemed as if everyone, beginning with Francis Cardinal Spellman, had something, usually negative, to say about the ban on compulsory school prayer. Bruce Dierenfeld, who has just finished a book on the case, takes us back to look at those reactions, and to remind us that the debate on the case is one of long standing.

Similarly, the women's movement had gained a great deal of momentum, and those of us interested in gender equality watched with fascination as the Equal Rights Amendment failed to win ratification, while the Supreme Court, in a series of cases usually argued by Professor Ruth Bader Ginsburg, essentially placed the mantle of the Equal Protection Clause around the shoulders of women. Jeremy Bressman takes us back to the case in which a new standard for review of gender inequality cases would be judged, and which is still, in many instances, the guiding standard used by the courts.

As a historian, I know that (a) the Senate over the past two centuries has not confirmed all presidential appointees to the judiciary; and (b) until the twentieth century, nominees did not even appear in person before the Senate Judiciary Committee. In what is still the longest and most bruising confirmation battle in our history, that of Louis D. Brandeis in 1916, the nominee, while certainly taking a key role in rebutting accusations against him, never made a public utterance about the confirmation during the four months it went on and never appeared before the subcommittee hearings. To the reader of the newspapers

and magazines of those days, it would have seemed that Brandeis had disappeared in Boston.

Ernesto Sanchez argues that the transition to the modern type of confirmation process began with the failed nomination of John J. Parker, and that from 1930 on we moved steadily toward the hearings with which we are familiar. Not everyone may agree that Parker is the pivotal case, but Mr. Sanchez makes some interesting and compelling points. (By the way, the Parker hearings were before my time.)

The Dartmouth College case is, of course, well-known in constitutional history as a key decision interpreting the Contracts Clause as well as for the template that Justice Joseph Story suggested to the states to give them legitimate power to amend corporate charters. But we rarely look at how the decision affected other areas of the law, and as Professor Elizabeth Brand Monroe shows, the case had an important impact on the nineteenth century law of charities.

In the last two years we have had two openings on the high court, one caused by death and the other by resignation. This is not unusual, since over time while there have been many deaths of sitting Justices, many others have left the Court to pursue other interests. What do they do? After one has sat on the most powerful constitutional court in the world, what options are available if a Justice chooses to step down? One thing we know they do not do is write their memoirs, although as a historian I wish that some of them had. Minor Myers III takes us on a tour of what retired Justices have done after leaving the bench.

Finally, our book editor, Grier Stephenson, tells us about some of the many new books that have appeared dealing with the Supreme Court.

The issue, as always, is diverse, challenging, and fun. Enjoy!

The Influence of the *Dartmouth College* Case on the American Law of Educational Charities

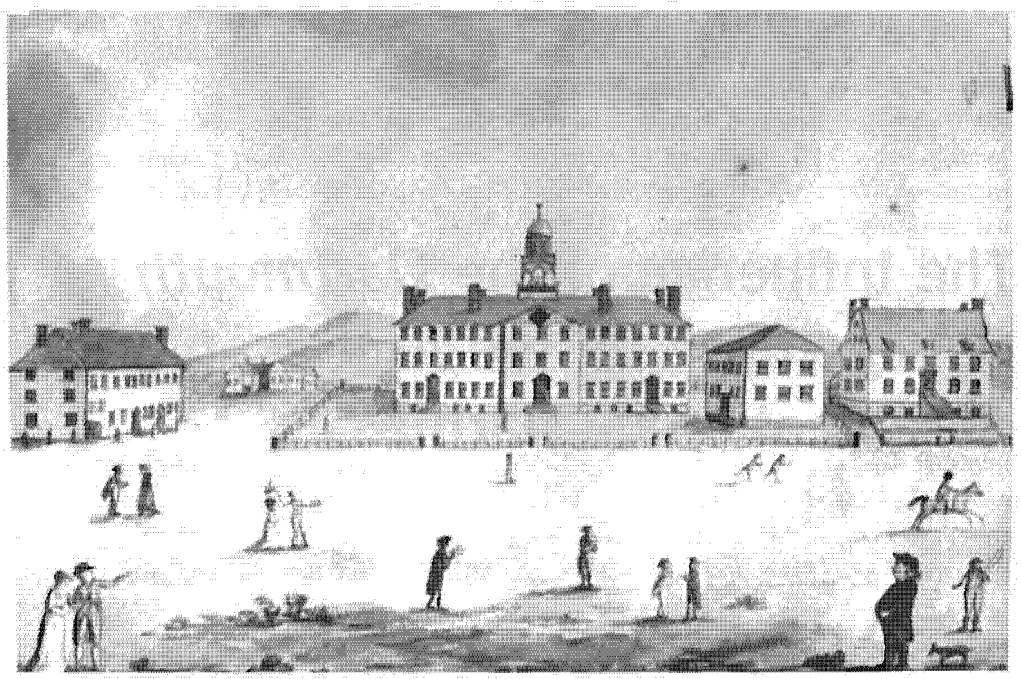
ELIZABETH BRAND MONROE

One of the important features of American history has been the availability of higher education. Religious toleration, low capitalization costs, few educational impediments, public interest and commitment, and ready corporate status made the foundation of colleges and universities a common event in early nineteenth-century America.[1] By the time of the Revolution Americans had founded ten colleges; by 1800, twenty-four; by 1820, thirty-eight; and by the Civil War, 232, of which 104 have survived.[2] Although the earliest colleges had religious affiliations, with the founding of the University of Georgia in 1785, states also began providing directly for higher education. But the creation of these institutions led to disputes within them over curricula and governance. How the U.S. Supreme Court dealt with a seemingly minor political dispute involving the governance of a small New Hampshire college would determine not only that college's relationship to state and federal government, but also that of all other corporations.[3]

The literature on *Dartmouth College v. Woodward* (1819) is largely the creature of constitutional historians, on the one hand, and scholars of American education, on the other. I delved briefly into works on the early development of Dartmouth College, general studies on American education, and histories of colleges and universities before the Civil War.[4] Research on American contract and corporation law, the U.S. Supreme Court, and *Dartmouth College* proved more useful.[5] I have also brought to this article a general knowledge of the history of the era.

In the last quarter of the eighteenth century, Americans rebelled against the British government, disestablished religion, and abolished most English statutory law. While new constitutions in the 1770s and 1780s quickly created state and federal governments, other republican reforms occurred slowly or incompletely.

Religious-toleration statutes of the colonial era had allowed dissenters to practice their faiths so long as they continued to financially support the established church. But during the Revolutionary era, back-country



Dartmouth College, like other colleges and universities in the new republic, was dependent on charitable donations for funding. In a culture that favored limited government and few taxes, colleges relied on state governments to encourage the creation and financial support of educational charities.

nonconformists grew more militant, and by 1800 most states, after much social and political unrest, had adopted anti-establishment policies that whittled away at the privileges of state churches.

Hostility to state-supported churches was matched by hostility to British law.[6] State legislators rejected English statutes as unfit for democratic society and wiped them from state statute books. After the War of 1812, American suspicion of English legal institutions increased, although American lawyers and judges continued to rely on English common law, partly because it was accessible. While politicians in the new republic declared William Blackstone and Lord Edward Coke irreconcilable with democratic institutions, American editions of Blackstone's **Commentaries** were the most widely available treatises prior to 1830. Politicians might decry English case law as inconsistent with American attitudes, but American lawyers and judges cited English reports because reports of state decisions were unavailable.[7]

Americans of the era also sought to realize the potential of the Revolution through balancing liberty and government power. To maintain the appropriate balance, republican leaders espoused an educated citizenry, protection of property rights, and the inculcation of civic virtue, or devotion to the affairs of the commonwealth.[8] An important institution in this early vision of self-government was the college. But the earliest colleges were affiliated with colonial established churches and maintained boards of trustees largely composed of the faithful. To provide colleges that reflected the new republican attitudes required either state-sponsored colleges, removal of sectarian influence from boards of existing colleges, or creation of nonsectarian colleges independent of the state. In a culture that favored limited government and few taxes, each of these forms of higher education would depend on public donations. To secure donations, state policy would have to encourage the creation and financial support of educational charities.[9]

Early national policies about religion and law colored attitudes toward charities. In the absence of a federal policy, each state worked out its own program. Some states restricted religious charities and many secular charities, others continued to use colonial statutes modeled on English law, still others encouraged the founding of charitable organizations in their constitutions, while most states left the creation of charities to the legislature.[10] In the colonial era, the typical charities had been churches, schools, and poor relief. While many donors to these charities made contributions during their lifetimes, others left bequests in their wills. Poor drafting and poorly conceived bequests often presented difficulties, however. In addition, heirs disputed testamentary gifts. In a culture in need of benefactors to provide basic services, judges interpreted wills permissively and reformed them when necessary. This leniency continued the tradition of English equity courts.

By the early nineteenth century, a countervailing attitude made inroads in charitable gifts. Like English landowners in the fifteenth and sixteenth centuries who feared too much property had made the Church too strong, Americans saw the increased wealth of charitable organizations as allowing too few people to control too much. Judges began to interpret bequests more strictly as well as to find more often for heirs, and legislatures denied charters for new charitable corporations. In this atmosphere of suspicion about how and by whom charitable gifts would be used, Americans debated the role of colleges in American life, their relation to the state, what they should teach, and how they should be financed and governed.[11]

By 1818, when *Dartmouth College* was argued, three of the Justices of the U.S. Supreme Court had been involved in attempts by states to limit the reach of the college boards of directors ("visitors").[12] Chief Justice John Marshall had argued for the Commonwealth of Virginia on behalf of the visitors of the College of William and Mary; Justice Joseph Story, a new member of the Harvard board of overseers, had joined a thirty-year-old dispute that dated to the state's Revolutionary constitution; and Justice H. Brockholst Livingston had spent almost as long trying to keep Columbia University independent of the New York legislature. By the early nineteenth century, Yale, the University of North Carolina, and Transylvania College had also felt the cold determination of their state legislatures. When the U.S. Supreme Court heard arguments in *Dartmouth*, representatives of other colleges and universities concerned about the outcome of the case filled the audience.

The Dartmouth College controversy had been brewing for about ten years when it finally erupted in a pamphlet war in 1814.[13] John Wheelock, president of the college, had succeeded his father in 1779 and had managed over the intervening thirty-plus years to repeatedly antagonize the college's board of trustees. Formerly a tractable group that had acquiesced in his father's management of college affairs, the trustees now quarreled with Wheelock over faculty appointments, the local church, and the president's duties and prerogatives. Wheelock took his problems to the public in an anonymous eighty-eight-page pamphlet describing the trustees as Federalist conspirators bent on destroying popular government. New Hampshire Republicans rallied to Wheelock to protect the institution the state had liberally supported.

In the state elections of 1816, Republicans pointed out that Dartmouth's charter, a royal grant of 1769, provided for a self-perpetuating board of the trustees that was more attuned to attributes of monarchy than to the spirit of American liberty. After the Republicans proved victorious at the polls, the new legislature converted the college to Dartmouth University, expanded the board of trustees from twelve to twenty-one members, and made it responsive to the state. The old board retaliated with its own pamphlet, which argued that the old charter granted property rights and functioned as a contract between the state and the

college. According to Article 15 of the New Hampshire Constitution, those property rights could not be confiscated without due process of law—that is, a trial. Since the new charter of the university abridged the old charter, it also violated the Contracts Clause of the U.S. Constitution.

In February 1817, the trustees of the college sued in trover[14] the former college treasurer, William H. Woodward, who had decamped to the university (Republican) side, taking with him the college records, seal, and account books.[15] In March, the university forces seized the campus buildings, although almost all of the students, remaining loyal to the college and its faculty, continued their schooling in borrowed rooms in town. In April, Wheelock died, to be replaced by his son-in-law William Allen. When President James Monroe visited Hanover that summer, he was awarded two honorary degrees—one from the college and another from the university. Skirmishes among students and faculty of both institutions continued on the campus throughout the fall.

In the meantime, the New Hampshire Superior Court received the special verdict prepared by joint agreement of the parties. It included the college charter of 1769, the recent legislation creating the university, and a petition requesting the court to decide on the constitutionality of the statutes. At the arguments in May and September 1817, Jeremiah Mason, Jeremiah Smith, and Daniel Webster represented the college, while Ichabod Bartlett and George Sullivan, New Hampshire's attorney general, appeared for Woodward (the university).[16]

Mason, Smith, and Webster presented a three-part argument[17]: (1) Only courts could take away vested rights in property, and the old board of the college had such property interests in the governance of it. (2) By creating the university, the legislature had violated the New Hampshire Constitution by taking the property of the old board. (3) This action also violated the Contracts Clause of the U.S. Constitution by impairing the old college charter (contract) with the creation of the university. The thrust of the plaintiff's presentation was that Dartmouth College was a private eleemosynary corporation immune from state interference. Mason explained the college's corporate status by resorting to English custom and case law. He contended that English law divided corporations into two classes: civil (public) for municipalities and for trade, and eleemosynary (charitable) for hospitals, colleges, and schools. Dartmouth fell into the latter category, based on the private bounty that had created it. Smith continued Mason's argument by expanding on the elder Wheelock's role in the creation of Dartmouth College. According to Smith, the earliest donations to the college had come from a group of English subscribers who had been solicited by agents of Wheelock. The 1769 charter described Wheelock as the founder because the birth of the college had occurred through his solicitation of those initial funds. Visitational and supervisory rights over the college were determined in English law by the source of the first endowment.

According to the plaintiff, Wheelock, the founder, had appointed the trustees to serve as "visitors" (supervisors) of the college. His action gave them a vested interest in their supervisory role. When the legislature altered the trustees' positions by installing additional trustees and creating the university, it violated the state and federal constitutions.[18]

Sullivan and Bartlett countered the plaintiff's argument with their own interpretations of English custom and law. Sullivan argued that the public status of a corporation was based on its purpose. If the corporation was founded to benefit the state or broad objects, it was a public institution, and the legislature had the right to interfere. Even private corporations had to yield to legislation in the public interest. To Sullivan, the Contracts Clause had been intended to prevent state debtor legislation, such as moratoria, and did not apply to the action taken by the New Hampshire assembly. Since the charter was a grant for a public

purpose—the education of the youth of the province—the college trustees appointed under it were public agents. According to English law, their visitation rights were within the jurisdiction of the chancery courts; failing that (and New Hampshire had no chancery courts), the legislature controlled.

Bartlett took a different tack, arguing first on the blurred history of Dartmouth College. He claimed that Smith and Mason had confused the foundation of Dartmouth with the foundation of Moor's Indian Charity School, also founded by the elder Wheelock. The charter for the college erroneously indicated that Wheelock was the founder of the college, when in fact the record indicated only that Wheelock had solicited donations to the Indian School. But both Vermont and New Hampshire had donated land and other aid to the college for the broad public object of the education of the boys of the region. Therefore, the State of New Hampshire had founded the college and was the only party with an interest. Even if the trustees appointed by Wheelock held powers of visitation, those powers could be altered by the legislature in the interest of the public.[19]

Chief Justice William M. Richardson delivered the unanimous opinion of the New Hampshire Superior Court on November 6, 1817.[20] He and the other members of the court, Samuel Bell and Levi Woodbury, had been appointed to their seats in 1816. All three were Republicans, and their decision vindicated the Republican legislature's statutes that had created the university.[21]

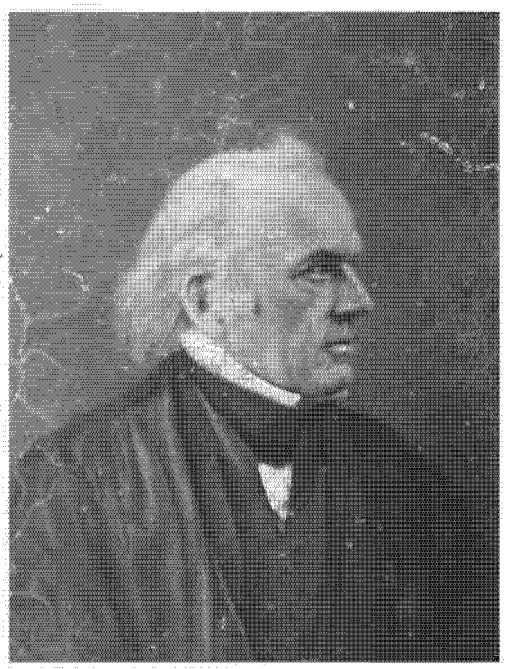
Richardson began by stating that the old division of corporations, based on their source of funds, was more suited to traditions in Europe than to the economic and cultural conditions of America. Relying on the defense's argument, he proposed a new division based on corporate purpose. To the court, banking and manufacturing were private opportunities for individual gain, the organizational needs of which could be met by corporate charters. Public corporations would include municipal organizations and educational and hospital facilities that provided needed services to the public at large. The Dartmouth College charter identified the college's purpose as spreading Christianity among the Indians and, more broadly, promoting education in New England. That broad purpose made the college a public corporation and its trustees public servants. Only the state had a property interest in the charter; the trustees had no rights to assert.

Levi Woodbury sat on the Supreme Court of New Hampshire that ruled unanimously in favor of the Republican legislature when it heard the *Dartmouth College* case in 1817. Woodbury had been a member of the college's board of trustees, but had resigned upon his appointment to the bench in 1816.

Having established the public nature of the college, Richardson denied the plaintiff's arguments: (1) An examination of New Hampshire decisions showed that both the legislature and the courts could take away vested rights in property. (2) Therefore, the New Hampshire constitutional provision had not been violated, because it applied only against actions by the governor. And (3) the Contracts Clause was meant to protect private rights, but because Dartmouth College was a public corporation, it was inapplicable. The clause was not intended to limit a state's control over its own institutions. Therefore, the legislation was

constitutional, although Richardson acknowledged that the trustees could "carry their cause to another tribunal."[22]

The college made plans for appeal to the U.S. Supreme Court's February 1818 Term, and the university prepared to reply. Each party rearranged its counsel. The college put Webster in the lead, assisted by Joseph Hopkinson, a Pennsylvania Congressman with limited experience before the Supreme Court. The university hired John Holmes, a Massachusetts Congressman with even less constitutional experience, and William Wirt, U.S. Attorney General, as associate. Webster and Wirt had both argued eight cases before the Court, and each was recognized as a leader of his state's bar. But the similarity ended there in *Dartmouth v. Woodward*. Webster had taken part in the state case, was familiar with the history of the college, and considered the case his primary concern for the Term. Wirt was not familiar with the case history, had not even been provided with Bartlett's or Sullivan's lower court argument, and was preparing ten other cases for the Term. Lack of preparation would be telling.



A bank president and authority on commercial law, Joseph Story believed that while banks, canals, and other public corporations performed public services, they were nonetheless private investment opportunities that would only flourish if investors felt secure from legislative encroachments. In *Dartmouth College*, he seized the chance to protect private property rights by means of the Contract Clause.

The case came before the Court under section 25 of the Judiciary Act of 1789, which limited jurisdiction to the Contracts Clause issue.[23] Webster began with a disquisition on all of the issues presented to the New Hampshire court that were not relevant to the U.S. Supreme Court's jurisdiction. Having spent most of his time interjecting the irrelevant—but useful—Webster then passed on to the Contracts Clause. Analogizing to the Court's decision in *Fletcher v. Peck*,[24] Webster argued that since Georgia's grant of land in that case was a contract, the Dartmouth charter—a grant of corporate powers—was also a contract within the meaning of the Contracts Clause. He concluded by contending that denial of Dartmouth's impaired contract claim would extinguish the "great lights of science" that small colleges represented in the young nation.[25]

Holmes, borrowing from Richardson's decision, attempted unsuccessfully to refute the force of Webster's argument. To Holmes, the nature of a corporation was determined by its purpose, and education was an important public concern. The New Hampshire constitution encouraged education, and the 1816 statutes amending the college charter were a form of encouragement.[26] Wirt, too, failed to deflect Webster's presentation. He argued that the Contracts Clause was intended to protect private rights, while charters of public corporations were always held subject to legislative change. And to Wirt, Dartmouth was a public corporation. Ignoring Richardson's distinction of the purpose of the corporation as the determining factor in corporate status, Wirt returned to the college's foundation. He argued that the charter did not declare the elder Wheelock the founder of Dartmouth College (when in fact it did), and that the foundation of the college and contributions of the state removed

any property rights Wheelock might once have had. It was not a convincing argument, nor was it accurate.[27]

Hopkinson closed for the plaintiff by directly refuting Wirt and Holmes. Pointing out that the charter indeed identified Wheelock as founder of the college, Hopkinson asserted that even if Wheelock had not been so listed, the college by the terms of the charter (contract) was still private, the visitation rights remained in the original trustees, and the New Hampshire legislature had impaired the contract.[28]

The next day Chief Justice John Marshall announced that the Court was divided and the case would continue, and the parties prepared for the coming battle in the 1819 Term. But the battle would not be joined, because on the opening day of the new Term, Marshall announced the decision of the Court.[29] The Chief Justice analyzed the issues within the context of the Contracts Clause, general principles, and the critical concepts of contract, property, and incorporation. He admitted that the Contracts Clause only covered agreements about private property, but he asserted that the Dartmouth College charter was a contract and the college a private corporation that, like individuals, could acquire property rights—in this instance, the right to self-government.[30] As a private charitable corporation, the college was protected by the Contracts Clause from the loss of its property. Therefore, the state could not interfere with the trustees' visitation by creating the university, and the statutes of 1816 were unconstitutional.

Marshall's understanding of the Contracts Clause turned on his belief that it had been proposed in the constitutional convention to reduce legislative tinkering with the faithful performance of private obligations or vested rights. The crux of the matter, therefore, was whether Dartmouth College was a private or a civil (public) institution. If the latter, it could be controlled by the legislature; if the former, it retained independence to pursue its stated charitable purposes. After analyzing the issues, Marshall found the college to be private. Next, Marshall declared that the college itself had the vested interest of self-government because it represented the rights of the initial founders.[31] By the end of his opinion, Marshall had expanded the definitions of contract, property, and private corporations and apparently protected all private colleges and other chartered charities from meddling state legislatures.

Of the seven Justices comprising the court at that time, Justice William Johnson concurred with the Chief Justice, while Justice Livingston concurred with the Chief Justice and the concurring opinions written by Justices Bushrod Washington and Story. Justice Gabriel Duvall dissented without opinion, and Justice Thomas Todd was absent.[32]

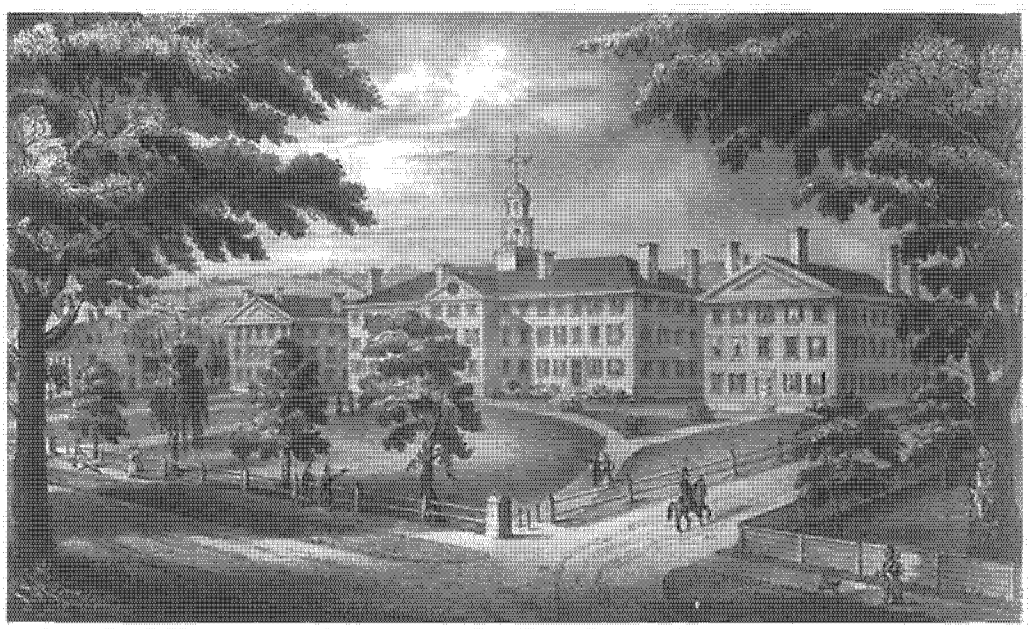
In contrast to the Chief Justice, who had reasoned from general principles, Justice Washington drew on treatises and common law to find the Dartmouth charter a contract within the meaning of the Contracts Clause. But Washington's reliance on case law left his conclusion vulnerable, because the English cases he cited had not established a clear distinction between public and private charters—the basis of his opinion that Dartmouth College, as a private institution, was protected from the legislature. Further, unlike Parliament's refusal to tamper with its corporate creations, American colonial and state legislatures had routinely changed the terms of some corporate charters.[33]

Justice Story, like Justice Washington but at greater length, used the common law and its authorities to support his view of the public/private division of corporations. Rebutting Richardson's decision at the state-court level, Story found the source of the initial donation to the college to determine its status as a private institution. Eschewing "purpose" as the basis for classifying whether a corporation was public or private, Story saw only corporations owned by the state as subject to legislative whim. To Story, all insurance companies, canals, turnpikes, and banks[34] were private, and legislatures could not intervene unless they

had reserved the right to do so in the initial grant. Story's views expanded on Marshall's decision by protecting all business corporations as "private."[35]

The reporter's summary of the attorneys' arguments and the Justices' opinions consumed 163 pages of text, including 165 citations to 109 sources, most of which related to charters of incorporation. Marshall, as was his habit in constitutional cases, reasoned from general concepts and only twice cited sources, in both instances Blackstone's **Commentaries**. Justice Washington offered only ten citations, all of which were duplicated by Webster in argument and Story in his opinion. Three of Washington's sources were also cited by Wirt in argument. Of the attorneys, Hopkinson cited only three British sources, none of which was referred to by other members of the bar or the Bench. Holmes presented five citations, two of which were also cited by Webster, Washington, and Story. One was also cited by Wirt, who, in addition, referred to two sources also used by Story, two used by Webster, and two more used by Webster, Story, and Washington. His four other sources were unique to his discussion. Webster included thirty-three citations in his argument. Five were references to Blackstone, and of the others, six were duplicated by other attorneys or the judges. Justice Story presented 101 citations, eleven of which had been used by the attorneys, Marshall, or Washington. Full citations for the most commonly cited sources and the parties who cited them are listed in the endnotes.[36]

Taken as a group, these sources provide insight on British and American legal reasoning regarding the status of charitable corporations in the early national period. Federalists Marshall and Hopkinson, who cited the fewest sources, chose only British ones. Holmes and Wirt, the Republicans, referred half of the time to American sources. Webster included twelve British sources out of a total of twenty-one. Story, who elaborated on many of Webster's points, used ten of Webster's materials—seven British, three U.S.—and added only three other American sources; the remainder of his citations were British. Washington's



How the Supreme Court determined the corporate status of a small college like Dartmouth College (pictured in 1835, fifteen years after the decision) helped shape the future relationship of all charitable corporations to the state and federal governments.

opinion tracked Webster's argument—the Justice's sources were all reflective of Webster's.[37]

Using the closely circumscribed references of the attorneys and Justices, I have analyzed the most often cited American and British sources to better understand trans-Atlantic legal attitudes toward charitable organizations. My analysis covers pertinent sections of Blackstone's **Commentaries**, the Elizabethan Statute on Charitable Uses, four British cases (*Attorney General v. Mayor of the City of London*, *King v. Pasmore*, *King v. St. Catherine's Hall*, and *Philips v. Bury*), four U.S. cases (*Fletcher v. Peck*, *New Jersey v. Wilson*, *Terrett v. Taylor*, and *Town of Pawlet v. Clark*) and one state case *(Trustees of University of North Carolina v. Foy*). I have chosen not to include in this analysis several items that received two or more citations, including *Ellis v. Marshall* (two cites—a narrow Massachusetts decision relating to consent to corporate change), *Federalist* #44 (two cites—while an influential document, this had only philosophical relevance), **Kyd on Corporations** (cited seven times by Story but by no one else), and thirty-eight cases cited once by Story, seven cases cited twice by him, and one case cited three times. A thumbnail sketch of each analyzed citation is provided in the endnotes.[38]

Attorneys and Justices used these eleven sources, six British and five American, to analyze the major issues of *Dartmouth v. Woodward*: what was a college, and how was it related to the state? how did its purpose relate to its governance? how did its source of funding relate to its governance? was the college charter a contract? and did the visitors have a property interest in the governance of the college? The paucity of American sources affected how many British sources were used, but British references such as Blackstone's **Commentaries** would have been used in any case. The few American cases cited left large holes in the legal reasoning of both sides, and two of the cases, *Terrett* and *Pawlet*, only indirectly related to the corporate status of donees.[39]

While the United States was more than thirty years old when *Dartmouth* was decided, state and federal courts still analogized to British case law because reported American decisions covered only limited areas. After the American Revolution, states passed reception statutes adopting British common law (though rarely British statutes) "where appropriate" into the new American system. If appropriate, then, eighteenth-century British law *was* American law. Further, American lawyers invoked a few British treatises. By the early nineteenth century, St. George Tucker's American edition of Blackstone's **Commentaries**, an adaptation of the British classic to American circumstances, influenced how even purely American law was interpreted. And Blackstone, whether British or American, had virtually no rivals—James Kent's **Commentaries** only appeared in the mid-1820s, and Story's **Commentaries** began appearing in the early 1830s.[40] When the U.S. Supreme Court decided *Dartmouth*, American law amalgamated earlier British law with new American social and political conditions.

Although Dartmouth College had a royal charter, it was, in essence, an American institution, and its institutional status would affect the Court's decision. By the end of the 1810s, there were almost forty colleges in the United States, only ten of which, like Dartmouth, predated the Revolution.[41] Beginning with Georgia in 1785, state governments had created state universities to educate American youth to fulfill the republican expectations of the new citizenry. In the United States, education became a task of the government, either directly, with state-sponsored schools and universities, or indirectly, with the creation of simple mechanisms (corporate charters) that allowed groups of individuals to form them. The latter technique was popular with town boosters and religious groups, often acting in concert. While states founded "universities," "colleges" were usually local and denominational. And in America, the distinctions of scale and organization known in England did

not exist. Therefore, when the U.S. Supreme Court analyzed the Dartmouth College situation, it was forced to consider how the British system—groups of scholars living in residential colleges endowed by individuals under the umbrella of a university that provided general services such as lectures, examinations, and degrees—affected the American "college."

The Statute of Charitable Uses included "schools of learning, free schools, and scholars in universities" in its list of appropriate charities, but provided no other guidance to the judges on the definition of a college and how it related to the state. Blackstone's **Commentaries** went a bit further, but they adhered to the British distinctions and found universities and towns to be civil corporations and colleges and hospitals to be eleemosynary ones. *Philips v. Bury* reiterated these distinctions in a decision related to governance. Whether one viewed Dartmouth as a college or a university—and, of course, the New Hampshire legislature's creation of "Dartmouth University" further confused the issue—would affect its status according to Blackstone, how it could be governed, and therefore the outcome of the case. No American case touched on the distinction between colleges and universities.

The relationship of the purpose of the college to its governance figured prominently in the argument of the defense and the decision of the New Hampshire court that the U.S. Supreme Court overturned. According to the Statute of Charitable Uses, Dartmouth's purpose—to educate the youth (Indian or otherwise) of the community—conformed to the British definition of charity. It also fell within Blackstone's definition. In *Philips*, Lord Holt and, later, the House of Lords used the purpose of the charity (to endow the rector and scholars of Exeter College, Oxford) to determine how they would be overseen (or "visited") and whether the decisions of the visitor could be reviewed. *King v. St. Catherine's Hall* took *Philips* one step further by designating which court would review problems of governance.[42]

Attorney General v. Mayor of the City of London also indicated the importance of the purpose of the charity. When Robert Boyle's 1691 bequest to advance the Christian religion by teaching natives in Virginia and New England foundered in 1783 due to the dispersion of the Indians and the independence of Virginia and New England, the Lord Chancellor required his Master to apply the endowment to a new task in accordance with the intentions (purpose) of the testator. The American case of *Trustees of the University of North Carolina v. Foy* also touched on the relationship of the purpose of the university to its method of governance. Here, the North Carolina Supreme Court found that the university had been created for the public purpose of education and that its trustees were "agents of the people" who would govern the university according to the intentions identified in the state constitution and their charter.

At the New Hampshire Supreme Court level, the college's attorneys had argued that the college's source of funding determined its form of government. This argument was extended by Story in his concurrence. British sources indicated two categories of founders—the King and private individuals—and divided the administration of charities along these lines. For example, Blackstone explained that civil corporations like municipalities were visited by the sovereign through his assigns, while eleemosynary corporations were visited by their founders' assigns—those appointed by the King or the patron. In *Philips*, Lord Holt shared this view: "[E]very man is master of his own charity, to appoint and qualify it as he pleaseth."[43] Therefore, aggregate corporations for public advantage, such as towns, were reviewable in the King's courts, but charitable corporations endowed by individuals were subject to their creators. Neither Blackstone nor Lord Holt recognized the existence of a hybrid category of corporations for public advantage, such as education, endowed by private individuals.[44] In *St. Catherine's Hall*, Chief Justice Lord Kenyon extended this dichotomy

to circumstances in which founders had failed to appoint visitors.

By contrast, the North Carolina Supreme Court's interpretation in *Trustees of the University of North Carolina v. Foy* was distinctly American. From inception, American colleges had multiple donors—usually private individuals, but also some public entities such as towns or churches—and corporate structures, while universities were creatures of the states, established by legislatures with public dollars to perform the republican task of educating the electorate.[45] In areas of North America covered by the Northwest Ordinance (1787) and its successors, schools of both stripes might also receive funds from the lease or sale of lands in "Section 16," set aside by the ordinance for educational purposes. The British image of enclaves of privately endowed residential colleges clustered at the two major universities did not fit into the American scheme, where the people saw both universities and colleges as public institutions of higher education accessible to a broad segment of its young men. The North Carolina legislature had funded the university through escheated and confiscated lands, making the university public and its visitors "agents of the people," immune from legislative interference. In *Foy*, the North Carolina court found it difficult "to conceive of a corporation established for merely private purposes."[46]

But the constitutional question that had brought *Dartmouth v. Woodward* to the U.S. Supreme Court hinged on whether the college charter was a contract within the meaning of the Contracts Clause of the U.S. Constitution. This was a purely American concern, since there was no similar provision in British law. Only three American cases covered the ground, and one, *Foy*, was a state case settled on state grounds. The court in *Foy* held that the legislature had established a public university with trustees who were "agents of the people." The North Carolina judges saw the statute creating and funding the university as a contract that the legislature could not repeal and that the judiciary could alter only if they found the trustees guilty of acts that would bring about forfeiture. The other American cases, *Fletcher v. Peck* and *New Jersey v. Wilson*, had been heard by the U.S. Supreme Court.[47] In *Fletcher v. Peck*, Chief Justice Marshall for the Court had found that the Contracts Clause protected a public grant of land just as common-law principles protected rights under private contracts. With the 1795 grant protected as a contract, the state legislature's rescission in 1796 was void. In *New Jersey v. Wilson*, also written by Marshall, the Court found that repeal of a state legislative grant of tax exemption violated the Contracts Clause because the negotiation leading to the exemption and property grant were a form of contract. While these earlier Contracts Clause cases related to legislative grants of land and their subsequent impairment by other legislative action, the legislative grant of charter to the university that impaired the earlier royal charter to Dartmouth College bore a striking resemblance in form.

Yet one British case suggested another outcome. In *King v. Pasmore*, Lord Kenyon had found that the King could grant a new town charter when the old corporation failed. A public charter could be reissued by the King, and the private interests of any remaining trustees could not defeat the good of the community—a surprisingly republican argument coming from a British court. If one assumed that Dartmouth College had failed due to the imbroglio between Wheelock and the trustees, then the New Hampshire legislature, acting in place of the King, could create a new institution—the university—to perform the work of the old. When the old corporation ceased to function effectively, the court would consider it dissolved, giving the King/legislature the ability to replace it. *Attorney General v. Mayor of the City of London* could be found to arrive at a similar conclusion. When conversion of Native Americans ceased because they no longer lived near the College of William and Mary or Harvard College, the Lord Chancellor had instructed his Master to apply the funds of

Robert Boyle's estate to other projects according to the original intention of the founder—the court modified the trust to suit the exigencies of the moment, but maintained its intent.

Finally, the Court considered whether the visitors of Dartmouth College had a property interest in the governance of it. In *King v. Pasmore*, Justice Ashhurst had found that once the trustees of Helleston had ceased to function as a group, only the private interests of the individual former trustees remained. Lord Kenyon had declared that their failure to accept the new corporation was immaterial, since they had ceased to exist as a corporate body. Because the new charter included all of the former trustees, though it expanded their numbers, Ashhurst found the former trustees had no grounds for complaint. The similarity of this case to *Dartmouth* on the issue of governance of succeeding visitors was remarkable.

The only other case that even indirectly spoke to property in governance was *Foy*.[48] There, in a case brought in the name of the Trustees of the University of North Carolina, the state supreme court held that the legislature could not deprive the university of appropriated and vested funds (the lands) because that would destroy the university itself. According to the court, the action of the legislature also destroyed the trustees' interests in the "property," here meaning real estate. The court declared that "the property vested in the trustees must remain for the uses intended for the university, until the judiciary . . . pronounce them guilty of such acts as . . . amount to a forfeiture of their rights or a dissolution of their body."[49] By extending the concept of property to include not only land but also the right to govern, Webster had argued that the decision regarding the University of North Carolina was germane to the Dartmouth College case.

While the specific circumstances before the Court related to a dispute about a small college in New Hampshire, the attorneys and Justices recognized that *Dartmouth College* could affect, not only other chartered charities, but also the broader category of all state chartered corporations. Thus, notions of the role of corporations in the American economy figured in the Court's decision. Chief Justice Marshall wrote the majority opinion to cover only charitable corporations such as colleges, but in concurrence Justice Story expanded his interpretation to include "private" corporations such as banks, factories, and transportation companies. After all, Marshall devoted almost all of his energies to the Court, leaving only a small amount of time to run his farming affairs in Virginia. His personal interest in the business community was nominal, and he declined to extend his decision to cover commercial enterprises. Story, on the other hand, was a bank president and an authority on commercial law. He believed that while banks, canals and other business endeavors performed public services, they were nonetheless private investment opportunities that would only flourish if investors felt secure from legislative encroachments. In *Dartmouth College*, Story seized the chance to protect private property rights by means of the Contracts Clause. As an ardent Federalist, Story used his judicial power to broadly interpret the Contracts Clause rights of corporations. He and Marshall were both more interested in the Contracts Clause aspects of the case than in its implications for charity law. Their interpretations related to legislative modification of any charter privileges remained in effect until *Charles River Bridge v. Warren Bridge* was decided by Chief Justice Roger B. Taney in 1837.[50]

Political attitudes also colored conclusions about the status of the college and its trustees. These attitudes split along early nineteenth-century party lines, although elements of both sets of attitudes could be labeled republican. In the broader republican frame of reference, advocates for both the college and the university sides shared republican goals of an educated citizenry, protected private property rights, and commitment to the affairs of the commonwealth. However, the Federalists, on the one hand, and the Republicans, on the

other, differed in how these goals were to be achieved and by whom.

According to Republicans, any institutions created by the state were to be held accountable to the people as directly as possible. Thus, Republican-controlled legislatures were strong, active, and accountable. Federalists, however, fearful of the swaying loyalties of the public, favored less direct accountability. Federalist governments relied less on the legislature and governor and more on appointed or indirectly elected officers, including judges and party caucuses. When the 1816 Republican-controlled New Hampshire legislature modified the Dartmouth College charter to create Dartmouth University, it acted to curb the power of the self-perpetuating college board by replacing it with a broader university board, the members of which served as state agents to protect the public interest in educating citizens. Following the lead of Georgia, North Carolina, and other states that had created public universities, New Hampshire was, in effect, turning the old Dartmouth College into a new state university. In 1816, New Hampshire Federalists were more concerned about the Republican attack on valuable private property rights, not only in college governance, but also in business corporations.

According to Federalist theory, then, Dartmouth College was a private institution that should be independent of legislative interference. Intended to educate the youth of the colony/state and endowed by private funds, the college was created by royal charter, which, after the Revolution and ratification of the U.S. Constitution, protected it from state legislative impairment. According to Republican theory, the old college had been altered by the New Hampshire legislature to protect the public's interest in higher education by making the board of trustees accountable to the people. After all, according to the Republicans, the old college had been partly funded by both Vermont and New Hampshire, and after the Revolution the former royal charter, because of its public purpose, fell to legislative oversight. The Federalists wanted a privately governed private college, the Republicans a publicly governed public university.

Another case of the same Term also related to higher education and shed additional light on contemporary judicial views. *Philadelphia Baptist Association v. Hart's Executors* presented a benefactor who had left a fund for training Baptist youths for the ministry.[51] However, at the time of the bequest, the Philadelphia Baptist recipients were not incorporated. According to the Virginia court that first heard the case, an unincorporated group was too uncertain to qualify as a beneficiary or trustee, and because Virginia had stricken the Elizabethan Statute of Uses from state law, the court could not reform the bequest to satisfy Hart's last wishes. When the case was heard in the U.S. Supreme Court, Chief Justice Marshall, writing the majority opinion, found for the executors on the grounds that no English chancery court had modified bequests before the Statute of Uses and that, with the statute not in effect in Virginia, the U.S. Supreme Court could not remedy the situation. Thus, while the Court in *Dartmouth College* encouraged charitable giving with the recognition that "one great inducement to these gifts [donations to Dartmouth College] is the conviction felt by the giver, that the disposition he makes of them is immutable" and therefore the state legislature could not alter the college charter, it discouraged similar giving in *Hart* by failing to reform the bequest.[52]

For almost fifteen years after *Hart*, the U.S. Supreme Court and many state courts continued to interpret charitable grants narrowly. In 1833, U.S. Supreme Court Justice Henry Baldwin, on circuit, argued in *Magill v. Brown* for returning to the permissive attitude toward charities.[53] Referring to the **Calendars of the Proceedings in Chancery**, published by the Royal Records Commission in 1827, Baldwin demonstrated that chancery courts had enforced charitable gifts long before 1601. Having concluded that the Statute of Uses was merely remedial—identifying

and streamlining an existing English charity policy—and that the requirement to adopt a British statute did not promote American jurisprudence, Baldwin declared that democratic American attitudes demanded encouragement of philanthropy. His research in the **Calendars** identified an expanded list of charitable purposes, including "such uses as concur in decency and good order with the intent of the founder."[54] In the case before him, Baldwin found that the benefactor's gifts to provide Indian relief and purchase fire-fighting equipment could be justified because the law should keep pace with the changing needs of American society. In the 1844 case *Vidal v. Girard's Executors*, in a unanimous decision written by Justice Story, the U.S. Supreme Court adopted Baldwin's reasoning in *Magill* and overturned its earlier ruling in *Hart*.[55]

Within the major political interpretations, there was also room for disagreement. Federalists Marshall, Story, and Kent might agree on the decision in *Dartmouth College*, but Kent criticized the Court's decision in *Hart* in his **Commentaries**. Story, on the other hand, downright eager to extend corporate rights in *Dartmouth* to both charitable and private corporations, was vocal in his opposition to self-perpetuating charitable associations that could deprive heirs of family property. At the other end of the political spectrum, Democrats Henry Baldwin and Henry St. George Tucker[56] also failed to agree. Baldwin believed that acts that promoted public utility should be interpreted broadly, as the risk of too-powerful charitable perpetuities was more than offset by benefits to the public. Tucker, however, feared religious interference with government based on accumulations of property from bequests of the faithful.[57]

Lawyers for the university side (Woodward) in *Dartmouth College* had both facts (that Wheelock's charter and the British donations were for Moor's Indian Charity School) and case law (on purpose, *Philips*, *St. Catherine's Hall*, *Attorney General v. Mayor of the City of London*, and *Foy;* on funding, *Foy*; on contract impairment, *Pasmore;* on property interest in governance, *Pasmore*) in support of their cause. And yet, apparently because of poor preparation, their arguments failed to convince the Court. But the bigger questions looming in the background in 1819—the role of corporations in the American economy, the place of charities in public education, their accountability to the people, the dangers of perpetuities, and general concepts related to religion and legal heritage—set the context for the decision. How the U.S. Supreme Court in *Dartmouth v. Woodward* used limited British and American authorities to determine the corporate status of a small college would help shape the future relationship of all charitable corporations to the state and federal governments.

ENDNOTES

[1]By "religious toleration," I refer to both the proliferation of denominational religion in America and to the perceived need felt by leaders of each denomination for a trained clergy to minister to their members. The initial college foundations in America were based on Puritan/Congregational (Harvard, 1636), Anglican (William and Mary, 1693), Congregational/Presbyterian (Yale, 1701), and Presbyterian (College of New Jersey/Princeton, 1746) desires to train their own clergy. Subsequent colleges created in the early republic were overwhelmingly denominational. Only about fifteen percent were state or municipal institutions. By "low capitalization," I mean that the cost for classroom space was nominal. Some colleges had purpose-built classroom buildings, but others made do with vacant buildings in town. Most students in the early days boarded in the community, so there were no costs at all for student housing. "Few educational impediments" refers to the absence of criteria for faculty education, the narrow compass of curricula, the expectation that the college president and any other teachers would teach across several disciplines, and the general sense that as few as two faculty members could staff a "college." "Public interest and commitment" indicates that communities vied with one another to host colleges, providing land, buildings, and boarding houses (not to mention students) to lure new institutions to their doorsteps. Lastly, "ready corporate status" reflects the fact that colonial and later state legislatures granted generous corporate conditions to almost everyone who petitioned for college charters, a fact borne out by the high college

mortality rate, for sixteen of the thirty-four states formed before the Civil War, from 516 total colleges (including ephemeral institutions created on paper but not in fact) to 104 total surviving (in 1932). See Donald G. Tewksbury, **The Founding of American Colleges and Universities before the Civil War,** Contributions to Education No. 543 (New York: Teachers College, Columbia University, 1932), 1–60. Conflicting—and noticeably smaller—figures can be found in Colin B. Burke, **American Collegiate Populations: A Test of the Traditional View** (New York: New York University Press, 1982); Natalie Naylor, "The Antebellum College Movement: A Reappraisal of Tewksbury's **Founding of American Colleges and Universities**," *History of Education Quarterly* 13 (Fall 1973) 261–74; and Jurgen Herbst, **From Crisis to Crisis: American College Government, 1636–1819** (Cambridge, MA: Harvard University Press, 1982).

[2]These figures are from Tewksbury, **Founding of American Colleges and Universities**, 16–28. Therefore, the survival figure covers the period until 1932.

[3]*Dartmouth College v. Woodward*, 4 Wheat. 518 (1819), established that corporation charters were contracts within the meaning of the Contracts Clause, Art. I sec. 10 of the U.S. Constitution, which states: "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ."

[4]In addition to the publications listed *supra* at note 1, I also used for my understanding of the education of the era Roger Geiger's "The Reformation of the Colleges in the Early Republic, 1800–1820" in *History of Universities* 16 (2) (2000) 129–82; Herbst, **From Crisis to Crisis**; Howard G. Miller, **The Revolutionary College: American Presbyterian Higher Education, 1707–1837** (New York: New York University Press, 1976); Steven J. Novak, **The Rights of Youth: American Colleges and Student Revolt, 1798–1815** (Cambridge, MA: Harvard University Press, 1977); and David W. Robson, **Educating Republicans: The College in the Era of the American Revolution, 1750–1800** (Westport, CT: Greenwood Press, 1985). More general works that proved only tangentially useful included: George M. Marsden, **The Soul of the American University: From Protestant Establishment to Established Nonbelief** (Oxford: Oxford University Press, 1994); Richard Hofstadter and Walter P. Metzger, **The Development of Academic Freedom in the United States** (New York: Columbia University Press, 1955); Lawrence A. Cremin, **American Education: The Colonial Experience, 1607–1783** (New York: Harper and Row, 1970); and Cremin, **American Education: The National Experience, 1783–1876** (New York: Harper and Row, 1980). Another volume with a title of more promise than value is Edward C. Elliott and M. M. Chamber's **The Colleges and the Courts: Judicial Decisions Regarding Institutions of Higher Education in the United States** (New York: Carnegie Foundation for the Advancement of Teaching, 1936). Elliott and Chambers address all aspects of higher education, including college personnel matters, the relation of the school to its students, diplomas, scholarships, finance, tort liability, merger, and tax exemption. Needless to say, the discussion of *Dartmouth College* is brief. Similarly, Lester William Bartlett's **State Control of Private Incorporated Institutions**, Contributions to Education No. 207 (New York: Teachers College, Columbia University, 1926), promises more than it has produced for this paper. Finally, Christopher J. Lucas's **American Higher Education: A History** (New York: St. Martin's Press, 1994) contains so many errors that I have chosen not to use Lucas's analysis of the Dartmouth case.

With regard to Dartmouth College histories, I examined James Dow McCallum's **Eleazar Wheelock: Founder of Dartmouth College** (New York: Arno Press, 1969; reprint of Dartmouth College Publications, 1939), a detailed but rarely footnoted biography of Wheelock. McCallum included transcriptions of Wheelock's correspondence, which, along with the 1972 Arno Press republication of **Memoirs of the Rev. Eleazar Wheelock, D.D.**, was useful. I have also referred to Leon Burr Richardson's **History of Dartmouth College**, 2 vols. (Hanover, NH: Dartmouth College Publications, 1932).

[5]I referred to a number of studies of legal concepts that colored the Supreme Court's interpretation in *Dartmouth*. The most prominent of these are: Howard S. Miller, **The Legal Foundations of American Philanthropy, 1776–1844** (Madison, WI: The State Historical Society of Wisconsin, 1961); Drew R. McCoy, **The Elusive Republic: Political Economy in Jeffersonian America** (Chapel Hill, NC: University of North Carolina Press for the Institute of Early American History and Culture, 1980); R. Kent Newmyer, "Justice Joseph Story's Doctrine of 'Public and Private Corporations' and the Rise of the American Business Corporation," *DePaul Law Review* (25) (1976) 825–41; Benjamin Fletcher Wright, **The Contracts Clause of the Constitution** (Cambridge, MA: Harvard University Press, 1938); Ronald E. Seavoy, **The Origins of the American Business Corporation, 1784–1855: Broadening the Concept of Public Service During Industrialization.** (Westport, CT: Greenwood Press, 1982); and Edwin Merrick Dodd, **American Business Corporations Until 1860** (Cambridge, MA: Harvard University Press, 1954). For general legal histories, I used Lawrence M. Friedman's **A History of American Law** (New York: Simon and Schuster, 1973) and Kermit L. Hall's **The Magic Mirror** (Oxford: Oxford University Press, 1989).

I have also studied G. Edward White's **The Marshall Court and Cultural Change, 1815–1835**, vols. 3 and 4 of the **Oliver Wendell Holmes Devise History of the Supreme Court of the United States** (New York: Macmillan, 1988), which provides both a brief analysis of the issues and decision in *Dartmouth* and a sense of the Court at the time. With specific reference to the case, Francis N. Stites's **Private Interest and Public Gain: The**

Dartmouth College Case, 1819 (Amherst, MA: University of Massachusetts Press, 1972) has been invaluable. Earlier treatments of the case, including Timothy Farrar, **Report of the Case of the Trustees of Dartmouth College Against William H. Woodward** (Portsmouth, NH: Foster, 1819) and John M. Shirley, **The Dartmouth College Causes and the Supreme Court of the United States** (New York: Da Capo Press, 1971; reprint of G. I. Jones, 1895), while dated, provide some primary sources not available in Stites's **Private Interest and Public Gain**. I have used them sparingly.

[6]It is possible to use either "English" or "British" in this essay. Of course, in 1819 the relevant nation was Great Britain. But for the most part, the law I discuss is English, due to the systemic differences between English and Scottish law, many of which still exist in the twenty-first century. However, when I refer to case law from the national courts I have generally used the term "British."

[7]Miller, **Legal Foundations**, 1–15, provides an excellent synthesis of this era.

[8]White, **The Marshall Court**, 595–600.

[9]Miller, **Legal Foundations**, 1–15.

[10]States that restricted the formation of charitable corporations included Maryland and Virginia. States that continued under their colonial charters, and therefore continued to recognize the Elizabethan Statute on Charitable Uses, were Rhode Island and Connecticut. Massachusetts and Pennsylvania encouraged charities in their constitutions, and—most relevant for this paper—New Hampshire modeled its 1784 constitution on the Massachusetts constitution.

[11]Miller, **Legal Foundations**, 7, 11–16, 19.

[12]Colleges and universities in the early national era used several terms to describe the group of members who supervised or oversaw the institution. For this article I use "directors," "supervisors," "trustees," and "visitors" (the English choice) interchangeably, although then and now the definitions of duties for each group vary slightly from institution to institution. Dartmouth College used "trustees."

[13]The following history of the Dartmouth College controversy is culled from Stites, **Private Interest and Public Gain**; Richard N. Current, "The Dartmouth College Case," in John A. Garraty (ed.), **Quarrels That Have Shaped the Constitution** (New York: Harper and Row, rev. and exp., 1987), 20–35; and Francis N. Stites, "Balancing Private Good and Public Good," in John W. Johnson (ed.), **Historic U.S. Court Cases, 1690–1990: An Encyclopedia** (New York: Garland, 1992). Other interpretations of the incidents at Dartmouth College are included in: Geiger; Herbst; Miller, **The Revolutionary College**; Novak; and Robson.

[14]"A common-law action to recover the value of goods wrongfully converted to another's own use." Merriam-Webster's Online Dictionary, *available at* http://www.m-w.com/dictionary/ (last visited Jan. 5, 2007)

[15]Woodward was Chief Justice of the Grafton County Court of Common Pleas, where the case would have been heard. Instead, by mutual consent it was transferred by special verdict to the Superior Court of New Hampshire. Stites, **Private Interest and Public Gain**, 41.

[16]Webster did not appear at the first hearing in May 1817. *Ibid.*, 51.

[17]Webster's argument does not survive.

[18]I have summarized the plaintiff's arguments from the published record of the case at 65 New Hampshire Reports 473–502 (Mason's argument) and 524–63 (Smith's argument).

[19]I have summarized the defendant's arguments from the published record of the case at 65 New Hampshire Reports 502–24 (Sullivan's argument) and 563–93 (Bartlett's argument).

[20]*Ibid.*, 642–43.

[21]Levi Woodbury had also been appointed a trustee of the university, but he resigned that position to become a judge of the superior court. Stites, **Private Interest and Public Gain**, 133 n. 61.

[22]65 New Hampshire Reports 643.

[23]White discusses at some length the maneuvers of the college to create "cognate" cases that would bring the *Dartmouth College* issues before the U.S. Supreme Court through its diversity jurisdiction. Three such cases were created, although they did not reach the Court before the 1819 decision in the primary case. Had they arrived, they would have broadened the issues presented to include general principles, common law, and state constitutional law as well as U.S. constitutional matters. *See* White, **The Marshall Court**, 176–80; Stites, **Private Interest and Public Gain**, 89–98.

[24]6 Cranch 87 (1810).

[25]Webster's presentation in *Dartmouth* is one of the most famous arguments of the nineteenth century. Although it was not reported in the official record, Chauncey Goodrich, a professor of oratory at Yale, reminisced about Webster's performance some years later. His version described Marshall and other members of the audience as moved to tears. White describes both Goodrich's version and other contemporary accounts. See White, **The Marshall Court**, 615–18. Webster's published argument is provided at *Dartmouth College v. Woodward*, 4 Wheat. 551–600 (1819).

[26]Holmes' argument is provided at *ibid.*, 600–606.

[27]Wirt's argument is provided at *ibid.*, 606–15.

[28]Hopkinson's argument is provided at *ibid.*, 615–24.

[29]Marshall's opinion for the Court is provided at *ibid.*, 624–54.

[30]Here Marshall was less than accurate. The record of the relationship between Moor's Indian Charity School, for which the elder Wheelock had raised funds, and the "foundation" of Dartmouth College and the grant of its royal charter was not clear in the materials presented to

the Court. The question of continuity from one institution to the other had been raised by Bartlett before the court in New Hampshire. Had the full record been conveyed by the university to its new attorneys, this relevant and perhaps determining point could have been argued in Washington. Instead, operating in the dark, Holmes and Wirt could not pursue it. See Stites, **Private Interest and Public Gain**, 79.

[31]According to Marshall, the original donors (and their descendants) had lost their legal interests once they had bestowed their property and created the college. The student body changed from year to year, and therefore no particular student had a recognizable interest. Even the trustees who had brought suit, according to the Chief Justice, had no beneficial interest to be protected. That left the corporation itself as the assignee of the original donors and the trustee of the aggregate interest of the students. This discussion comes from 4 Wheat. 641–43.

[32]See *ibid.*, 666, 713.

[33]Washington's opinion is provided at *ibid.*, 654–66. American legislatures frequently altered the charters of municipal corporations.

[34]Story was president of the Merchants' Bank of Boston.

[35]Story's opinion is provided at *ibid.*, 666–713.

[36]Full citations for the most commonly cited sources are listed below, along with the names of those who cited the sources.

English Sources:

Blackstone's Commentaries (cited by Webster 5 times, Story 9, Washington 3, Marshall 2, and Holmes 1).

Philips v. Bury, 2 T.R. 346 (1788) (cited by Webster 3 times, Story 5, and Washington 2).

King v. Pasmore, 3 T.R. 199 (1789) (cited by Webster 3 times, Story 3, Washington 2, Holmes 1, and Wirt 1).

Attorney General v. the Mayor of the City of London, 3BRO.C.C. 171 (1790) (cited by Story 2 times and Wirt 2).

King v. St. Catherine's Hall, 4 T.R. 233 (1791) (cited by Webster 1 time and Story 1).

43 Elizabeth c. 4 Statute of Charitable Uses [An Act to Redress Misemployment of Lands, Goods and Stocks of Money Heretofore Given to Charitable Uses] (1601) (cited by Webster 1 time and Story1).

United States

Terrett v. Taylor, 9 Cranch 43 (1815) (cited by Webster 2 times, Story 2, Washington 2, and Wirt 1).

Fletcher v. Peck, 6 Cranch 87 (1810) (cited by Webster 1 time, Story 1, Washington 1, and Wirt 1).

New Jersey v. Wilson, 7 Cranch 164 (1812) (cited by Webster 1 time and Wirt 1).

Town of Pawlet v. Clark, 9 Cranch 292 (1815) (cited by Webster 1 time and Story 1).

Individual States

Ellis v. Marshall, 2 Mass. 269 (1807) (cited by Webster 2 times and Story 1).

Trustees of the University of North Carolina v. Foy, 5 N.C. 58 (1805) (cited by Webster 1 time).

Related Material

Federalist #44 (cited by Webster 1 time, Wirt 1).

[37]These figures are based on my tabulation of all references by Justices and attorneys in *Dartmouth College v. Woodward*.

[38]Thumbnail sketches follow in the order of note 35. Citations to pages and explanations are shown parenthetically.

William Blackstone, **Commentaries on the Laws of England**

Webster, Holmes, Marshall, Washington, and Story cited **Blackstone's Commentaries** a total of twenty times. Besides a few scattered references, most citations were to Chapter 28, "Of Corporations." Here Blackstone defined corporations as artificial persons whose purpose was the "advancement of religion, learning, and commerce." He divided corporations into "aggregate or sole" and "ecclesiastical or lay." The latter division he further subdivided into civil (corporations created for temporal purposes, such as towns or the corporate bodies of universities) and eleemosynary (those created for the perpetual distribution of free alms). Eleemosynary corporations included hospitals and colleges within universities where the alms were used to (1) promote piety and learning and (2) assist members in their devotions and studies. 1 **Blackstone's Commentaries** 468–71.

Blackstone also described how corporations were created and delineated the powers of corporations, their privileges and disabilities, their duties, and their dissolution. For the judges and attorneys in *Dartmouth*, Blackstone's most important analysis related to visitation. According to Blackstone, English law provided for "proper persons" to visit and correct the actions of corporations. Civil corporations were visited by the King or his assigns (which, in reality, meant grievances could be taken to the Court of King's Bench), while the founder's assigns—those appointed by the King or patron/first donor—served as visitors of eleemosynary corporations. Blackstone recognized, however, that until "the famous case" of *Philips v. Bury* (see below), the doctrine of visitation as it related to eleemosynary corporations was "unsettled." In that case, according to Blackstone, the majority of judges on the Court of King's Bench found that it could revise the visitor's decision. However, Chief Justice Holt dissented, finding redress available only from the visitor. On appeal, the House of Lords agreed with Holt. 1 **Blackstone's Commentaries** 472–84.

Philips v. Bury (1788)

"The famous case" of *Philips v. Bury* was cited three times by Webster, five times by Story, and twice by Washington. The question before the Court of King's Bench and ultimately before the House of Lords was whether the Bishop of Exeter, appointed as visitor of Exeter College, Oxford by the founder of the College, had the power to remove the rector of the college and, if he did, whether his action could be reviewed by the Court of King's Bench.

According to Chief Justice Holt in dissent, the visitor had the power of removal because his appointment by the founder stated he had, and "every man is master of his own charity, to appoint and qualify it as he pleaseth." 2 T.R. 346 at 351. Holt described two forms of aggregate corporations, those for the government of towns and those for private charity. The former, created for public advantage, were to be governed by common law, and their actions were reviewable in the King's courts because they had no private patrons and therefore no visitors. But private corporations for charitable purposes endowed by private persons were subject to the governments of the patrons who created them. Even if the founder had not appointed a visitor to oversee the charity, the law appointed the founder and his heirs as visitors. *Ibid.*, 352.

Where those receiving the bounty of the founder were not themselves incorporated—like the poor—trustees were charged with dispensing the gift and no visitor was necessary "because the interest of revenue was not vested in the poor." Where those who enjoyed the bounty were incorporated, "to prevent perverting of charity" the visitatorial power resided in the founder who created the charity. *Ibid.*, 352–53.

According to Holt, "there is no manner of difference between a college and an hospital, except only in degree." The hospital was for the "poor, and mean, and low, and sickly," while the college was "for another sort of indigent persons . . . but still it is as much within the reason of hospitals." Because of the corporate nature of its membership (rector, fellows, etc.) the college required a visitor, although it, like the hospital, was a charity. And the visitor, by virtue of his appointment by the founder, had the power to review the activities of the rector and fellows according to the statutes that created the college. His decisions were not appealable to the courts. *Ibid.*, 354. The House of Lords agreed with Chief Justice Holt.

King v. Pasmore (1789)

Webster referred to this case three times in his argument, and Holmes and Wirt each cited it once in response. Story mentioned the case three times and Washington twice in their concurring opinions. Chief Justice Lord Kenyon wrote the primary opinion in the case, but Justices Ashhurst, Buller, and Grose also wrote concurring opinions. The case related to the government of the borough of Helleston, which George III had chartered in 1774 in response to a petition by the freemen. By letters patent, the King created "one body corporate and politic . . . by name of Mayor and Commonalty of the borough of Helleston." The petition of the townspeople indicated that Helleston was a borough by prescription—it had existed by letters patent of Elizabeth I and Charles I—but because of ousters and deaths the corporation could not function, causing much inconvenience, and the petitioners therefore asked for a new charter. The question before the court was whether the Crown could grant a new charter when a corporation could no longer perform the functions for which it was created. 3 T.R. 199 at 199–201.

Lord Kenyon declared that it could because once the corporation ceased to function, it was dissolved. Since corporations were "creatures of the Crown," by their dissolution their franchises reverted to it. The King could either revive the rights in the old group of men or grant them to a new set of men. And he could add other powers he deemed necessary. Lord Kenyon found the failure of the majority of the old grantees to accept the new charter immaterial, as they were dissolved as a body before the new charter was granted, and sufficient members of the expanded group of grantees had accepted the new charter. *Ibid.*, 241–42.

Justice Ashhurst agreed with Lord Kenyon. In answer to whether the interests of the few aldermen of the old corporation should defeat the good of the community, he declared that private interest should not stand in the way of the community as a whole. And because the old corporation was extinct, all that remained of it was the private interests of its former members. Since the King's new charter included the members of the old corporation, they had no complaint. Justice Buller agreed. *Ibid.*, 242–48.

Justice Grose also found the reaction of the old members immaterial. He extended his opinion to the question of whether the King had been deceived by the petition of the freemen and whether any deceit, had it occurred, voided the grant of the new charter. Like Lord Kenyon, Grose found no deception in the petition and therefore concluded that the grant was valid. Grose's view is at *ibid.*, 248; Kenyon's is at *ibid.*, 242.

Attorney General v. Mayor of the City of London (1790)

Wirt referred to this decision twice in his argument, and Story cited it twice in his opinion. Here the Lord Chancellor had been asked to consider whether the visitor and object of a charity to spread Christianity among the Indians of Virginia could be created *de novo*, since there were no longer any natives left within the limits of the grant and because the visitor (the rector and

governor of the College of William and Mary) was now "subject to a foreign power." 3 BRO. C. C. 171 at 171–76. The Lord Chancellor found that the charity to convert the neighboring infidels had ceased for want of objects, and the charity must be applied *de novo* to other projects according to the original intention of the founder. *Ibid.*, 177–78.

King v. St. Catherine's Hall (1791)

Webster mentioned this decision once in his argument, and Story also referred to it once in his opinion. In this case, the founder of a private eleemosynary charity—St. Catherine's Hall, Cambridge—had not appointed a visitor and had no heirs. The Court of King's Bench was asked to determine whether the right to visit had passed by default to the King, who visited by his Chancellor, or whether the remedy required an application to the Court of King's Bench for a writ of mandamus. Chief Justice Lord Kenyon decided that civil corporations, like municipalities, were better regulated by the Court of King's Bench than the Chancery Court, but that eleemosynary foundations were better visited by the Lord Chancellor. His decision was based on "general convenience" and principles of law, for he found no decided authority. Here the Court of King's Bench refused to intervene because the King was capable of exercising the visitatorial power "in full force" through the Lord Chancellor without the interference of a common-law court. 4 T.R. 233 at 240–46.

Statute of Charitable Uses [An Act to Redress Misemployment of Lands, Goods and Stocks of Money Heretofore Given to Charitable Uses], 43 Elizabeth c. 4 (1601)

Both Webster and Story referred to the Elizabethan Statute of Charitable Uses. In the preamble, Parliament listed among the appropriate purposes for charities maintenance "of schools of learning, free schools, and scholars in universities." The statute also created county commissioners charged with the oversight of trusts established for charitable purposes. Parliament and later judges interpreting the act considered relief of the poor its principal aim, but religious and other uses not mentioned in the preamble were also found acceptable. In general, English charities of the seventeenth century (and continuing into the nineteenth century) were created in the form of trusts, not corporations.

Terrett v. Taylor (1815)

Webster referred to this case twice, while Wirt referred to it once. Justices Story and Washington each cited it twice in their opinions. Taylor, a vestryman of the Episcopal parish in Alexandria, District of Columbia (formerly of Virginia), sued Terrett, a county overseer of the poor, to prevent him from blocking the sale of glebe land. During and after the Revolution, Virginia had confirmed the Church of England's (later Episcopal Church's) title to land within the state and had designated the church as a corporation that could hold property. However, in 1798 the Virginia General Assembly repealed these statutes, and in 1801 it asserted the state's right to the property, which it placed under the control of the county overseers of the poor to be sold to provide alms.

The case came to the U.S. Supreme Court on a writ of error from the circuit court for the District of Columbia. Therefore, the Court could consider "principles of natural justice, . . . fundamental laws of every free government, . . . the spirit and the letter of the Constitution of the United States, . . . and the decisions of the most respectable judicial tribunals," although it could have found the repeal law of 1801 void, because by then Virginia had ceded Alexandria to the newly formed District of Columbia, over which Congress had exclusive control. U.S. CONST, Art. 1, Sec. 8. By apparently not using Congress's exclusive legislative power over the new jurisdiction, Justice Story's opinion appears to have relied on either general principles of law—for example, the takings analogy from republican theory and natural justice that a legislature could not take property from one person and give it to another—or the Contracts Clause, although in this case there was no legislative grant. This is not to suggest that Story was referring to the Takings Clause of the U.S. Constitution in Amendment 5, which only restricted Congress. In several of these cases, however, he and Marshall used the restriction against Congress and analogized to a similar theoretical restriction against state legislatures. According to G. Edward White, Marshall and Story "packed" the Contracts Clause against the states with Takings Clause values. See White, **The Marshall Court**, 595–672.

Fletcher v. Peck (1810)

This case, the Court's first experience with the Contracts Clause, was cited by Webster and Wirt in argument and Story and Washington in their opinions. *Fletcher v. Peck* arrived at the U.S. Supreme Court by way of a writ of error from the federal circuit court in Boston. As such, the Supreme Court heard arguments on general law as well as constitutional issues. The case involved the successors in interest to landowners whose title to lands in Mississippi Territory had been conveyed by the 1795 Georgia legislature and rescinded by the 1796 legislature. Earlier owners had lobbied Congress to settle the disputed land claims, but Congress had failed to act. In a contrived transfer from Peck to Fletcher, attorneys for the New England Mississippi Land Company created a "controversy" that would litigate in federal court the issues that jeopardized clear title to 11 million acres.

Chief Justice John Marshall, writing for the Court, began with an acknowledgment of "certain great principles of justice" and continued with an analysis of the "rule of property" and the principles that protected innocent third parties in disputed property transfers. He also discussed the need for limits to legislative power, especially to protect property rights, and declared that when rights had vested in a contract, "repeal of the law [creating those rights] cannot divest [them]." 6 Cranch 87 at 133, 135. However, Marshall grounded his decision in the Contracts Clause, finding that a public grant was protected by the clause just as rights under private contracts were protected by common-law principles. *Ibid.* 137, 138. Therefore, the 1795 legislative act granting the property was valid, while the 1796 repeal impaired the earlier grant and was unconstitutional.

New Jersey v. Wilson (1812)

Only Webster and Wirt in argument referred to this case. In *New Jersey v. Wilson*, the colony of New Jersey had granted local Delaware Indians a tract of ground exempt from taxation in exchange for the Delawares relinquishing their claims to other lands. 7 Cranch 164 at 165. In 1803, the Delaware migrated to New York and sold their lands to white speculators with the consent of the State of New Jersey. A year later the legislature repealed the tax exemption and the new owners challenged the repeal in state courts as a violation of the Contracts Clause. The New Jersey supreme court found for the state on the grounds that the tax exemption had been granted to Indians and was available only to them because of their foreign or ward-like status vis-à-vis the state. When the Delaware sold the land, the exemption vanished.

Wilson appealed to the U.S. Supreme Court under Section 25 of the Judiciary Act. Marshall, writing for the Court, held that the repeal violated the Contracts Clause because "every requisite to the formation of a contract" had occurred in the negotiation between the colony and the Delaware. The resulting grant, therefore, was a contract. According to Marshall, the exemption was "annexed to the land itself; not to [the Delawares'] persons." 7 Cranch 164 at 166. The new owners had succeeded to the rights of the Native Americans in the land, and the Contracts Clause of the U.S. Constitution protected these property rights. *Ibid.*, 167.

Town of Pawlet v. Clark (1815)

Webster referred to this case once in argument, and Story referred to it once in his opinion. Before the Revolution, New Hampshire had granted glebe lands to the Church of England if it established parish churches in the towns of the colony. At the end of the Revolution, Vermont succeeded to western New Hampshire, where the town of Pawlet was located. In 1794, the Vermont legislature regranted outright to towns all lands formerly granted to the Church of England where no parish church had been established. The town of Pawlet sued Clark and other members of a voluntary society of Episcopalians who claimed the glebe lands for their church. 9 Cranch 292 at 292–95.

The case came to the U.S. Supreme Court on the certification of a division of the federal circuit court in Vermont. Justice Story based his decision on general principles of common law, not the Constitution, as no constitutional issue was raised in the case. According to Story, the parson and his successors, as spiritual heads of local churches, represented the church corporation. But because no parish of the Church of England (Episcopal Church) existed in Pawlet in 1794 and no parson had been appointed to the benefice, there was no church corporation in Pawlet capable of receiving the grant. Therefore, according to the common law, Vermont could grant the lands to the town for other "pious uses," and the legislature had granted the lands to support education. Story found that the town of Pawlet was entitled to recover from Clark and the Episcopal society, since it was not a corporation created by the Church of England or the state. 9 Cranch 292 at 322–37.

Trustees of the University of North Carolina v. Foy (1805)

Only Webster referred to this case, which related to the North Carolina constitutional requirement for a public university. In 1789, the state legislature had granted to the trustees of the University of North Carolina "all the property that has heretofore or shall hereafter escheat to the state." But in 1800, the legislature repealed this act and another that had granted the trustees unsold confiscated lands. In this case, the trustees sued to recover a tract escheated to the state before 1800 but repossessed by the state after passage of the repealing act. 5 N.C. 58 at 81, 82.

The North Carolina Supreme Court found that the legislature had obeyed the demand of Section 41 of the state constitution declaring that "all useful learning shall be encouraged and promoted in one or more universities" by enacting the 1789 statute, which appointed the trustees to manage the university and appropriated escheated lands for its support. The Court then considered whether the act of 1800 destroyed the people's constitutional right of educating their youth. Justice Locke for the Court examined **Blackstone's Commentaries** and determined that corporations were "formed for the advancement of religion, learning, commerce, or other beneficial purposes." According

to Locke, the University of North Carolina "stood on higher grounds" than other corporations because it was protected not only by the common law but also by the state constitution. The Court found that the legislature could not deprive the university of "appropriated and vested" funds, because that would indirectly destroy the university itself. Further, the Court concluded that although the trustees as a corporation for public purposes were the "agents of the people," the corporate property was beyond the control of the legislature, just as property of individuals or private corporations was beyond legislative interference. Therefore, "property vested in trustees must remain for the uses intended for the university until the judiciary . . . pronounce . . . a forfeiture of their rights or a dissolution of their body." 5 N.C. 58 at 86–89.

[39]See analyses at note 37. *Terrett v. Taylor* (1815) related to a state grant to a charitable corporate body (the Anglican Church) that had subsequently been rescinded. *Town of Pawlet v. Clark* (1815) related to a legislative grant that had not been consummated because no Episcopal church corporation had been established in Pawlet and the grant was therefore incomplete.

[40]The first of Joseph Story's commentaries, **Commentaries on the Laws of Bailments**, appeared in 1832. Volumes of commentaries on other topics appeared in 1833, 1834, 1836, 1838, 1839, 1841, 1843, and 1845. James Kent's **Commentaries on American Law** appeared between 1826 and 1830.

[41]See footnotes 1 and 2.

[42]According to *Philips*, the decisions of the visitor were not reviewable. According to *St. Catherine's Hall*, if the patron, his family, and his assigns were extinct, the Lord Chancellor served as visitor if the corporation was eleemosynary. If the corporation was civil, the Court of King's Bench reviewed the decisions of the visitor by writ of mandamus.

[43]*Philips*, 2 T.R. 346 at 351.

[44]Both Blackstone and Holt in *Philips* found universities to be public. But in England, Oxford and Cambridge universities were superstructures erected in the distant past to provide general services to their clusters of privately endowed colleges.

[45]Stanford, Duke, and other individually endowed universities only developed in the late nineteenth century.

[46]*Trustees of the Univ. of N.C. v. Foy*, 5 N.C. 63 (1805).

[47]*See* note 38 and the discussion of *Terrett* and *Pawlet* in note 37. *Philadelphia Baptist Association v. Hart's Executors* was heard at the same session as *Dartmouth v. Woodward*. 4 Wheaton 1 (1819). *See infra* for a discussion of that case.

[48]Other cases related to whether decisions of visitors were reviewable (*Philips*) and by whom (*St. Catherine's Hall*), who visited in the absence of any appointed visitors (*St. Catherine's Hall*), and whether the court could appoint a new visitor when the old one was no longer under the jurisdiction of the court (*Attorney General v. Mayor of the City of London*).

[49]*Foy*, 5 N.C. 63.

[50]36 U.S. 420 (1837).

[51]I am indebted to Miller, **Legal Foundations**, chapter 3 for bringing *Hart* to my attention.

[52]*Dartmouth College*, 4 Wheat. 518, 647 (1819).

[53]*Magill v. Brown*, Fed. Cases Nos. 8952, 437 (1833).

[54]*Ibid.*, 437–38.

[55]43 U.S. 127 (1844).

[56]Tucker was the son of St. George Tucker, a noted Virginia judge who produced the first American edition of Blackstone's **Commentaries**.

[57]Much of the preceding paragraph is based on Miller, **Legal Foundations**, chapter 4.

John J. Parker and the Beginning of the Modern Confirmation Process

ERNESTO J. SANCHEZ*

Ideological concerns' dominance of the Supreme Court confirmation process has certainly become routine, especially in the form of issue-driven interest groups' influence over the agenda for Senate debates. More significantly, the Senate normally focuses on what Laurence Tribe has called "the net impact of adding [a] candidate to the Court"[1] in terms of steering the Court toward adherence to a particular judicial philosophy, such as originalism[2] or pragmatism,[3] or toward a specific outlook on a given constitutional issue. And when the President nominates someone with prior judicial experience, the candidate's decisions, as well as his or her prior speeches or other public activities, become fair game as supposed indications of his or her fitness for service on the Court.

This article tells the story of the first such confirmation controversy that resulted in the Senate's rejection of a Supreme Court nominee. President Herbert Hoover's nomination of Fourth Circuit Court of Appeals Judge John J. Parker to the Court in 1930 prompted unprecedented opposition that extended beyond traditional party lines and concerns over basic competence to single-issue agendas. Almost immediately, the National Association for the Advancement of Colored People (NAACP), only twenty-two years old, launched a lobbying campaign against Judge Parker because of a purportedly racist statement he had made as the Republican candidate for governor of North Carolina in 1920. The American Federation of Labor (AFL) initiated an equally virulent movement against the judge because of one prior decision in which he had upheld a company's "yellow dog" contracts, or agreements by the company's workers not to join unions.

A closer analysis of the Parker controversy, however, reveals its parallels to contemporary disagreements over presidential nominations to both the Supreme Court and, more recently, lower federal courts. Reflecting Tribe's assessment, a central issue underlying the dispute was not Parker himself, but the course the Court would follow in resolving a seminal legal issue: Congress's ability to pass legislation to rebuild the collapsed American economy in the wake of the

Court's invalidation of many such laws with that same intent.[4] A secondary question involved the degree to which the Court would examine the constitutionality of state "Jim Crow" laws, the reason for the NAACP's involvement in the Parker debate. And in the form of modern controversies over whether a nominee will, for example, vote to overturn *Roe v. Wade*, Judge Parker's opponents felt that only a personally like-minded Justice could ensure their desired outcome in labor and civil rights cases. Thus, just as in some modern judicial confirmation battles, which Supreme Court scholar Henry Abraham has likened to "emotion-packed, politicized drama[s],"[5] the Parker episode involved misrepresentations of the judge's record and apparently groundless accusations for the sake of achieving specific agendas.

Of course, one might argue that this trend toward ideologically oriented confirmation processes with a level of discourse equal to that of a crass political campaign instead commenced with Woodrow Wilson's nomination of Louis D. Brandeis to the Court in 1916. Numerous business interests, angered by Brandeis's support of such causes as trade union rights and antitrust regulation, pressured Senators to oppose a nomination that was to guarantee one more Court vote in favor of the Wilson administration's generally progressive economic program.[6] But the fact that the Parker controversy constituted the first time the Senate actually rejected a Supreme Court nominee under such politically charged circumstances—albeit a nominee who would likely have differed from Brandeis philosophically as a Supreme Court Justice—arguably makes it, rather than earlier confirmation battles, the definitive event that set forth the overall thematic context underlying the contemporary judicial nomination scene.[7]

Criticism by the NAACP helped torpedo Judge John Parker's nomination to the Supreme Court, but the allegations against the moderate Southerner focused on a single racist remark he made during an unsuccessful gubernatorial campaign in 1920. Above, NAACP members picketed the practice of lynching, an underprosecuted crime in many southern states in the 1930s.

Whether one views the Parker nomination as a singularly seminal event or as the end of a process of change in how the Senate considered presidential judicial nominees, it certainly remains a significant point in the history of the American judiciary. Simply put, when the Parker controversy ended, the legislative branch's "politicization" of the government's third branch had reached new heights and set a precedent for the judicial confirmation battles, primarily involving but by no means limited to the Supreme Court, that became commonplace in the latter half of the twentieth and beginning of the twenty-first centuries.

The Parker Confirmation Battle's Context

In 1930, the United States was a country characterized by the Great Depression's economic chaos and the resulting unemployment and homelessness that ensued. In addition to the era's rampant labor unionism in the wake of mass layoffs, the Depression's disproportionate effect on African Americans presaged the popular racial tensions and civil rights movement to come. In **Simple Justice**, his classic work on the drive to desegregate the public school system, Richard Kluger notes how the first sectors of the economy to contract included the household and personal services industries, as well as those involving the extraction and processing of raw materials—areas employing the vast majority of African-American men and women. By 1935, approximately sixty-five percent of African Americans needed some sort of public assistance.[8] These were only a few of the socioeconomic changes beginning during the 1920s that, as Kluger states, "had all but compelled massive governmental monitoring of industry's predatory instincts, which, left largely untended thanks in no small measure to the Court's past decisions, had contributed importantly to the national crackup."[9]

Whether Kluger fairly characterizes the Court's jurisprudence during that time certainly remains debatable, but the majority of the Court definitely stressed the concepts of limited government and federalism in its decision making, even when it struck down legislative restrictions on morally questionable activities. In *Bailey v. Drexel Furniture Company*, the Court precluded Congress from attempting to effectively ban child labor by imposing an excise tax on goods manufactured under such circumstances.[10] Earlier, in *Truax v. Corrigan*, the Court invalidated a Clayton Antitrust Act prohibition on injunctions against labor picketing, reasoning that even peaceful picketing might deprive business owners of their rights to the free use of their property that the Fourteenth Amendment guaranteed.[11]

Chief Justice William Howard Taft wrote both decisions. And yet, Taft was by no means the most vehement opponent of such pro-labor government regulations. That distinction, as evidenced in the Court's ban on minimum wages for women and children in *Adkins v. Children's Hospital*,[12] belonged to the more ideologically conservative "Four Horsemen"—George Sutherland, Pierce Butler, Willis Van Devanter, and James McReynolds—each of whom adhered to a view of certain labor laws as the sort of "meddlesome interferences" the Court had highlighted in *Lochner v. New York*.[13] With Taft and Justice Edward Sanford assuming only somewhat more moderate stances on these sorts of issues, opponents of allegedly unchecked free enterprise could solely count on the more centrist Justice Harlan Fiske Stone, the liberal idol Justice Brandeis, and the aging but legendary Justice Oliver Wendell Holmes. When Taft resigned in 1930, dying soon thereafter, he left behind an institution that one Senator accused of "fixing policies for the people . . . when they should leave that to Congress" and that another called "the economic dictator of the United States."[14]

President Hoover's response to these criticisms was to nominate Charles Evans Hughes to lead the Court. Hughes was a former public servant who had earned labor interests'

revulsion because of his current employment as a Wall Street corporate lawyer.[15] In the end, the Senate chose to confirm the distinguished former Secretary of State, Governor of New York, and Supreme Court Associate Justice. Most of the Taft Court's opponents in the Senate reserved their vitriol for Hoover's choice to replace Justice Sanford, who also died that year—a young federal appellate judge from North Carolina named John J. Parker.

Parker's Ascent to the Bench

Born in the working-class town of Monroe, North Carolina, John Johnston Parker was the paternal grandson of a Confederate soldier killed in the battle of Chancellorsville. His mother, a music teacher and daughter of an Episcopal minister, traced her ancestry to such prominent North Carolinians as Abner Nash, Governor of North Carolina in 1780, Samuel Johnston, Governor of North Carolina in 1787, and James Iredell, who served on the U.S. Supreme Court from 1790 to 1799. But in spite of this distinguished lineage, the Parker family lived in tight economic circumstances. Young John Parker took his first job in his father's meat market at the age of 13 and later worked in a series of odd jobs.[16]

These challenges did not faze the future judge, a serious and opinionated student whom his brother later called a "lawyer, even as a boy."[17] His mother instilled in him a lifelong love of learning and religious devotion. It was this industriousness that allowed him to graduate from the University of North Carolina at Chapel Hill as a member of Phi Beta Kappa while having worked his way through school by selling suits for a Baltimore clothing store. A personally likable and genial fellow, Parker was elected class president by his classmates in both their freshman and senior years. Nonetheless, Parker demonstrated a maverick individualism that was to characterize his later political career. Unlike what one might expect of most ambitious young men seeking to make beneficial social connections for the future, he rejected membership in the university's honor society, the Order of the Golden Fleece, and in fraternities because of what he saw as their undemocratic selection procedures.[18]

Parker graduated from the university's law school with honors in 1908 and took a job with a small law office in the much larger North Carolina city of Greensboro. Politics, however, interested him more. Combining his drive with his willingness to follow his own independent career path, he became active in Republican party affairs. Even though membership in the Republican party likely constituted political suicide for an aspiring officeholder in early twentieth century, yellow dog Democrat North Carolina, Parker became impressed with the national Republican platform of enhancing nationwide economic strength through minimal government regulation.

In 1910, at the age of twenty-five, Parker ran unsuccessfully for the U.S. House of Representatives. Six years later, he sought election as state attorney general. And in 1920, he earned more votes than any Republican who had previously run for the state governorship, though he ultimately did not win a term in Raleigh. Yet in spite of all these failed efforts, Parker's work on his party's behalf brought him to the attention of top officials in the administration of President Warren Harding, who took office the following year.

In 1922, Parker, who had also established a reputation as one of the state's best-known litigators, accepted a partnership with a law firm in Charlotte. Impressed by Parker's rapid professional ascent, administration officials sounded him out regarding an appointment to the federal district bench, which he declined for sheer lack of interest. President Calvin Coolidge's later offer of a seat on the Fourth Circuit Court of Appeals, which at the time had only three judges to cover the states of West Virginia, Maryland, Virginia, and North and South Carolina, proved far more appealing, with its greater opportunities to engage the law on more theoretical and intellectual levels—a

revulsion because of his current employment as a Wall Street corporate lawyer.[15] In the end, the Senate chose to confirm the distinguished former Secretary of State, Governor of New York, and Supreme Court Associate Justice. Most of the Taft Court's opponents in the Senate reserved their vitriol for Hoover's choice to replace Justice Sanford, who also died that year—a young federal appellate judge from North Carolina named John J. Parker.

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strong attraction for a man who enjoyed reading Scripture in ancient Greek. Parker took office in 1925 and, as was the time's practice, rode circuit with his colleagues.[19]

Judge John J. Parker's opinions became acclaimed throughout the bar for their combination of sound legal reasoning with clear and concise writing. The judge's civility and fairness impressed lawyers who appeared before him. Only five years later, he had risen to the position of acting chief judge and had definitely established himself as a distinguished federal jurist. And yet, Judge Parker retained a modest and humble demeanor in spite of this quick rise to prominence, endearing him even to those who disagreed with him judicially and politically. A man who read his hometown newspaper throughout his life and visited his immediate family in Monroe on every possible occasion, he remained a man equally "comfortable in the world" and "really at home in the region of his birth."[20]

The death in 1930 of Justice Sanford, a Tennesseean, opened what some legislators and policymakers viewed as a "Southern seat" on the Supreme Court. President Hoover had dented the Democratic party's firm grip on the South by carrying North Carolina in the 1928 presidential election, making such Southern Republicans as Parker just the sorts of officeholders to whom party leaders wished to give a high profile. In turn, many North Carolina officials and prominent citizens, regardless of political affiliation, were eager to see a favorite son on the Court. North Carolina Republican Congressman Charles Jonas led efforts on Parker's behalf in Washington, D.C., with ten Southern Democratic Senators and seven Southern Democratic governors contacting President Hoover in support of the judge. Of course, Parker did not engage in any activity that one could have considered "campaigning" for the seat, even though he did send letters of appreciation to those pressing his case.

Attorney General William Mitchell recommended Parker to President Hoover as an eminently qualified candidate with sterling academic and career credentials, as well as strong bipartisan backing that would presumably ensure a smooth confirmation process. Politically, a Parker appointment promised to capitalize on the Republican party's increased strength in the South and in the states of the Fourth Circuit, from which a Supreme Court Justice had not hailed since the Civil War.[21] Hoover formally nominated Parker to

Judge Parker was photographed leaving the White House in 1930. The young appellate judge from North Carolina was President Herbert Hoover's choice to succeed Justice Edward Sanford of Tennessee on the Supreme Court.

the Court on March 10, 1930, mentioning this same concern over Fourth Circuit representation on that body in a later press conference.[22] Routinely, the Senate Judiciary Committee assigned a subcommittee consisting of North Carolina Democrat Lee Overman, progressive Idaho Republican William Borah, and Rhode Island Republican William Hebert to study the nomination and make a recommendation for or against confirmation. But the praise from so many quarters garnered by Parker's nomination so impressed Overman, who received only one minor objection, that he announced his intention to not even hold a hearing on the nomination.[23] Enthusiastically looking forward to welcoming his probable future colleague, Chief Justice Hughes wrote to Judge Parker, "Congratulations, I look forward with the greatest pleasure to our collaboration."[24]

The Controversy Begins

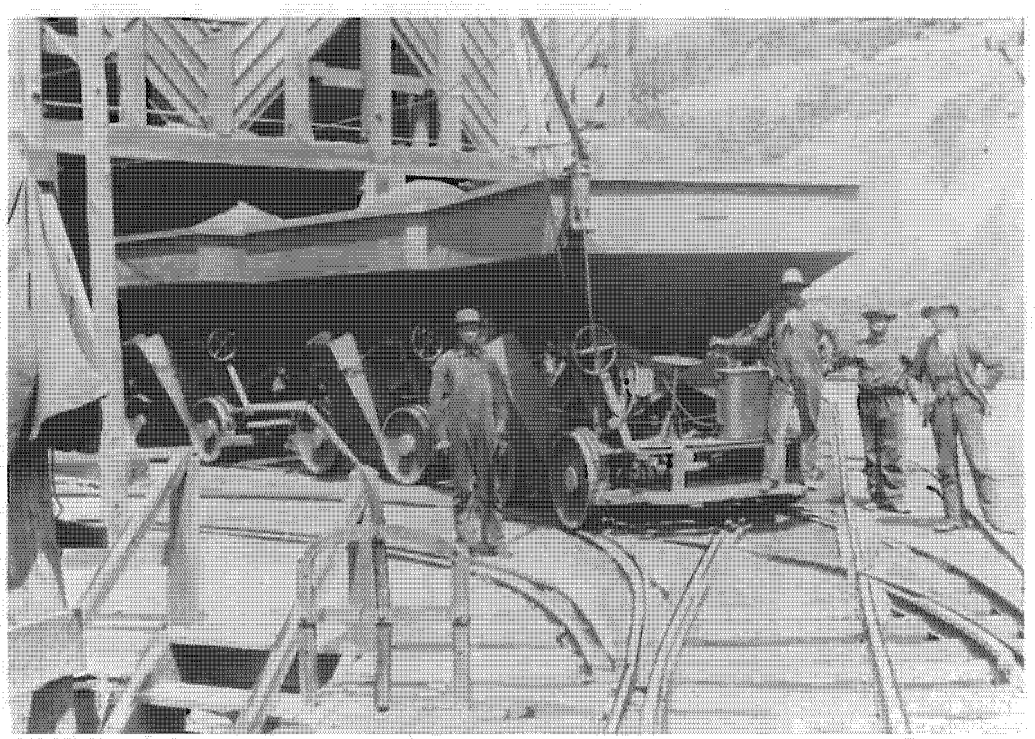
In a matter of days, the Parker nomination raised the ultimately consequential ire of organized labor and civil rights organizations that exercised influence among Senators from both parties. The reason for these groups' opposition was simple: ensuring that

President Hoover chose the eminently qualified Parker in part to capitalize on the Republican party's increased strength in the South and in the states of the Fourth Circuit, from which a Supreme Court Justice had not hailed since the Civil War. Above, Hoover and his wife received political big shots at a garden party.

the Supreme Court would not invalidate any future legislation favoring their interests. Influencing the Court's ideological balance was crucial to achieving any such goal.

Parker's "lively skeleton"[25] with respect to labor issues involved his 1927 opinion for the Fourth Circuit in *International Organization, United Mine Workers of America v. the Red Jacket Consolidated Coal and Coke Company*, which had dealt a significant blow to the United Mine Workers' (UMW) efforts to increase its membership among West Virginia coal miners.[26] Red Jacket miners had long been subject to "yellow dog contracts" with their employer wherein they promised not to join unions. Such agreements prevented miners from benefiting from any UMW collective bargaining on coal miners' behalf. Nonetheless, because of the union's natural interest in increasing its membership, UMW representatives launched an extensive campaign throughout the 1920s, including interference in mining operations, to enlist these miners. Violence and unrest resulted, leading Red Jacket to successfully seek an injunction against further UMW organizing efforts, an order the Fourth Circuit upheld in an opinion Parker wrote.[27] Thus, at the requests of AFL President William Green and the UMW's iconic leader, John L. Lewis, numerous protests poured into every Senator's office upon Parker's nomination, leading Senator Overman to change his mind and hold a hearing.[28]

In fact, the legal issues underlying *Red Jacket* really had not revolved around the question of whether yellow dog contracts were proper or not. Even though Green opposed Parker because of his fear that the judge personally saw such agreements as just, the opinion's analysis actually reveals no such



A 1927 opinion by Parker on the legality of yellow-dog contracts gave the United Mine Workers ammunition to label him as anti-labor. But his opinion did not actually uphold such contracts, which forced the worker to pledge not to join a union as a condition of employment. Above, miners filled a rail car with coal in Bluefield, West Virginia.

sentiment if one feels that Parker correctly restricted his focus to applicable law without regard to the results that would follow. Indeed, at one level, Parker's analysis actually favored the concept of organized labor. Citing the Clayton Act's provisions excluding labor from antitrust laws, he stated:

> [The UMW does not constitute] an unlawful conspiracy in restraint of trade and commerce because it embraces a large percentage of the mine workers of this country or because its purpose is to extend its membership so as to embrace all of the workers in the mines of the continent. It may be conceded that the purposes of the union, if realized, would affect wages, hours of labor, and living conditions, and that the power of its organization would be used in furtherance of collective bargaining, and that these things would incidentally affect the production and price of coal sold in interstate commerce. And it may be conceded further that by such an extension of membership the union would acquire a great measure of control over the labor involved in coal production. But this does not mean that the organization is unlawful.[29]

Parker cited Supreme Court precedent to a similar effect.[30]

Nonetheless, in regard to whether a union could induce nonunion members to break a yellow dog contract with their employer, Parker was bound by the Supreme Court's decision in *Hitchman Coal & Coke Company v. Mitchell;* a case with similar facts in which the Court also prohibited unions from inducing workers to break yellow dog contracts through peaceful persuasion.[31] Parker wrote:

> To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership is one thing. To approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them, in violation of their contracts, to join the union and go on a strike for the purpose of forcing the company to recognize the union or of impairing its power of production, is another and very different thing. What the [injunction] forbids is this "inciting, inducing, or persuading the employees of plaintiff to break their contracts of employment"; and what was said in the *Hitchman* case with respect to this matter is conclusive of the point involved here. [32]

Red Jacket, then, constituted nothing more than a mechanical application of binding law on Judge Parker's part. Unfortunately for the judge, however, Green would not come to sympathize with these circumstances.

The race issue left Parker far more vulnerable to attack and eventually combined with the AFL campaign to destroy his Supreme Court hopes. But why did the NAACP, at a time of such travesties as lynching and average African-American living conditions almost no better than those under slavery, choose to concern itself with a few comparatively innocuous remarks Parker had made earlier? Parker's background was not that of a rabid segregationist by any means. Indeed, according to Parker's only biographer, William Burris, Parker had been a "friend to blacks on a personal basis" and defended African Americans' right to vote on numerous occasions.[33] And never mind his committing political suicide by joining the Republican party—the party of Lincoln and the Union—in a Democrat-dominated state where Civil War memories were still fresh in many people's minds.

But the class-based strictures that characterized contact between the races in the America of 1930—namely in how most African-Americans worked in the household

and personal service sectors[34]—extended to Supreme Court Justices as much as they did to so many other segments of the white population. The idea of personally viewing African Americans as equals remained alien even to prominent citizens later hailed as "liberal" or "progressive" in matters of politics, race, or class. The Court, then, certainly could have potentially struck down NAACP-supported legislation, because the bigoted and anti-Semitic Justice McReynolds[35] would likely have compounded most of his Brethren's skepticism toward any perceived use of law as a tool for social change on the government's part. Going beyond legal philosophy to personal views, however, McReynolds was not the only Justice the NAACP had to fear. Even Justice Holmes had written and spoken of his belief in social Darwinism and in the need to preserve an aristocracy and, as his biographer Sheldon Novick noted, the "art, gentility, and aspirations" that class of individuals represented.[36]

Both of these Justices—ideological opposites—held personal views, one based more on race and the other on class, that were completely anathema to the fundamental egalitarianism upon which the civil rights movement was founded. Consequently, the NAACP did not really face a Supreme Court of jurists who were truly sympathetic to its goals on a personal level. One more Justice even remotely hostile to the needs and goals of the civil rights cause would likely hamper the movement's nascent struggle even further An uphill and long-shot nomination opposition campaign, then, could conceivably educate the public about the movement's moral underpinnings. Under these circumstances, Walter White, the longtime NAACP executive secretary of partial African ancestry who had chosen to live life as a black man in spite of his blond hair, blue eyes, and light skin, ordered an investigation into Parker's background.

Parker's record on civil rights cases did not present cause for concern. In a recent case, *City of Richmond v. Deans*, he and his colleagues had ruled in favor of an African-American resident of Richmond, Virginia who had contested a city ordinance prohibiting him from purchasing a home in a white neighborhood.[37] The facts of that case resembled those in *Buchanan v. Warley*, in which the Supreme Court held that such a regulation did not constitute a legitimate exercise of a state's police power and thereby violated the Fourteenth Amendment's preclusion of state interference with property rights without due process of law.[38] Following the lead of *Red Jacket*, Parker and his colleagues simply applied binding law, this time in a two-paragraph *per curiam* opinion.

But one statement Parker had made during his gubernatorial campaign heightened White's fears. Parker had addressed a state Republican convention as the candidate for a party whose Democratic opponents had often criticized its comparatively progressive history on matters of race.[39] Forced by stubborn political realities to mitigate this perception, candidate Parker tempered his apparent personal lack of animosity towards African Americans with support for a state constitutional amendment that would add a "grandfather clause, which restricted voting rights to individuals eligible to vote when the Fourteenth Amendment was enacted in 1867," to the state's election laws.[40] He said:

> The Republican Party of North Carolina has accepted the amendment in the spirit in which it was passed and the Negro has so accepted it. I have attended every state convention since 1908 and I have never seen a Negro delegate in any convention that I attended. The Negro as a class does not desire to enter politics. The Republican party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development where he can share the burden and responsibility of government.

Immediately thereafter, he tried to moderate his tone by criticizing opponents who had

sparked racial tensions in the campaign. Yet the way in which he tried to portray himself as a man who meant African Americans no real harm, even if his intentions were indeed benign, would likely be called condescending at best by today's standards. He continued:

> This being true, and every intelligent man in North Carolina knows it is true, the attempt of certain petty Democratic politicians to inject the race issue into every campaign is most reprehensible. I say it deliberately, there is no more dangerous or contemptible enemy of the state than the men who for personal or political advantage will attempt to kindle the flame of racial prejudice and hatred. The participation of the Negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.

White sent Parker a telegram asking him to explain the statement and whether he still felt the same way. Fatefully, and perhaps foolishly, Parker failed to respond, and the NAACP announced its opposition to his nomination.[41]

The Committee Hearings

In the face of the momentum the AFL and NAACP protests generated, Senator Overman reversed himself and decided to hold subcommittee hearings on the Parker appointment. Judge Parker, following his home state Senator's advice to make no comments on his nomination unless the Senate requested him to do so, did not attend.[42]

Upon opening the hearings on April 5, Overman entered into the record numerous letters and news editorials supporting Judge Parker. Some of these letters and articles even came from North Carolina union officials who had defied their national organizations' positions by supporting the nomination, including one Brotherhood of Railway Trainmen member who cited Parker's representation of labor groups during past "car strike troubles" in Charlotte[43] and one former president of the North Carolina Federation of Labor who said no man was "closer to labor" than Parker.[44]

Green, however, had obtained permission to testify before the subcommittee and was ready with a response. Reciting a litany of national labor organizations opposing the Parker nomination, the AFL president certainly surprised no one with his position against yellow dog contracts. But Green simply disregarded the notions that Supreme Court precedent had really bound the judge and that Parker could certainly have harbored more sympathy for the labor cause than the level for which organized labor leaders gave him credit. Green said:

> Labor firmly believes that those who are appointed to serve as members of the Supreme Court of the United States should possess a knowledge and understanding of modern day economic questions, of human relations in industry, and should possess a trained mind sympathetic towards the hopes and aspirations of the masses of the people . . . Our action in opposing the confirmation . . . of Judge Parker is based upon . . . his qualifications, his life's environment, his point of view regarding human relations in modern industry, and his judicial attitude toward economic and industrial problems which seriously affect the material and moral well-being of working men and women as shown by the decision . . . in . . . *Red Jacket*.[45]

Green seemed to imply that Parker should have acknowledged the unconscionable result of upholding a yellow dog contract and just refused to sanction such an outcome. The judge's refusal to do so, then, made him unfit for higher judicial office. The AFL president continued:

> It will be no doubt alleged by the friends of Judge Parker that his decision was based upon a rule laid down

> by the Supreme Court . . . 13 years ago. Since that time many economic, industrial, and social changes have taken place . . . [T]he late Chief Justice Taft had [concluded] that "yellow dog" contracts were inequitable and that employees subjecting themselves to the signing of such contracts did so under duress and compulsion . . . The significant fact connected with the opinion of Judge Parker . . . is not so much that he followed the decision of the Supreme Court . . . but that he has shown in the opinion that he is in entire sympathy and accord with the legal and economic policy embodied in the injunction . . . The appointment and confirmation of Judge Parker means that another injunction judge will become a member of the Supreme Court . . . As a result, the power of reaction will be strengthened, and the broad minded, humane, progressive influence so courageously and patriotically exercised by the minority members of the highest judicial tribunal in the land correspondingly weakened.[46]

Green later acknowledged Parker's extensive legal credentials. But he also called him a jurist lacking "wide experience in human affairs" who would be unable to "dissociate [himself] from a provincial environment and to possess a comprehensive understanding of human relations in industry . . . which have arisen out of the development of . . . modern . . . economic life."[47]

In an audacious move, Green even cited a number of state court cases in which he claimed that courts had refused to follow *Hitchman*, while not clarifying such important circumstances surrounding those matters as whether they simply concerned issues of state and not federal law, thereby making them inapplicable by themselves in the federal cases Parker heard. He also attempted to make a case that Parker had "gone far beyond the doctrine laid down by the Supreme Court"—that the judge, in other words, had misinterpreted precedent.[48] None of these attempts at legal analysis interested the subcommittee, leading Green to return to his policy-oriented arguments.

Green also attacked one of the union officers who had written in Parker's support, saying that the official "in no way speaks for labor" and had been "excommunicated from membership in [his] organization because of some violation of its rules." Yet Green did not elaborate.[49] He simply concluded by expressing his desire to add to the Court "the strength and purpose and hand and mind and brain of men like Justice Holmes, whom we love with all our hearts, and Justice Brandeis."[50]

The opposition to Parker did not end there. Further communications criticizing Parker included one letter from prominent Socialist Norman Thomas, who also criticized *Red Jacket* and wrote that "a great judge fit for the bench at this critical time if he could not find a way around precedent would have found a way to dissociate himself from apparent moral approval of it."[51]

For Parker's supporters, the hearing then took a hopeful turn. E. C. Townsend, the lawyer who had represented the UMW in the *Red Jacket* case, summarized the legal issues the dispute had presented, clarifying how the validity of yellow dog contracts did not constitute the matter's central question.[52] *Hitchman* had indeed bound Judge Parker, a man who had otherwise indicated no hostility towards organized labor in general and whom even Townsend felt should be confirmed.[53] Green objected, stating that Townsend in no way represented the AFL.[54]

Overman responded by allowing one H. E. Fish, identified as an ex-business agent of the Washington, D.C. chapter of Hoisting Engineers, Local 77, to testify. Fish had merely shown up at Overman's office that morning to leave a letter with the senator. Printed into the

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QUIZDEX FOR THIS ISSUE

YOUNGEST SUPREME COURT JUSTICE

Associate Justice John Johnston Parker of North Carolina, who succeeds the late Justice Edward T. Sanford to the high bench, is only 44 years old. (See page 11)

PUBLISHED AT THE HEART OF THINGS

PATHFINDER PUBLISHING CO., 2414-16-18 DOUGLAS ST., WASHINGTON, D. C.

This journal emphasized that Parker, age forty-four, would, if confirmed, become the youngest Justice on the Bench. The insistence on his youth reflected concerns that many Justices were in their seventies.

record, the letter detailed a systematic and intimidating campaign of micromanagement by the national AFL office, at Green's direction, that sought to foster local chapters' compliance with all of the union leadership's positions and policies. Fish, it turned out, had consequently been expelled from an AFL member organization, the International Union of

Operating Engineers.[55] Overman recognized that organization's president, Arthur Huddle, who simply depicted Fish as a "Bolshevik" and a troublemaker who had filed numerous frivolous lawsuits against the union.[56]

Then, in a final turn for Parker's worst, Overman recognized White. Referring to Parker's controversial comments during his gubernatorial campaign, White mentioned that he had received no reply to his inquiry as to whether the judge still held similar feelings.[57] White then stated the NAACP's position on the nomination:

> The [NAACP] is convinced that no man who entertains such ideas of utter disregard of integral parts of the Federal Constitution is fitted to occupy a place on the bench of the United States Supreme Court. Twelve million American negroes and all white Americans who have a regard for law and order [condemn] . . . an attitude which indicates a willingness to support some laws and to disregard others when political expediency dictates.[58]

Upon Senator Borah's questioning, however, White indicated that he knew nothing about Parker indicative of personal racist sentiments except that one campaign statement. He also admitted that NAACP officials had not even heard of Parker, in fact, until President Hoover nominated him to the Supreme Court.

In defense of his state's native son, Overman asked White some questions pertaining to the state of race relations in North Carolina compared to other "Jim Crow" states. White admitted that the state had "made more rapid progress toward fair treatment of the negro than any other Southern state." But he refused to agree with Overman's claims as to Parker's support from African-American voters in the 1920 gubernatorial election.[59]

The hearing's last witness, one Mercer G. Johnson of a group called the People's Legislative Service, outlined his view of yellow dog contracts' basic cruelty and how Parker possessed an "Egyptian darkness of the mind" in having upheld them in *Red Jacket*.[60] On that note, the hearing ended, and the subcommittee ended up recommending confirmation by a vote of two to one, with Senator Borah, once a Parker supporter, casting the lone negative vote.[61] The Parker nomination had become an event unprecedented in legal history in terms of the popular interest aroused in a Supreme Court appointment.

According to Overman, the Judiciary Committee's deliberations on April 21 were tense and extensive. The Committee rejected Overman's attempt to convince it to hear testimony from Parker in person. Finally, by a vote of ten to six, the Committee recommended against confirmation. Six Republicans and four Democrats, all from the Midwest and West, voted against the judge.[62] President Hoover's hope to place his first choice on the Supreme Court was now in jeopardy.

The Senate Debate and Vote

As the Senate began to debate the Judiciary Committee's recommendation on April 28, Senator Overman, increasingly determined in the face of mounting opposition, strongly defended his constituent. Introducing a letter Parker had written him, the Senator read the judge's first public response to the two organizations leading the fight against his elevation to the Court. Regarding the AFL's criticism of the *Red Jacket* decision, Parker argued:

> My answer to the charge of the labor people is that I followed the law laid down by the Supreme Court. This, I think, has been demonstrated in memoranda filed with the Judiciary Committee . . . It is, of course, the duty of the judges of the lower Federal courts to follow the decisions of the Supreme Court. Any other course would result in chaos . . . In view of this it must be obvious to anyone that

> as a member of the court in the *Red Jacket* case I had no latitude or discretion in expressing any opinion or views of my own, but was bound by these decisions to reach the conclusion and to render the decision that I did.[63]

Of course, this argument was no different from his defenders' claims. Parker continued to address the NAACP's fears of hostility to civil rights claims:

> The protest of the colored people seems to be based upon the fear that I might not enforce the provisions of the Constitution in so far as [it] guarantees their rights. Needless to say such fear is entirely groundless. I regard the Constitution and all of its amendments as the fundamental and supreme law of the land, and I deem it the first duty of a judge to give full scope and effect to all of their provisions. In the discharge of my duties as circuit judge I have never hesitated, I hope and believe, to meet this obligation in the fullest degree. The effort to interpret some statements alleged to have been made 10 years ago in a speech in a political campaign as indicating a contrary disposition is wholly unjustified. My effort then was to answer those who were seeking to inject the race issue into the campaign under a charge that the Republican Party of North Carolina intended to organize the colored people and restore the conditions of the reconstruction era. I knew the baneful effect of such a campaign and sought to avoid it. For years the best men of both races in the State had been seeking to create friendly sentiments and peaceful relation between the races; and I did not want their efforts to be sacrificed or the party whose nominee I was to be embarrassed by the raising of a false issue of this character.[64]

Parker concluded by denying any racist attitudes on his part:

> Let me say that I have no prejudice whatever against the colored people and no disposition to deny them any of their rights or privileges under the Constitution and the laws. I think that my record as a judge of the United States circuit court of appeals, in a circuit where many of them reside, shows that I have no such prejudice or disposition.[65]

At Overman's request, the Senate clerk then read a number of nomination endorsements out loud, including letters from Fourth Circuit district judges, a Fourth Circuit colleague of Parker's, the president and faculty members of Parker's alma mater, the University of North Carolina, and past and present leaders of the American Bar Association.[66]

Calling Parker "a man of courage, a man of character, [and] a man of supreme ability," Overman began the afternoon debate session by describing the judge as a man who could harbor no ill will against those individuals comprising the AFL and NAACP constituencies, on account of being a basically self-made man himself. The senator stated:

> How could the trend of this man's mind be in favor of the corporations and against humanity? The whole life and environment of the man has been among the plain people. Judge Parker loves the plain people; he has worked for them; his practice has been among them; and he has never represented any of the great corporations. The whole trend of his mind is, therefore, bound to be in favor of humanity and against the corporations, if there be any such distinction.[67]

The senator cited Parker's bipartisan support as a Republican from a state Democrats

dominated, even noting letters received by his office from dissenting AFL members. One railroad worker had called Parker an "able jurist" who "always remembers his friends whether in overalls or in the highest executive of the largest corporation."[68]

And Overman did not ignore the race issue. He claimed that Parker's ability to gain more votes than any other Republican gubernatorial candidate stemmed from strong African-American backing.[69] Overman tackled the NAACP's charges of racism by introducing letters from a "leading" African-American physician in Salisbury, North Carolina, attesting to the judge's "spirit of fair play in all his dealings with our race."[70] An African-American educator in the same town stated that "the white people" had not attempted to "intimidate" the African-American community into supporting Parker. And as for Parker's "unpleasant utterances with reference to the colored franchise" while seeking the governorship, they were "simply a political gesture and by no means represent[ative] [of] the true spirit of the gentleman and jurist."[71]

None of this support convinced Senator Borah to change his mind when he rose to speak later that day. Over the course of a number of hours spanning two days, Borah passionately spoke against the *Red Jacket* decision and the very concept of yellow dog contracts. The most revealing part of his speech was his description of how he felt Parker should have approached the prospect of following the applicable Supreme Court precedent:

> The entire controversy, so far as the law is concerned, seems to hinge upon some isolated principle extracted from the common law. To apply the principles of the common law, the barren, naked, technical rules of the common law, which sprang up three and four hundred years ago under conditions in a business world which have passed away, and to refuse to consider the conditions in the business and the labor world as they are to-day, is to deny working men and women the right or the benefit of advance and progress. That which may have been a sound public policy, that which may have been for the public welfare in those times and under wholly different conditions cannot bind another age and a wholly different business and labor world.[72]

Here, then, was perhaps a precursor to later support for the judicial decision making approach known as pragmatism, or more derogatorily as judicial activism. What made Parker unfit for the Supreme Court in Borah's view was the former's firm belief in *stare decisis* and adhering to established case law without much regard to results.

For such senators as Ohio Republican Simeon Fess, a professed opponent of yellow dog contracts, this was a judge's appropriate function:

> I should not hold [Judge Parker] responsible for deciding within the law, in accordance with the terms of the law, although had I been making the law in the outset I might have been strongly opposed to such a contract as, indeed, I would have been . . . I wish to say that all my sympathies are against the final decision. But judgments cannot be rendered upon mere sympathy.[73]

Other senators, however, displayed no shame in implying that judges could legitimately decide cases as veritable legislators, disregarding unfavorable precedents with attention to policy considerations and the like. One later exchange between Kansas Republican Henry Allen and the more progressive Nebraska Republican George Norris, the Judiciary Committee chairman, remains quite revealing to this effect. Senator Norris said:

> I am frank to admit that I want to see men put on the Supreme Bench who have modern ideas and who are

> not so encrusted with ancient theories which existed in barbarous times that they are going to inflict human slavery upon us now.

Senator Allen asked, "By 'modern ideas' the Senator means his own ideas?" Norris nonchalantly responded, "I do, of course, mean my ideas." Allen continued:

> And the senator believes it is reasonable to set up a policy here that Senators should insist that no one be chosen for the Supreme Bench except those who have their ideas touching the policies which ought to govern our civilization?

Norris only retorted:

> I am not in favor of packing the Supreme Court with men who are in favor of enforcing contracts which, if carried to their logical conclusion, mean human slavery for every man who toils.

In sum, Norris stubbornly refused colleagues' attempts to explain why Parker ruled as he did, limiting himself to a more policy-oriented view of judges' duties.[74]

Throughout the debate, no one, either through letters or any other evidence, really offered any substantive proof of any lacking legal ability on Parker's part. Neither was Judge Parker immune to personal attacks. Alabama Democrat and future Supreme Court Justice Hugo L. Black highlighted one of the few anti-Parker newspaper editorials, which charged Parker with prosecutorial misconduct in trying a lumber fraud case for the government shortly after World War I. Parker had supposedly withheld definitive evidence of the defendant's innocence, a charge Overman disproved with a letter from the case's presiding judge.[75] Arizona Democrat Henry Ashurst did what even few of Parker's opponents had done and randomly claimed that Parker lacked the requisite experience and intellectual ability to sit on the Supreme Court.[76] Towards the end of the Senate debate, Ashurst also charged Parker with quietly participating in a scheme to bribe senators to vote for his confirmation, a charge later proven groundless on account of how the underlying information came from another senator and Parker opponent, Washington Democrat Clarence Dill.[77]

If there was one pertinent factor lacking in the Senate debate, it was the relative absence of any reference to the race issue, perhaps a reflection of African Americans' general lack of extensive political influence at the time. Only New York Democrat Robert Wagner, who opposed Parker, spoke at length about the NAACP's charges.[78] Yet the senators remained fully aware of the NAACP's increasingly influential campaign against the judge, prompting Senator Fess to lash out at its leaders. To Fess, W.E.B. Du Bois, editor of the NAACP publication *The Crisis* and a member of the organization's executive committee, was a "self-confessed Bolshevist." Field secretary William Pickens was a "communist and defender of communism." Chairman of the Board Mary White Ovington was a "socialist" who "promot[ed] the revolutionary spirit among negroes." Another future Supreme Court Justice, national legal committee member Felix Frankfurter, was a "well-known defender of revolutionary radicals."[79] Unfazed, the NAACP focused its campaign during the debate on organizing letter-writing campaigns to Senators from states with large numbers of African-American voters. One historian, Kenneth Goings, later estimated that the NAACP affected as many as thirteen senators' ultimate votes on the nomination.[80]

Because of the poisonous atmosphere the Parker controversy had wrought in the Senate's ranks, President Hoover even personally lobbied wavering Republican Senators, but to no avail.[81] Back and forth the Senators went, arguing over whether Parker should have ignored precedent and simply invalidated the injunction at issue in *Red Jacket*. When the debate ended on May 6, the Senate was divided, not across pure party lines, but mainly according

The highly contentious Parker nomination fractured the Senate. Progressive Republicans, such as William Borah of Idaho (above), were easily swayed by criticism from both the NAACP and the AFL.

to its members' respective needs to adhere to specific stances on either the labor or race issues, due to either deeply felt personal beliefs or the simple desire to ensure reelection by satisfying key constituencies.

The Senate gathered to vote on May 7. Onlookers jammed the Senate gallery to capacity. The controversy had aroused so much popular interest that members of the House of Representatives crowded the Senate chamber's aisles in order to witness the outcome of the most intense Supreme Court confirmation dispute to date.

And when the votes were tallied, Judge Parker's nomination failed by only one vote. Forty-one Senators had voted to reject Parker, while thirty-nine had supported his elevation to an Associate Justiceship of the United States Supreme Court. Had only one vote changed, Vice President Charles Curtis, in his capacity as president of the Senate, would certainly have changed the outcome. Not since 1894 had the Senate refused to advise and consent to a Supreme Court nomination. The Senators voting against Parker included a number who had initially supported his appointment but who had bowed to pressure from the AFL and NAACP campaigns. The vote cut across party lines, with seventeen Republicans joining twenty-three Democrats and one Minnesota Farmer Laborite in voting against the increasingly unpopular Hoover's wishes. Meanwhile, twenty-nine Republicans and ten Democrats supported Parker. All but one of these Democrats hailed from the southeastern United States.

For many Senators, the factor determining their vote had been, not their personal views, but rather the influence the AFL and NAACP constituencies could potentially wield over their reelection prospects. And such constituencies easily won the sympathies of such progressive Republicans as Borah, Norris, and Wisconsin's Robert La Follette, who consistently earned the political enmity of the more ideologically conservative factions dominating their party.[82] It was these and other like-minded Republican Senators who really dashed Hoover's hope of obtaining unanimous Republican support and gaining political traction in the South by appointing a Southerner to the nation's highest court, leading the President to refer to them in his memoirs as "white mice."[83]

The Precedent

The Senate's rejection of Judge Parker constituted a seminal event in the history of Supreme Court nominations. In contrast to earlier

such appointments, single-issue ideological concerns, rather than more general partisan ones, came to dominate the confirmation process. Consequently, as the makeup of both Parker's support and his opposition in the Senate illustrated, party lines no longer mattered as much as the influence a specific interest group held over a given Senator's constituency. And these groups did not seem really to care about a prospective Supreme Court Justice's general judicial philosophy or qualifications, but only about the outcome in a potential dispute concerning a "pet" issue that that same philosophy would bring about given the presence of enough votes on the Court.

Before the Parker nomination, the Senate had refused to approve presidential Supreme Court nominations nine times throughout its entire history, occasions really more reflective of partisan rivalry than later ideological concerns.[84] As the nineteenth century came to a close, however, popular tensions between differing social and economic worldviews became more pronounced, with such events as industrialization complicating the political scene. Within the Republican party, divisions developed between such progressives as La Follette, who expressed sympathy for the goals of organized labor, and his more corporatist colleagues. And Northern and Midwestern Democrats extended their party's traditional populism to include support for immigrant and civil rights interests, thereby going against most Southern Senators' will. No longer, then, would a Democratic or Republican Senate absolutely guarantee the confirmation of a Democratic or Republican President's Supreme Court nominee, respectively. Instead, a nominee's popularity would depend on how his particular judicial philosophy would affect Court rulings pertaining to the specific issues most important to every individual Senator.

President Wilson's nomination of Louis Brandeis to the Supreme Court demonstrated this new reality, with La Follette and two other maverick Republicans, Norris and Washington's Miles Poindexter, joining all but one Senate Democrat to confirm the famous Boston lawyer for various liberal or progressive causes.[85] Norris also joined five other Senators in going against a President from his own party and opposing the nomination of Harlan Fiske Stone, a "tool of the House of Morgan," in 1925.[86] And a similar progressive Republican coalition opposed the nomination of Charles Evans Hughes to the Chief Justiceship in 1930.[87] Thus, by the time Hoover nominated Parker, changes in the Senate's political dynamics had essentially set the stage for a more ideological and issue-driven confirmation battle.

A new Senate rule requiring consideration of presidential nominations in open executive session, which certainly enhanced the confirmation process's transparency to the public, also enabled outside interest groups with highly specific agendas to more effectively influence Senators' stands on Supreme Court nominees.[88] Upon Hughes's nomination, then, confirmation hearings had become more public affairs, with Senators receiving constituent concerns about nominees in the same manner as they did opinions on legislation. The Parker nomination consequently constituted the first occasion on which issue-driven lobbying groups launched a successful campaign to reject a Supreme Court nominee, not because of the judge's judicial philosophy and legal acumen, but as a result of how the same philosophy—divorced from any personal sympathies—would lead to undesired outcomes in given legal disputes in which they had an interest.

At no time during the Parker controversy did the AFL's leaders acknowledge the propriety of referring to precedent in judicial decision making, the quintessentially lawyerlike approach that had led Judge Parker to rule as he did in *Red Jacket*. Apparently, such labor leaders as the AFL's Green and the UMW's Lewis would have rejected any judge who would have upheld yellow dog contracts' validity, even if case law mandated such an outcome. What

mattered to them were the results of a dispute, and not abstract questions of law, making the Supreme Court—and, indeed, the entire federal judiciary—no different from a legislature in their view.

NAACP leaders felt similary. Ignoring Parker's decision in *Deans*, the NAACP simply assumed that Parker's personal racial attitudes—if they could even be called racist in the first place—would trump precedent's influence. They saw Parker, not as a judge who would follow the law as it was written, but as an official whose willingness to basically make new law consistent with the NAACP's interests could not be guaranteed.

Thus, the Parker controversy definitively outlined a central possibility that Presidents face to this day in nominating individuals for federal judgeships: a series of interest groups pressuring Senators from states where they hold the most sway to abandon their parties and vote to ensure the outcomes these same organizations seek to achieve in future cases. With the Parker controversy, questions of legal ability became, for the most part, irrelevant. As Professor Burris noted, the Parker vote "was merely a small skirmish in a much larger political struggle over the proper functions of government in a changing society," with Parker himself becoming "a casualty in the head-long rush of . . . groups to gain objectives that were more important to them than a fair and balanced evaluation [or a basic partisan one] of a relatively unknown federal judge."[89]

If there was any casualty resulting from this new approach to confirming Supreme Court nominees, perhaps it was the ideal of the Court itself as an august body above the political and ideological fray. After the Parker nomination, similar disputes became more commonplace, from the fight over Franklin Roosevelt's Court-packing plan to myriad special interest groups' descent on Washington, D.C. to ensure a desirable Court makeup after the nominations of such controversial individuals as Clement Haynsworth and Robert Bork. It is perhaps fair, then, to call the Parker episode the first Supreme Court nomination that truly ensured more future ones involving the kind of drawn-out, tense Senate confirmation process that has become a staple of the contemporary American government scene.

* * *

Judge Parker's eminence as a jurist in the years following his rejection until his death in 1958 is notable. Supporters often proposed Parker's name to the White House as a potential Justice during the Roosevelt, Truman, and Eisenhower administrations. Perhaps more than any other unsuccessful Supreme Court nominee, the perceived need to correct the supposed injustice done to him became a sort of *cause célèbre* among a number of prominent legislators and lobbyists.[90]

Parker distinguished himself not only as a judge, but also as a scholar and proponent of judicial system reform. In addition to his duties as the Fourth Circuit's chief judge, he published several articles in legal periodicals and made a number of well-received speeches to professional groups. He also sat on American Bar Association committees charged with exploring new court administration initiatives. To historians of the Allied war crime investigations following World War II, Parker is perhaps best known for his service as an alternate member of the International Military Tribunal for the Trial of Major War Criminals during the Nuremberg Trials.[91]

With all of these achievements, then, did the AFL and NAACP oppose the right man? Organized labor interests strongly supported Franklin D. Roosevelt's presidential candidacy and his New Deal. Unlike what Green and others concerned over *Red Jacket* would likely have predicted, Parker actually upheld many New Deal measures that the Court Roosevelt wanted to reform, or "pack," apparently threatened.[92]

Ironically, given the Senate debate's focus on labor issues, it is the NAACP to whom some historians have given the most credit for Parker's defeat.[93] And the issue of whether they appropriately prevented Parker's elevation to the Court remains more complicated because

Years after Judge Parker failed to ascend to the High Court, Walter White (left) of the NAACP publicly admitted that Judge Parker's decisions in "both Negro and labor cases which have come before him have been above reproach in their strict adherence not only to the law but to the spirit of the Constitution."

of the moral implications surrounding the civil rights debate. Certainly Parker was not a civil rights activist by any means, as his controversial gubernatorial election speech—even if made for the well-meaning purpose of encouraging calm in a time and place of great racial tension—illustrated.

Nevertheless, in all fairness, no one has produced evidence that Parker harbored any ill will toward individuals of different ethnic backgrounds. Parker enjoyed African-American support, both in politics and during his nomination battle, perhaps because of his membership in what a majority of African-American voters then identified as the party of Lincoln. Even Walter White later wrote, "In Judge Parker's behalf I should like to add this postscript: since his rejection, his decision on both Negro and labor cases which have come before him have been above reproach in their strict adherence not only to the law but to the spirit of the Constitution."[94]

Precedent, and not personal conceptions of justice, then, governed Parker's decision-making process. He invalidated a discriminatory housing ordinance in *Deans*.[95] He ruled in favor of an African-American Virginia schoolteacher suing for equal wages, consistent with Supreme Court doctrine precluding discriminatory state actions targeted on the basis of race.[96] Following the Court's invalidation of South Carolina policies denying African Americans the right to participate in parties' nominations of candidates as an unconstitutional state action in *Smith v. Allwright*, Parker wrote for a panel that precluded the state from holding primary elections restricted to white voters.[97] But he also followed the infamous decision of *Plessy v. Ferguson*.[98] When considering *Briggs v. Elliott*, one of the "separate but equal" schooling cases that accompanied *Brown v. Board of Education of Topeka* to the Supreme Court, Parker held that school segregation itself

did not violate the Fourteenth Amendment in principle, even though the school facilities at issue did.[99]

Perhaps one's view of Parker's approach to civil rights cases depends on whether one adheres to a more restrained, originalist or textualist approach to constitutional interpretation or a more pragmatic one. Goings, who cited the Parker battle as a key event in the development of the NAACP's political influence, wrote:

> At a crucial moment in American judicial history, and indeed, in the history of the United States, Parker chose not to fully support the highest court of the land after having done so in only a few notable exceptions all of his judicial life. By falling back on *Plessy* in the *Briggs* decision of 1951, Parker maintained his adherence to Supreme Court policy. Even though technically correct, as a learned, respected and active international legal scholar, Parker should have had no doubt that *Plessy* was wearing thin . . . [H]e was trying to soften the blow that *Brown* dealt the South. After *Brown* and *Brown II*, however, finding justifications for his actions became very difficult.[100]

Goings was responding to Parker's ruling in the third *Briggs* case, which nullified South Carolina school segregation laws in accordance with the *Brown* decisions. Parker had written:

> A state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.[101]

In interpreting *Brown* as narrowly as apparently possible, Goings claimed, Parker frustrated its "meaning and force."[102] Rightly or wrongly, then, Parker certainly was not a jurist interested in shaking up the status quo for its own sake.

Some individuals may feel that this reluctance placed Parker on the wrong side of justice and history. Others may feel he had no other choice as a judge. Thus, the debate over Judge Parker truly outlined to the general public for the first time the dispute over courts' proper role in determining law's course, which was to become a basic context for the modern judicial confirmation process. Parker's rejection made such concepts as originalism, pragmatism, and judicial activism a central focus in political disagreements following controversial Supreme Court nominations, several years before these terms even became a part of the media's lexicon. Parker died in 1958 with his reputation as a capable and competent jurist intact.[103] But the legacy of his unsuccessful nomination to the Court would be a judicial selection process that would never again be free of single-issue ideological considerations and numerous pressures on the President and Senate from interest groups on all sides.

*The author wishes to acknowledge the detailed research into Judge John J. Parker's life and career conducted by the late William

C. Burris, professor of political science at Guilford College (Greensboro, NC) and author of the only full-length biography ever written about the judge, upon which this article relied extensively.

ENDNOTES

[1]Laurence H. Tribe, **God Save This Honorable Court: How The Choice Of Supreme Court Justices Shapes Our History** (New York: Random House, 1985), p. 90.

[2]Originalism is the theory that the U.S. Constitution should be interpreted according to the Founding Fathers' intent regarding the given issue at hand.

[3]Legal pragmatism, placing each issue in the present context, weighs the results of all possible judicial interpretations, sometimes facilitating a decision that may not satisfy originalist criteria because of a perceivedly greater need to promote the public good.

[4]In his classic study of *Brown v. Board of Education* and the accompanying school desegregation cases, Richard Kluger estimates that the Court invalidated nineteen such laws during Chief Justice William Howard Taft's tenure (1921-1930). Richard Kluger, **Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Racial Equality** (New York: Alfred A. Knopf, 2004), p. 140.

[5]Henry J. Abraham, **Justices, Presidents, and Senators: A History of The U.S. Supreme Court Appointments from Washington to Clinton** (New York: Rowman & Littlefield, 1999), p. 299. Abraham used that phrase to compare the failed 1987 nomination of Judge Robert Bork to that of Louis D. Brandeis in 1916.

[6]*Id.*, pp. 135–138. Abraham provides an extensive summary of the Brondeis confirmation controversy.

[7]The Senate's nine previous rejections of presidential Supreme Court nominations stemmed, not from similar ideological considerations, but rather from basic partisan rivalry. Thus, in 1795, the Federalist-dominated Senate refused to elevate John Rutledge to the Chief Justiceship because he had opposed Jay's Treaty, an accord eliminating British control of posts in the U.S.'s Western territory, establishing American claims for damages stemming from British seizures of American ships, and defining terms for American trade in the West Indies, provisions the majority of the Senate had determinedly championed. A later Federalist Senate rejected James Madison's 1811 appointment of Alexander Wolcott because of its opposition to the nominee's acts as a Connecticut customs collector. In 1844, John Spencer had served in the cabinet of President John Tyler, unpopular in his own Whig party, thereby making Spencer a "traitor" in the eyes of Senator Henry Clay, a leader of Tyler's Whig opponents. In fact, the first time a single issue transcending overall partisan concerns significantly contributed to a Senate rejection of a Supreme Court appointment was in 1846, when Congressman George Woodward's "gross nativist sentiments," which particularly offended many Irish-American voters in his native Pennsylvania, led five Democratic senators to cross party lines and facilitate his Senate rejection.

Partisan concerns again became evident with James Buchanan's nomination of Secretary of State Jeremiah Black in December 1860, when Republican Senators blocked Black's confirmation in order to ensure a Court vacancy for the President's successor, Abraham Lincoln, to fill. Senate Republicans displayed similar hostility towards another Democratic president, Andrew Johnson, who unsuccessfully sought to place Attorney General Henry Stanbery on the Court in 1866. In fact, Professor Abraham concluded that Johnson could have nominated "God himself" and still failed, illustrating the unpopularity evident in the President's impeachment battle. Ulysses Grant's 1869 nominee, Attorney General Ebenezer Hoar, had gained Senators' enmity through his steadfast advocacy of civil service reform and abolition of patronage in government appointments. For fellow Republicans, Hoar's defense of the impeached Johnson, a Democrat, was the final straw that led them to join his other opponents in denying him a Court seat. And the longstanding tradition of senatorial courtesy—obtaining the approval of nominees' home-state Senators from the nominees' own party—played a role in Grover Cleveland's failed nominations of New Yorkers William Hornblower and Wheeler Peckham in 1894, whom New York Democratic Senator David Hill refused to endorse. Cleveland had refused Hill's own request for the vacant Justiceship. *See* Abraham, *supra* note 5, pp. 29-30, 53, 66, 79, 86, 93, 95-96, 108.

[8]Kluger, *supra* note 4, p. 139.

[9]*Ibid.*, p. 140.

[10]*Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). The Court ruled that the 1919 Child Labor Tax Law, which imposed an excise tax of ten percent on the profits of companies employing children, effectly constituted a penalty and regulation on business, thereby violating the Tenth Amendment by intruding on a matter more properly left to the States to resolve.

[11]*Truax v. Corrigan*, 257 U.S. 312 (1921).

[12]*Adkins v. Children's Hospital*, 261 U.S. 525 (1923). The Court viewed the regulation at issue as an unconstitutional infringement on freedom of contract under the Fifth Amendment.

[13]*Lochner v. New York*, 198 U.S. 45 (1905) (referring to the bakery-work-hour limitations invalidated).

[14]Clare Cushman, ed., "History of the Court: The Taft Court, 1921–1930," *available at* http://www.supremecourthistory.org/02_history/subs_history/02_c10.html (last visited Jan. 5, 2007).

[15]Kluger, *supra* note 4, p. 140.

[16]William C. Burris, **Duty and the Law: Judge John J. Parker and the Constitution** (Bessemer, AL: Colonial Press, 1987), pp. 10–13. This appears to be the only full-length biography of Judge Parker ever published.

[17]Samuel Iredell Parker, quoted in *ibid.*, p. 13.

[18]*Ibid.*, pp. 14–21.

[19]*Ibid.*, 33–71; *see also* Kluger, *supra* note 4, p. 141; Kenneth W. Goings, **The NAACP Comes of Age: The Defeat of Judge John J. Parker** (Indianapolis, IN: Indianapolis University Press, 1990), pp. 21–24; "Remembering The Fourth Circuit Judges," 55 *Wash. & Lee L. Rev.* 471, 503–504 (Spring 1998); Peter G. Fish, "A 'Freshman' Takes Charge: Judge John J. Parker of the United States Court of Appeals, 1925–1930," 10 *Journal of Southern Legal History* 59–65 (2002).

[20]Burris, *supra* note 16, pp. 31–32; Fish, *supra* note 19, pp. 66–68.

[21]Burris, *supra* note 16, pp. 71–74.

[22]News Conference of March 21, 1930, **Public Papers of the Presidents of the United States: Herbert C. Hoover**, vol. II (Washington D.C., U.S. Government Printing Office, 1976), pp. 98–99.

[23]Burris, *supra* note 16, p. 74.

[24]Letter from Charles E. Hughes to Judge John J. Parker, March 23, 1930, The Parker Papers, Southern Historical Collection, University of North Carolina, Chapel Hill, NC.

[25]Kluger, *supra* note 4, p. 143.

[26]*International Organization, United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Company* ("Red Jacket"), 18 F.2d 839 (4th Cir. 1927).

[27]Burris, *supra* note 16, pp. 74–76; Peter G. Fish, "Red Jacket Revisited: The Case That Unraveled John J. Parker's Supreme Court Appointment," 5 *Law and History Review* 51–73 (Spring 1987).

[28]Kluger, *supra* note 4, p. 143; Burris, *supra* note 16, p. 74.

[29]*Red Jacket*, 18 F.2d at 843–844.

[30]*Red Jacket*, 18 F.2d at 843–844.

[31]*Red Jacket*, 18 F.2d at 849, *citing Hitchman Coal & Coke Company v. Mitchell*, 245 U.S. 229 (1917).

[32]*Red Jacket*, 18 F. 2d at 849.

[33]Burris, *supra* note 16, pp. 62–63.

[34]Kluger, *supra* note 4, p. 139.

[35]Justice McReynolds' behavior towards colleagues in this regard is well documented. In 1924, when his level of seniority called for him to stand next to Justice Brandeis for the Court's annual photograph, McReynolds refused, leaving the Court without an official picture that year. When in conference, he would leave the room whenever Brandeis spoke. Ruth Bader Ginsburg, Remarks for Touro Synagogue (Newport, R.I.) celebration of the 350th Anniversary of Jews in America (August 22, 2004). *Available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-22-04.html (last viewed February 4, 2007). After the appointment of Benjamin Cardozo in 1932, McReynolds often shielded his face with a document when his second Jewish colleague read an opinion from the Bench. Andrew L. Kaufman, **Cardozo** (Cambridge, MA: Harvard University Press, 1998), p. 480. Finally, a former law clerk recounted how his expressions of politeness to McReynolds' African-American servants had met with the Justice's displeasure. In that instance, McReynolds told the clerk that he "should have some feeling about his position and not wish to associate with colored servants . . ." John Knox, **The Forgotten Memoir of John Knox** (Dennis J. Hutchinson and David J. Garrow eds., Chicago: University of Chicago Press, 2000), p. 51.

[36]*See* Sheldon Novick, **Honorable Justice: The Life of Oliver Wendell Holmes** (Boston, MA: Little, Brown & Co. 1989), pp. 140-141, 199. Novick quotes an 1873 law review article in which Holmes had claimed that legislation needed "to aid the survival of the fittest." And in 1895 remarks to Boston's Tavern Club concerning his encounters with the leader of a typographers' union who had advocated the use of popular referenda to counter moneyed interests' legislative influence, Holmes merely stated: "I see that you people have aims, but I don't see that you have ideals . . . There is something in the world besides comfort, something worth living and dying for."

[37]*City of Richmond v. Deans*, 37 F.2d 712 (1930).

[38]*Buchanan v. Warley*, 745 U.S. 60 (1917).

[39]Given its legacy as the party of Lincoln, the Republican party won a majority of the African-American vote until the Great Depression. President Roosevelt's share of that vote was buoyed by the popularity of his relief programs among African Americans, whom the economic situation had affected disproportionately. These measures presaged a period of strong civil rights advocacy within Democratic party ranks, demonstrated by such actions as President Truman's desegregation of the military, that enabled the party to enhance its African-American support in spite of opposition from several Southern Democratic politicians (e.g., Strom Thurmond's 1948 Dixiecrat presidential candidacy). Republican leaders' failure to take an equally activist approach disappointed many African Americans, even though Democratic leaders in the House and Senate were able to overcome several Southern legislators' opposition to civil rights legislation with Republican support. By the 1960s, the Republican party had lost its majority among African Americans.

[40]Parker's support of such grandfather clauses was likely nothing other than a politician's standard attempt to win votes—the U.S. Supreme Court had actually validated a similar measure in 1915. *See Guinn v. United States* 238 U.S. 347 (1915) (striking down an Oklahoma law allowing illiterate individuals to vote if they could prove their grandfather had been eligible to vote, thereby disenfranchising most African Americans, whose grandfathers had almost all been slaves).

[41]Burris, *supra* note 16, pp. 79–80; Kluger, *supra* note 4, p. 142; Hearing Before the Subcommittee of the Committee

on the Judiciary, United States Senate, on the Confirmation of Judge John J. Parker to Be an Associate Justice of the Supreme Court of the United States, 71st Congress, 2d session, April 5, 1930, p. 10.

[42]Burris, *supra* note 16, p. 81.

[43]Hearing, p. 5.

[44]*Ibid.* This editorial in the *Brevard News* was actually enclosed in a letter to Senator Overman by one W. E. Breese.

[45]*Ibid*, p. 24.

[46]*Ibid*, pp. 25–27.

[47]*Ibid*, p. 33.

[48]*Ibid*, p. 44.

[49]*Ibid.*, p.55.

[50]*Ibid*, p. 56.

[51]*Ibid*, pp. 57–59.

[52]*Ibid*, pp. 61–69.

[53]*Ibid*, p. 67.

[54]*Ibid*, p. 69.

[55]*Ibid*, pp. 70–73.

[56]*Ibid*, p. 73.

[57]*Ibid*, p. 74.

[58]*Ibid*, p. 75.

[59]*Ibid*, p. 78.

[60]*Ibid*, p. 82.

[61]Burris, *supra* note 16, pp. 80–81.

[62]*Ibid*, p. 82.

[63]*Congressional Record*, 71st Congress, 2d session, p. 7793.

[64]*Ibid.*

[65]*Ibid*, p. 7794.

[66]*Ibid*, pp. 7794–7795.

[67]*Ibid*, pp. 7808–7809.

[68]*Ibid*, p. 7809.

[69]*Ibid*, p. 7810.

[70]*Ibid*, p. 7811.

[71]*Ibid.*

[72]*Ibid*, p. 7931.

[73]*Ibid*, p. 7946.

[74]*Ibid*, p. 8103.

[75]*Ibid*, p. 7811.

[76]*Ibid*, p. 7950.

[77]*Ibid*, pp. 8425–8427.

[78]*Ibid*, pp. 8033–8037.

[79]*Ibid*, p. 8435.

[80]Goings, *supra* note 19, p. 48.

[81]Herbert C. Hoover, **The Memoirs of Herbert Hoover: The Cabinet and the Presidency, 1920–1933** (New York: Macmillan Company, 1952), p. 269.

[82]Burris, *supra* note 16, pp. 92–101; Goings, *supra* note 19, pp. 48–53.

[83]Hoover, p. 269.

[84]*See* discussion *supra* note 7. This figure does not include withdrawals of nominations or refusals by the Senate to vote.

[85]Abraham, p. 137.

[86]*Ibid*, p. 147.

[87]*Ibid*, pp. 150–151.

[88]Burris, *supra* note 16, p. 93.

[89]*Ibid*, p. 101.

[90]*Ibid*, pp. 102–110; Goings, *supra* note 19, pp. 88–89.

[91]*Ibid*, pp. 102–110.

[92]*See, e.g.*, *Campbell v. Alleghany Corp.*, 75 F.2d 947 (4th Cir. 1935) (affirming a contested provision of the 1934 Bankruptcy Act); *Virginian Railway Co. v. System Federation*, 84 F.2d 641 (4th Cir. 1936) (affirming the amended Railway Labor Act). The Supreme Court largely followed the reasoning of Parker's opinion in upholding the Fourth Circuit's decision. *See Virginian Railway Co. v. System Federation*, 300 U.S. 515 (1937).

[93]Indeed, Going's book, **The NAACP Comes of Age**, focuses on the way in which the Parker fight established the organization as an influential force on the political scene. *See* Goings, *supra* note 19, pp. 19–36, 54–90.

[94]Goings, *supra* note 19, p.75, *quoting* Walter White, **A Man Called White: The Autobiography of Walter White** (Bloomington, IN: Indiana University Press, 1970), p. 114.

[95]*City of Richmond v. Deans*, 37 F.2d 712 (1930).

[96]*Alston v. School Board of the City of Norfolk*, 112 F.2d 992 (4th Cir. 1940). (The Nonflok school board had fixed the salaries of African-American teachers at a lower rate than that of white teachers.)

[97]*Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947).

[98]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

[99]*Briggs v. Elliott*, 98 F. Supp. 529 (4th Cir. 1951) (school segregation was not per se violative of the Fourteenth Amendment, even though the facilities provided to African-American students in that instance were inferior to those of white students). ; *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[100]Goings, *supra* note 19, p. 87.

[101]*Briggs v. Elliott*, 132 F. Supp. 776 (4th Cir. 1955).

[102]Goings, *supra* note 19, p. 86.

[103]In a cruel, ironic twist of fate, Judge Parker suffered a heart attack and died in the arms of a younger Fourth Circuit colleague, Clement Haynsworth, who would become the next Supreme Court nominee formally rejected by the Senate in 1970 after a very similar confirmation battle. Judge Haynsworth later credited Judge Parker's experience as a guide for rebounding from his defeat. Gary Libman, "Judges Testify to Life After Senate Rejection," *Los Angeles Times*, October 8, 1987, part 5, p. 1; John P. MacKenzie, "A Judge For Life," *New York Times*, December 5, 1989, p. A34.

The Judicial Service of Retired United States Supreme Court Justices

MINOR MYERS III

Introduction

Biographies of Supreme Court Justices generally devote little attention to the period following retirement. For many Supreme Court Justices, though, departure from the Court is not the end of their service on the federal courts. As Justice Willis Van Devanter noted following his retirement in 1937, "I am still a judge."[1]

Justices, like lower court judges, may assume senior status and sit by designation of the Chief Justice in any circuit or district in the federal system. Most commonly, they do so on the courts of appeals. Justice Lewis Powell, for instance, sat regularly as a retired Justice on the Fourth Circuit Court of Appeals in his native Virginia. Rarely, a retired Justice will preside at trial; only Justice Van Devanter and Justice Tom C. Clark sat on district courts after leaving the Bench.

While others have looked at Justices' decisions to leave the Bench and their final years on the Bench,[2] no one has previously endeavored to examine the senior service of retired Justices. This article fills that tiny gap by examining the service of those Supreme Court Justices who in retirement have sat on the lower federal courts. It begins by detailing the history of the senior-status provisions, which first applied to Supreme Court Justices in 1937. Next, it examines the judicial service of those Justices who have elected to serve on the lower courts after assuming senior status. Of the thirty-five Justices who have assumed senior status, nine have sat on the lower courts. It concludes by touching on some novel points of interest.

Brief History of Senior Status for the Supreme Court

Though judges on federal circuit and district courts were given the option to take senior status in 1919, Supreme Court Justices were not eligible to do so until 1937.

Congress created the first retirement provisions for federal judges in 1869.[3] Prior to that time, as Justices aged and the duties of the post became more difficult, some nevertheless held on to their seat to continue receiving the salary.[4] Of the twenty-four Justices who departed the Court between 1801 and 1868, twenty ended their service only upon their death.[5] Under the 1869 retirement scheme, a Justice or judge who was 70 years of age or older and had at least ten years of service on the court could retire and continue to receive his salary for life, but he was no longer a part of the operation of the court of appointment.

The 1937 reforms, which set out the basic framework that currently applies to Supreme Court retirements, grew out of President Franklin D. Roosevelt's Court-packing plan. In 1935, the Supreme Court invalidated portions of the National Industrial Recovery Act,[6] and in the following year it struck down portions of the Agricultural Adjustment Act,[7] both important components of Roosevelt's New Deal. Determined to see his programs upheld, Roosevelt on February 5, 1937 announced his plan to reorganize the federal judiciary. The most controversial aspect of the plan was his proposal to add one Justice to the Supreme Court for each Justice over age seventy who does not retire. The practical effect of this would have been to allow Roosevelt to fill the Supreme Court with enough new Justices to uphold New Deal legislation. Though its prospects appeared promising at first because Roosevelt's Democrats held majorities in both houses of Congress, the proposal soon encountered trouble. Many in Congress came to support a mandatory retirement age for Justices, but Roosevelt would not compromise.[8]

The 1937 Retirement Act was passed on March 1, 1937,[9] and its proponents hoped it would siphon off support for Roosevelt's plan. Under the statute, retiring Justices not only would continue to receive their salary, but also could assume senior status. This would permit them, although no longer in regular active service, to continue to be federal judges and to serve episodically on lower federal courts.[10] On May 18, 1937, Justice Van Devanter, one of the conservative Justices known as the Four Horseman, announced that he would retire, making him the first Justice to elect to take senior status.

After amendments in the years since 1937, the retirement requirements for judges and Justices have become largely identical.[11] Any Justice over sixty-five years old may assume senior status upon satisfying the "Rule of Eighty," under which the Justice's age and years of federal service must add up to eighty.[12] Once that requirement is met, the Justice "may retain the office but retire from regular active service."[13] Thus, though the President may nominate successors, senior Justices may continue to perform certain judicial duties at a workload of their own choosing and may continue to draw a salary.

A retired Justice may "be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit Justice, as he is willing to undertake,"[14] though no senior Justice may perform judicial duties without an assignment from the Chief Justice.[15] During the terms of the assignment, the senior Justice has "all the powers of a judge of the court, circuit or district to which he is designated and assigned."[16]

The pay to which a senior Justice is entitled depends on the work done in retirement. Those senior Justices who perform in one year the equivalent amount of work that an active-service judge would do in three months are entitled to "the salary of the office."[17] In other words, they receive any pay raise

Justices Who Have Sat in Retirement by Designation on Lower Federal Courts

Justice	Retirement	Termination of Senior Service (length)
Willis Van Devanter	June 2, 1937	February 8, 1941 (3 years, 8 months)
Stanley F. Reed	February 25, 1957	April 2, 1980 (23 years, 1 month)
Harold H. Burton	October 13, 1958	October 28, 1964 (6 years)
Tom C. Clark	June 12, 1967	June 13, 1977 (10 years)
Potter Stewart	July 3, 1981	December 7, 1985 (4 years, 5 months)
Lewis F. Powell, Jr.	June 26, 1987	August 28, 1998 (11 years, 2 months)
William J. Brennan, Jr.	July 20, 1990	July 24, 1997 (7 years)
Thurgood Marshall	October 1, 1991	January 24, 1993 (1 year, 4 months)
Byron R. White	June 28, 1993	April 15, 2002 (8 years, 10 months)

that active Justices receive. Senior Justices who do not meet that requirement and do not otherwise obtain certification from the Chief Justice are entitled to the salary received when last in active service or when they last met the three-months-work requirement.[18] Senior Justices may maintain chambers in the Supreme Court building or elsewhere. Justices Harry A. Blackmun and Byron R. White both maintained chambers in the Thurgood Marshall Federal Judiciary Building.[19] Justice Sandra Day O'Connor has opted to remain in the Supreme Court building.[20] Senior Justices also have a staff of a secretary and a law clerk, as the Chief Justice allocates to them.

The Service of Senior Justices

Since the advent of senior status for Supreme Court Justices, thirty-five Justices have left the Court. Of those departing Justices, only eight have died in office, and only Chief Justice William Rehnquist has done so since 1954.[21] Only four have resigned: Justices James F. Byrnes, Owen J. Roberts, Arthur Goldberg, and Abe Fortas. The remaining twenty-three have taken senior status.[22] Justice Van Devanter was the first to do so, and, before Justice O'Connor in early 2006, Justice Blackmun was the most recent, in 1994.

Nine of those twenty-three have sat by designation on lower federal courts.[23]

For each of the Justices who have sat in retirement, the date of termination of senior service has been the date of their death. All senior Justices save Justice Van Devanter sat on a court of appeals, and some sat on panels in more than one circuit. The senior service of Justices Clark, White, and Powell was relatively prolific. The rest sat in moderation. Only Justices Clark and Van Devanter presided over trials in the district courts.

A typical assignment order is entered into the minutes of the Supreme Court by the Chief Justice and designates the court and dates of service. For instance, Justice Reed was authorized by order to serve on the Court of Claims "beginning November 1, 1965 and ending June 30, 1966 and for such further time as may be required to complete unfinished business."[24] Not all requests for assignments are granted, however. "The late federal district judge William H. Becker reported a conversation that he had with Chief Justice Earl Warren about Justice Charles E. Whittaker. When Whittaker wanted to try cases following his retirement and sought Warren's consent, Warren told Becker: 'Tell him that I never could get

him to make up his mind, and I'll be damned if I will let him do that to me again trying cases. So the answer is no.'"[25] Justice Whittaker apparently never sat on the lower courts by designation and resigned his commission entirely in late 1965 to take a position in the legal department of General Motors.

Justice Willis Van Devanter

Justice Van Devanter announced his intent to retire at the close of the Supreme Court's 1936 Term, just two months after the senior service provisions were made applicable to the Justices. Van Devanter "carefully worded his [retirement] letter to President Roosevelt to indicate that his departure was only 'from regular active service.'"[26]

As a senior Justice, Van Devanter does not appear to have sat on any of the Courts of Appeals, but he did preside over at least two criminal trials in Southern District of New York. At a 1942 tribute by the Supreme Court bar to the recently deceased Justice Van Devanter, Charles E. Hughes, Jr., son of the Chief Justice, noted that Van Devanter accepted an assignment to the Southern District in December 1937 and presided over criminal matters there in January and February of 1938. As described by Hughes:

> The circumstance of a judge who has been so long and so recently a member of the highest court in the land conducting jury trials was an arresting one and attracted wide public interest and more than capacity attendance. His conduct of the court was a revelation to members of the Bar and laymen alike. His early years as a trial lawyer and a continuous aggregate of thirty-four years of service on appellate courts, in which records of trials were constantly passing under his scrutiny, gave him such complete mastery of rules of substantive law, procedure and evidence that his application of them appeared instinctive. The trials were models of expedition, without sacrifice of fairness or courtesy to litigants, witnesses or counsel. On two occasions he remained at the Federal Building until long past midnight, once until after two o'clock to receive a verdict, and once until after four o'clock to prepare a charge which he, although then suffering from a cold, was on hand to deliver to the jury at ten o'clock the same morning. There can be no doubt that such strains, at his age, impaired his health and hastened his end.[27]

During Van Devanter's time on the trial Bench, a man named Nobel John Moore was brought before him charged with violating his probation.[28] Van Devanter revoked the probation and imposed a new sentence, which Moore challenged on appeal, arguing among other things that Van Devanter had no power to sit as a district judge. The Second Circuit upheld Van Devanter's authority under the new statute "to act as a District Judge for the Southern District of New York."[29] The court noted: "In former times Justices of the Supreme Court often presided over the trial courts of the United States. Their inherent power so to do has long been taken as a matter of course and, indeed, it cannot be doubted."[30] Van Devanter also presided over a large mail fraud trial, and the resulting convictions were upheld against a similar challenge on appeal.[31]

Van Devanter's two or so months on the trial bench in 1937 were all the senior service from retired Justices until Justice Reed retired twenty years later.

Justice Stanley F. Reed

Justice Reed took senior status in 1957. Seventy-two years old when he assumed senior status, Justice Reed was the first Justice to sit regularly in retirement. Prior to his 1938 appointment, he had not been a circuit judge,[32]

Willis Van Devanter was the first Supreme Court Justice to take senior status under the new retirement legislation passed in 1937. This allowed him not only to continue to draw a salary, but also to serve as a judge on lower courts. This cartoon makes reference to how Van Devanter's retirement helped foil President Franklin D. Roosevelt's attempt to pass legislation to pack the Court with younger Justices.

and as a senior Justice he sat on the D.C. Circuit and the Court of Claims. Justice Reed participated in eighty-seven published decisions on the D.C. Circuit, the last in 1966. In the Court of Claims, Reed sat on forty-four reported cases and wrote an opinion in thirty of them. Reed's final case as a retired Justice was on the Court of Claims in the spring of 1970, at the age of eighty-five.[33] During his retirement, Justice Reed also served as a special master for the Supreme Court.[34] He died in 1980 at the age of ninety-five.

Justice Reed wrote seventeen decisions on the D.C. Circuit. Of the six of his opinions that went to the Supreme Court, five were denied certiorari.[35] In the one case where

Retired Justice Stanley F. Reed and his wife, Winnifred, were photographed after Reed retired from the Court in 1957 at the age of seventy-two. Reed was the first Justice to sit regularly in retirement: he served on the D.C. Circuit Court and the Court of Claims.

the petition for certiorari was granted, *Public Affairs Associates, Inc. v. Rickover*,[36] the Court vacated Reed's opinion.[37]

Upon Reed's death, Chief Justice Warren E. Burger spoke at a memorial service of their unique relationship. Though they had never served together on the Supreme Court, Burger had been a judge on the D.C. Circuit while Reed sat there as a senior Justice. Burger recalled:

> I had argued cases before him when he was on this Court, but I really came to know him when he sat with us on the Court of Appeals, where he was a regular member of panels for about four years. He maintained chambers at the Court of Appeals, and joined us at the judges' lunch table and often regaled us with stories of Kentucky and of the New Deal days when he was Solicitor General.[38]

Justice Harold H. Burton

Justice Burton assumed senior status on October 13, 1958. Like Justice Reed, Justice Burton had not sat on any federal court before his appointment in 1945. He had previously been a U.S. Senator from Ohio.

Between March 1959 and October 1962, Burton sat on panels of the D.C. Circuit Court of Appeals and participated in forty-four published opinions. He wrote eight opinions. Parties sought Supreme Court review in three of those cases. In two, the Court denied certiorari.[39] In the one case where the Court granted certiorari,[40] Justice Burton's opinion was affirmed.[41]

Justice Tom C. Clark

Justice Clark retired from the Court in 1967. In the summer of 1970, Clark sat on his first appeals court panel, on the Seventh Circuit.[42] Between then and his death seven years later,

Justice Clark sat on panels that resulted in approximately 380 available decisions. He also sat on the district court in California. As Chief Justice Burger noted at a memorial service for Justice Clark on January 23, 1978, "No one in the history of this Court, after retirement as an Associate Justice, has ever engaged in such constant and steady judicial activity."[43]

During his senior service, Justice Clark sat on all of the geographic courts of appeals: the District of Columbia, First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.[44] He was tireless. Only six days prior to his death, he sat on a panel of the Third Circuit and participated in oral argument.[45] Two weeks earlier, he had sat on the Seventh Circuit.[46]

On the courts of appeals, Clark wrote the majority opinion in seventy cases. In twenty-four of those cases, a party petitioned the Supreme Court for certiorari. Of the twenty-four cases in which Clark wrote the majority opinion and the aggrieved party petitioned the Supreme Court, the Court denied certiorari in twenty-one cases.[47] The Court granted the petition for certiorari in three cases. One of those was affirmed.[48] In the other two cases, one from the D.C. Circuit and one from the Eighth, the Supreme Court overturned Justice Clark's opinions.[49] Neither of the decisions mentioned that it was a former colleague whose decision

Justice Tom C. Clark retired from the Court in 1967. Three years later, he sat on his first appeals court panel, on the Seventh Circuit. When he died in 1977, Clark had sat on panels that resulted in approximately 380 available decisions.

they were reviewing. He dissented from the panel opinion on only one case, and the Supreme Court denied certiorari.[50]

Justice Clark oversaw at least three trials in the Northern District of California in 1971 and 1972, all of them large private antitrust actions.[51] Two of those cases were reversed by the Ninth Circuit, and one eventually made its way to the Supreme Court.[52]

One of Justice Clark's decisions on the trial bench gives an illuminating view into his busy work schedule as a senior Justice.[53] The case, *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, involved a contract and antitrust law dispute between the owner of the Oakland A's baseball team, which had moved to the city in 1967, and a concessionaire who had contracted with the franchise under a previous owner in Philadelphia and asserted a contractual right to operate concessions until 1984.

As described by Justice Clark in the published opinion, he was assigned the case in 1970. In August of that year, he held a bench trial on the contract issue. One month later, he ruled favorably for the plaintiff, and the case proceeded to the antitrust question. In May 1971, Justice Clark found for the plaintiff on the antitrust question, based on the discovery from the contract question. But the defendant requested additional discovery, and Justice Clark reopened the case. The trial resumed in September 1971 and then took a one-month hiatus because of the death of Justice Hugo L. Black and other demands on Justice Clark's time.[54] After twenty-eight days of trial, producing over 6,000 pages of transcript and 800 attendant exhibits, Justice Clark took the matter on submission on February 1, 1972. On September 29, 1972, almost eight months later, Justice Clark delivered his findings of fact and conclusions of law. He felt obliged to explain the delay and noted that he had earlier assumed the trial would conclude in the fall of 1971 and had accepted offers to sit on various courts of appeals through 1972. When the trial went on as long as it did, he found himself without time to devote to the case.[55]

A three-judge panel of the Ninth Circuit Court of Appeals reversed Justice Clark's legal conclusion that the concession agreement violated the antitrust laws.[56] It concluded that Justice Clark had erred in his conclusions about market definition for baseball concessionaires and remanded the case. Justice Clark did not participate in the remand.

Justice Clark also presided over the trial of a case that is familiar to any antitrust law student, *GTE Sylvania Inc. v. Continental T. V., Inc.*,[57] in which the Supreme Court rejected the per se illegality of vertical restraints of trade. That 1977 Court decision, in which Justice Clark did not participate, "is a landmark of antitrust" and "perhaps the best judicial summary of the modern approach to competition issues generally."[58]

Justice Clark's role in the development of antitrust law here is remarkable, though not immediately obvious. He had previously been the assistant attorney general in charge of the Antitrust Division, and while he was on the Court, he had strong opinions on antitrust. In *White Motor Company v. United States*,[59] a majority of the Court held that a truck manufacturer's territorial limitations on distributors and dealers was not a per se violation of Section 1 of the Sherman Act. Justice Clark dissented. To him, the vertical limitation scheme at issue constituted "one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century," and he was prepared to conclude that it was a per se violation.[60] One month after Clark's resignation from the Court and four years after *White Motor*, the Court heard argument in *United States v. Arnold, Schwinn & Co.*[61] In the resulting opinion, the Court took a position that Clark would have likely endorsed, adopting a bright line rule of per se illegality: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the

manufacturer has parted with dominion over it."[62]

In the *Sylvania* case over which Justice Clark presided, television manufacturer Sylvania instituted a franchise strategy under which it strictly controlled the number of retailers in any given geographic area. Continental T.V., a Sylvania retailer, wanted to open a new store in the San Jose, California area. Sylvania denied the request and, when Continental persisted, withdrew its franchise. Continental's antitrust claim against Sylvania was that its scheme of restrictions on retailers constituted an illegal restraint of trade under the Sherman Act. Clark was assigned the case, and he instructed the jury that any territorial resale restrictions Sylvania put on its products that continued after title had passed to the dealer, regardless of their reasonableness, would be a violation of the Section 1 of the Sherman Act.[63] Under those instructions, the jury found that Sylvania had violated the antitrust laws.

That judgment was initially affirmed by a three-judge panel of the Ninth Circuit,[64] but that decision was vacated and the *en banc* Circuit reversed.[65] The majority noted Justice Clark's role in the decision and suggested that he was perhaps too taken with his dissent in *White Motor*:

> The trial judge in this case was the distinguished Associate Justice Tom C. Clark (Ret.), sitting by designation in the District Court. In formulating his jury instructions, Justice Clark apparently adopted some of his own dissenting comments in *White Motor Co. v. United States*. There, the majority of the Court, against the will of Mr. Justice Clark, declined to establish a broad per se rule regarding all vertical territorial restraints.[66]

The majority upheld Sylvania's practice, distinguishing it from that struck down in *Schwinn*. While the restriction in *Schwinn* was a wholesale prohibition on franchisees selling to persons outside a certain geographic area, the Sylvania case involved just a clause dictating the location at which the franchise was valid. The majority drew support from the *Schwinn* remand, which held that Schwinn was still permitted to "designat[e] in its retailer franchise agreements the location of the place or places of business for which the franchise is issued."[67]

A judge dissenting from the *en banc* holding took issue with that interpretation of the *Schwinn* remand.[68] He supported his alternative reading of the *Schwinn* remand with a then-recent Eighth Circuit case, *Reed Brothers, Inc. v. Monsanto Chemical*.[69] In *Reed Brothers*, which had been decided after the original panel opinion in *GTE Sylvania*, the Eighth Circuit read *Schwinn* to mean only that "a manufacturer may properly designate geographic areas in which distributors shall be primarily responsible for distributing its products and may terminate those who do not adequately represent it or promote the sale of its products in such areas."[70] Under the Eighth Circuit's reasoning, *Schwinn* surely did not sanction the termination of franchise agreements for resale outside the geographic area. The author of the Eighth Circuit's *Reed Brothers* decision was Retired Justice Tom C. Clark, sitting there by designation.

The Supreme Court famously used *GTE Sylvania* to overrule *Schwinn* altogether and evaluate such restrictions under the rule of reason. The opinion made no mention of Clark's remarkable role in the trial.

Justice Potter Stewart

Justice Stewart assumed senior status in the summer of 1981. He first sat as a retired Justice in February 1982 on the Sixth Circuit,[71] of which he was a member for four years before his elevation to the Supreme Court and where he sat for the last time in the fall of 1984.[72] He sat on panels in the First, Third, Seventh, and Ninth circuits in addition to the Sixth.[73] Justice Stewart, a baseball fan, is said to have remarked of his part-time work on the courts

of appeals that it was "no fun to play in the minors after a career in the major leagues."[74]

Justice Stewart wrote nine panel opinions as a senior Justice. None were reversed by the Supreme Court or an *en banc* court. In only one case did a party petition for certiorari, and it was denied.[75]

He dissented in one case, on the Seventh Circuit.[76] That panel, in the face of a threatened *en banc* hearing, issued a second, narrower opinion, and Justice Stewart dissented from that one, too.[77] The case eventually was heard *en banc*,[78] and Justice Stewart did not participate in that.

Justice Lewis F. Powell

Justice Powell assumed senior status in the summer of 1987. He first sat as a retired Justice in October 1987 on the Fourth Circuit,[79] and it was on the Fourth Circuit that he spent most of his time sitting as a retired Justice. The only other circuit where he heard cases was the Eleventh.[80] Nevertheless, he maintained chambers in the Supreme Court building following his retirement until 1996, upon the death of his wife.[81]

Powell authored thirty-three majority opinions as a retired Justice and wrote one dissent. None of the eight petitions for certiorari seeking review of his decisions were granted.[82] The petition for certiorari was also denied in the one case in which Powell wrote a dissent.[83]

Powell's final sitting was in September 1995. He participated in some of the decisions from that sitting's cases, but his participation ended in December of that year.[84] He died on August 25, 1998.

Justice William J. Brennan

Justice Brennan assumed senior status in the summer of 1990. He appears to have sat only once on the lower courts. In November 1991, he sat on the D.C. Circuit with Judge Patricia Wald and Judge Karen L. Henderson.[85] Justice Brennan wrote one opinion as a member of that panel.[86]

Justice Thurgood Marshall

Justice Marshall assumed senior status on October 1, 1991. The following month, he participated in cases heard by the Federal Circuit.[87]

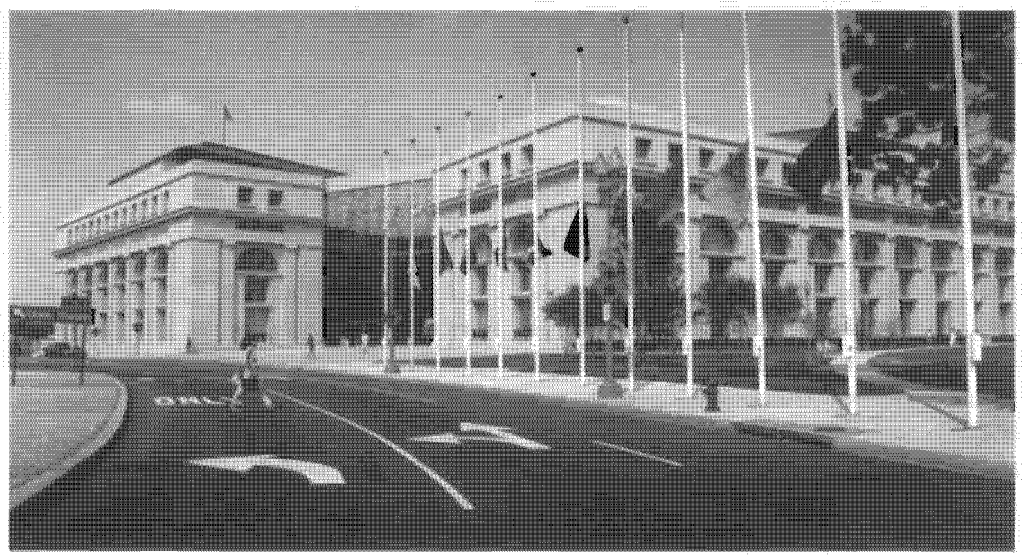
In January 1992, Justice Marshall sat on the Second Circuit Court of Appeals, on which he had served a circuit judge in the early 1960s. He sat on a panel with Judge John O. Newman and Judge Amalya Kearse.[88] He wrote one opinion arising from that sitting, in an antitrust case.[89]

Justice Marshall's visit to the Second Circuit was an event. He was invited to fill a "sudden and temporary vacancy on the court schedule," and the courtroom was packed, not only because of Justice Marshall's visit, but also because the Rev. Al Sharpton was present for argument in his own appeal.[90] As the panel adjourned for the day, Justice Marshall rose with difficulty from what would be his final day on any bench, and a woman in the gallery said, "God bless him." Another replied, "Amen."[91]

At one point, Justice Marshall was scheduled to sit on the Fourth Circuit at one of its periodic sittings in Baltimore.[92] Retired Justice Lewis Powell, who sat on the Fourth Circuit in Richmond with regularity, told then-Chief Judge Sam J. Ervin that Justice Marshall was interested in joining the court in Baltimore, and Chief Judge Ervin invited Justice Marshall to do so.[93] However, Justice Marshall came down with a virus and, on his physician's recommendation, cancelled his visit shortly before the sitting.[94]

Justice Byron R. White

Justice White assumed senior status in 1993 after twenty-one years on the Bench. He began sitting on courts of appeals in early 1994. He sat by designation on the Tenth Circuit in 1994 and also sat later on the Fifth, Eighth, Ninth, and Tenth Circuits.[95] His last sitting was on the Ninth Circuit in 1999.[96]



Although senior Justices may maintain chambers in the Supreme Court building, both Harry A. Blackmun and Byron R. White moved to chambers in the Thurgood Marshall Federal Judiciary Building, a few blocks away.

He wrote eighteen opinions as a senior Justice. Five of those cases went to the Supreme Court on petitions for certiorari, and all were denied.[97] He dissented in one case as a senior Justice.[98]

Justice White maintained chambers in the Thurgood Marshall Federal Judiciary Building from the time he took senior status in 1993 until he moved his offices to Denver in the summer of 2001.[99] In Denver, he used an office reserved for the Circuit Justice—then Justice Stephen Breyer—and though he did not sit for any more cases, he did use the office and spoke with neighbor and former clerk Circuit Judge David Ebel.[100]

Other Curiosities About Senior Justices

Prohibition on Supreme Court Work

By statute, senior Supreme Court Justices may perform judicial duties "in any circuit."[101] However, they may not participate in the case work of the Supreme Court. The Report of the House Judiciary Committee made clear that retired Justices would not be eligible to "sit in the Supreme Court, by assignment or otherwise."[102] Senators stated in debate that Justice Van Devanter, the first Justice who would assume senior status under the new bill, "cannot voluntarily go back and sit on the Supreme Court in any case."[103]

Justice William O. Douglas, however, sought to participate in the consideration of cases granted certiorari before his retirement. He retired in late 1975, having suffered a debilitating stroke the previous year, and Justice John Paul Stevens took his place in December 1975. Justice Douglas even drafted an opinion in *Buckley v. Valeo*,[104] argued after he had left the court, which he had printed in the Court printing office. The active Justices soon responded with a three-page memo stating that "a retired Justice cannot be assigned any duties of a Supreme Court Justice."[105]

Others have put forward proposals for using retired Justices in various ways. Professor Steven Lubet has suggested allowing retired Justices to replace acting Justices in consideration of petitions for certiorari when an active Justice is recused.[106] Professor Ross Davies has suggested using retired Justices as part of

a plan to serve on the Supreme Court should it fail to reach a quorum due to incapacitation of its members.[107] And in 1988, Justice John Paul Stevens suggested to Chief Justice Rehnquist that the Court request that Congress enact a statute authorizing retired Justices to sit in place of recused Justices when necessary to achieve quorum.[108]

Sitting on Lower Courts as Active Justices

Justices rarely serve on the lower courts while in active service,[109] but it does sometimes happen.

Commonly, Justices are elevated from the federal courts of appeals. Upon joining the Supreme Court, some elect to continue working on pending court of appeals cases. Others apparently cease participation in their appeals court cases. A Justice who continues to participate in his or her previous work does so as Circuit Justice. Chief Justice Roberts did so in 2005, and earlier Justices Clarence Thomas and John Paul Stevens did so as well.[110] A greater number of Justices choose not to continue their prior work. In most circumstances, the remaining members of the three-judge appellate panel, if in agreement, decide the case. This is what happened to cases involving Chief Justice Burger and Justices Stephen Breyer, David Souter, Harry Blackmun, Samuel Alito, and John Marshall Harlan.[111] For the Ninth Circuit cases in which Justice Anthony Kennedy was a member of the panel, another circuit judge was randomly selected to replace him on the panels.[112] Justice Antonin Scalia appears to have issued one opinion as Circuit Justice but ceased participation in others.[113]

Though it is a rare occurrence, active Justices have sat on the inferior courts. In 1985, for instance, then-Justice Rehnquist presided over proceedings in the District Court for the Eastern District of Virginia. A panel of the Fourth Circuit overturned one of his decisions in an unpublished order.[114] And in 1951, Justice Reed sat on the Second Circuit as Circuit Justice.[115]

Unique Pairs

The service of senior Justices on the courts of appeals has also produced some anachronistic pairings of Justices. For instance, Justice Reed sat in retirement on the D.C. Circuit with then-Judge Burger.[116] In 1984, Justice Stewart sat on the First Circuit with then-Judge Breyer.[117]

Perhaps the most remarkable composition of an appellate panel appears in two reported Seventh Circuit opinions from 1975.[118] Both were issued by a three-judge panel that included two Supreme Court Justices: Justice Clark in senior status, and Justice Stevens sitting as Circuit Justice. Justice Clark had sat by designation at oral argument on June 11, 1975 along with then-Judge Stevens and District Judge Robert P. Grant. On November 28, 1975, President Gerald Ford nominated Stevens to replace Justice Douglas. Justice Stevens was confirmed on December 17, 1975 and received his commission on the same day. Those two appeals from the June sitting were decided after that date, so the panel that issued the decision included no circuit judges, but instead two Supreme Court Justices and a district court judge.

Seniority

One curious aspect of opinions in which retired Justices are involved is the order in which the published opinion lists the participating judges. It is not clear whether the order results from circuit policy or the preference of the judge writing the opinion. Nevertheless, opinions fall into three categories. In the first category are those opinions that list retired Justices before any circuit judges. The Eleventh Circuit, for instance, listed Justice Powell before the chief judge in one opinion.[119] The second category includes those opinions that treat retired Justices as members of the court and list them according to seniority of service or

some other criteria.[120] In the third category are those opinions that list all members of the circuit court first and visitors—whether from the Supreme Court or elsewhere—last. The Third Circuit, for instance, listed Justice Stewart after Circuit Judges Seitz and Adams.[121] A single sitting of a three-judge panel can result in various orders. In 1997, Justice White sat by designation on the Tenth Circuit with Judge David M. Ebel and Judge Paul Kelly. A resulting opinion written by Justice White listed the panel as "White, Associate Justice (Ret.); Ebel, and Kelly, Circuit Judges."[122] Judge Ebel, a former clerk for Justice White, used the same order.[123] Judge Kelly, however, listed Judge Ebel first, Justice White second, and himself last.[124]

Conclusion

The service of retired Supreme Court Justices, while generally overlooked, has in many instances been considerable. Those Justices who continue to serve in retirement share in Judge Wilfred Feinberg's description of senior circuit and district judges: "jewels in the crown of the judiciary."[125]

ENDNOTES

[1]316 U.S. xxxvii (1942).

[2]Artemus Ward, **Deciding to Leave: The Politics of Retirement from the United States Supreme Court** (2003), at 47; David N. Atkinson, **Leaving the Bench: Supreme Court Justices at the End** (1999).

[3]Judiciary Act of 1869, 16 Stat. 45 (1869).

[4]Ward, **Deciding to Leave**, *supra* note 2, at 46–48.

[5]*Id.*

[6]*Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[7]*United States v. Butler*, 297 U.S. 1 (1936).

[8]Ward, **Deciding to Leave**, *supra* note 2, at 135–37.

[9]The Retirement Act of March 1, 1937, Pub. L. No. 10, 50 Stat. 24.

[10]Ward, **Deciding to Leave**, *supra* note 2, at 136–37.

[11]*See* Wilfred Feinberg, "Senior Judges: A National Resource," 56 *Brook. L. Rev.* 409, 410–12 (1990).

[12]28 U.S.C. § 371(c).

[13]28 U.S.C. § 371(b)(1).

[14]28 U.S.C. § 294(a).

[15]28 U.S.C. § 294(e).

[16]28 U.S.C. §§ 296. Notwithstanding the quoted language, judges sitting by designation do not have the power "to appoint any person to a statutory position or to designate permanently a depositary of funds or a newspaper for publication of legal notices." *Id.*

[17]28 U.S.C. §§ 371(b)(1), (e).

[18]28 U.S.C. § 371(b)(2).

[19]Linda Greenhouse, "Court Veteran Remembers a Scary Start," *N.Y. Times*, February 16, 2006, p. A31.

[20]*Id.*

[21]Ward, *supra* note 2, at 131, 156.

[22]Justice Charles E. Whittaker assumed senior status when he left the Court, but resigned his commission altogether three years later.

[23]This list, which does not include Justice O'Connor's service on the Second Circuit Court of Appeals as this article was going to press in late 2006, is based on secondary sources and searches of cases and newspaper accounts on online databases. It may not include all senior Justices who have sat on lower courts, since biographies often rush through the period between a Justice's retirement and death. In addition, not all cases are reported and searchable. One tally identified eight senior Justices, omitting Justice Van Devanter. Joshua Glick, Comment, "On the Road: The Supreme Court and the History of Circuit Riding," 24 *Cardozo L. Rev.* 1753, 1830 (2003).

[24]Henry J. Abraham, **The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France** 39 n.28 (3d ed. 1975).

[25]Atkinson, *supra* note 2, at 4.

[26]*Id.* at 105.

[27]316 U.S. xv–xvi (1942).

[28]*United States v. Moore*, 101 F.2d 56, 57 (2d Cir. 1939).

[29]*Moore*, 101 F.2d at 59.

[30]*Id.*

[31]*United States. v. Graham*, 102 F.2d 436 (2d Cir. 1939).

[32]Justice Reed did sit as circuit Justice on the Second Circuit while in active service. *See also* note 115, *infra*.

[33]*Brown v. U. S.*, 192 Ct. Cl. 203, 426 F.2d 355 (Ct. Cl., May 15, 1970).

[34]*See, e.g., Virginia v. Maryland*, 355 U.S. 946 (1958) and 371 U.S. 943 (1963).

[35]*Brandenfels v. Day*, 316 F.2d 375 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 824 (federal jurisdiction); *Slaughter v. Atlantic Coast Line R. Co.*, 302 F.2d 912 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (interpreting the Federal Employers' Liability Act); *Coleman v. Jackson*, 286 F.2d 98, (D.C. Cir. 1960), *cert. denied*, 366 U.S. 933 (1961); *Episcopal Theological Seminary of the Southwest v. Federal Power Commission*, 269 F.2d 228 (D.C. Cir. 1959), *cert. denied sub nom. Pan Am Petroleum Corp v. Federal Power Commission*, 361 U.S. 895; *Porter v. United States*, 258 F.2d 685 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 906 (1959).

[36]284 F.2d 262 (D.C. Cir. 1960), *cert. granted*, 365 U.S. 841 (1961).

[37]*Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111 (1962).

[38]449 U.S. lviii (1981).

[39]*Whittier v. Emmet*, 281 F.2d 24 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 935 (1961); *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1960).

[40]*International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B.*, 280 F.2d 616 (D.C. Cir. 1960), *cert. granted*, 364 U.S. 811.

[41]*International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B.*, 366 U.S. 731 (1961).

[42]*Bailey v. Prudence Mut. Cas. Co.*, 429 F.2d 1388 (7th Cir. 1970).

[43]434 U.S. xxix (1978). For a summary of Clark's extra-judicial activities in retirement, see Evan A. Young, **Lone Star Justice: A Biography of Justice Tom C. Clark**, 91–105 (1998). For Clark's legal-reform activities, see James A. Gazell, "Justice Tom C. Clark as a Judicial Reformer," 15 *Houston L. Rev.* 309 (1978).

[44]*See, e.g., Avrech v. Secretary of Navy*, 520 F.2d 100 (D.C. Cir. 1975); *Carr v. Learner*, 547 F.2d 135 (1st Cir. 1976); *Ernest and Mary Hayward Weir Foundation v. United States*, 508 F.2d 894 (2d Cir. 1974); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929 (3d Cir. 1976); *Thorne v. Weinberger*, 530 F.2d 580 (4th Cir. 1976); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *United States v. Huffman*, 455 F.2d 982 (6th Cir. 1972); *United States v. Jackson*, 429 F.2d 1368 (7th Cir. 1970); *United States v. Arradondo*, 483 F.2d 980 (8th Cir. 1973); *United States v. Duffy*, 550 F.2d 533 (9th Cir. 1977); *United States v. Wagner*, 497 F.2d 249 (10th Cir. 1974). The Eleventh Circuit was not then in existence.

[45]*United States v. Cahalane*, 560 F.2d 601 (3d Cir. 1977) (argued on June 7, 1977).

[46]*See, e.g., In the Matter of North American Inv. Co.*, 559 F.2d 464 (7th Cir. 1977).

[47]*Motor Carriers Traffic Ass'n, Inc., v. United States*, 559 F.2d 1251, (4th Cir. 1977), *cert. denied*, *All Island Delivery Service, Inc. v. United States*, 435 U.S. 1007 (1978); *Murphy v. L & J Press Corp.*, 558 F.2d 407 (8th Cir. 1977), *cert. denied*, *L & J Press Corporation v. Murphy*, 434 U.S. 1025 (1978); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir. 1977), *cert. denied*, *McDonnell Douglas Corp. v. Houghton*, 434 U.S. 966; *United States v. Turzitti*, 547 F.2d 1003 (7th Cir. 1977), *cert. denied*, *Turzitti v. United States*, 430 U.S. 969; *Deering Milliken Research Corp. v. Beaunit Corp.*, 538 F.2d 1022 (4th Cir. 1976), *cert. denied*, *Deering Milliken Research Corp. v. Beaunit Corp.*, 426 U.S. 936; *Noranda Aluminum, Inc. v. United Broth. of Carpenters and Joiners of America, AFL-CIO*, 528 F.2d 1304 (8th Cir. 1976), *cert. denied*, *United Broth. of Carpenters and Joiners of America, AFL-CIO v. Noranda Aluminum, Inc.*, 429 U.S. 835; *United States v. Stead*, 528 F.2d 257 (8th Cir. 1975), *cert. denied*, *Stead v. United States*, 425 U.S. 953 (1976); *United States v. Larsen*, 525 F.2d 444 (10th Cir. 1975), *cert. denied*, *Larsen v. United States*, 423 U.S. 1075 (1976); *Reed Bros., Inc. v. Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975), *cert. denied*, *Monsanto Co. v. Reed Brothers, Inc.*, 423 U.S. 1055 (1976); *Advanced Hydraulics, Inc. v. Otis Elevator Co.*, 525 F.2d 477 (7th Cir. 1975), *cert. denied*, *Advanced Hydraulics, Inc. v. Otis Elevator Co.*, 423 U.S. 869; *Elot H. Raffety Farms, Inc. v. United States*, 511 F.2d 1234 (8th Cir. 1975), *cert. denied*, *Elot H. Raffety Farms, Inc. v. United States*, 423 U.S. 834; *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, *Braasch v. United States*, 421 U.S. 910 (1975); *United States v. Kowalski*, 502 F.2d 203 (7th Cir. 1974), *cert. denied*, *Kowalski v. United States*, 420 U.S. 979 (1975); *Umbaugh v. Hutto*, 486 F.2d 904 (8th Cir. 1973), *cert. denied*, *Umbaugh v. Hutto*, 416 U.S. 960 (1974); *Bourns, Inc. v. Allen-Bradley Co.*, 480 F.2d 123 (7th Cir. 1973), *cert. denied*, *Bourns, Inc. v. Allen-Bradley Co.*, 414 U.S. 1094; *Chicago & N. W. Ry. Co. v. United Transp. Union*, 471 F.2d 366 (7th Cir. 1972), *cert. denied*, *United Transp. Union v. Chicago & North Western Ry. Co.*, 410 U.S. 917 (1973); *Hospital Television, Inc. v. Wells Television, Inc.*, 462 F.2d 417 (8th Cir. 1972), *cert. denied*, *Hospital Television, Inc. v. Wells Television, Inc.*, 409 U.S. 1024; *United States v. Lane*, 464 F.2d 593 (8th Cir. 1972), *cert. denied*, *Lane v. United States*, 409 U.S. 876; *Easter v. United States*, 441 F.2d 425 (8th Cir. 1971), *cert. denied*, *Easter v. United States*, 404 U.S. 833; *Kroger Co. v. F.T.C.*, 438 F.2d 1372 (6th Cir. 1971), *cert. denied*, *Kroger Co. v. F.T.C.*, 404 U.S. 871; *United States v. Karigiannis*, 430 F.2d 148 (7th Cir. 1970), *cert. denied*, *Panagiotopoulos v. United States*, 400 U.S. 904.

[48]*Gautreaux v. Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1974), *aff'd*, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

[49]*United States v. Hazelwood School Dist.*, 534 F.2d 805 (8th Cir. 1976), *vacated and remanded by Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (8–1); *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973), *judgment rev'd by Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974) (6–3).

[50]*Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). Justice Clark began his dissent with an air of disappointment: "This is the first dissent that I have filed in my several sittings with this Circuit, and it is, therefore, with regret that I find myself in disagreement here." *Id.* at 772.

[51]*Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 365 F. Supp. 235 (N.D. Cal. 1972); *Marnell v. United Parcel Serv. of Am., Inc.*, 1971 WL 576 (N.D. Cal. 1971); *John P. Maguire & Co. v. Continental T.V., Inc.*, Civil No. 44251 TCC (N.D. Cal., Feb. 16, 1971).

[52] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).
[53] *Twin City Sportservice*, 365 F. Supp. 235.
[54] *Twin City Sportservice*, 365 F. Supp. at 238.
[55] *Twin City Sportservice*, 365 F. Supp. at 238 n.3.
[56] *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264 (9th Cir. 1975).
[57] 433 U.S. 36 (1977).
[58] Charles J. Goetz & Fred S. McChesney, **Antitrust Law: Interpretation and Implementation**, 529 (3d ed. 2006).
[59] 372 U.S. 253 (1963).
[60] *White Motor Co.*, 372 U.S. at 276 (Clark, J., dissenting).
[61] 388 U.S. 365 (1967).
[62] *Arnold, Schwinn & Co.*, 388 U.S. at 379.
[63] *GTE Sylvania Inc. v. Continental T. V., Inc.*, 433 U.S. 36, 40–41. The instruction read:

> [I]f you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions. *Id.*

[64] *GTE Sylvania Inc. v. Continental T.V., Inc.*, 1974 Trade Cas. ¶ 75,072, at 96,793 (9th Cir., May 9, 1974).
[65] *GTE Sylvania Inc. v. Continental T. V., Inc.*, 537 F.2d 980 (9th Cir. 1976) (*en banc*).
[66] *GTE Sylvania Inc.*, 537 F.2d at 987 n.10 (citation omitted).
[67] *United States v. Arnold, Schwinn & Co.*, 291 F. Supp. 564, 565–66 (N.D. Ill.1968).
[68] *GTE Sylvania Inc.*, 537 F.2d at 1111–12 (Kilkenny, J., dissenting).
[69] 525 F.2d 486 (8th Cir. 1975).
[70] *Reed Brothers, Inc.*, 525 F.2d at 494.
[71] *Smith v. Bordenkircher*, 671 F.2d 986 (6th Cir. 1982).
[72] *Perkins v. C.I.R.*, 746 F.2d 1187 (6th Cir. 1984).
[73] *Rees v. Mosaic Technologies, Inc.*, 742 F.2d 765 (3d Cir. 1984); *Corey v. Mast Road Grain and Bldg. Materials Co., Inc.*, 738 F.2d 11 (1st Cir. 1984); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983); *Owen v. Lash*, 682 F.2d 648 (7th Cir. 1982).
[74] John C. Jefferies, Jr., **Justice Lewis F. Powell, Jr.**, 542 (2001).
[75] *United States v. Articles of Drug Consisting of Following: 5,906 Boxes*, 745 F.2d 105 (1st Cir. 1984), *cert. denied sub. nom. Alcon Laboratories, Inc. v. United States*, 470 U.S. 1004 (1985).
[76] *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1983).
[77] *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1492 (7th Cir. 1983).
[78] *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984) (*en banc*).
[79] *Oscar v. Clovervale Foods Processing, Inc.*, 833 F.2d 310 (4th Cir. 1987).
[80] *In re Owen*, 961 F.2d 170 (11th Cir. 1992); *United States v. Langford*, 946 F.2d 798 (11th Cir. 1991).
[81] Atkinson, *supra* note 2, at 164.
[82] *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773 (4th Cir. 1994), *cert. denied*, 516 U.S. 824 (1995); *United States v. All That Lot or Parcel of Land Located at 31 Endless Street, Martinsville, Va.*, 8 F.3d 821 (4th Cir. 1993), *cert. denied sub nom. Brown v. U.S.*, 511 U.S. 1034 (1994); *United States v. Ellis*, 951 F.2d 580 (4th Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992); *United States v. Miller*, 925 F.2d 695 (4th Cir. 1991), *cert. denied*, 502 U.S. 833; *Ballard v. Carlson*, 882 F.2d 93 (4th Cir. 1989), *cert. denied sub nom. Ballard v. Volunteers of America*, 493 U.S. 1084 (1990); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990); *Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989), *cert. denied*, 493 U.S. 920; *United States v. Parker*, 834 F.2d 408 (4th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988).
[83] *Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316 (4th Cir. 1992), *cert. denied*, 506 U.S. 872.
[84] *See, e.g., Bowman Transp., Inc. v. Heinsohn*, 72 F.3d 126 (1995) ("Justice Powell heard oral argument but did not participate in the decision of this case").
[85] *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991).
[86] *Tenngasco Exchange Corp. v. F.E.R.C.*, 952 F.2d 535 (D.C. Cir. 1992).
[87] *Templeton v. Office of Personnel Management*, 951 F.2d 338 (Fed. Cir. 1991).
[88] *Sharpton v. Turner*, 964 F.2d 1284 (2d Cir. 1992).
[89] *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992).
[90] Bruce Weber, "2 Fiery Personas, but No Sparks, in Courtroom," *New York Times*, January 24, 1992, at B4.
[91] *Id.*
[92] Associated Press, "Former Justice to Serve on Appeals Panel," *New York Times*, October 18, 1992, at A31.
[93] *Id.*
[94] "Marshall Cancels Trip," *Washington Post*, October 23, 1992, at D3.
[95] *Ebmeier v. Stump*, 70 F.3d 1012 (8th Cir. 1995); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995); *Rubio-Rubio v. I.N.S.*, 23 F.3d 273 (10th Cir. 1994).
[96] *United States v. Stone Container Corp.*, 196 F.3d 1066 (9th Cir. 1999).
[97] *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999); *Legal*

Aid Soc. of Hawaii v. Legal Services Corp., 145 F.3d 1017 (9th Cir. 1998), *cert. denied*, 525 U.S. 1015; *United States v. Starnes*, 109 F.3d 648 (10th Cir. 1997), *cert. denied*, 521 U.S. 1128; *United States v. Russell*, 109 F.3d 1503 (10th Cir. 1997), *cert. denied*, 521 U.S. 1126; *Habiger v. City of Fargo*, 80 F.3d 289 (8th Cir. 1996), *cert. denied*, 519 U.S. 1011.

[98] *Lewis v. United States*, 144 F.3d 1220 (9th Cir. 1998).

[99] Tony Mauro, "A Tough Tour of Tribal Courts Have Their Day," *Legal Times*, July 30, 2001, at 8.

[100] *Id.*

[101] 28 U.S.C. § 294(a). Senior Justices have occasionally served as special masters for some of the Supreme Court's original jurisdiction cases. *See generally* Anne-Marie C. Carstens, "Lurking in the Shadows of Judicial Process: Special Masters in the Court's Original Jurisdiction Cases," 86 *Minn. L. Rev.* 625 (2002). Chief Justice Hughes, Justice Reed, and Justice Clark were so appointed during their terms of senior service. *New Hampshire v. Maine*, 414 U.S. 996, 996–97 (1973) (Justice Clark); *Virginia v. Maryland*, 355 U.S. 946, 946 (1958) (Justice Reed); *Wisconsin v. Illinois*, 271 U.S. 650, 650 (1926) (Chief Justice Hughes).

[102] H.R. Rep. No. 176, at 1 (1937), *quoted in* Edward A. Hartnett, "Ties in the Supreme Court of the United States," 44 *Wm. & Mary L. Rev.* 643, 648 (2002).

[103] 81 *Cong. Rec.* 9082 (1937) (statement of Sen. Barkley), quoted in Hartnett, *supra* note, 102 at 649 n. 27.

[104] 424 U.S. 1 (1976).

[105] Letter from Warren E. Burger, William J. Brennan, Jr., Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist to William O. Douglas, December 22, 1975, in Ward, **Deciding to Leave**, *supra* note 2, at 191. *See also* Artemus Ward, "The Tenth Justice: The Retirement of William O. Douglas," 25 *J. Sup. Ct. Hist.* 296 (2000).

[106] Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum," 80 *Minn. L. Rev.*, 657 (1996).

[107] Ross E. Davies, "A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court," 90 *Minn. L. Rev.* 678, 710–13 (2006).

[108] Letter from John Paul Stevens to William H. Rehnquist, October 28, 1988, in Ward, **Deciding to Leave**, *supra* note 2, at 255–57.

[109] Justices, of course, used to do so with regularity. *See, e.g.*, Glick, *supra* note 23.

[110] *See, e.g.*, *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (Chief Justice Roberts); *Lamprecht v. F.C.C.*, 958 F.2d 382 (D.C. Cir. 1992) (Justice Thomas); *Stevenson v. Matthews*, 529 F.2d 61 (7th Cir. 1976) (Justice Stevens).

[111] *See, e.g.*, *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (Justice Alito); *Wachtler v. County of Herkimer*, 35 F.3d 77, 78 (2d Cir. 1994) (Justice Breyer) (sitting in the Second Circuit by designation); *Jensen v. Frank*, 912 F.2d 517 (1st Cir. 1990) (Justice Souter); *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971) (Justice Blackmun); *United States v. Wharton*, 433 F.2d 451 (D.C. Cir. 1970) (Chief Justice Burger); *United States v. DeLime*, 223 F.2d 96 (3d Cir. 1955) (Justice Harlan).

[112] *Nilsson, Robbins v. Louisiana Hydroelectric*, 854 F.2d 1538 (9th Cir. 1988).

[113] *McKenzie v. Kennickell*, 825 F.2d 429 (D.C. Cir. 1987) (no participation); *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986) (writing as Circuit Justice).

[114] *Heislup v. Town of Colonial Beach*, 1986 WL 18609 (4th Cir. 1986).

[115] *Field v. United States*, 193 F.2d 86 (2d Cir. 1952).

[116] *Saunders v. United States*, 286 F.2d 823 (D.C. Cir. 1961).

[117] *Merchant v. Ruhle*, 740 F.2d 86 (1st Cir. 1984).

[118] *United States. v. Crouch*, 528 F.2d 625 (7th Cir. 1976); *United States v. Donner*, 528 F.2d 276 (7th Cir. 1975).

[119] *United States v. Langford*, 946 F.2d 798 (11th Cir. 1991) ("POWELL, Associate Justice, TJOFLAT, Chief Judge, and KRAVITCH, Circuit Judge."). *See also United States v. Fine*, 1995 WL 522565 (4th Cir. 1995) ("Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, ERVIN, Chief Judge, and MOTZ, Circuit Judge"); *Ramex Min. Corp. v. Watt*, 753 F.2d 521 (6th Cir. 1985) ("Before STEWART, Associate Justice (Retired), ENGEL and MERRITT, Circuit Judges"); and *Metropolitan Life Ins. Co. v. Kase*, 720 F.2d 1081 (9th Cir. 1983) ("Before STEWART, Retired Associate Justice, DUNIWAY, Senior Circuit Judge, and ALARCON, Circuit Judge").

[120] *United Paperworkers Intern. Union, AFL-CIO, Local 274 v. Champion Intern. Corp.*, 81 F.3d 798 (8th Cir. 1996) ("Before McMILLIAN, Circuit Judge, WHITE, Associate Justice (Ret.), and LOKEN, Circuit Judge.") (footnote omitted); *Merchant v. Ruhle*, 740 F.2d 86 (1st Cir. 1984) ("Before COFFIN, Circuit Judge, STEWART, Associate Justice (Retired), and BREYER, Circuit Judge"); *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083 (7th Cir. 1983) ("Before PELL, Circuit Judge, STEWART, Justice (Retired), and POSNER, Circuit Judge").

[121] *Rees v. Mosaic Technologies, Inc.*, 742 F.2d 765 (3d Cir. 1984).

[122] *United States v. Starnes*, 109 F.3d 648 (10th Cir. 1997) (footnote omitted) (capitalization changed).

[123] *Aaron v. Kansas*, 115 F.3d 813 (10th Cir. 1997) (footnote omitted).

[124] *United States v. Toro-Pelaez*, 107 F.3d 819 (10th Cir. 1997) (footnote omitted); *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997).

[125] Feinberg, *supra* note 11, at 418.

"The Most Hated Woman in America": Madalyn Murray and the Crusade against School Prayer

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Throughout her life, Madalyn Murray (O'Hair) tried to obliterate the concept of God and Christianity. She first burst onto the national stage in the early 1960s with a lawsuit against the religious exercises her son was subjected to in a Baltimore, Maryland, public school. A colorful woman who flouted convention, Murray despised religion: "If people want to go to church and be crazy fools, that's their business. But I don't want them praying in ball parks, legislatures, courts and schools. . . . They can believe in their virgin birth and the rest of their mumbo jumbo, as long as they don't interfere with me, my children, my home, my job, my money or my intellectual views." At a time when religious conviction was often equated with patriotism, Murray's public statements were regarded as heretical. The media naturally sought her out and as the public learned more about her, Murray was demonized as a belligerent, loudmouthed crank—"the most hated woman in America." She was not, in fact, the first person to challenge school prayer successfully. That distinction belonged to a fellow atheist, Lawrence Roth, in *Engel v. Vitale* (1962), a highly unpopular decision against a state-devised prayer in New York. But unlike the reclusive Roth, Murray gravitated to the limelight and became the leader of American atheism in the late twentieth century.

To dampen the extraordinary fervor against *Engel*, the U.S. Supreme Court revisited the question of school prayer in a pair of cases decided the following year. In *School District of Abington Township v. Schempp* and *Murray v. Curlett*, the question before the Court was whether school officials in Pennsylvania and Baltimore, Maryland, could require students to participate in daily devotions, including listening to Bible verses and reciting the Lord's Prayer, even if the state had not written the devotions. These cases had broad implications because thirty-nine states either required or permitted religious exercises in public school classrooms.

In Pennsylvania, Bible reading had existed in the public schools before the Civil War. In 1913, the state legislature voted to require the practice to help young people develop lives of "good moral training," "honorable thought," and "good citizenship." As the Cold War divided the world into two camps—one democratic and God-fearing, the other communistic and atheistic—many American politicians believed that devotions were indispensable to the nation's survival. With that thought in mind, the state in 1949 required Pennsylvania public schoolteachers to read ten Bible verses without comment every school day or face dismissal. In Baltimore's pubic schools, the Bible had been required as a "reading book" since 1839, a rule that was superseded in 1905 by a requirement for daily devotions consisting of a chapter from the King James or Douay versions of the Bible and/or recital of the Lord's Prayer.

The *Schempp* case arose in 1956 when sixteen-year-old Ellory Schempp, a popular honors student and track athlete at the prestigious Abington High School in suburban Philadelphia, decided to ignore the scripture reading. Every day, at 8:20 a.m., a teacher selected students from a television and radio workshop to lead their classmates in a familiar ritual. Using the public address system, they opened with a "fact for the day"—"Mt. Everest is 29,000 feet high"—to get the students thinking, followed by ten Bible verses, the Lord's Prayer, the salute to the flag, and school announcements. The school provided the King James Bible, but students who were selected to read sacred text could use a different version. The Revised Standard (Protestant), Douay (Catholic), and Torah (Jewish) scriptures were sometimes used. In the lower grades, which were attended by Ellory's younger sister, Donna, and brother, Roger, entire classes recited the Lord's Prayer with bowed heads and closed eyes. Although state law did not require recital of the Lord's Prayer, the Abington School District mandated it anyway.

At first, Ellory thought of morning devotions as harmless background noise, but he became deeply offended by such indoctrination as patently unconstitutional. He had been taught to think for himself, surrounded as he was by supportive liberal adults—his parents, his church leaders, and his teachers. Ellory's father, Edward Schempp, a self-taught electronics engineer, could not believe in the Old Testament's bloodthirsty god of vengeance, and he completely rejected the idea that the sins of the fathers would be visited on their sons, even to the fourth generation. Raised in the Unitarian Universalist tradition of free thought, Ellory likewise rejected core Christian teachings about Jesus of Nazareth—that Jesus was conceived by the Holy Spirit and was part of a triune godhead—which had been asserted in biblical passages read in class. Years later, Ellory wrote his own Ten Commandments, the first of which read: "You are a human, and neither Jesus, nor Mohammed, nor Buddha speaks for you. Take courage—you can live without a god." In school, Ellory read Henry David Thoreau's classic essay "On Civil Disobedience," studied Thomas Jefferson's and Thomas Paine's writings on the nature of government, and learned about Senator Joe McCarthy's recent persecution of nonconformists. Ellory examined the First Amendment in his social studies class, and it dawned on him that the devotions in his own school violated the law.

Ellory's mentor, English teacher Allan Glatthorn, assigned weekly essays on timely issues and urged his students to meet outside of class to continue the discussions. Ellory and a dozen of his friends met at each other's homes on Thursday nights, talking about "everything from politics to civil rights to sex." "It was a wonderful forum for testing ideas," Ellory recalled. One night, school prayer and Bible reading came up. While Ellory's circle agreed that these devotions were probably unconstitutional, "a lot of them thought it was trivial—who cares?" A few friends, one

Ellory Schempp, age sixteen, was a popular honors student in suburban Philadelphia who refused to recite the Lord's Prayer at school. His father, Edward, was a self-taught electronics engineer who raised his children as freethinkers in the Unitarian Universalist tradition. The Schempp family was photographed on the steps of the Supreme Court building after hearing arguments in their case.

of whom was Roman Catholic and the other Greek Orthodox, made a compact to protest the devotions, but "they all chickened out when they thought of the principal calling their parents. So it came down to me," Ellory remembered, which was "a little scary." His chief concerns were always twofold: "What is fair to everyone? What does the Constitution mean? In my naivete, I thought I could point out the error and someone would make things right. I don't think I understood the extent of how jolting this would be to the American public."

On Monday, November 26, 1956, Ellory borrowed a copy of the Qur'an from a friend and began reading it silently while Bible verses were read over the public address system. He continued reading at his desk when the rest of his classmates stood to recite the Lord's Prayer. Ellory later told reporters that he picked the Qur'an because "I wanted to indicate that Christ and the Bible were not the only holy scriptures of the world." Ellory stood to say the Pledge of Allegiance, but this did not pacify his flabbergasted homeroom teacher, who rushed over to Ellory and told him: "You know you have to obey the rules about Bible-reading." Ellory replied, "I've been thinking about that, and I have decided that in good conscience I can no longer participate." Ellory admitted that he was "terribly, terribly nervous, nervous as a cat."

The teacher was taken aback by Ellory's recalcitrance and ordered him to the principal's office. The lonely walk down the school corridor began a journey that led to the U.S. Supreme Court. The principal, W. Eugene Stull, was furious over Ellory's protest and tried to isolate him in a face-to-face conference. Stull asserted that Ellory was the only Unitarian he knew who would protest Bible

reading and the only one of the 1,100 Abington high-schoolers who did not "show respect" for mandatory devotions. Ellory defended himself by citing the First Amendment, only to find himself shuffled off to the guidance counselor's office. After an hour, Evelyn Brehm, the counselor, determined that Ellory was sane, but their meetings would last for months. Ellory was to come to the counselor's office during the devotionals and do his algebra homework. Almost from the beginning, Brehm was sympathetic to Ellory's protest and did not try to dissuade him.

To stop the devotions, Ellory laboriously typed a letter to the American Civil Liberties Union (ACLU), with his parents' full blessing. They were, after all, ACLU members. "Gentlemen," Ellory wrote, rather pretentiously, "I thank you for any help you might offer in freeing American youth in Pennsylvania from this gross violation of their religious rights as guaranteed in the first and foremost Amendment in our United States' Constitution." To prod the ACLU to pay attention to his letter, Ellory enclosed a $10 check.

The ACLU did not need prodding, for it had been looking for a plaintiff for years, going so far as to ask Joseph Lewis, president of the Freethinkers of America, if he could find a petitioner to stop Bible reading. ACLU attorney Bernard Wolfman, a University of Pennsylvania law professor, interviewed the Schempp family to determine the feasibility of filing a lawsuit. The parents told Wolfman, "Talk to the kids," and then abruptly left the room. After pointing out that the community might well be hostile to a legal challenge against Bible reading, Wolfman asked the children to whom they prayed. Twelve-year-old Donna replied, "You are Jewish, aren't you? Well, Unitarians are like Jews and they are individualistic." When Edward Schempp returned to the room, Wolfman asked whether Schempp wanted to proceed. The father replied, "If the children agree, we will support them." Wolfman was impressed by this "attractive, well-balanced" family who were "very keen mentally." He recommended that the ACLU take the case. "How could I not, after this?" he asked rhetorically.

As it turned out, the ACLU's Philadelphia affiliate had doubts about the case. The board of directors split down the middle over whether it could afford such a lawsuit. Board Chairman Charles Byse, the Harvard law professor who inspired the television show *The Paper Chase*, cast the deciding vote in favor. Although he was Roman Catholic and regarded Bible reading as a source of morality, Byse was convinced that the Abington School District had abridged the Establishment Clause of the U.S. Constitution. The ACLU spent the next year soliciting other plaintiffs from different religious convictions and mapping out its legal strategy. The ACLU particularly hoped for a "*real* Christian family." In this respect, Spencer Coxe, the branch's executive director, used the national organization's experience in the *Engel* case as a model for *Schempp*. When no one else in Abington signed up other than the Schempps, the ACLU proceeded with the suit anyway, warning that legal action could take five years.

The ACLU was not alone in doubting the value of the case. In the spring of 1958, Socialist party leader Norman Thomas, a founder of the national ACLU, appeared at the Unitarian church in Germantown, which the Schempps attended regularly. In a private meeting, Thomas agreed completely with the Schempps' complaint but urged them not to proceed. Thomas worried that, even if the lawsuit were successful, it would, in Ellory's words, "raise such a backlash that we could lose everything." Although Thomas was Ellory's "idol," the Schempps never wavered.

After news of the lawsuit surfaced, Ellory saw little change in his daily routine. Because of his intelligence, Ellory took Advanced Placement classes in science, math, and history, which put him in a virtual academic cocoon. "We had the best teachers," Ellory recalled, "and most were sympathetic" to his cause. He recalled only one teacher who "attacked" his position in front of his classmates.

The stakes were heightened in the fall of 1958, when school officials refused to allow Ellory to miss morning devotions any longer. The state law, after all, did not permit any student to be excused from the devotions. The ACLU decided that Ellory's civil disobedience was counterproductive, so he now remained in class with everyone else to say the Lord's Prayer and listen to the Bible reading. The point was to illustrate the coercive nature of the law.

At the trial, the Schempps told the federal district court that the literal reading of the Bible ran contrary to their religious beliefs. Expert testimony on the Bible followed. Rabbi Solomon Grayzel, a distinguished scholar who had translated the Torah into English, outlined the harm that could come from presenting religious works in a public school environment. In Judaism, scriptures are sources to be studied and not merely read, as occurred in the Abington School District. Bible reading without study, the rabbi maintained, would degenerate into an empty ritual. He noted that there were marked differences between Jewish and Christian scriptures, besides the obvious one that the New Testament is found only in the Christian Bible. Grayzel noted that the concept that Jesus is the Son of God was "practically blasphemous" to Judaism. Grayzel cited instances in which the New Testament tended to ridicule or scorn Jews, including the Good Samaritan story, which served as "a slap at the Jews of that day who refused to join the Christian church." Grayzel also examined the crucifixion account in which the Jews in the crowd ask for condemnation: "His [Jesus'] blood be on us, and our children," a phrase, Grayzel commented, that had been "the cause of more anti-Jewish riots throughout the ages than anything else in history."

Abington school officials argued that Bible reading was not a religious practice: "It requires only that those who wish to do so may listen to daily readings without discussion or comment from a great work that possesses many values . . . . [It] does not involve proselytizing, persuasion, or religious indoctrination. It involves no avowal of faith, acceptance of doctrine, or statement of belief." The school's attorneys went so far as to contend that even if Bible reading were religious, the practice need not be outlawed, because the Constitution did not require government to be "hostile to religion." To outlaw Bible reading, the school board's attorneys alleged, would blaze a trail that would eliminate from public life customs that "are now and have long been cherished and accepted by a vast majority of the people."

The school district's star witness was Luther Weigle, a Lutheran minister and former dean of the Yale Divinity School. He had long worked for Christian unity, serving in leadership positions for the World's Sunday School Association, the American Association of Theological Schools, and the National Council of Churches. Most significant, he had chaired the committee of biblical scholars who prepared a fresh translation of the Bible called the Revised Standard Version. In court, Weigel asserted that the Bible was "non-sectarian," but on cross-examination, he provided valuable support to the Schempps when he explained that his use of the phrase "non-sectarian" referred to groups within Christianity. The Bible, in his view, necessarily included the Torah and the New Testament. Weigel maintained that the Bible, however defined, was of great moral, historical, and literary value.

The Schempps anticipated that their lawsuit would result in harassment, if not worse. "We figured we would be the objects of a certain amount of hate," Edward Schempp said. In the mail, the Schempp family received hundreds of New Testaments and letters that ran against them by a two to one margin. One postcard read, "You must be either Catholics, Jews or Communists. Why don't you go back to Russia?" Ellory's favorite read, "In the name of Christianity, go to hell." Edward dismissed such invective-filled diatribes as unintelligent, but the family replied to every one with a return address. Vandals pelted the Schempp home with rotten fruit and smeared dog feces on the doorknobs. At school, the younger

Second grade students at this New York public school in 1962 were expected to fold their hands and listen to their teacher read a biblical passage every day. The practice of daily devotions had been in place in most schools since the early 1800s; states began requiring it by law in the early twentieth century.

Schempp children were hounded and beaten, which caused fourteen-year-old Roger to develop a stuttering problem that compounded his learning difficulties. As the afternoon bus passed by the Schempp home, the youngsters pointed to the "Commie camp" or the "devil's house." When Donna's girlfriends shunned her, her father wrote a note for Donna to give to her circle of friends. The note explained that the Schempps were not anti-God, just interested in their constitutional rights. Donna dutifully passed out the note, which only made matters worse. She threw herself into church youth activities as an escape. The abuse occurred despite efforts by the Schempps to portray themselves as religious. A posed photograph of them reading the Bible at home appeared in the local newspaper.

The mistreatment of Ellory was particularly serious, because his future was on the line. Principal Stull found out where Ellory had applied to college and wrote unsolicited letters labeling him a "troublemaker"—perhaps a Communist—and urging institutions of higher learning to reject his application. When Tufts University in Boston, Massachusetts, nonetheless accepted Ellory for its new class, Stull escalated his campaign by calling on Tufts to rescind Ellory's admission. Tufts very much wanted the gifted science student and declined to reject him. In the end, Ellory continued his outstanding academic performance, graduating from Tufts with Phi Beta Kappa honors and then earning a doctorate in nuclear physics at Brown University. Along the way, he joined sit-ins against racial discrimination and counseled conscientious objectors like himself against the Vietnam War. He subsequently taught at several universities, helped to develop magnetic resonance imaging (MRI) diagnostic technology, worked at the Lawrence Berkeley National Laboratory, and managed

a firm specializing in high technology superconductors.

In 1959, a federal district court ruled that Bible reading and the Lord's Prayer in Abington High School were unconstitutional because such practices illegally established religion. The court held that the Bible is "primarily a book of worship," which the school used for "the promotion of religious education." While the school district appealed the decision, the Pennsylvania state legislature rushed to change—and thereby save—the law by excusing students from participation in the religious rituals, provided their parents sent written notes to school. Edward Schempp was unimpressed by the excusal provision, charging that the amendment did not change the state's establishment of religion. After careful consideration, Schempp decided against asking school officials to excuse his children. He thought that if his children were excused and stood outside the classroom door, they would miss important school announcements and be stigmatized as "odd balls," called "un-American," and tied to "atheistic communism."

In February 1962, the same federal court ruled against Pennsylvania's excusal provision because Christianity was still promoted at taxpayer expense. Chief Judge John Biggs Jr., wrote: "The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercise does not mitigate the obligatory nature of the ceremony. . . . Since the statute required the reading of the 'Holy Bible,' a Christian document, the practice . . . prefers the Christian religion." This setback prompted the Abington School District to appeal the decision to the U.S. Supreme Court, at which point the case was consolidated with a similar case that had arisen from Baltimore, Maryland.

In 1960, Madalyn Murray, a forty-one-year-old social worker with a law degree, sued to stop Baltimore public schoolteachers from reading the Bible aloud and leading their students in reciting the Lord's Prayer. Murray's lawsuit against such "brain washing" was the first since the rule had been implemented a half-century earlier. She explained that, as an atheist, she doubted "the historicity of Jesus Christ" and denied the "efficacy of prayer." More important, in her view, "state-sponsored religious practice for children" violated the First Amendment, because the school subjected their "freedom of conscience to the rule of the majority." Murray's recollection was that her fourteen-year-old son, William III, made the momentous decision to resist saying the prayer and called her a "hypocrite" for not having the courage of her convictions to support him. According to Murray, William said, "I don't know if there is a god or if there isn't, but I do believe one thing: it's fruitless to pray to him if there is one, and damn stupid to pray if there isn't, and no one should be forced into doing either one." He refused to listen to the Bible being read or to recite the Lord's Prayer. William's recollection is that his domineering mother coerced him to support her complaint.

Exactly why Murray, who was raised Presbyterian and had her sons baptized, became anti-religious remains ambiguous. Whatever her motivation, she attacked religion as a dangerous superstition that created a repressive society. Only irrational people, she wrote in a letter to *Life* magazine, would follow a "nauseating" Bible that was "replete with the ravings of madmen" and a god who was "sadistic" and "brutal." An atheist, by contrast, "loves his fellow man instead of god" and "believes that a hospital should be built instead of a church." As for the Lord's Prayer, which was mandated in her son's school, Murray said that people who uttered it were mere "worms, groveling for meager existence in a traumatic, paranoid world." Religion, she concluded, did not belong in public education, because children should be prepared to address problems on earth, not get ready for heaven—"a delusional dream of the unsophisticated minds of the ill-educated clergy."

Murray found herself increasingly alienated from a "decadent" American society the

capitalist economy of which abandoned the poor. As she drifted from job to job, Murray gravitated to socialism and tried to defect to the "strong and beautiful nation" of Russia, which had launched the first artificial satellite, *Sputnik*. When Moscow rejected her application—a turn of events she blamed on a sinister CIA—she returned to Baltimore and enrolled William in the ninth grade at Woodbourne Junior High School.

As they walked down the long hallway to the school office, they passed by classrooms with students reciting the Lord's Prayer. Purpling with rage, Murray barreled into the administrative office and tore into the young school counselor. "Why are those ****ing children praying?" she shouted. "It's un-American and unconstitutional." The flustered counselor completed an enrollment form and marked it with a large "T" for "troublemaker." As the heated exchange continued, the counselor remarked, "There were prayers in the school of this city before there was a United States of America. If our forefathers had wanted us to stop this practice, they would have told us that when they formed the government." He suggested that Murray enroll her son in a private school if Murray was so unhappy with the required devotions. When Murray replied, "It doesn't matter where I put him. You people have to be stopped," the counselor finally retorted, "If you don't like it, why don't you sue us?"

A light went on in Murray's head, and she vowed to become an atheist Joan of Arc, committed to the destruction of God and the church. She had long admired Vashti McCollum for suing public schools in Illinois to stop released time for religious instruction, and now Murray would follow in her footsteps. The key part of Murray's battle plan to end school prayer was for William to record every classroom activity with religious overtones. William reluctantly played along with his mother's plan, but had no interest in her crusade, preferring to watch television, hang out with his friends, and chase girls. Insisting that William be her spy, Murray delivered a Marxist harangue tinged with anti-Semitism: "Listen, kid, the United States of America is nothing more than a fascist slave labor camp run by a handful of Jew bankers in New York City. They trick you into believing you're free with those phony rigged elections. . . . The only way true freedom can be achieved is through the new socialist man. Only when all men know the truth of their animal sameness will we have true freedom." William came to believe that *Murray v. Curlett*—a case against organized religion in public education—was his mother's plan to persuade the officially atheist Soviet Union to grant her citizenship.

Murray decided to force the issue. In a telephone call with Vernon Vavrina, assistant superintendent for secondary education, Murray threatened to pull William from school

In 1958, Socialist party leader Norman Thomas (above), a founder of the national American Civil Liberties Union, visited the Unitarian church, where the Schempps attended services regularly. Thomas tried to persuade them not to pursue their lawsuit because he was concerned that it would cause a backlash.

if he were not exempted from devotions. Vavrina was taken aback: "This is part of our history and our culture, our total background. I never had a request like this in my life." Vavrina told Murray bluntly, "Bill will, Bill shall, attend these services." Murray was infuriated by Vavrina's arrogance. In a private meeting, Vavrina tried to ingratiate himself with William: "Now, Bill, young man, I know that you don't want to do these terrible things your mother is forcing you to do. Now, Bill, if you don't want to do this, and I know you don't, you can tell me just confidentially, right now, and we can just forget the whole thing." There would be no reprisals, he promised. All William had to do during homeroom was to stand reverentially with his classmates and mouth the Lord's Prayer. (Vavrina later denied this account.) William replied, "You are asking me to be a complete hypocrite and abandon my entire principles. If the law wants that then the law must be changed. It is an evil and unjust law. Will that be all, Dr. Vavrina?" With that retort, William stormed out.

Furious over the school's ongoing religious activities, Murray kept William home for almost three weeks on "strike." She sent registered letters to school officials explaining why her son was truant, but received no reply. Tired of being ignored, she wrote a plaintive letter to the *Baltimore Sun*, defending atheists as persecuted people, like Jews, and objecting to the "collective madness" of prayer in the public square. Although her letter went unpublished, it did attract the newspaper's attention and led to a front-page photograph and feature article about her son, including the entire text of his school paper on the Soviet Union. The shocking headline read, "Boy, 14, Balks at Bible Reading." The David vs. Goliath story implied that William's motivation in challenging school devotions stemmed from Communism. Murray declared that she felt so strongly about the matter that she vowed to fight it by going on a hunger strike in jail and by litigating all the way to the U.S. Supreme Court.

The news created a national sensation, and Murray milked the developing story for all it was worth. In contrast to every other school-prayer plaintiff before or since, Murray assiduously cultivated the media, providing reporters with free beer, scripts of her next actions, and an endless stream of quotable comments. According to her son, Murray was a "perfect media maven" who loved being a celebrity—even one stigmatized as "the most hated woman in America." She reveled in the contributions that arrived in the mail from Communists, Orthodox Jews, anti-government conservatives, and atheists. A particularly generous donation came from Carl Brown, a wealthy wheat farmer who gave her $5,000 and 160 acres of land to found an atheist/nudist university near Centralia, Kansas. Joseph Lewis persuaded his fellow freethinkers to support the Murrays as well. With two young sons to support, as well as her mother, alcoholic father, and chronically unemployed brother, Murray desperately needed every donation; she had had to sell her automobile, fur coat, and grand piano to feed her family.

The case quickly came to the attention of the Maryland Civil Liberties Union, which advised Murray to return William to the school immediately so a workable church-state case could be developed. But the relationship between Murray and her private attorney, Fred Weisgal, who chaired the ACLU's local legal committee, was tempestuous and short-lived. According to Murray's recollection, Weisgal opposed the case almost from the beginning. He told her, "You are wrong, wrong, wrong, Madalyn. I know in my heart you are wrong. You should not being doing this. I went to public schools. I'm a Jew. *I* had to say that prayer to Jesus Christ. *I* had to go through what your son is going through. Look at me. Did it change me? Does a Jew accept Jesus Christ because he hears about him in public schools constantly?" When Murray defended her course of action, Weisgal said flatly, "You, Madalyn, are some sort of nut. You see injustice everywhere you look. . . . What do you hope to

gain?" As the next school board meeting approached, Weisgal suddenly asked Murray if she would like to be represented; when she agreed, he turned to her and allegedly said, "You fucking Commies are all alike. You get your ass in a sling and then you hustle to us bloody rotten capitalists to get you out of it."

Such sentiments offended Murray, who was in any case upset about Weisgal's strategy of letting other school prayer cases come ahead of hers, potentially making hers moot. When additional plaintiffs were to be added to the *Murray* case itself, Murray demanded to come before the others whose names preceded hers alphabetically. The national ACLU refused to take the case, repelled by Murray's admission that her financial backers were rabid anti-Semites and preoccupied by the *Schempp* case in Pennsylvania and the *Chamberlin* case in Florida, which were similar to *Murray* but not stained by atheism and thus far less of a headache. Murray retorted, "*The ACLU can go to hell, and take their opinions with them.*"

Left in the lurch by the ACLU, Murray searched for another attorney to take her case. She turned to Harold Buchman after getting a recommendation from a door-to-door Fuller Brush salesman who was a Communist. Buchman, who was Jewish, took the case briefly, only to withdraw because Murray received financial assistance from Charles Smith, editor of *The Truth Seeker*—a "vile, Negro-hating and Jew-baiting" publication—and founder of the American Association for the Advancement of Atheism. Buchman also resented Murray's penchant for giving "peremptory orders." "*I take orders from no client*," Buchman declared. He was, in any event, convinced that a strong case could not be developed in Maryland because of its adverse climate on church-state issues.

That left Murray's fate in the hands of Leonard Kerpelman, a thirty-two-year-old Baltimore attorney who sought out high-profile, if sometimes wacky, cases, including one involving bull-fighting. He had pestered the Murrays to let him represent them, even though it opened him to the charge of being an ambulance chaser. (Twenty years later, Kerpelman would be disbarred for unprofessional conduct.) Murray was not impressed with Kerpelman, whose scruffy appearance and physical deformities were off-putting, but she had nowhere else to turn. They were an odd couple to be sure: Murray was an unapologetic atheist and anti-Semite who called her attorney a "grossly inept little Jew, Sammy the Shyster" and Kerpelman, an admirer of civil-liberties attorney Leo Pfeffer's, was an Orthodox Jew who later gained notoriety for jumping into public fountains fully clothed. For all his weaknesses, Kerpelman offered to work without a fee, and, as a graduate of the Baltimore public schools, he could fully empathize with William, because both of them had endured unwanted devotions. Still, Kerpelman seemed to be nearly hopeless in oral argument, so Murray, who had graduated from the South Texas College of Law but never passed the bar exam, insisted on doing much of the legal work herself.

Once Woodbourne school officials recognized what Murray was up to, they tried to forestall a lawsuit in two ways. The administration proposed a deal. If the Murrays dropped the school prayer lawsuit, the school would allow William to graduate; if they kept on, he would be failed for not completing all his homework while on strike and would be ineligible for graduation. The Murrays declined the offer. At the same time, school officials kept William out of homeroom, so that he would not hear the devotions and therefore would have no case. Male teachers escorted William to the administrative office, where he filled out paperwork, took aptitude tests, and received counseling. Murray believed that William was being singled out for special treatment, and told him not to answer any questions and to submit blank test papers. She feared that counseling might lead to "pressure to conform."

After two weeks of this cat-and-mouse game, William entered the school building through a back door and sneaked into his homeroom. The tall, muscular youngster was

impossible to miss, but the teacher believed that the office had cleared him to return. As the prayer began, William's heart was pounding as he blurted out: "This is ridiculous." He then grabbed his coat and books and stormed out. "Communist pig," a classmate hissed at William as he departed. When William told his mother what had happened, she laughed with glee: "That's great, Bill. Let's see what they do about this!" Thus was set into motion the challenge to another prayer, this one not written by school officials, as in the case of *Engel*, but an officially approved prayer nonetheless.

William Murray endured all manner of harassment. He was assaulted daily on the playground. His classmates—many of whom were children of Polish and Hungarian Catholics who had broken through the Iron Curtain—taunted him as a "Commie lover! Why don't you move to Russia?" William thought to himself, "*We tried, but they wouldn't take us!*" William was punched, kicked, and spat upon as he made his way down the school corridors. Boys used rosaries as weapons, swinging the attached metal crosses to lacerate William's skin. At one point, hoodlums cornered William and tried to shove him in front of a city bus. Teachers shunned William, allegedly on the principal's orders. When Murray complained to the principal, Dorothy Duval, about this abuse at "Stalag Woodbourne," Duval purportedly replied, "Why should I be concerned with your son's special rights, when you and he both flagrantly disregard the rights of our Christian children in the school?" Another time, Murray barged into the administrative office and physically assaulted the vice principal. She threatened to kill "that son of a bitch" unless the violence against William stopped. The principal's answer was to isolate William from his classmates, designating where he could enter the school and forbidding him to use the library or cafeteria.

Though she relished the attention, Murray endured month after month of heavy abuse. Taunters spat in her face so much that spittle dripped on her dress. She was called a "dirty atheist," an "anti-Christ," a "slut," and a "masculine lesbian bitch." Letters smeared with feces accused her of bestiality and threatened to "kill you, kill you, kill, kill, kill, kill, kill." Postal workers tampered with her mail, forwarded the contents to the Communist party, or delivered empty envelopes. Crank telephone calls came incessantly, day and night. Some callers tried to convert the Murrays; others cursed them, breathed heavily or shrieked into the telephone, slammed receivers in their ears, or jammed their telephone line so that no one else could call. False telephone orders ruined their credit. The Murray flower garden was trampled upon, their car's tires were slashed, their electricity was short-circuited, and their home was pelted with gunshot and stones. Murray was arrested and prosecuted for having barking dogs, and the family cat's neck was wrung. When Murray complained about the abuse, the police arrived belatedly and made her feel like a "'Nigger' in a white block." The city finally provided the Murrays some police protection after two years of suffering. But by then, Murray's father had suffered a fatal heart attack, which the family attributed to the unending stress they endured.

It was easy for most Americans to hate Murray, who thumbed her nose at conventional society. A reporter who interviewed Murray for the *Saturday Evening Post* described her as "a strange, immensely complicated woman, full of paradoxes, conflicts and challenges. She is a woman who can in one moment be loud, profane, vain, arrogant, seemingly paranoid, messianic, rebellious, and implausible in her ideas, and in the next be gentle, intelligent, reasonable, thought-provoking and monumentally courageous." Murray described herself as an "offensive, unlovable, bull-headed, defiant, aggressive slob" who loved "a good fight." She led a life that most people branded as bizarre, if not immoral, an inevitable outgrowth of her atheist beliefs. She attacked her father with a 10-inch butcher knife, bore two children out of wedlock by different men, assumed the last name of a man she never married (Murray),

Madalyn Murray and her two sons, William and Garth, stood in front of the Supreme Court on the day their case was heard. Murray, an atheist who worked for the Communist party, was an unlikable woman who alienated even her supporters. Her son William eventually became an evangelical Christian.

challenged God to strike her dead in a driving rainstorm, assaulted police and skipped bail, renounced her citizenship in favor of Communism, admired Fidel Castro and headed a Fair Play for Cuba Committee, bit her son's arm until she drew blood, joined forces with pornographer Larry Flynt, and contemplated running for President. She felt suicidal for years and once confided to her diary: "There is nothing for me ahead but a petty existence eked out from day to day. I am frustrated and bitter and full of hate . . . . I am impossible to live with." William eventually concluded that his mother "wasn't angry about God; she was angry *at* God."

As the controversy escalated, Maryland State Attorney General C. Ferdinand Sybert issued an opinion stating that all students had to attend school, even if they objected to the Lord's Prayer. In his view, children "had the right and the duty to bow their heads in humility before the Supreme Being." Anyone who was absent from school, except for reasons of ill health, could be prosecuted for truancy. Sybert, who had graduated from Catholic preparatory schools and Loyola College of Maryland, conceded that any student who did not say the prayer might well be embarrassed, but said that such was "the inevitable consequence of dissent." He recommended that students who objected to devotions be permitted to remain silent, or, if their parents submitted a written request, be excused from the exercise. Borrowing the trial judge's language in *Engel*, Sybert wrote, "We believe that while every individual has a constitutional right to be a non-believer, 'that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude.'" Any student who objected to Bible reading had one additional recourse—private school. The Baltimore School Board, led by president John Curlett, took the attorney general's advice and directed all of the district's schools to make

sure that excused students were not held up to "ridicule or scorn." In the first week after the new excusal rule was adopted, out of a district student population of 170,000, only three students, including Murray's two sons, asked to be excused.

Murray had difficulty finding support from family, friends, neighbors, and activist organizations. Even Murray's mother accused her of defying God and behaving like a "freak" for "dragging [her] children down in the gutter." "No good can come of this," she said with a sense of finality. Weary of the fight, Murray mused to her son, William, "We are just about as unlikely a pair to start this kind of campaign as anyone in the country. Here we are, sociologically middle-middle class, educated, should-be-Protestants, with no connections, no pull, no weight we can hurl around, completely unknown, with no backing." Unlike the Schempps, who belonged to a recognized religious group and received legal assistance from the ACLU, the American Jewish Congress, and the Pennsylvania State Education Association, the Murrays received no help from mainline groups in Maryland. Fearful of being "squelched," she telephoned, wrote, and even drove to the headquarters of the leading separatist groups—the ACLU, American Association for the Advancement of Atheism, American Humanist Association, American Jewish Congress, Protestants and Other Americans United for Separation of Church and State, and Society for Ethical Culture—only to be ignored or patronized. A shocked Murray pled "guilty to incredible naiveté."

After the Maryland Court of Appeals ruled against her in April 1962, Murray became an ever-more-visible target. The FBI opened a file on her after she wrote a letter to the *Washington Post* protesting the government's censorship of the *Daily Worker*, a Communist newspaper. The day after appealing her case to the U.S. Supreme Court, Murray was fired from her job as a caseworker for Baltimore's Department of Public Welfare. Her supervisor claimed that Murray had "brought disgrace" to the city by her actions. William contends that his mother was fired for not passing the state bar exam within a year of beginning employment, which had been stipulated at the time of hiring. To stay afloat financially, Murray worked for the Communist party, managing its left-wing bookstore and recruiting new party members.

As their world came apart, the Murrays learned of the related case being fought against school prayer in nearby Pennsylvania. Hoping for moral support, the Murrays drove up to Abington to meet the Schempps. The meeting was a disaster. In Murray's eyes, the Schempps were hypocrites and cowards, because, she claimed, the Schempps were really atheists who attended the Unitarian church as a "cover" for their unorthodox convictions. Edward Schempp admitted to speaking to and writing for a free-thought group, but was apparently afraid of jeopardizing his livelihood if his atheism became publicly known. Murray deeply resented Schempp's decision to keep his children in homeroom so that they would not be thought of as oddballs and lumped with "atheists" and "traitors" during the Cold War.

Still, the Murrays charged ahead, earning their way to the nation's highest court. On the day of oral argument, Kerpelman, the Murrays' attorney, was hesitant to enter the U.S. Supreme Court building. "I can't go in. I'm afraid," he blurted out. His fears may have been due to the realization that his case was based on Murray's superficial research and his own unsophisticated arguments. Murray finally steadied Kerpelman enough to proceed into the hallowed room, only to be horrified when the clerk cried, "Oyez, Oyez, Oyez! . . . God save the United States and this Honorable Court!" How, she wondered, could such a court "impartially judge an Atheist's rights with this all too obvious commitment of fortunes to the deity?" His voice quavering, Kerpelman contended that tradition did not make an unconstitutional act constitutional. Relying on the *Engel* decision, he told the Court that the Constitution had erected

a "wall of separation" between church and state. Justice Potter Stewart interrupted to ask Kerpelman exactly where this wording appeared. Kerpelman was stumped and remained silent for an embarrassing moment until Justice Hugo Black spoke up. Finally, Kerpelman regained his composure and commented that that phrase was indeed not in the Constitution but that the First Amendment had been so interpreted.

While Kerpelman stumbled, Henry Sawyer III, the Schempps' ACLU attorney and a former Philadelphia councilman, performed superbly. With Pfeffer's assistance, Sawyer insisted that the state law amounted to religious establishment, preferring one religion to another. He disputed the claim that the King James Bible was a guide to morality, rather than a sectarian scripture. "It is the final arrogance," he argued, "to quote constantly about our religious traditions and to equate those traditions with this Bible." Such an argument, Sawyer asserted, "suggests that the public schools of Pennsylvania are a Protestant institution to which others are cordially invited." He noted the obvious—that many Americans, including Jews, Catholics, and his clients, did not subscribe to the King James Bible. Some passages were plainly anti-Semitic, Sawyer maintained, and the introduction described the Pope as "that man of sin." Sawyer urged the Court to extend the *Engel* decision to the Pennsylvania practice.

Philip Ward, the Abington School Board attorney, conceded the "religious character" of Bible reading and the Lord's Prayer, but claimed these devotions promoted "moral values" that helped counter "the materialistic trends of our times." Ward asked the Court, "Must the government rip out that document, that tradition, simply because it involves a religious book?" Besides, he argued, the schoolchildren in Abington only had to listen to the devotions, or could be excused.

Such arguments proved unpersuasive. When Ward asserted that it was a "debatable" contention that the Lord's Prayer was sectarian and might well be compared to the Jewish prayer the Kaddish, Justice Black retorted, "Then why not use that one?" Justice Byron White wanted to know why children needed to be excused from devotions if they were not religious. "If it is *only* moral, and not religious, they should be compelled to attend." If the schools simply wanted to promote a good atmosphere, several Justices asked, why did the public schools not use tranquilizers or scriptures from other traditions, including Islam and Buddhism? When Ward characterized the dispute as one between atheists and theists, Chief Justice Earl Warren contradicted him, noting that Jews and other "fine groups" of theists had filed *amicus* briefs to strike down school-led devotions.

Ordinarily, Justice Black would have written the *Schempp* decision, because he had written *Engel*. But Warren's instincts led him to assign the opinion to Tom Clark, a Presbyterian church elder from Texas, who might placate conservative critics because of his sensitivity to public opinion. Clark had written articles in the lay press that trumpeted the value of prayer and religious piety, and Madalyn Murray was certain that he would vote against her. As Truman's Attorney General during the early stages of the Cold War, Clark unapologetically developed the administration's loyalty program for federal employees, drafted a list of allegedly subversive organizations, and prosecuted top Communist party leaders. But other experiences led Clark to identify with religious and ethnic minorities. At the University of Texas, he had at first been blackballed by fraternities because his roommate was Jewish. During World War II, he was the civilian relocation coordinator whose job it was to handle the legal aspects of interning Japanese-Americans. Though he supported the policy at the time, he later rued his actions as one of the worst mistakes he ever made. Clark was far more progressive with respect to African Americans, taking unprecedented action against restrictive housing covenants and other Jim Crow practices.

On June 17, 1963, Clark agreed with the plaintiffs in *Abington v. Schempp* and *Murray v. Curlett*. Writing for an 8–1 majority, which included Justices who were Protestant, Catholic, and Jewish, Clark upheld and expanded the *Engel* decision. A prime objective was to dampen the public furor left over from *Engel*. Although *Murray* was docketed first, Clark listed the *Schempp* as the lead case and treated the cases unequally in his opinion, evidently to say little about Madalyn Murray's atheism.

In ringing language designed to reassure the faith community, Clark paid homage to the importance of religion in American society, noting that "many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'" In simple, direct prose, Clark dismissed the argument that school prayer is permissible because the Founding Fathers did not object to it. He noted that American education had changed remarkably since the First Amendment was ratified. For a long time, education was confined to private schools, and it only gradually passed into the hands of public officials. "It would, therefore, hardly be significant," Clark concluded, "if the fact was that the nearly universal devotional exercises in these schools of the young Republic did not provoke criticism; even today religious ceremonies in church-supported private schools are constitutionally unobjectionable." The central idea of the Establishment and Free Exercise clauses, Clark wrote, was that the Constitution prohibits the union of "governmental and religious functions." Clark declined to mention Jefferson's rigid "wall" metaphor, fashioning instead a two-fold test of legislation to guide lower federal courts on church-state suits. Maintaining that government may not sponsor religious activities, Clark insisted that "wholesome 'neutrality'" requires that a statute or regulation have (a) "a secular legislative purpose" and (b) "a primary effect that neither advances nor inhibits religion." The classroom exercises in Abington and Baltimore failed this test on both counts.

Outraged Senate Minority Leader Everett Dirksen, who credited prayer with saving his eyesight, proposed his own "amen amendment" in 1966 after the Supreme Court handed down its school prayer ruling. The amendment was defeated.

Clark rejected several arguments the state made in favor of religious exercises. "It is no defense," he wrote, to say that Bible reading and school prayer were "minor encroachments" on the First Amendment: "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" Recalling the storm of criticism over *Engel*, Clark dismissed the claim that his ruling established a "religion of secularism," something *Zorach v. Clauson* had already prohibited. He declared that "one's education is not complete" without instruction in the objective history of religion, especially comparative religion and the Bible as literature or philosophy. *Schempp* was Clark's most controversial opinion in his fourteen years on the Court.

William Brennan, the gregarious son of Irish immigrants and the only Catholic on the Court, asked that no one join him in writing what proved to be an exhaustive concurrence in the *Schempp* decision. He hoped thereby to appeal to the Catholic hierarchy. Brennan noted that the Founders hardly knew what

public schools were at the end of the eighteenth century and could not have foreseen how religiously diverse the country would become. Since then, education had developed "a uniquely *public* function" of inculcating the core values of Americanism in a completely non-divisive atmosphere. Such instruction, Brennan argued, could readily be accomplished by reading patriotic speeches, studying the Declaration of Independence, and reciting the pledge of allegiance. Brennan conceded that in the First Amendment, the Founders had intended initially to forbid an official church, but he pointed out that the Amendment's final language prohibited the endorsement of religion generally, not just a particular church. Brennan characterized his *Schempp* opinion as excruciatingly difficult: "In the face of my whole lifelong experience as a Roman Catholic, to say that prayer was not an appropriate thing in public schools . . . that gave me quite a hard time. I struggled."

Potter Stewart almost made *Schempp* unanimous, but in the end, he dissented, as he had in *Engel*. Stewart criticized his brethren for adopting Jefferson's "sterile metaphor," which, he claimed, was likely to produce "a fallacious oversimplification" of the Establishment Clause. Stewart maintained that it was neither necessary nor desirable to have a "single constitutional standard" concerning religion and government. "Religion and government must interact in countless ways," he thought, and most of them are harmless enough. He favored sending the case back to the lower court because there was insufficient information to render a sound decision. Stewart wanted the plaintiffs to demonstrate that coercion had occurred before the Court agreed with them. For him, coercion was not the inevitable result of government involvement in a religious activity.

In light of the *Engel* decision that had just preceded it, the *Schempp* ruling was scarcely a surprise, and it did not engender the same outpouring of hostility as *Engel*. The Supreme Court received fewer than a hundred letters about it. A survey of thirty-five states and the District of Columbia found that sixty-one percent of them approved of the decision, a marked change from a year earlier. While Leo Pfeffer of the American Jewish Congress characterized the momentous decision as marking the end of Christian hegemony in America and the beginning of religious equality, he thought that *Schempp* was "certainly universally expected and came almost as an anti-climax." This was so even though *Schempp* directly affected far more schools and students than *Engel* did.

A year had passed since *Engel*, and most Protestant leaders and groups concluded that the Supreme Court was correct in outlawing organized religious activities in public schools. Indeed, some groups acted before *Schempp* was announced, in order to minimize hostile reaction. The General Assembly of the United Presbyterian Church issued an unqualified endorsement of church-state separation a month prior to the decision. Presbyterian leader Eugene Carson Blake, the "Protestant Pope," said, "My experience is uniformly that where there is careful study of the issues involved—in contrast to an initial and unconsidered emotional reaction—a substantial body of thoughtful church-member opinion sees the dangers inherent in the practice of devotions in the public schools." Fellow Presbyterian minister Thomas Davis of Chapel Hill, North Carolina, added calmly, "It is not necessary to legislate in favor of God. He doesn't need it." Howard Kennedy, dean of the Episcopal Cathedral of St. James in Chicago, explained why he had rejected *Engel* but accepted *Schempp*: "Unlike last year when I reacted emotionally, illogically, and non-intellectually, this decision doesn't disturb me." He commended the ruling, arguing that it "dissipates the myth that ours is a Christian country." The decision "should clear the air and put the challenge squarely up to the churches and Christian parents."

Schempp was still bitterly attacked in statehouses, the halls of Congress, and some newspapers and churches, especially Southern Baptist ones. Many people believed that

the Court was more interested in protecting a few kooks than in protecting the majority's assumed right to read the Holy Scriptures. *Schempp* seemed to be one more sign that the country was splitting apart at the seams. Evangelist Billy Graham was "shocked" by the *Schempp* decision, and said the Court was "wrong": "At a time when moral decadence is evident on every hand, when race tension is mounting, when the threat of communism is growing, when terrifying new weapons of destruction are being created, we need more religion, not less." He described *Schempp* as a penalty for the seventy percent of Americans who supported Bible reading and prayers in public schools. "Why," he asked, "should the majority be so severely penalized by the protests of a handful?" The *Washington Star* was sharply critical of the decision, declaring that God and religion had all but been driven from the public schools. What remains, the *Star* wondered? Would the baccalaureate service and Christmas carols be next to go?

In general, Catholic reaction was more muted with respect to *Schempp*, because the decision was expected. Archbishop Joseph McGucken of San Francisco commented, "We should . . . work harder at letting our children know of God and religion in our homes and churches." Only three of the five American cardinals, then meeting in Rome to choose Pope John XXIII's successor, lashed out against *Schempp*. Francis Cardinal McIntyre of Los Angeles remarked that the decision "can only mean that our American heritage of philosophy, of religion and of freedom are being abandoned in imitation of Soviet philosophy, of Soviet materialism and of Soviet-regimented liberty." Francis Cardinal Spellman of New York declared flatly that no believer in God could approve of *Schempp*: "I think it will do great harm to our country and there is nothing we can do but bear it." The Jesuit magazine *America*, which had bitterly opposed *Engel*, issued no incendiary editorials and opposed a constitutional amendment. *America*'s editor took small comfort that the Court had relied this time on the notion of "neutrality," not Jefferson's "wall" metaphor, and quoted *Zorach*'s declaration that Americans are a "religious people whose institutions presuppose a Supreme Being."

Although the mood in Congress was more temperate after *Schempp* than after *Engel*, school-prayer amendments that had been languishing in committee received new life with the *Schempp* ruling. The House Judiciary Committee received one million signatures and more mail backing a school prayer amendment than on any other topic, primarily from Protestant and Catholic women. The most important support came from the National Association of Evangelicals, which drew much of its membership from Pentecostal and Holiness churches. Other supporters included fundamentalist Carl McIntire, president of the International Council of Christian Churches; Gerald L. K. Smith, the silver-tongued minister of hate who led the Citizens Congressional Committee; and evangelist Billy James Hargis, whose Christian Crusade advertised itself as a "weapon against Communism and its godless allies." Francis Burch, the city solicitor who represented Baltimore in the *Murray* case, and George Brain, the superintendent of Baltimore schools, launched a group called the Constitutional Prayer Foundation, whose illustrious membership included former President Dwight Eisenhower, newspaper magnate William Randolph Hearst Jr., Cardinal Spellman, hotelier Conrad Hilton, and the governors of several states, but other than impressive stationery, little came of this glittering roster of names. Perhaps the largest such campaign was Project America, whose supporters came from the American Legion, Catholic War Veterans, International Christian Youth in the United States, and such state groups as the Massachusetts Citizens for Public Prayer, which was led by Robert Howes, a Roman Catholic priest.

After months of drum-beating for school prayer, House Judiciary Committee Chairman Emanuel Celler, a New York Democrat and Reform Jew, grudgingly consented to open hearings on proposals to amend the Constitution,

but he dug in his heels as deeply as he could. When the committee met on April 22, 1964, the large room was packed to capacity, with a long line of spectators waiting for admittance. Reporters crowded the press tables inside the room, and television lights glared outside to illuminate interviews with key players. New York Congressman Frank Becker, whose district included the locale in which the *Engel* case arose, commented on the high stakes involved: "The welfare and entire future of our beloved America depends upon how we handle the most dynamic tradition in our national life—dependence upon Almighty God." At the hearings, the first ever held on school prayer, Becker kicked off the proceedings, reminding the committee that the Supreme Court had once ruled that the United States was a Christian nation. The hearings quickly devolved into partisanship, prejudice, and flaring tempers, as congressmen grilled each other in the name of God and the Constitution. Howard W. Smith of Virginia, the powerful chairman of the House Rules Committee, warned the Judiciary Committee that if it failed to recommend the measure, "the House of Representatives will take the matter out of your hands and do it themselves."

Prominent politicians endorsed the Becker Amendment, including Republican presidential candidate Barry Goldwater of Arizona, former House minority leader and future President Gerald Ford, and John Sparkman of Alabama, a former Democratic vice-presidential nominee. The nation's governors supported the amendment at their annual meeting. Eager for another showdown with the federal government just one week after trying to keep the University of Alabama lily-white, Alabama Governor George Wallace urged disobedience to *Schempp*, a "ruling against God": "I would like for the people of Alabama to be in defiance of such a ruling.... I want the Supreme Court to know we are not going to conform to any such decision. I want the State Board of Education to tell the whole world we are not going to abide by it." The pugnacious former boxing champion noted that the nation was founded by men who believed in the Bible, adding, "I don't care what they say in Washington, we are going to keep right on praying and reading the Bible in the public schools of Alabama." The state law requiring daily Bible reading in the public schools was not struck down until a federal court did so in 1971.

Even though a Gallup poll showed that seventy-seven percent of Americans wanted the Becker Amendment, it never got beyond the House Judiciary Committee. The amendment failed in the wake of a grassroots effort by civil libertarians, Jews, and many Protestants, especially Dean Kelley, a Presbyterian minister who worked for the National Council of Churches. Together, these groups organized meetings, sponsored speakers, and launched a letter-writing campaign to protect the First Amendment. Numerous interest groups, along with prominent theologians and 223 constitutional law professors, spoke against the amendment in congressional hearings. Even Harvard Law Dean Erwin Griswold, who had sharply criticized the *Engel* decision, signed a petition to prevent a gutting of the First Amendment. One Judiciary Committee member sighed, "We have just been hit by 223 bricks." Joachim Prinz, a former rabbi of Berlin and president of the American Jewish Congress, testified at the hearings that sterile religious training failed to prevent the German people from slaughtering millions of innocents. The committee also received 13,000 letters on the matter, with 5,000 of them against the amendment. A rising crescendo of editorial opinion from the *Cincinnati Post and Times-Star*, *Cleveland Plain Dealer*, *Detroit Free Press*, *Minneapolis Tribune*, *St. Louis Post-Dispatch*, and *Washington Post* warned against tampering with the First Amendment. The sustained effort swung congressional sentiment from support to opposition, dooming the first attempt to win approval of a school prayer amendment.

Compliance with *Schempp*, as with *Engel*, depended on local willingness to enforce the law, because the U.S. Supreme Court has

no police force of its own. Such willingness revealed considerable regional variation. In Pennsylvania, State Superintendent of Public Instruction Charles Boehm thought *Schempp* barred only religious services and rituals. He declared that children would still begin their school days with "silent meditation," followed by inspirational music, art, and literature. "God and religion will remain in our schools," Boehm insisted. By contrast, many school-district officials concluded that public schools had to ban all forms of religious activity. In 1960, just before *Engel* was decided, a survey of the continental United States reported that forty-two percent of public school districts allowed Bible reading and thirty-three percent permitted teachers to recite prayers. By the mid-1960s, those figures had shrunk, as the table below indicates. The drop in religious practices in the public schools encouraged Pfeffer, who forecast that *Engel* and *Schempp* "may well be the last major battle . . . in the area of religion in the public schools." Subsequent litigation proved Pfeffer correct, as the Supreme Court simply closed loopholes in the decisive rulings.

Religious Practices in American Public Schools (by percent)

	1960	1966
Baccalaureate services	86.8	84.0
Bible distribution	42.7	37.4
Bible reading	41.8	12.9
Devotions	33.2	8.0

While numerous communities stopped the offending religious practices in the public schools, others defied the Court. Many states voided their laws on school prayer but quietly looked the other way as local schools said prayers on their own. Some officials believed erroneously that school prayers and Bible reading were constitutional as long as students were not directly compelled to participate. Two-thirds of southern schools and one-half of those in the Midwest continued as they had before. Six states—Alabama, Arkansas, Delaware, Florida, Georgia, and Idaho—had laws requiring devotions in the public schools. Delaware's attorney general ruled that *Schempp* applied only to Pennsylvania and Maryland, so devotions could continue in his state. Bible reading continued in nine other states—Indiana, Kansas, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia—though as a matter of tradition, not statutory requirement. In Tennessee, only forty-two percent of the 121 school districts made any change in their policies, and only one district eliminated devotions entirely. In Oklahoma City, sixty-one percent of the public schools had mandatory classroom prayers and ninety-two percent allowed Bible reading, in direct defiance of the Supreme Court.

Such defiance forced the judiciary's hand. Federal courts soon ordered compliance with *Engel* and *Schempp* by striking down prayers of one kind or another in Florida, New York, and Illinois. In accordance with the New York State Department of Education guidelines issued after *Engel*, Elihu Oshinsky, the principal at Whitestone Elementary School in Queens, immediately stopped kindergarten pupils from reciting a brief prayer before they received their morning milk and cookies. A group of Protestant, Roman Catholic, Jewish, Greek Orthodox, and Armenian Apostolic parents formed a group called Prayer Rights for American Youth (PRAY), and sued the school to give their children "an opportunity to express their love and affection to Almighty God each day through a prayer in their respective classrooms." The suit, which was underwritten by a thousand local families, alleged that the principal had "destroy[ed] the parent's right to have the child feel that God is with him the whole day long as well as the parent's right to have the child develop religious beliefs and religious expression." A federal district court struck down the prayer in *Stein v. Oshinsky*, deciding that "[t]he plaintiffs

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must content themselves with having their children say these prayers before 9 A.M. and after 3 P.M."—a ruling that the U.S. Supreme Court refused to review.

A parallel case arose in DeKalb, Illinois, and the outcome was the same. Esther Watne required her Elwood kindergarten class to recite the following "Cookie Prayer" with their hands folded and eyes closed before their morning snack:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you, God, for everything.

Some children said "amen" after the devotional, and others crossed themselves. When Lyle DeSpain protested that he did not want his five-year-old daughter Laura listening to this exercise, Watne deleted the word "God." As revised, Watne maintained that the verse was not a prayer but a part of her good-citizenship and "thankfulness" program. DeSpain thought the slightly camouflaged prayer violated his daughter's religious freedom and went to court to stop it. In *DeSpain v. DeKalb County Community School District*, the Seventh Circuit Court of Appeals agreed with DeSpain and tossed out the prayer. The court concluded that "[t]he so-called 'secular purposes' of the verse were merely adjunctive and supplemental to its basic and primary purpose, which was the religious act of praising and thanking the Deity."

These rulings outraged U.S. Senate Minority Leader Everett Dirksen, who credited prayer with saving his eyesight. Although he had once remarked that school prayer amendments were doomed to failure, the gravelly-voiced Illinois Republican proposed his own "amen amendment" in 1966. Evidently acting out of sincere, rather than raw political, convictions, Dirksen declared, "I'm not going to let nine men say to 190 million people, including children, when and where they can utter their prayers. . . . I can see no evil in children who want to say that God is good and to thank Him for their blessings." Dirksen's proposal precluded school authorities from "prescribing" any particular prayer, which the U.S. Supreme Court had barred. In a clever parliamentary maneuver, Dirksen managed to have his bill considered by the full Senate, but it narrowly failed. Birch Bayh, an Indiana Democrat who headed the Senate Judiciary Subcommittee on Constitutional Amendments, arranged to kill Dirksen's amendment by proposing that the Senate vote first on a meaningless resolution in support of God and prayer before voting on the amendment. After much soul-searching, Sam Ervin of North Carolina, who had denounced *Engel*, turned against Dirksen's amendment for weakening the First Amendment, and persuaded others to join him. As Bayh expected, the Senate approved the resolution as a face-saving measure, and voted against the amendment on technical grounds.

Hopes for a school prayer amendment did not evaporate with Dirksen's death. His son-in-law, Republican Senator Howard Baker of Tennessee, reintroduced a briefer version of the prayer amendment, but that failed too. In 1971, Ohio Republican Congressman Chalmers Wylie, a much-decorated World War II veteran, offered an amendment almost identical to Baker's, but that also failed. With each failure, a school prayer amendment became ever less likely.

As more religion cases came before the U.S. Supreme Court, the Justices made another stab at defining the First Amendment's religion clauses in the case of *Lemon v. Kurtzman* (1971). Spencer Coxe, executive director of the Greater Philadelphia branch of the ACLU, asked for volunteers to test a 1968 state law that provided $5 million annually for teacher salaries, textbooks, and instructional materials in nonpublic elementary and secondary schools, mostly Roman Catholic. Alton Lemon, an African American who had grown up hearing school prayers in Atlanta, Georgia, and who had once been president of the Society for Ethical Culture, stepped forward, even though he feared retribution from

his Catholic boss. Finding that such payments violated the Establishment Clause, Chief Justice Warren Burger, a Presbyterian and a Nixon appointee, tried to develop a more sure-handed formula to distinguish what was permissible in the church-state arena. This three-pronged *Lemon* test, which built on the *Schempp* decision, declared that a valid law concerning state action and religious entities must (1) have a secular purpose, (2) have a primary effect that neither aids nor hampers religion, and (3) not foster "an excessive government entanglement with religion." Although the *Lemon* test was criticized as vague and confusing, it has been mentioned in almost every subsequent state-aid dispute.

As the Supreme Court fine-tuned its interpretation of the Establishment Clause, Madalyn Murray, the self-proclaimed leader of American atheism, did her best to bring more church-state cases before it. She sued, for example, to end tax exemptions for churches, to forbid astronauts from reading the Bible in space, and to expunge the motto "In God We Trust" from all U.S. currency. She estimated that if churches had to pay taxes "like everyone else," they would disappear within forty years. Although all of these suits were denied, she managed to build an atheist empire in Austin, Texas, which included a center, a library, a magazine, and frequent television appearances. She once confessed, "I don't really care that much about atheism . . . . But I've gotten into this thing, and I've been driven out of the community. Atheism is all I have to fight my way back in with. I want respect for my right to have any opinion I want—and to live. I could be a damned fascist and do the same thing I'm doing now." Such a high profile wrongly convinced many Americans that it was Madalyn Murray who had won the case against organized school prayer.

Eventually, Murray alienated her followers, who detested her egomania, autocratic rule, obscene language, and lavish lifestyle at their expense. Even William Murray broke with his mother, embracing evangelical Christianity and picketing her public appearances. Murray's bizarre death matched her bizarre life. Her former office manager, a convicted felon, kidnapped her, along with her son Jon Garth and granddaughter Robin, just as they were headed to exile in New Zealand, extorted a fortune from them, and murdered and dismembered them in 1995. When the grisly murders were finally solved, William Murray claimed his mother's mutilated remains and put them in an unmarked grave. In doing so, he followed her oft-stated burial wishes—cremation of the body and no intercessory prayers for an afterlife. The "most hated woman in America" was finally at peace.

ENDNOTES

*I have used the names of the plaintiffs at the time of their suits against school devotions. Madalyn Murray did not marry Richard O'Hair until two years after her case was decided. Ellory Schempp later changed his name to "Ellery," because it was misspelled so often.

This article is based on chapter 8 in Bruce Dierenfield's new book, **The Battle Over School Prayer: How *Engel* v. *Vitale* Changed America.** Lawrence, KS: University Press of Kansas, 2007. The book appears in the "Landmark Law Cases and American Society," which does not use notation. Below is an alphabetical list of the sources used in preparing this article.

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A New Standard of Review: *Craig v. Boren* and Brennan's "Heightened Scrutiny" Test in Historical Perspective

JEREMY BRESSMAN*

"To withstand constitutional challenge, previous cases establish that *classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.*"[1] With this one statement, Justice William Brennan, Jr., writing for the majority in the 1976 Supreme Court case *Craig v. Boren*,[2] both reversed the decision of the district court below and—more importantly—redefined the legal standard for equal protection in gender-discrimination cases. Brennan's statement encapsulated decades' worth of development and decisions under the Equal Protection Clause of the Fourteenth Amendment, which bars states from denying "to any person within [their] jurisdiction the equal protection of the laws,"[3] by creating what is now referred to as the "heightened scrutiny"[4] standard for judging equal protection legislation. Yet Brennan's creation of a new standard is quite striking, even when looked at in hindsight. How was Brennan able to create this standard of review, and where did it come from? Was this new step taken by the Justices under equal protection adjudication a mistake, or a necessary reality of the period? Through a close analysis of both the history of the Equal Protection Clause in its relation to gender legislation and the history of feminism during the 1960s and 1970s, the inevitability of Brennan's decision becomes clear. In fact, the creation of the heightened scrutiny standard was an inevitable outgrowth of two separate, yet fundamentally related progressions: the steps taken in the Court in its review of gender-discrimination cases in the years prior to *Craig v. Boren*; and the changes in society's relation to the feminist movement in the pre-1973 and post-1973 periods.

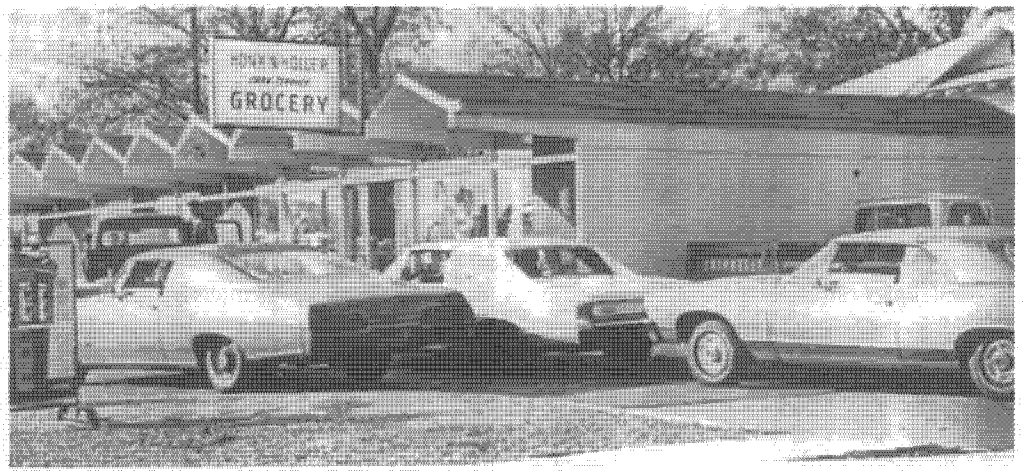
Background of *Craig v. Boren*

In 1958, the Oklahoma legislature passed a number of statutes, among which two contained seemingly innocuous sections. Sections 241 and 245 of Title 37 prohibited the sale of 3.2-percent beer—a type of beer that contains approximately half the amount of alcohol in regular beer—to males under twenty-one years of age, while only prohibiting the sale of the beverage to females under eighteen.[5] Such an age distinction in legislation was common in Oklahoma; it was primarily a remnant of the general age distinctions that existed prior to Oklahoma becoming a state.[6] While Oklahoma began to overturn such distinctions in 1972 following the Supreme Court decision in *Reed v. Reed*,[7] lobbying from anti-liquor parties precluded the 3.2-percent law from being changed.[8] Two things about this law are striking. First, while a distinction in the law existed for 3.2-percent beer, generally known to be a "non-intoxicating" drink, no distinction existed for other types of alcohol. Second, unlike most gender distinction legislation, the law in this case affected men more negatively than it did women.[9]

After sixteen attorneys turned her down, grieving mother Sally Reed (right) finally persuaded Allen Derr (left) to appeal her case challenging a statute that automatically appointed her ex-husband administrator of their deceased son's estate. In its first ruling striking down a gender-based law under the Equal Protection Clause, the Supreme Court found in favor of Reed in 1971.

The original suit in the case was brought by a college student named Mark Walker against David Boren, the governor of Oklahoma, soon after the legislature's decision not to overturn sections 241 and 245. Walker's lawyer, Fred Gilbert, advised him to add a beer vendor to the case as a second plaintiff, out of fear that the court would dismiss the case, since Walker had not truly been "injured" by the act; Carolyn Whitener, a beer vendor in the area, was soon added onto the case. By the time the case came to trial in late 1972, Walker had already celebrated his twenty-first birthday; since he could now legally purchase 3.2-percent beer, he no longer had standing to argue in the case. As a result, eighteen-year-old Curtis Craig was added on as a final plaintiff. No sooner than was Craig's name added than the complaint was promptly dismissed by a district court judge on the grounds that Oklahoma had every right to legislate the sale of alcohol, a power granted to the states by the Twenty-First Amendment. Gilbert appealed to the circuit court on behalf of Craig and Whitener, and the case eventually came before a three-judge district court panel in 1974.[10]

After hearing oral arguments, the panel found unanimously in favor of Oklahoma. In its argument, the state had relied heavily on the issue of traffic safety. It provided statistical information that "proved" that drunk driving was more common among men of ages eighteen to twenty-one than among women in the same age bracket. A 1973 Oklahoma census, for example, showed that two percent of male drivers were arrested for drunk driving, whereas only 0.18 percent of female drivers were arrested for this offense. Other surveys indicated that the



The owner of the Honk 'n' Holler convenience store in Stillwater, Oklahoma, teamed up with a college student to challenge a state law setting the age for purchasing 3.2 "non-intoxicating" beer at eighteen for women and twenty-one for men. The Supreme Court ruled in 1976 that the law was discriminatory, introducing an intermediate standard of review for gender-based laws.

seventeen to twenty-one age group was overrepresented in the number of those injured in traffic accidents, and that young males were more inclined to drink and drive than were young females.[11] Using this information and the *Reed* precedent that suggested the use of a rational-basis test, whereby the law would stand so long as the gender distinction was legitimately applied with reason,[12] the court concluded that the state had acted "rationally," that its action was not arbitrary, and that its statute was constitutional. Once again, Craig and Whitener had lost.[13]

When Gilbert appealed the case on behalf of his plaintiffs to the Supreme Court, he was joined by Ruth Bader Ginsburg, the counsel for the American Civil Liberties Union's (ACLU) Women's Rights Project and a rising star in the United States legal arena. Along with Gilbert's brief to the Court, Ginsburg filed an *amicus curiae* brief (a brief by someone who is not involved, but who is interested in the case at hand) in the case. Even with Ginsburg's help, however, things seemed quite shaky during the argument stage of the trial on October 5. Craig's case quickly became moot, since he had turned twenty-one on September 26, and Gilbert's attempt to add on another male plaintiff under twenty-one was dismissed by the Court. The case now rested solely on Carolyn Whitener; it remained unclear, however, whether or not she held standing to argue an equal protection case in a situation where she herself was not being discriminated against by the legislation.[14] Finally, the question of equal protection remained. Did the Oklahoma statute violate the Equal Protection Clause of the Fourteenth Amendment? And according to what method were the Justices supposed to determine the constitutionality of the law? What "test" were they supposed to employ? As we shall see, though the opinion in *Craig* became famous in its attempt to answer these questions, the path that the Justices took in this case was a natural effect of years of precedent in the early 1970s concerning gender-based equal protection and of the climate of contemporary society regarding gender discrimination.

Equal Protection: A Legal Perspective

By 1970, there existed a plethora of cases regarding the Equal Protection Clause under the Fourteenth Amendment, but few focused on the issue of the equality of gender.[15] Instead,

these cases dealt primarily with the meaning of equal protection in terms of its impact on race. Among the first cases to deal with equal protection in the realm of gender was *Goesaert v. Cleary*.[16] This 1948 case involved a 1947 Michigan statute that denied a woman the right to obtain a bartending license "unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment."[17] Goesaert, the plaintiff in the case, challenged the validity of the Michigan law on the ground that it impinged on the Equal Protection Clause of the Fourteenth Amendment: the law, as it stood, unfairly and unjustly discriminated between the wives and daughters of male bar owners and non-owners. Speaking for the majority, Justice Felix Frankfurter affirmed the judgment of the district court and upheld the constitutionality of the Michigan law. The state's motive in enacting the law, it was argued, was perfectly justified. Since the profession of bartending could potentially lead to moral and social problems for women, it was within the state's power to bar them from working as bartenders; only when the owner of the bar was sufficiently close in relation to the woman bartender—that is, husband or father—could it be guaranteed that such immorality would be prevented.[18]

What is most important about Frankfurter's argument is that he relied on the rational basis test for equal protection legislation. Under this test, a court asks "whether it is reasonable for state purposes to treat two classes of people differently."[19] As long as the court declares that the state had a justifiable reason to enact a law that distinguished between classes, the law will stand; in essence, the law has merely to be rationally related to *any* legitimate interest of the state in order to remain justified.[20] Echoing this notion, Frankfurter wrote that "[t]he Constitution in enjoining the equal protection of the laws upon states *precludes irrational discrimination* as between persons or groups of persons in the incidence of a law . . . Since the line they have drawn *is not without a basis in reason*, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[21] By applying the rational basis test to the question of equality in gender-based legislation, Frankfurter opened the door for further state legislation that distinguished between the genders. Since gender was a legitimate legal classification, the state merely had to provide a minimal and satisfactory reason as to why such legislation was rational for its purposes. Despite all of this, *Goesaert* remains a milestone among Fourteenth Amendment cases in its application of the Equal Protection Clause to cases concerning gender- and sex-based discrimination.

Over the next two decades, the Supreme Court continued to use the rational basis test in adjudicating cases involving gender discrimination. For example, in *Hoyt v. Florida*, the Court upheld a Florida statute that exempted women from serving as jurors, arguing that "[in no way] can we conclude that Florida's statute is not 'based on some reasonable classification,' and that it is thus infected with unconstitutionality."[22] Gender classification, as it stood, was acceptable so long as the state's rationale behind its legislation withstood a basic reasonableness test.

Things began to shift in 1971, however, when *Reed v. Reed*[23] came before the Court. The appellant, Sally Reed, challenged the constitutionality of an Idaho law that granted her husband, from whom she had separated, preference over her with regard to the administration of her deceased son's estate. The statute, Reed felt, was a clear violation of the intentions of the Equal Protection Clause; by contrast, the Idaho supreme court found the statute to be merely an attempt to eliminate controversy and promote administrative convenience when multiple parties were involved.[24] Holding for a unanimous Court,[25] Chief Justice Warren Burger accepted Reed's argument and overturned the Idaho statute. Burger, still relying on the rational basis test, noted that "[t]o give a mandatory preference to members of

either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[26]

Though Burger's opinion ultimately relied on the reasoning of the rational basis test, his decision nevertheless reflected the start of a new trend in the Court's approach to the issue of gender equality. The Justices were no longer willing to uphold gender-based legislation by accepting a basic measure of reasonableness. Instead, the Justices had seemingly begun to make a stricter inquiry into the necessity of such discriminatory legislation. As we shall see, *Reed* marked the demise of the use of the rational-basis test in gender-discriminatory legislation.

Less than two years after *Reed*, the Court was faced with yet another case that challenged a law on equal-protection reasoning. In *Frontiero v. Richardson*,[27] Sharron Frontiero, an Air Force lieutenant, sought as a member of the United States armed forces to gain dependency benefits for her husband. Her request was denied because she failed to prove that her husband depended on her for more than one-half of the family income. Frontiero appealed the decision to the Court, arguing that the fact that male lieutenants were granted automatic dependency rights for their wives without the need to proving "true" dependency, whereas females were not, violated the Due Process Clause of the Fifth Amendment.[28] Reversing the decision of the District Court of Alabama, the Supreme Court upheld Frontiero's claim and ruled that the government's law was unconstitutional. In an 8–1 decision, the majority argued that the nature of the government's classification was without purpose and served to do nothing more than relegate women to a lower sphere of the social order. As in *Reed*, the Court seemed to have dismissed a statute based on its classifications regarding gender.

Yet the decision in *Frontiero* is wholly different from that of *Reed* and expresses a large shift in the thought of the Justices regarding the issue of equal-protection review. Writing for the majority, Justice Brennan, with whom Justices William O. Douglas, Byron R. White, and Thurgood Marshall agreed, did not just uphold Frontiero's argument based on rational basis reasoning. He went a step further, noting that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are *inherently suspect*, and must therefore be subjected to *close judicial scrutiny*."[29] The "strict scrutiny," or "suspect classification," test noted here does not imply that every classification by the state is unconstitutional. There are obviously instances where a classification is necessary and of great value—for example, legislation barring ten-year-old children from driving cars. Instead, the test involves looking critically at the law, determining its purpose, and deciding whether or not the classification involved is necessary to accomplishing that purpose; that is, there must be a close relationship between the classification and the purpose of the law for the law to be upheld, with the burden of proof on the state.[30]

The notion of a strict scrutiny test was not new to Court opinions surrounding equal protection cases; it had already been used in cases that involved suspected racial discrimination. For example, the 1967 case of *Loving v. Virginia*[31] tested the constitutionality of a Virginia miscegenation law. In his opinion for the *Loving* majority, Chief Justice Earl Warren noted that "at the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be *necessary to the accomplishment of some permissible state objective*, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[32] Furthermore, in *Skinner v. Oklahoma*, a case involving a statute that mandated sterilization for felons twice convicted of violations of "moral turpitude", the Court noted that the line drawn between different types of felons with regard to forced sterilization was

"as invidious a discrimination as if [the law] had selected a particular race or nationality for oppressive treatment."[33]

But the strict scrutiny test had never been systematically applied to gender as a classification. By applying it in *Frontiero*, the Justices could have potentially opened up the possibility for the dismissal of all legislative statutes involving gender classification, by defining gender as a dubious way of limiting a law. Brennan himself was clearly willing to take this step, noting that "[*Reed*'s] departure from 'traditional' rational-basis analysis with respect to sex-based classifications is clearly justified."[34] Nevertheless, while a four-Justice plurality admitted that sex was a suspect classification, no majority of the Court agreed to such a notion. Three Justices—Lewis F. Powell, Harry Blackmun, and Burger—agreed that the classification in this case was unconstitutional in light of the Due Process Clause of the Fifth Amendment; they would not go so far, however, as to admit that gender was necessarily suspect as a categorization. Another Justice, Potter Stewart, filed a separate opinion, agreeing that the statutes were unconstitutional, but failing to mention anything regarding a strict scrutiny test. Finally, the lone dissenter, William Rehnquist, would clearly not have admitted that gender was a suspect classification. Thus, while the Court was almost unanimously ready to invalidate the classification in *Frontiero* as unconstitutional, it was hesitant to assign the tag of "suspect" to all gender-discriminatory categories.

The *Craig* Opinion and Brennan's "Heightened Scrutiny" Test

In *Craig*, the Court took a novel approach. In a 7–2 decision, it reversed the decision of the district court and declared the Oklahoma law at issue unconstitutional. Writing for the majority, Brennan first noted that Whitener did have standing (*jus tertii*, or third-party, rights) to argue as an appellant: in effect, the statute forced her to either abide by it and face economic loss or disobey it and face sanctions or loss of license.[35] Addressing the constitutional question at hand, Brennan's argument relied most heavily on the precedents of *Reed* and *Frontiero*, with a large emphasis placed on *Reed*. Using the cases that had come before the Court in the early 1970s, Brennan sketched a picture of the decisions in those cases and showed how they fit into the larger picture of Court jurisprudence. Brennan noted that the rational-basis test applied in *Reed* and other similar cases was inapplicable in *Craig*, since "when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired . . . the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to achievement of the statutory objective."[36] The statistics that the state had provided regarding male and female drivers and their propensity to drink and drive also had no weight in the case. According to Brennan, the 2-percent-versus-0.18-percent distinction between male and female drunk drivers in the 1973 census could hardly "form the basis for employment of a gender line as a classifying device."[37] Moreover, none of the statistical inferences measured the effect of 3.2-percent beer specifically, as opposed to the effect of alcohol in general, for which no distinction in the law existed.[38]

On the other hand, as seen in *Frontiero*, the Justices were clearly not prepared to declare gender a suspect class vis-à-vis the strict scrutiny test. Bereft of both the rational-basis and strict scrutiny tests, Brennan was essentially left without either commonly applied equal-protection test under which to adjudicate *Craig*.

Left with neither equal protection test at his disposal, Brennan developed a new test to adjudicate the case. Under the "heightened scrutiny" test, a gender-discriminatory law must be proven to "serve important governmental objectives and must be substantially

related to achievement of those objectives" in its distinction between the sexes.[39] Notice that the concept Brennan puts forward here is not the same as the strict scrutiny test that was often applied to race discrimination cases; gender can, at times, be a valid classification in legislation, so long as it meets a certain requirement, namely that the law be related to an important objective of the state.[40] In essence, the heightened scrutiny test is a stricter version of the rational basis test: it subjects the law to a rationality test based on more rigorous criteria than those applied under the simple rational basis test. In *Craig*, Brennan found that the Oklahoma statute did not meet the gender-discrimination criteria of the heightened scrutiny test. It would have been acceptable had the state wanted to prohibit both males and females from purchasing 3.2-percent beer until the age of twenty-one. The division of the genders into different groups, however, served no specific purpose for the state, and only served to further the stereotypes and roles that had been associated with each particular sex.[41]

While an overwhelming majority of the Justices agreed that the statute was a violation of equal protection, not all agreed with Brennan's creation of a middle-tier test for gender-related cases. Only Justices White and Marshall joined Brennan's opinion in full. Justice Blackmun filed a concurring opinion in which he agreed with Brennan in all but part II-D of the decision, which discussed the power of the state in regards to regulation of liquor commerce; thus, he also seemingly agreed with Brennan's basic argument. Justices Powell, Stewart, and John Paul Stevens, however, all argued in separate concurring opinions against the need to create a heightened scrutiny test. In his opinion, Powell noted that *Reed*, as the "most relevant precedent," need not be read as "broadly as some of the Court's language may imply."[42] Rather, previous cases, such as *Reed*, attest to the fact that the Court already judges gender classifications more critically than other similar classifications that also do not qualify as suspect.[43] Stevens denied that multiple methods exist to determine and review the legitimacy of equal protection suits; instead, he argued that only one Equal Protection Clause exists, that it "requires every State to govern impartially," and that the different tiers of analysis are nothing more than a way for the Court to explain the different decisions.[44] Stewart concurred with the judgment of the Court in so far as it found the Oklahoma statute irrational; his argument, however, moved no farther than the rational basis test, implying a definitive split with Brennan's approach to the case.[45] Finally, the dissenters—Chief Justice Burger and Justice Rehnquist—clearly did not accept the legitimacy of the new standard.[46] Rehnquist had systematically dissented in every gender-related protection case over the past years, including *Frontiero*. And while Burger's dissent related mainly to Whitener's standing as a plaintiff, he obviously disagreed, as well, with Brennan's "liberal" view of equal-protection legislation. Nevertheless, though many of the Justices viewed the intermediate standard suspiciously, a new standard was created and set in equal-protection adjudication by *Craig*.

Craig v. Boren in Legal and Historical Perspective

The real question remains: What caused this dramatic shift in the Court's approach to gender equality over the course of five years? How was the Court able to "create" a new standard for equal protection cases in such a short time span? There are really two ways of answering this question, interrelated yet independently able to provide a solution.

The first answer asserts the inevitability of the heightened scrutiny test given the path the Court had been taking over the first half of the decade with regard to equal-protection cases. The Burger Court had started off the decade with its decision in *Reed*, in which it forcefully—and unanimously—dismissed an Idaho law as irrational. True, the Court did

The participants in *Craig v. Boren* posed for a photo to mark that landmark decision's twentieth anniversary in 1996: (left to right) Fred Gilbert, the attorney who argued the state's case; Carolyn Whitener, the convenience-store owner; Ruth Bader Ginsburg, who litigated the case for the ACLU's Women's Rights Project; and Curtis Craig, the college student who challenged the law.

stick to the reasoning of the rational basis test in order to decide the case. Nevertheless, it is clear from the decision that the Justices had taken the first step in maintaining that basic rationality cannot be the sole factor in judging the constitutionality of a gender-related law; in other words, with regard to gender-based legislation, a "rational" measure can still be wrong. At the same time, the Court as a whole was not willing to admit that gender was a "suspect classification" and thus provide for the examination of gender discriminatory legislation under the strict scrutiny test—even in *Frontiero*, where the Court almost took its largest leap. In essence, the Court was stuck in the middle: it could not use the rational basis test, because such a test could mistakenly excuse gender-discriminatory legislation, and it could not use the strict scrutiny test, because it was not willing to hold that gender was always an illegitimate classification.

Accordingly, the Court had no choice but to create a middle-tier standard for equal-protection cases. This test would need to admit that a classification in the law could potentially exist, but only when it serves an important state interest and is at least substantially related to serving that interest. From this necessity developed a new standard, one that judged a discriminatory measure based on its ability to attain and importance in attaining the government's desired end. In order for the Justices to be able to adjudicate equal protection cases effectively and consistently, they needed to be given an invariable formula through which the case could be judged. This "formula" ultimately took the

form of Justice Brennan's heightened scrutiny test. Among all of the Justices, it was Justice Powell who took note of this process within the Court's decisions, in a lengthy footnote on his opinion:

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of Reed and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, *candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification*. So much is clear from our recent cases.[47]

The middle-tier approach was not a fabricated device that Brennan employed to solve a specific situation. Rather, it was the inevitable outcome of the equal-protection cases that preceded it.

The second approach to the development of the heightened scrutiny test relates to the historical context in which *Craig v. Boren* was decided. In the 1960s and early 1970s, a new feminist movement arose in American society. "Second-wave feminism," as it was dubbed by Martha Lear in a 1968 *New York Times* article,[48] quickly took a central role in American politics and thought. Groups such as the National Organization for Women used forceful tactics to put forth legislation and laws concerning women's rights. The women's liberation movement continued to receive more and more press: for example, over a span of ten months from May 1969 to March 1970, mention of the new movement in news publications increased tenfold.[49] And in no period was the movement as successful as it was in 1972 and 1973. In 1972, Congress passed the Equal Rights Amendment (ERA), which was then sent to the states for ratification; later that year, Title IX of the Education Amendments was passed, granting women more rights in the field of athletics.[50] Women also made great strides in the workforce, a sign of the continuing change of their position in society.

While all of this continued and increased in the following year, 1973 also marked an important point in the development of equal-protection legislation in the Supreme Court. That year, the Court struck down a Texas law that declared abortion a criminal offense: in *Roe v. Wade*, the law was deemed unconstitutional in its breach of the right to privacy of the individual under the Fourteenth Amendment. The Court's acceptance of the right to an abortion, a controversial topic in the American political scene, was celebrated as an important milestone by the feminist movement.

Yet, while the feminist movement met with many successes, a backlash against the movement began to form. This backlash, while present in American society since the end of the 1960s,[51] really began to take form after *Roe*. In the year following that decision, the National Committee for a Human Life Amendment began to press for a law to overturn *Roe*, while the Society for a Christian Commonwealth "called for the excommunication of Justice William Brennan Jr. (!) for his pro-choice view in the Supreme Court."[52] In short, the radical branch of the conservative political movement reacted strongly and vehemently to the opinion in *Roe*.

In subsequent years, the reaction to the new feminist movement grew stronger and more vociferous. The National Conservative Political Action Committee was formed in 1974, and quickly became the "Right's major tool to oppose feminism."[53] Phyllis Schlafly, one of the most outspoken opponents of the ERA, organized the Eagle Forum in 1975 to serve as "the alternative to women's lib."[54] These antifeminist movements became a major influence on the different political reactions to feminism and society's conception of the movement as a whole.

Taking the differences between these two periods—pre-*Roe*, or pre-1973, and post-*Roe*—into account, the development of a new standard in equal-protection review is quite clear. The decisions in *Reed* and *Frontiero*, which made great strides in gender-related equal-protection review, occurred before the decision in *Roe v. Wade*. In other words, these decisions took place in a society where pro-feminist thought was active and influential. The Justices on the Burger Court, working within such a society, reacted accordingly and (almost) built these pro-feminist thoughts into their review of equal protection cases by nearly declaring gender to be a suspect classification. By contrast, *Craig* took place under totally different circumstances, when much antifeminist sentiment existed within the society at large. Again, the Justices reacted to this sentiment when formulating their decision. Instead of including gender, along with race, under strict scrutiny, they instead took a middle path and delimited a new standard for gender-protection review. In this light, Justice Brennan's creation of a middle-tier standard of review was not particularly novel. Rather, Brennan and his fellow Justices merely followed the tides of social thought in forming their opinions and in adjudicating the cases related to equal protection.

The creation of the heightened scrutiny test to review gender-related equal-protection cases was not a careless mistake. Its creation was inevitable. The adjudication of equal-protection cases before *Craig v. Boren*—specifically *Reed v. Reed* and *Frontiero v. Richardson*—had already led in that direction. The tides of feminist and antifeminist thought widespread in society had pushed towards its creation. True, Craig's and Whitener's victory in the case was a decisive one in the realm of equal-protection-related cases. More importantly, however, the decision in the case was an excellent indicator of the shifting tides of social thought and of the changes within the Supreme Court's opinions. Brennan was no prophet when he created this new standard of review; instead, he was just vocalizing what had already been handed to him on a silver platter by the women's movement.

ENDNOTES

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[1]*Craig v. Boren*, 429 U.S. 190, 197 (1976).

[2]*Craig*, 429 U.S. 190.

[3]U.S. CONST., Am. 14, *available at* http://www.archives.gov/national-archives-experience/charters/constitution_amendments_11-27.html (last visited Dec. 30, 2006).

[4]This standard is also commonly referred to as the "intermediate-level" or "middle-tier" test, since it falls between the other two tests, as outlined later in the paper.

[5]Okl. Stat. tit. 37, § 241 and former § 245 (LEXIS 2006).

[6]"Justice for Beer Drinkers," in Clare Cushman, ed., **Supreme Court Decisions and Women's Rights: Milestones to Equality** (Washington, D.C.: Congressional Quarterly Press, 2000), *available at* http://www.supremecourthistory.org/05_learning/subs/05_c03.html (last visited Dec. 30, 2006).

[7]404 U.S. 71 (1971).

[8]Cushman, "Justice for Beer Drinkers."

[9]This is not to say that the law was designed to achieve this effect, merely that such was the practical result of the legislation.

[10]Cushman, "Justice for Beer Drinkers"; *Walker v. Hall*, 399 F. Supp. 1304 (1975).

[11]*Craig v. Boren*, 429 U.S. 190, 200–201 (1976). *See generally* Brennan's opinion for the majority and Rehnquist's dissent. *Craig*, 429 U.S. at 191–211, 217–28.

[12]*See Reed v. Reed*, 404 U.S. 71, 76 (1971) ("The question presented by this case, then, is whether a difference in the

sex of competing applicants for letters of administration bears a *rational relationship to a state objective* that is sought to be advanced by the operation of §§ 15-312 and 15-314.") (emphasis added). See discussion below for a more thorough explanation of this concept.

[13]Cushman, "Justice for Beer Drinkers."

[14]*Id.*

[15]A number of cases prior to *Goesaert* revolved around issues of gender. By and large, however, these dealt with the Due Process Clause and the issue of substantive due process. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[16]*Goesaert v. Cleary*, 335 U.S. 464 (1948).

[17]*Goesaert*, 335 U.S. at 465.

[18]*Goesaert*, 335 U.S. at 466–67.

[19]Winnie Hazou, **The Social and Legal Status of Women** (New York: Praeger, 1990), p. 45.

[20]Doug Linder, "Rational Basis Test with 'Bite,'" in *Exploring Constitutional Conflicts* (Kansas City, Mo.: University of Missouri-Kansas City Law School, 2006), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/home.html (last visited Dec. 30, 2006). According to some, this test is, in essence, an abdication of judicial responsibility.

[21]*Goesaert*, 335 U.S. at 467 (emphasis added).

[22]*Hoyt v. Florida*, 368 U.S. 57, 61 (1961).

[23]*Reed v. Reed*, 404 U.S. 71, 76 (1971).

[24]*Reed*, 404 U.S. at 76 (quoting *Reed v. Reed*, 465 P. 2d 635, 638 (Ida. 1970)).

[25]The decision was, in reality, 8–0, since Justice William Rehnquist did not participate in the decision.

[26]*Reed*, 404 U.S. at 76.

[27]*Frontiero v. Richardson*, 411 U.S. 677 (1973).

[28]Though this case revolves specifically around the Due Process Clause and not the Equal Protection Clause, its arguments and opinions vis-à-vis gender equality are very important for a broader view of legal gender classifications.

[29]*Frontiero*, 411 U.S. at 681 (emphasis added).

[30]Hazou, **The Social and Legal Status of Women**, p. 46.

[31]*Loving v. Virginia*, 388 U.S. 1 (1967).

[32]*Loving*, 388 U.S. at 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (emphasis added). Note that Brennan's language in *Frontiero* is that such classifications are "*inherently* suspect," a slight twist on the notion expressed by Warren in *Loving*. *Frontiero*, 411 U.S. at 681.

[33]*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

[34]*Frontiero*, 411 U.S. at 684.

[35]*Craig v. Boren*, 429 U.S. 190, 194 (1976).

[36]*Craig*, 429 U.S. at 204.

[37]*Craig*, 429 U.S. at 201.

[38]*Craig*, 429 U.S. at 202–03.

[39]*Craig*, 429 U.S. at 197.

[40]The difference in language between Brennan's *Craig* opinion and Warren's *Loving* opinion is also noteworthy: Brennan uses the term "*important* governmental objective," whereas Warren uses "*permissible* state objective." *Craig*, 429 U.S. at 197; *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[41]This analysis does not seek to determine why Brennan needed to apply the heightened-scrutiny test in this case when the rational-basis test surely would have sufficed. Rather, it comes only to explain the development of this standard in its historical context.

[42]*Craig*, 429 U.S. at 210.

[43]*Craig*, 429 U.S. at 210.

[44]*Craig*, 429 U.S. at 211–12.

[45]*Craig*, 429 U.S. at 215.

[46]*Craig*, 429 U.S. at 215–17, 217–28.

[47]*Craig*, 429 U.S. at 210 n.*(emphasis added).

[48]Ruth Rosen, **A World Split Open: How the Modern Women's Movement Changed America** (New York: Penguin, 2001), p. 85.

[49]Rosalyn Baxandall and Linda Gordon, "Second-Wave Feminism," in Nancy Hewitt, ed., **A Companion to American Women's History** (Malden, MA : Blackwell, 2002), p. 417.

[50]Rosen, **A World Split Open**, p. 89.

[51]*Id.* at 90.

[52]*Id.* at 91.

[53]*Id.*

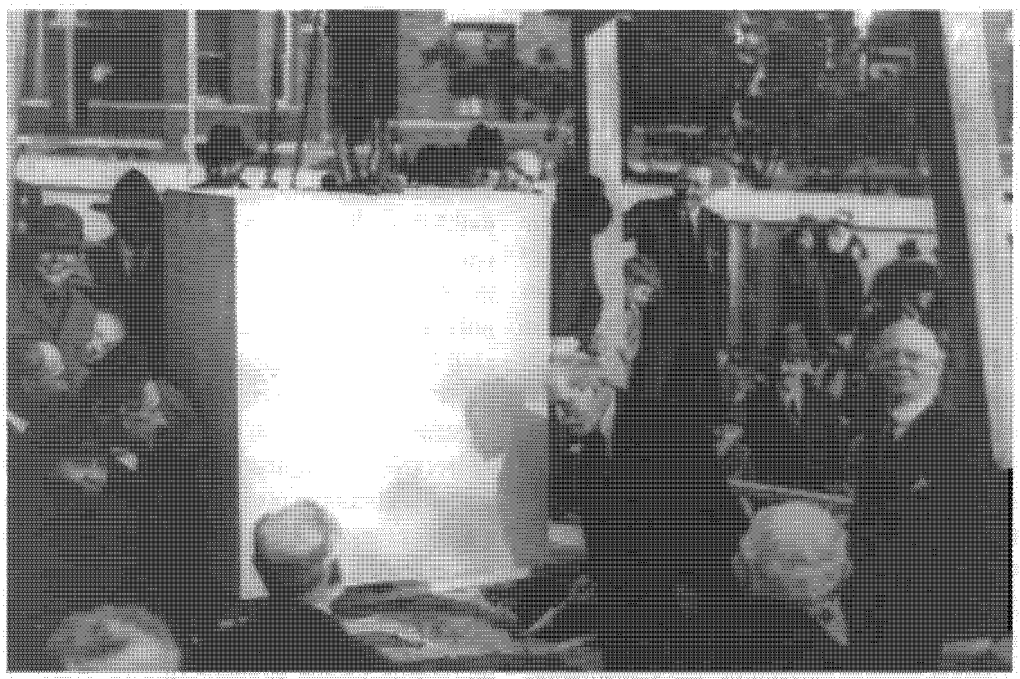
[54]*Id.*

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

A persistent reality of constitutional government in the United States from practically the beginning of the Republic has been the close link between the Constitution itself and the Supreme Court. Oddly, this link derives more from the Constitution's impact on the American political system than from what the Constitution itself actually says or contains. True, Article III included cases "arising under this Constitution" in describing the proper reach of the federal judicial power, and Article VI specified that "[t]his Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land . . . "[1] But the document not only provided scant means for enforcing that supremacy, but also failed even to specify how this "supreme Law" should be interpreted. It soon became clear, however that the task of interpretation would fall upon the Supreme Court, as illustrated by *Chisholm v. Georgia*.[2] In the face of assurances made by Alexander Hamilton, James Madison, John Marshall, and others during the ratification debates in 1787–1788 that a state could not, without its consent, be made a defendant in the federal courts by a citizen of another state,[3] the Justices in 1793 construed the language in Article III conferring the federal judicial power in suits "Between a State and Citizens of another State" to encompass a suit brought by a South Carolinian against the State of Georgia. The uproar that ensued prompted swift ratification of the Eleventh Amendment, which reversed the Court's first excursion into the realm of constitutional interpretation. Despite this rebuke, it was only a short time before Chief Justice Marshall insisted that the judicial power encompassed the authority "to say what the law is."[4] Thus, from the assumed role of expounding of the Constitution evolved the companion duty of guarding it as well.

Some 129 years later, this connection between the Court and fundamental law lay at the heart of the address Chief Justice Charles Evans Hughes delivered on October 13, 1932, as President Hoover put in place the cornerstone for the new Supreme Court Building.[5] "The Republic endures and this is the symbol of its faith," he said.[6] By "this," the eleventh Chief Justice presumably referred to the institution that would be housed in the grand facility then under construction that would be the High Court's first permanent home of its



Chief Justice Charles Evans Hughes delivered an address outlining the connection between fundamental law and the Court as the cornerstone for the new Supreme Court Building was put into place on October 13, 1932.

own. For nearly a century and a half, after all, the Court had been "living with relatives."[7] By "faith," Hughes probably had constitutionalism in mind, the unshakable American belief in the value and utility of government under a written charter—"a continuously operating charter of government,"[8] as Chief Justice Harlan Stone, Hughes's successor, would explain eleven years later. In its American incarnation in the Constitution, this faith was designed to grapple with the twin manifestations of what James Madison had called "the great difficulty" encountered in "[f]raming a government which is to be administered by over men. . . . [Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity of auxiliary precautions."[9] Thus, a successful Constitution would have to be both power-conferring and power-limiting. Hence the express grants of authority to the several branches of government and the intricate system of checks and balances, whereby separate institutions would share some powers (Madison's "auxiliary precautions") to augment the control on elected officials applied through the ballot box (Madison's "dependence on the people"). Or, as Hamilton observed soon after the Philadelphia Convention finished its work, "It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."[10]

Significantly, Chief Justice Hughes's choice of words at the cornerstone-laying ceremony was both remarkable and unremarkable. On the one hand, by mid-1932 the United States was by most accounts and measures[11] at the depths of the Great Depression, easily the most severe domestic crisis the nation had experienced since the Civil War. In that context,

it must surely have taken great confidence in the future and continuity of the American experiment in constitutional government to emphasize the endurance of the Republic. On the other hand, Hughes would have been thoroughly comfortable in associating the Constitution with the Supreme Court. Not only had he served as Chief Justice for two years by 1932, but he had previously served as Associate Justice for six[12] and had authored an important book on the Supreme Court itself.

It was in that book, as well as through his judicial service, that Hughes made the link between the Constitution and the Court's work perfectly clear: "The judicial power of the United States was vested in the Supreme Court. . . . It was manifestly impossible that the Supreme Court should appropriately exercise this power in cases arising under the Constitution without sustaining the Constitution as against any legislation that conflicted with it. Instead of this authority being a judicial usurpation, the failure to exercise it would have been an unworthy abdication."[13] Besides, if any doubt about the link between Court and Constitution had somehow managed to linger on that overcast and damp fall day, it was Hughes, after all, who, while Governor of New York for two terms,[14] had asserted not only that "the Constitution is what the judges say it is," but also that "the judiciary is the safeguard of our liberty and of our property *under the Constitution*."[15]

If the judiciary and the Constitution have long been joined in the American legal mind, the same can be said for the judiciary as a forum for the vindication of individual rights, as Hughes's gubernatorial assertion illustrates. During the debates over ratification of the Constitution, Hamilton emphasized this role as the principal reason behind the system of judicial independence that the proposed Constitution embodied in providing an "essential safeguard against the effects of occasional ill humors in the society." True independence of the courts from the rest of the polity, he wrote, would assure "[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice. . . ."[16] Chief Justice Marshall echoed the same idea in *Marbury v. Madison*. Usually viewed in the context of justifying judicial review, this foundational case of judicial power would not have had its important outcome in shoring up judicial review had the functional link between courts and rights not been firmly in place. "The very essence of civil liberty," counseled the fourth Chief Justice, "consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[17] After three decades, Marshall's views had not changed. In the context of a discussion on judicial independence at the Virginia constitutional convention of 1829–1830, where he was a delegate, the Chief Justice distilled the court-rights link to two simple clauses: "The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all."[18] For Justice Robert H. Jackson many years later, this link between courts and rights was not only obvious but essential. "The very purpose of a Bill of Rights," he asserted in the second *Flag Salute Case*, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles *to be applied by the courts*. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[19]

The same link that was so essential to Jackson persists, as demonstrated by the public debate that has surrounded every recent nominee to the High Court. That link is also

highlighted in several recent volumes about the Supreme Court itself. One of these is the much-awaited new installment in the **Oliver Wendell Holmes Devise History of the Supreme Court of the United States**. Authored by legal historian William M. Wiecek of Syracuse University, this addition, volume XII, is entitled **The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953**,[20] and covers the years during the Chief Justiceships of Harlan F. Stone and Fred M. Vinson. This is a period of Court history that Wiecek believes to be unfairly "condemned to obscurity, if not scorn. Learned opinion dismisses the postwar Court as a slough of mediocrity, lit up only by the fireworks among Frankfurter, Black, Jackson, and Douglas."[21] This obscurity and neglect are unfortunate, the author contends, because a grasp of the Stone and Vinson Courts aids in understanding the Court of the late twentieth and early twenty-first centuries. "The undeserved low repute of the Court and the Justices devalues the real significance of their work. The 1940s Court had the responsibility of ushering American law into the modern era, preserving legitimacy while redirecting judicial activism into new channels appropriate to the profoundly changed circumstances of American life in the late twentieth century."[22] And in grasping the scope of change since the era of Stone and Vinson, it may be instructive to recall that our own day is as nearly as distant from theirs as theirs was from the end of Reconstruction.

Readers of the *Journal of Supreme Court History* are no doubt familiar with the Holmes Devise History Project. The series, now under the general editorship of Stanley Katz, stems from Justice Oliver Wendell Holmes' decision to make the people of the United States his residuary legatee. Congress then created a committee to oversee use of the money (some $263,000), with the result that a major collective history project of the Supreme Court was eventually launched,[23] with Justice Felix Frankfurter apparently having much to do with the initial selection of authors.[24] Delay even beyond the initial congressional dawdling, however, has hobbled the series from practically the beginning. Indeed, though Justice Holmes died in 1935, the first Holmes Devise volume did not appear until 1971.[25]

Counting Wiecek's contribution, there are now eleven published volumes in the series, but only ten discrete books, with at least two more volumes, on the Taft and Hughes Courts, in preparation.[26] Like all volumes thus far in the Holmes Devise History, **The Birth of the Modern Constitution** is thorough and meticulously researched, although one wishes that the subject index were more generous in its detail and therefore more useful.[27] Unlike some, volume XII is also sufficiently readable to be accessible to the general reader. Moreover, careful readers will find a gem tucked away in the Appendix: a letter dated March 13, 1950, from Justice Robert H. Jackson to Professor Charles Fairman of Stanford University dealing with the school segregation issue then before the Supreme Court.[28]

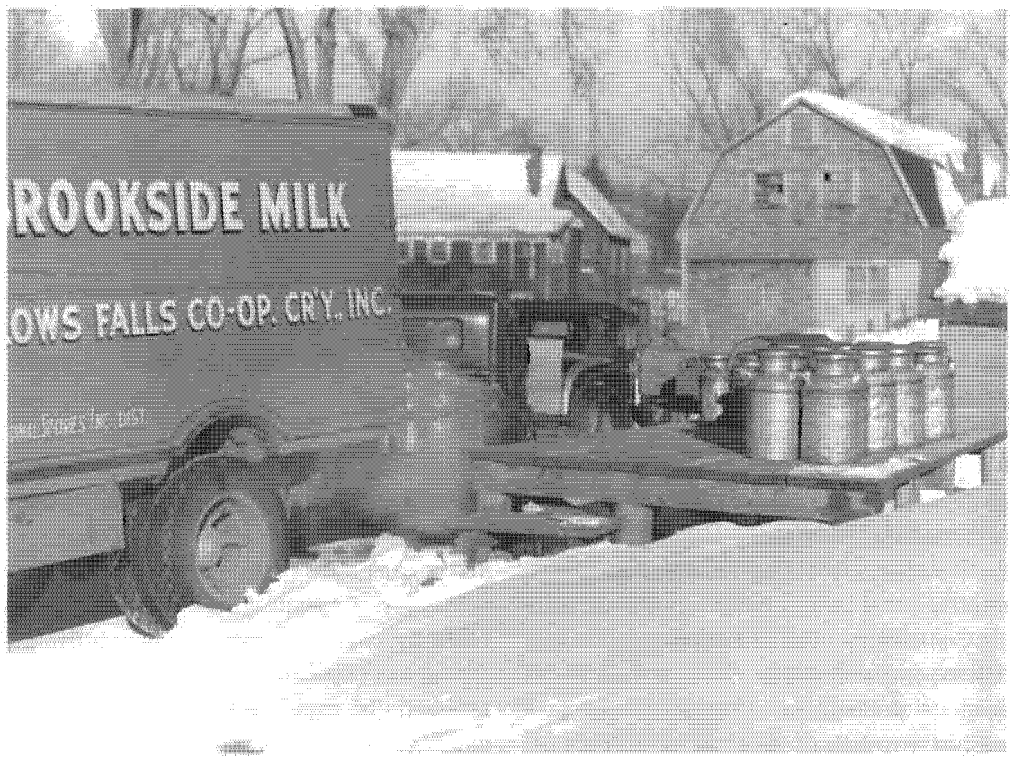
Anyone undertaking a study of the Supreme Court during the twelve years between 1941 and 1953 confronts several defining facts. Of the sixteen Chief Justices through William H. Rehnquist, the tenures of Chief Justices Stone and Vinson rank among the briefest.[29] Stone's five years are surpassed by every Chief since John Jay's six, and Vinson's seven are exceeded by every Chief since Ellsworth's four. Moreover, all of the eleven Justices who served with either Stone or Vinson were appointed by only two Presidents, Franklin D. Roosevelt and Harry Truman. Rarely have Presidents enjoyed so many opportunities to shape the Bench. Roosevelt's nine appointees, of course, stand outsized because of the uniquely long length of his tenure in the White House, and are surpassed only by George Washington's eleven. Yet even Truman's four look respectable alongside those of other Presidents—such as Jackson, Lincoln, Taft, and Eisenhower, with six, five, six, and five appointments, respectively—who also had disproportionate impact on the composition of

the Bench. In Roosevelt's case, some scholars even speak of the Court during the late 1930s and early 1940s as "the Roosevelt Court,"[30] to emphasize that the imprint left by a cohort of Justices during a certain period may have more to do with the appointing President than with the individual who may have been Chief Justice.[31]

Doctrinally, the Court under Stone and Vinson is noteworthy because it was "transitional between two profoundly different conceptions of the judicial function."[32] The older of these is often labeled "legal orthodoxy."[33] Dominant in state and federal cases involving social and economic regulations from the 1890s until 1937, it required courts to inquire whether such legislation infringed too greatly upon individual liberty. As Justice George Sutherland advised regarding the minimum-wage law challenged in *Adkins v. Children's Hospital*, "[F]reedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered."[34] In other words, the burden lay with the government to justify restrictions on individual liberty, and it was the judicial task to decide whether the regulation in dispute was actually needed—presumably the question already answered in the affirmative by the legislature. This classical approach was the legal edifice that collapsed in the "Constitutional Revolution Ltd."[35] of 1937, in the wake of President Roosevelt's audacious assault on the Court by way of his Court-packing plan. Roosevelt's attempt to enlarge the Court failed to gain congressional approval, but, thanks to prudent changes of mind by Justice Owen J. Roberts and Chief Justice Hughes, the President quickly acquired the Court majority he needed to sustain his New Deal Depression recovery programs, some of which had been turned aside by a Bench then still wedded to the old orthodoxy.

Ironically, even without the help of the Court-packing bill, the President soon got his long-awaited chance to remake the Court. Justice Willis Van Devanter announced his retirement on May 18, 1937 and was swiftly replaced by Hugo L. Black.[36] Before the election of 1940, Justices Sutherland, Benjamin Cardozo, Louis D. Brandeis, and Pierce Butler were gone, too. In their seats were Stanley F. Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy, respectively. When FDR took the oath of office for an unprecedented third term in January 1941, only McReynolds, Stone, Hughes and Roberts remained from the "old Court" of 1936–1937, and by late spring both McReynolds and Hughes had retired, with James F. Byrnes and Robert H. Jackson arriving soon afterwards.[37] The President now had "his" Court, and its roster was not only impressive but also unusual.[38] Yet, the Court faced a dilemma. "Would its chastening experience of 1937 lead it to withdraw from judicial review entirely, almost entirely, selectively, only as to economic matters, or not at all?"[39]

If the Court abandoned one way of thinking about its role, it suggested an alternative vision in *United States v. Carolene Products Co.*,[40] which illustrated the judicial metamorphosis soon to be under way that would offer greatly diminished protection for property rights and vastly increased protection for civil liberties and civil rights. According to Wiecek, the Court had to affirm the 1937 settlement of the issues of economic substantive due process and federal commerce power and, at the same time, provide a credible explanation for that change that would do more than admit that the Justices had changed their minds because of their personal policy preferences or ideological orientation. Indeed, regardless of the era, this has always been an essential goal of successful constitutional interpretation: that it is the Constitution, not the author of the particular judicial opinion, that appears to be speaking.[41] The question is one of legitimacy, which a statute possesses by virtue of popular sovereignty. But when unelected judges overturn the actions of



The newest *Oliver Wendell Holmes Devise History* explores the fresh direction the Court took in its decision in *Carolene Products*. At issue in that case was the constitutionality, under the Fifth Amendment's Due Process Clause, of a congressional enactment banning the interstate shipment of "filled milk," which had vegetable fat, such as palm oil, substituted for the butterfat.

elected officials, the legitimacy of such rulings must derive from higher law—the Constitution itself.

At issue in *Carolene Products* was the constitutionality, under the Fifth Amendment's Due Process Clause, of a congressional enactment banning the interstate shipment of "filled milk," which had vegetable fat, such as palm oil, substituted for the butterfat. "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional," explained Justice Stone in his opinion upholding the act, "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."[42] 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.

But there was more to the constitutional revolution than the Court's newly proclaimed hands-off approach toward the regulatory state. *Carolene Products* also revealed a new set of constitutional values that would replace the old. A clue to the Court's thinking about its role in the political system was appended as footnote 4 to Stone's sentence in *Carolene Products*, quoted above, on the new judicial understanding of constitutional reasonableness. The footnote's three paragraphs floated three exceptions to the Court's newly professed tolerance for majority rule. The first was legislation that "appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ." The second was legislation

restricting "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . ." The third was legislation "directed at particular religious . . . or national . . . or racial minorities. . . ." Such "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[43]

The first point in Stone's footnote—"the most celebrated footnote in constitutional law," according to Justice Lewis Powell[44]—suggested that the Court was still prepared to check majority rule if legislatures contravened specific—that is, text-based—prohibitions in the Constitution. The second assumed a special responsibility for the Court as defender of freedoms prerequisite to the democratic process, as guardian of the channels of political change. That is, the Court would now be less concerned about the outcome of the political process and more about the integrity of that process itself. The third suggested an exception to the second: a close look at laws discriminating against historically repressed groups that might be helpless to defend themselves in the rough and tumble of majoritarian politics. Thus, *Carolene Products* not only represented a limitation on judicial review but also offered a justification for judicial review itself. If unelected judges were to thwart policies made by elected officials, they could more convincingly do so if they grounded their decisions on the words of the Constitution, if their decisions were designed to protect the democratic process itself, or if their decisions were intended to protect particular victims of that process when it ran amok.

Under the freshly acquired banner of self-restraint, property rights, which had enjoyed heightened protection under the old orthodoxy, would be left to the vagaries of the ballot box. If so, judicial activism old-style was dead; judicial activism new-style in support of judicial liberalism, which would manifest itself most clearly during the Warren Court (1953–1969) seemed to be just around the corner.

For Wiecek, *Carolene Products'* footnote 4 is the "prism" of the Stone Court.[45] Yet, as momentous as the footnote proved to be in pointing the way toward a new role for the Court, Wiecek explains that its genesis was "incredibly modest."[46] "According to the much-later recollections of Stone's law clerk Louis Lusky, then just a year out of law school, the Chief Justice wanted to limit the presumption of constitutionality for economic regulatory legislation. Working late into the night proofreading the printer's proofs of Stone's opinion, Lusky came up with a draft stating that 'perhaps the [party attacking the constitutionality of a statute] bears a lighter burden where the effect of the statute may be to hamper the corrective political processes which would ordinarily be expected to bring about repeal of unwise legislation.' The next day Stone revised this to a version close to paragraphs 2 and 3 . . . , and then circulated his draft opinion with the Stone-Lusky note appended. Of his handiwork, Lusky insisted a half century later that the draft 'was being offered not as a settled theorem of government or Court-approved standard of judicial review, but as a starting point for debate.'"[47]

Lusky's observation may explain why, although the outcome of the case was never in doubt, Stone was able to muster only a four-Justice majority from "the Brethren," as the Justices still then referred to themselves, in support of his opinion—especially that part containing footnote 4. According to Wiecek, the note immediately ran into opposition from Chief Justice Hughes, who had concerns about the wording of what survived as the footnote's first paragraph. "Hughes's objection caused Stone to rethink his position, especially since he already knew that he did not have Hugo Black's vote. Stone then added what became the first paragraph of footnote 4 as further outreach to Hughes."[48]

Lusky's recollection may also provide some insight as to the reasons why the Justices

in the early 1940s soon diverged on application of the liberal vision enshrined in Stone's footnote 4. The constitutional revolution of the late 1930s had made it possible to think realistically about a dynamic constitutional order, in which the legal order was open to substantial and judicially driven change. The question then became one of figuring out the direction in which constitutional change should go and in amassing a corresponding supporting consensus. Looking at Justices Frankfurter, Black, Stone, Murphy,[49] and Rutledge, Wiecek finds a "continuum of thought"[50] as to how that question should be answered, in that each embraced at least some degree of constitutional dynamism. "Frankfurter believed that the legislature was responsible for that change. He allowed little judicial discretion to control the legislature's management of change, almost abdicating the judicial function in favor of deference and self-restraint. Black believed that courts must play a more active oversight role in supervising legislatures, but he too was troubled by Juevenal's challenge, 'Who will guard the guardians themselves?' He found his answer in a rudimentary form of originalism and textualism that required that constitutional text and the Framers' intent imputed from it control judicial discretion. Stone allowed freer rein to judicial discretion through the doctrine of the 'preferred position'.... Finally, Murphy and Rutledge together evolved a position of rights absolutism that invited courts to override all legislative incursions on civil liberties and civil rights."[51]

This divergence, at least with respect to Stone and Frankfurter, became noticeable in the *Flag Salute Cases*,[52] which, at first glance, would seem to have provided ideal test situations in which footnote 4 might be applied. In both cases, official entities directly or indirectly accountable to the people had imposed a flag-salute requirement for students in public schools, although in neither case had the challenged regulation impeded the democratic process. In both cases, affected students and their parents grounded their objections on provisions of the Bill of Rights, and in both cases, the objecting families were members of a religious minority (Jehovah's Witnesses) that for some time had been a target of ridicule and outright persecution. In the first case, the Court ruled 8–1 against the Witnesses, with Frankfurter writing for the Court and with Stone filing the sole dissent, but in the second case, the Witnesses prevailed 6–3, with Jackson writing for the Court and with Frankfurter, Reed, and Roberts in dissent.

Examination of the opinions filed by Frankfurter, Stone, and Jackson in the two cases reveals the pattern of divergence that was present in the early 1940s. "Out of this divide," writes Wiecek, "emerged both legal liberalism (from the Stone view) and its sharpest critics on the Court (from Frankfurter's). A major theme that emerges from the story of the Court in the 1940s and 1950s thus seems paradoxical: It anticipated both Warren Court activism on behalf of minorities and society's marginalized members, and yet included the sharpest critics of that new form of activism."[53] It is also paradoxical that, of the variety of competing doctrinal approaches to judicial review present on the Court of the 1940s—and it is difficult realistically to imagine a richer assortment—none "emerged as dominant; none succeeded classical thought as the conventional way of thinking about law, courts, and judicial review."[54] In this sense, Wiecek believes, the Justices of 1941–1953 failed to meet their major challenge.[55] They "appeared to be invoking or reaching results that had no warrant in precedent or in values widely shared outside the Court. Where the pre-1937 Court had been principled to a fault, its successors seemed at times without anchor or rudder or even a keel, drifting in the currents."[56] The disintegration of legal orthodoxy in 1937 plainly left an intellectual void that the Stone and Vinson Courts failed to fill. Consequently, American "public law crossed over from classical legal thought, with its reassuring but deceptive promise of certitude[,] to the creative uncertainties of judicial activism in the Warren and Burger Courts."[57]

Within **The Birth of the Modern Constitution**, the reader finds little of a substantial nature about the circumstances that led to the selection of those Justices who served on the Stone and Vinson Courts. The slight is entirely understandable, since the focus of the volume lies elsewhere.

Examination of the process of judicial appointments, however, is at the heart of **Advice and Consent**[58] by political scientists Lee Epstein and Jeffrey A. Segal of Washington University and Stony Brook University, respectively. Alongside the nominations and confirmations in 2005–2006 of both Chief Justice John G. Roberts, Jr. and Associate Justice Samuel A. Alito, Jr., as well as the debates in the United States Senate in both 2005 and 2006 about some of President George W. Bush's nominations to the federal courts of appeals, publication is certainly timely. Epstein and Segal's book joins a rich literature on judicial selection that has taken shape during the past two decades. While **Advice and Consent** lacks the historical sweep of Henry J. Abraham's **Justices and Presidents**,[59] the executive-branch perspective of David Alistair Yalof's **Pursuit of Justices**,[60] the detail of Sheldon Goldman's **Picking Federal Judges**,[61] or the perspective of Michael Comiskey's **Seeking Justices**,[62] Epstein and Segal have succeeded in achieving their goal of providing the reader with what amounts to concise one-stop shopping for information about federal judicial appointments at all levels. "Our focus on both judges and justices is no accident," write the authors. "While some books on the appointment process—and excellent volumes at that—focus exclusively on candidates for the U.S. Supreme Court, we take a broader approach, exploring nominations to all federal courts: district courts, circuit courts, and of course the high court. This approach reflects the fact that contemporary debates over judicial appointments have centered on the nation's lower courts."[63] That emphasis was certainly apparent until the retirement announcement of Justice Sandra Day O'Connor and the death of Chief Justice Rehnquist in 2005, events that shifted Supreme Court nominations back into the public spotlight for the first time since Justice Harry A. Blackmun's retirement and Justice Stephen Breyer's appointment in 1994.

First and foremost, Epstein and Segal emphasize "that political clashes over candidates for the Supreme Court [or other judicial positions, for that matter] are not a new phenomenon. Quite the opposite."[64] As if to disabuse the reader of any notion to the contrary, **Advice and Consent** opens with commentary that was published in the *Wall Street Journal* after President Woodrow Wilson nominated Brandeis to the Supreme Court in 1916: "In all the . . . agitation of the past years one name stands out conspicuously above all others. Where others were radical, he was rabid; where others were extreme, he was super extreme."[65] While such controversy, the authors believe, may be regrettable, it should not be surprising. Indeed, although the separate institutions mandated by the Constitution make possible the Court's considerable independence from outside political pressure, three factors thrust the Court into the partisan life of the nation: the role of interpretation that the Constitution allows and that the Court has assumed; the significance of the decisions the Justices render; and the method of judicial selection the Constitution imposes. Little wonder the appointment of Justices remains of paramount concern to Presidents, Senators, and citizens alike.

Advice and Consent is particularly helpful in addressing several matters suggested by the title itself, derived from Article II of the Constitution, which states that the President "shall nominate, and by and with the *Advice and Consent* of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. . . ."[66] The first of these concerns the constitutional origins of the divided appointment process that the Constitution mandates. The

second focuses on the relationship between the President and the Senate, and the third relates to the issue of criteria by which the nominees are to be judged in the Senate.

While delegates to the Philadelphia Convention divided over the structure of the federal judiciary, with some being opposed to any federal courts below the supreme Court, it was the issue of judicial selection that proved most vexing, apparently occupying debate on no fewer than twelve days in June, July, August, and September 1787.[67] During this time, at least seven methods vied for approval: (1) all judges would be selected by both houses of Congress; (2) all judges would be appointed by the executive; (3) members of the Supreme Court would be selected by the Senate, with other judges selected by both houses of Congress; (4) all judges would be named by the Senate; (5) all judges would be picked by the executive "by and with the Advice and Consent" of the legislature; (6) selection would be by executive appointment except when two-thirds of the legislature disapproved; and (7) appointments would be made by the Senate with a veto by the executive.[68] Benjamin Franklin, senior member of the Convention, attempted to inject some levity into the debate on June 5 by recommending yet an eighth arrangement: the Scottish method of appointment, "in which the nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves."[69] The plan that was ultimately adopted and appears in Article II represented a "compromise between those who, like Benjamin Franklin, James Madison, and John Rutledge, feared 'monarchial' tendencies in strong solo executive prerogatives on the issue and thus called for a potent legislative role, and those who like James Wilson, Alexander Hamilton, and Gouverneur Morris, favored broadly independent executive powers."[70] It seems clear from the text of the Constitution that it was the second group that did much of the compromising.

Less clear from the text of the Constitution or from the proceedings of the Convention was the degree of deference to which presidential nominations should be entitled. This is the balance-of-power issue that frequently arises when the Senate considers a President's choices. Advocates of executive authority—who, not surprisingly, have included most Presidents—point to the fact that the nominating/appointing authority is vested in the President, subject to Senate approval, concluding then that the legislature should operate only as a "minor check" on the President. Alexander Hamilton, that great defender of executive power, agreed. "But might not his nomination be overruled?" Hamilton queried. "I grant it might, yet this could only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The Senate could not be tempted, by the preference they might feel to another, to reject the one proposed; because they could not assure themselves, that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain, that a future nomination would present a candidate in any degree more acceptable to them; and as their dissent might cast a kind of stigma upon the individual rejected, and might have the appearance of a reflection upon the judgment of the chief magistrate, it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal. To what purpose then require the co-operation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters . . ."[71] By this view, the Senate would be expected to block truly unfit nominees but "would not be a serious check"[72] on a President's authority.

Yet if the Constitution fails to settle the issue of deference, history does not, at least with respect to nominations to the Supreme Court. The Senate has failed to approve a President's choice sufficiently often to make any President wary of assuming that confirmation will be forthcoming as a matter of course. In 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.[73] Since 1930, six High Court nominations have failed.[74]

If one believes that the language of Article II anticipated an independent role of some kind for the Senate in reviewing nominees, what criteria are Senators to use? Aside from questions about competence and ethics, may partisanship and ideology properly be considered? According to Henry Abraham, the delegates at the Philadelphia Convention spent little time on the question."[C]riteria for such appointments were not debated, nor did they appear to loom as a matter of either significance or puzzlement. Those few delegates who vocalized the issue of judicial selection criteria did so by assuming *viva voce* and *sub silentio* that merit, as opposed to favoritism, should—and indeed would—govern naturally."[75] Viewed from the perspective of more than two centuries of practice, "the controversy is less cut-and-dried," write Epstein and Segal, "with at least three camps at odds."[76] The first, identified with Abraham's conclusion, emphasizes merit. The "delegates simply assumed, perhaps a mote naively, albeit quite understandably, that those selected as federal jurists would be chosen on the basis of merit. Period."[77] Accordingly, applying this standard, neither a President *nor* members of the Senate should consider anything but competency and individual integrity when selecting a jurist or passing on his or her nomination. A second camp contends that while the Founders may have believed that ideology plainly had no place in the Senate's decision, they fully expected politics to play a role in the President's decision. The third group, in which the authors seem to find themselves, views the Founders as prescient people who comprehended the implications of the system they had devised. "It was one that would invite the Senate, and of course the President, not just to scrutinize a candidate's professional qualifications but to examine, in ways that might also be political, the candidate's political values as well."[78] Yet few of the Framers foresaw the role that political parties would come to play in the new political system launched by the Constitution, which led soon to a situation where "partisan considerations rather than the fitness of nominees would often be the controlling considerations of the Senate in passing on nominations."[79] The third camp—which holds that ideological inquiries are a proper element of judicial selection—thus seems to lack the underpinnings to support its legitimacy. Nonetheless, looking to the future, Epstein and Segal see a continuation of the present situation in which partisanship and ideology will remain firmly in the saddle of judicial selection. "[U]ntil judges and Justices stop reaching political decisions, the process will never become any less political . . . Political decision-making and political decisions started in 1800, not . . . with the 'modern' Court."[80]

Unquestionably, of all appointments to the Supreme Court to date, the most significant was President John Adams' selection of John Marshall to be Chief Justice after Oliver Ellsworth resigned. Although at least one member of the Senate in 1801 referred to Marshall's selection as a "wild freak"[81] of the President, Adams himself never regretted his decision. As Adams told the Chief Justice's son some twenty-five years later—by which time Marshall had already had a substantial impact on the emerging American nation—"My gift of John Marshall to the people of the United States was the proudest act of my life."[82] Indeed, the fourth Chief Justice casts such a long shadow on the Constitution and on the American political system that to write about Marshall after 1800 is to write about the

Supreme Court and—with only a handful of exceptions such as Justices William Johnson and Joseph Story—to write about the Supreme Court in the first third of the nineteenth century is to write almost entirely about John Marshall. "A catalyst rather than an innovator, Marshall marked the path America was impelled to take."[83]

Understandably, therefore, Marshall's place in the American pantheon means that he has seldom been allowed to stray far from the center of scholarly attention. Alongside at least four major biographies[84] lies a host of more narrowly focused volumes,[85] reams of articles, plus countless other studies in which Marshall's handiwork figures prominently. Indeed, more has probably been published about John Marshall than about any other Justice.

Since 1974, at least, the task of exploring Marshall's life and work has been made far easier by the ongoing John Marshall Papers project under the editorship of legal historian Charles Hobson of the College of William and Mary, who by now easily knows more about Marshall than anyone else in this country or abroad. The fruits of the project are now spread across the twelve volumes of **The Papers of John Marshall**,[86] and thus seem to have discredited Joseph P. Cotton's assertion in 1905 that it "is not possible to bring to the study of Marshall's life and work any new great light." For Cotton, Marshall's achievements were either obvious or already "universally acknowledged," while "comparatively little, save the bare outlines,"[87] could be known about his personal life. With recent publication of the twelfth and concluding volume in the Marshall Papers series, covering the months between January 1831 and July 1835,[88] there is now in print sufficient material to inform additional assessments of some of Marshall's accomplishments, and more than enough new detail about his life and style of living to enrich our understanding of Marshall the person and the Court he led.

However, it may well be that some people might not consider publication of the Marshall papers a special event. If so, that view probably stems from a lack of appreciation of what the term "papers" ordinarily encompasses: the written record of a person's life, including correspondence, relevant family documents, and, for public and/or literary figures, speeches and other writings. In a digital age, one's "papers" would include the contents of one or more computer hard drives, plus, no doubt, vast amounts of email in third-party storage.

For different reasons, even someone generally familiar with American history might not consider publication of the Marshall papers particularly noteworthy. First, the papers of some of the nation's most important Presidents are already available in bound volumes in one or more editions,[89] so the idea of publishing an important figure's papers, while interesting, is hardly novel. Second, while the papers of the great majority of Justices have not have been published, their *opinions* surely have since practically the beginning through the labors of the various reporters, such as William Cranch. Thus, one might query the rationale for publishing material in addition to opinions. Moreover, the papers of many former Justices are accessible at the Manuscript Division of the Library of Congress or at few university libraries, although they exist in varying degrees of completeness.[90]

Nonetheless, the Marshall project is special, because there has been no systematic effort to collect, catalog, and then publish the papers of even the most important figures who have sat on the Supreme Court of the United States. True, several volumes of Justice Brandeis's letters have been published,[91] as have a few volumes of the letters of Justice Holmes.[92] However, anything approaching the depth of the John Marshall papers project for other former members of the Court remains a rarity, although digitalization holds the promise of at least some limited future publication without the accompanying bulk and expense of hard copy.

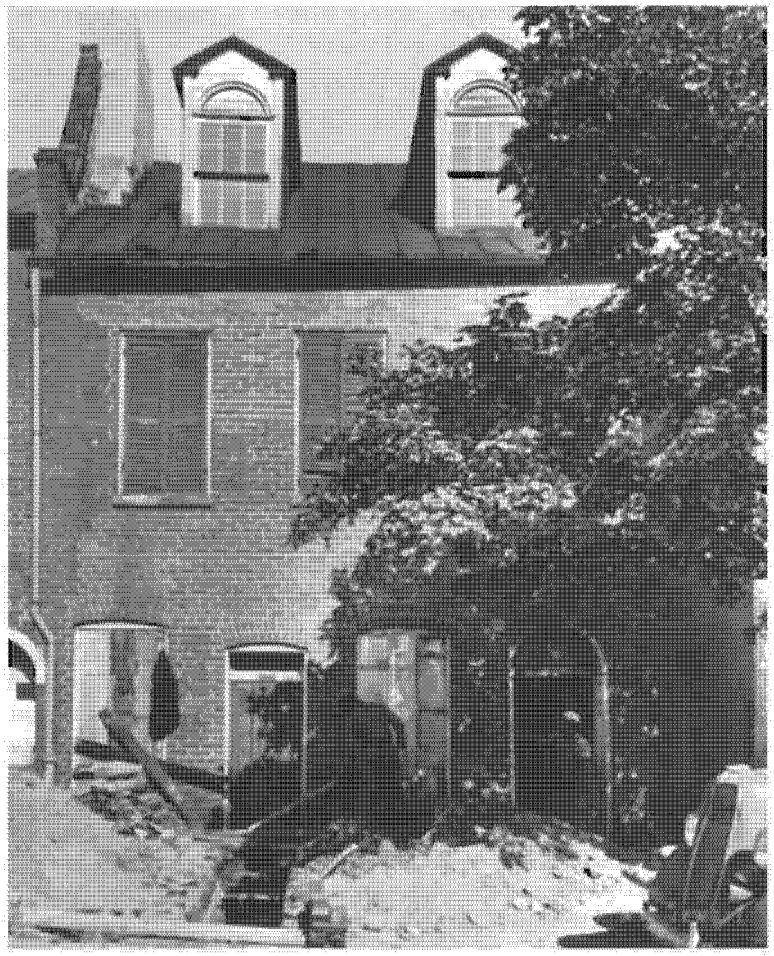
Compared to presidential papers from recent administrations and even some older ones, extant documents from the Marshall era are, of course, not nearly so vast. Still, the Marshall Papers project, like any similar undertaking, required editorial judgments as to which documents to include and which to exclude. As illustrated by volume 12, Marshall's constitutional opinions written during the volume's time frame are reprinted, sometimes with an editorial note attached, as are a sample of his nonconstitutional opinions, which, given the Court's business in that day, far outnumbered those in constitutional cases. In any event, each of these is today easily available in the *United States Reports*. Far more obscure are Marshall's opinions from cases decided on circuit, and for that reason each circuit opinion is reprinted. Marshall's instructions to a circuit court jury are also included.[93]

As for Marshall's correspondence, much has "been lost or destroyed," according to Hobson, and what remains "consists overwhelmingly of letters Marshall wrote to others."[94] Some 257 letters appear in volume 12, including fifteen to his colleague Justice Story. Several are a window into Marshall's mind. For example, in a letter dated December 7, 1834, to John Marshall, Jr., headed "My dear Grandson,"[95] the Chief Justice recommended the study of English and American history, which he saw as "so closely connected that the former seems to be introductory to the latter. They form one whole."[96] In the same letter, Marshall also stressed the importance of good writing: "There is no exercise of the mind from which more valuable improvement is to be drawn than from composition. In every situation of life the result of early practice will be valuable. . . . The man who by seeking embellishments hazards confusion, is greatly mistaken in what constitutes good writing. The meaning ought never to be mistaken. Indeed the reader should never have to search for it."[97]

Other correspondence highlights the workings of the Marshall Court. A letter to Justice Story, dated May 3, 1831, typified the Chief Justice's well-known preference for a unanimous Bench behind an opinion of the Court,[98] a goal that Marshall had long facilitated by arranging for the Justices to reside and take their meals at the same boarding house in Washington. Now, however, a "revolutionary spirit" had "displayed itself in our circle"[99]—an apparent reference to Justice Henry Baldwin, who had recently registered an unusual number of dissents and who had objected to the Court's returning to Brown's Indian Queen Hotel, the Justices' usual abode, for the following year. Moreover, Baldwin, who had agreed to make alternative arrangements, had not yet done so, a fact that troubled Marshall, who fretted that the Justices would "scatter ad libitum" and that the few cases decided would "probably be carried off by seriatim opinions." "I think this is a matter of some importance," Marshall emphasized.[100] Happily, before they were to convene again, the Justices accepted an invitation to lodge at the Tench Ringgold house.

Appropriately, Charles Hobson authored the essay on the Marshall Court for **The United States Supreme Court**,[101] an exceptionally useful reference volume on the High Court that many will want to consult alongside the heftier **Oxford Companion to the Supreme Court of the United States**.[102] Edited by Christopher Tomlins of the American Bar Foundation, **The United States Supreme Court** contains eighteen historically focused essays on the Court that generally, although not exclusively, coincide with major periods of institutional development. The essays, authored by an impressive roster of historians, legal scholars, and political scientists, are followed by shorter biographical entries on each Justice through the appointment of Justice Breyer in 1994. These entries, in turn, precede useful tables in the appendices that highlight judicial personnel across time as well as the Court's budget from 1790 through 2003, including amounts allotted both for salaries and, where applicable, for operation of the Supreme Court Building.

"Morally and legally," writes Tomlins in the introductory essay—perhaps with Chief Justice Hughes's 1932 cornerstone-laying comment about the Court as "symbol" in



When Justice Henry Baldwin refused to return to Brown's Indian Queen Hotel, the boardinghouse where the Justices lodged in 1832, Chief Justice Marshall worried that they would scatter to other dwellings and thereby jeopardize the precious unanimity of opinion Marshall had worked so hard to foster on the Court. Happily, before they were to convene again, the Justices accepted an invitation to lodge at the Tench Ringgold house (right).

mind—"the Supreme Court . . . is the most authoritative branch of the federal government; institutionally, the least powerful."[103] Yet, ironically, "this most morally authoritative institution is also, in its interior workings the least transparent. . . . At work, the Court is an alchemist, self consciously transmuting the living ideas of a panel of men and women . . . into collective pronouncement. But the Court's public pronouncements set conditions of constitutional legality on action. . . . The Court's 'work' transforms the ideas of men into statements of law. . . . Its current incarnation, as at every moment during its history, is a construct of the human choices made by its members. . . ."[104] As the book's essays emphasize, "[t]he path the Court has followed—the way it turned out—was not foreordained. . . . All the same, traditions that suggest an abiding continuity are an extremely useful resource—perhaps even the Court's most powerful weapon. . . . From beginning to end, . . . the history of the Supreme Court of the United States provides cogent proof that appearances matter."[105]

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

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ENDNOTES

[1]U.S. CONST., Art. VI, Sec. 2.

[2]2 U.S. (2 Dallas) 419 (1793).

[3]*See, e.g.*, Hamilton's explicit assurances in *The Federalist*, No. 81.

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

[5]"Hoover Lays Supreme Court Cornerstone; Hughes and Davis Speak for Bench and Bar," *New York Times*, October 14, 1932, p. 1.

[6]*Id.*, p. 8.

[7]*Id.*, p. 1.

[8]*Hirabayashi v. United States*, 320 U.S. 81, 104 (1943).

[9]*The Federalist*, No. 51.

[10]*The Federalist*, No. 1.

[11]Donald Grier Stephenson, **Campaigns and the Court: The United States Supreme Court in Presidential Elections** (1999), 137. *See also* Samuel Eliot Morrison, **The Oxford History of the American People** (1965), 642–43.

[12]Appointed to the Supreme Court by President William Howard Taft, Hughes took the oath of office as Associate Justice on October 10, 1910 and resigned on June 10, 1916, the day that he accepted the Republican National Convention's nomination for President. Hughes is thus the only Justice to submit a letter of resignation to the President whose office he would officially be seeking as the nominee of a major party. Wilson's re-election in 1916, of course, meant Hughes's defeat, an outcome that did not surprise former President Theodore Roosevelt, who had referred to the Republican nominee as the "bearded iceberg." Arthur S. Link, **Wilson: Campaigns for Progressivism and Peace 1916–1917** (1965), 7. Hughes was nominated by President Hoover to be Chief Justice on February 3, 1930, the very same day that Chief Justice Taft resigned. He assumed the center chair on February 24, 1930. On June 2, 1941, Hughes, then seventy-nine years old, notified President Franklin Roosevelt of his intention to retire effective "on and after July 1, 1941," due to "considerations of health and age." Samuel Hendel, "Charles Evans Hughes," in Leon Friedman and Fred L. Israel., eds., **The Justices of the United States Supreme Court, 1789–1969: Their Lives and Major Opinions** (1969), vol. 3, 1913. Hughes died at age eighty-six on August 17, 1948.

[13]Charles Evans Hughes, **The Supreme Court of the United States** (1928), 78.

[14]Hughes was first elected in 1906 and was re-elected in 1908.

[15]Speech at Elmira, New York, May 3, 1907, in Charles Evans Hughes, **Addresses of Charles Evans Hughes** (2d ed., 1916), 185 (emphasis added).

[16]*The Federalist*, No. 78.

[17]*Marbury v. Madison*, 5 U.S.(1 Cranch) 137, 163 (1803).

[18]Albert J. Beveridge, **The Life of John Marshall**, vol. 4 (1919), 493.

[19]*West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).

[20]William M. Wiecek, **Oliver Wendell Holmes Devise History of the Supreme Court of the United States**, volume XII, **The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953** (2006) (hereafter cited as Wiecek). Wiecek is also author of a concise volume on Supreme Court history. *See* William M. Wiecek, **Liberty Under Law: The Supreme Court in American Life** (1988).

[21]Wiecek, 707.

[22]*Id.* The idea of the Stone-Vinson era as a time of transition is also a principal theme of Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941–1943** (1997), ix.

[23]*See* Pub. L. No. 84-246, 69 Stat. 521 (1955). For a brief history of the Oliver Wendell Holmes Devise, see Roy Mersky, Book Review, 8 *Criminal Law Bulletin* 67 (1972).

[24]G. Edward White, **Oliver Wendell Holmes Devise History of the Supreme Court of the United States**, vols. 3–4, **The Marshall Court and Cultural Change, 1815–1835** (1988), xix–xx.

[25]Julius Goebel, Jr., **Oliver Wendell Holmes Devise History of the Supreme Court of the United States**, vol. I, **Antecedents and Beginnings to 1801** (1971).

[26]In addition to Wiecek's Volume XII, volumes to date in the Holmes Devise include: vol. I, Goebel, **Antecedents and Beginnings to 1801**; vol. II, George Lee Haskins and Herbert A. Johnson, **Foundations of Power: John Marshall, 1801–15** (1981); vols. III–IV, White, **The Marshall Court and Cultural Change**; vol. V, Carl B. Swisher, **The Taney Period, 1836–64** (1974); vols. VI–VII, Charles Fairman, **Reconstruction and Reunion, 1864–88** (1971,

1987), vol. VII supp., Charles Fairman, **Five Justices and the Electoral Commission of 1877** (1988); vol. VIII, Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888–1910** (1993); vol. IX, Alexander M. Bickel and Benno C. Schmidt, Jr., **The Judiciary and Responsible Government, 1910–21** (1984). Earlier volumes were published by Macmillan. The most recent volumes have been published by Cambridge University Press.

[27]For example, a reader interested in Justice Rutledge will find thirty-two page numbers listed on which his name appears, but, other than a biographical reference, there is no indication provided as to what one might find discussed on any of those pages, whether that might be his appointment to the Court or interactions with other Justices. Wiecek, 731.

[28]Wiecek, 713–15.

[29]*See* Table 1 in Donald Grier Stephenson, Jr., "The Waite Court at the Bar of History," 81 *Denver University Law Review* 449, 453 (2003).

[30]*See, e.g.*, C. Herman Pritchett, **The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947** (1961).

[31]At least one study makes a similar point about President Eisenhower's five appointments. *See* Theodore M. Vestal, **The Eisenhower Court and Civil Liberties** (2002).

[32]Wiecek, 7.

[33]*Id.*, 4.

[34]261 U. S 525, 446 (1923).

[35]The phrase is usually attributed to Professor Edward S. Corwin of Princeton University. *See* Edward S. Corwin, **Constitutional Revolution, Ltd.** (1941; reprinted by Greenwood Press, 1977).

[36]Van Devanter's departure was hastened after Roosevelt signed legislation on March 1 that sweetened retirement benefits by providing full salary to those who retired at age 70.

[37]Appointed in 1943 to replace Byrnes after his resignation, Wiley Rutledge was the last of the Roosevelt Justices.

[38]Only one Justice since Black—Harold Burton in 1945—has come directly from the United States Senate. Frankfurter was the last Justice appointed directly from the professorate. No Justice since Jackson has entered the legal profession the old-fashioned way: by apprenticeship.

[39]Wiecek, 119.

[40]304 U.S. 144 (1938).

[41]Jeffrey D. Hockett, **New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson** (1996), 292–293, 298.

[42]*Carolene Products*, 304 U.S. at 152 (emphasis added).

[43]*Carolene Products*, 304 U.S. at 152 n.4.

[44]Lewis F. Powell, Jr., "*Carolene Products* Revisited," 82 *Columbia Law Review* 1087, 1087 (1982).

[45]Wiecek, 116.

[46]*Id.*, 120.

[47]*Id.* (internal footnotes omitted).

[48]*Id.*, 121. As Wiecek explains, Justice Cardozo was then "ill with his final illness, and Reed had recused himself because of his role as solicitor general. . . . McReynolds dissented. Butler concurred separately, and Black refused to concur in that portion of the Stone opinion in which footnote 4 was appended." *Id.*, n.34.

[49]John Roche once referred to Justice Murphy as "the living incarnation of the liberal myth of the New Deal." Quoted in *id.*, 99.

[50]*Id.*, 8.

[51]*Id.*, 9.

[52]*Minersville School District v. Gobitis*, 310 U.S. 586 (1940); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Court records misspelled the Gobitas and Barnett family names; hence, the landmark decisions perpetuate the errors in the *United States Reports*. Donald Grier Stephenson Jr., and Alpheus Thomas Mason, **American Constitutional Law: Introductory Essays and Selected Cases** (14th ed., 2005), 565.

[53]Wiecek, 7.

[54]*Id.*, 9.

[55]*Id.*

[56]*Id.*, 710.

[57]*Id.*, 712.

[58]Lee Epstein and Jeffrey A. Segal, **Advice and Consent: The Politics of Judicial Appointments** (2005) (hereafter cited as Epstein and Segal).

[59]Henry J. Abrahams, **Justices and Presidents** (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** (2000).

[60]David Alistair Yalof, **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (1999).

[61]Sheldon Goldman, **Picking Federal Judges** (1997).

[62]Michael Comiskey, **Seeking Justices** (2004).

[63]Epstein and Segal, 5.

[64]*Id.*, 2.

[65]Quoted in *id.*, 1. For a detailed account of the struggle over the Brandeis nomination, see A. L. Todd, **Justice on Trial: The Case of Louis D. Brandeis** (1964).

[66]U.S. CONST., Art. II, Sec. 2 (emphasis added).

[67]Henry Abraham, "Can Presidents Really Pack the Supreme Court," in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 39.

[68]Epstein and Segal, 17–18.

[69]Abraham, "Can Presidents Really Pack the Supreme Court," 40.

[70]*Id.*, 39.

[71]*The Federalist*, No. 76.

[72]Epstein and Segal, 19.

[73]John Massaro, **Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations** (1990), app. 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. In the nineteenth century, however, 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.

[74]The number does not include the nomination of Judge Douglas Ginsberg in 1987, who withdrew his name from consideration before the nomination was formally submitted to the Senate. It does include Harriet E. Miers, whose nomination was submitted and then withdrawn in 2005.

[75]Abraham, "Can Presidents Really Pack the Supreme Court," 39.

[76]Epstein and Segal, 19.

[77]Abraham, **Justices, Presidents, and Senators**, 18.

[78]Epstein and Segal, 20.

[79]Joseph P. Harris, **The Advice and Consent of the Senate** (1953), 34.

[80]Epstein and Segal, 144.

[81]Charles Warren, **The Supreme Court in United States History**, vol. 1 (1926), 178.

[82]*Id.*

[83]Alpheus Thomas Mason, "Preface," in Joseph P. Cotton, Jr., ed., **The Constitutional Decisions of John Marshall**, vol. 1 (1969 ed.), xiv.

[84]Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916–1919); Leonard Baker, **John Marshall: A Life in Law** (1974); Jean Edward Smith, **John Marshall: Definer of a Nation** (1996), and Francis N. Stites, **John Marshall: Defender of the Constitution** (1981).

[85]*See, e.g.*, R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001); Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (1996).

[86]Charles F. Hobson, ed., **The Papers of John Marshall**, 12 vols (1974–2006) (hereafter cited as Hobson). All citations below to "Hobson" refer to vol. 12.

[87]Joseph P. Cotton, Jr., "Prefatory Note," in Cotton, ed., **The Constitutional Decisions of John Marshall**, vol. 1 (1905), iii. Da Capo Press reprinted this two-volume set in 1969.

[88]The time frame for volume 12 includes the nullification controversy in South Carolina plus *Barron v. Baltimore*, on application of the Bill of Rights to the States, as well as the Marshall Court's decisions in the *Cherokee Indian* cases, which nearly precipitated a major clash between the Court and the Jackson administration. *Barron v. Baltimore*, 7 Peters (32 U.S.) 243 (1833); *Cherokee Nation v. Georgia*, 5 Peters (30 U.S.) 1 (1831); *Worcester v. Georgia*, 6 Peters (31 U.S.) 515 (1832). An addendum to volume 12 covering the period from June 1883 to January 1829 includes "documents accessioned too late to be presented in proper chronological sequence." Hobson, xxxi.

[89]*See, e.g.*, **The Collected Works of Abraham Lincoln**, 9 vols. (1953–1955); **The Papers of Thomas Jefferson**, 34 volumes to date (1950–); and **The Papers of Woodrow Wilson**, 69 volumes to date (1966–).

[90]For a partial list, see D. Grier Stephenson, **The Supreme Court in the American Republic: An Annotated Bibliography** (1981), 170–263. In addition, the Web site maintained by the Federal Judicial Center hosts the Biographical Directory of Federal Judges, *available at* http://www.fjc.gov/public/home.nsf/hisj (last visited Jan. 5, 2007).

[91]Melvin I. Urofsky and David W. Levy, eds., **The Letters of Louis D. Brandeis**, 5 vols. to date (1971–).

[92]*See, e.g.*, Mark D. Howe, ed., **The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935**, 2 vols. (1953).

[93]*See, e.g.*, Hobson, 210.

[94]Hobson, xxxii.

[95]According to Hobson, John Marshall Jr. (1821–1872) was the son of John Marshall's late son John Marshall. *Id.*, 431 n.1.

[96]*Id.*, 430.

[97]*Id.*, 431.

[98]David M. O'Brien, **Storm Center** (5th ed., 2000), 112.

[99]Hobson, 62.

[100]*Id.*, 63.

[101]Christopher Tomlins, ed., **The United States Supreme Court: The Pursuit of Justice** (2005) (hereafter cited as Tomlins). For Hobson's essay on the Marshall Court, *see* Tomlins, 47–74.

[102]Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States** (2d ed., 2005).

[103]Tomlins, xi.

[104]*Id.*, xii, iii, xiv.

[105]*Id.*, xiv.

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