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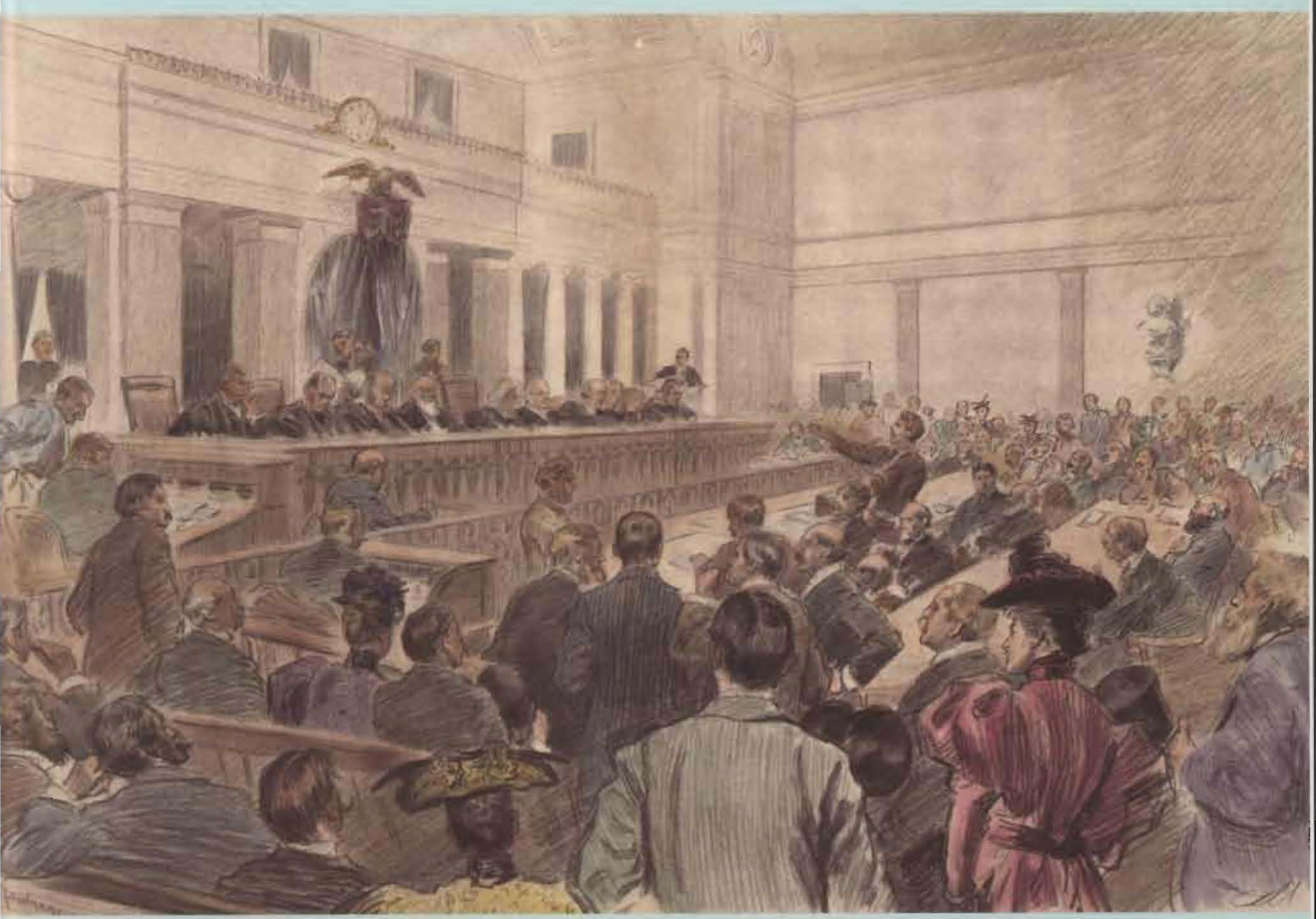

SUPREME COURT HISTORICAL SOCIETY

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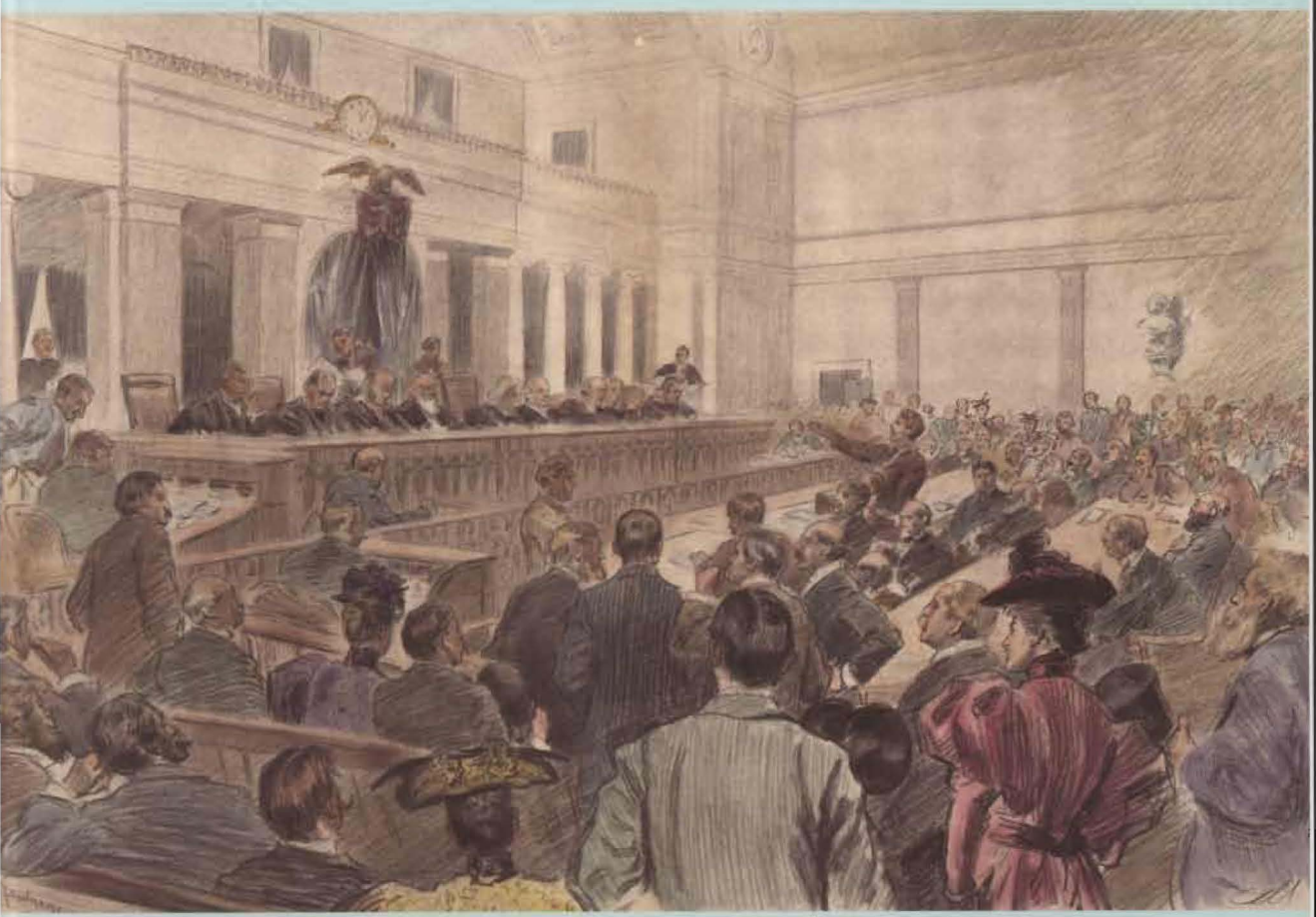

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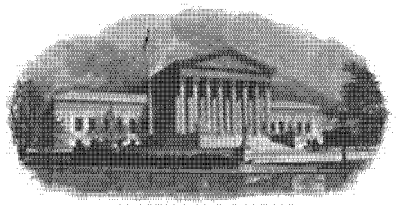

Supreme Court Historical Society

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2007 vol. 32 no. 2

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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

Dissent occupies a very important role in the history of the Supreme Court. While the majority holding is the law of the land—even if by a bare 5–4 vote—we know that in a significant number of cases, it is the rule espoused by the dissenters that will ultimately be accepted as the proper constitutional interpretation. To take but one example, while the majority holding in *Plessy v. Ferguson* (1896) gave judicial imprimatur to racial segregation, in the final analysis the eloquent dissent by Justice John Marshall Harlan I—that the "constitution is color-blind"—carried the day. Similarly, the dissents by Justices Oliver Wendell Holmes, Jr., and Louis D. Brandeis in *Olmstead v. United States* (1928) led to the Court's adoption of the rule that wire-tapping did indeed constitute a search, and that under the Fourth Amendment it required a prior warrant.

In this series, we are interested as much in the dissenters as in the dissents. For example, Sandra VanBurkleo looks at the career of William Johnson, often characterized as the first dissenter. Johnson, when viewed in the context of the Marshall Court, often appears to be a loose cannon, and his dissents are not always on target. But he set an example, and subsequent Justices have accepted it as a matter of course: that if they do not agree with all—or even part—of the majority ruling, they are free, not only to vote against it, but to explain why.

Some members of the Court did not value dissent, and none less so than Chief Justice William Howard Taft, who during his decade on the Bench fought valiantly to "mass the Court." As Jonathan Lurie points out, Taft believed that the rulings of the Court would have greater impact and influence if they had the backing of the entire Bench. While he often succeeded, the frequent dissents of Holmes and Brandeis, joined by Harlan Fiske Stone, vexed him enormously. No doubt his frustration would have been even greater if he had lived long enough to see practically all of the dissenters' opinions adopted by later Courts.

Two of the most famous nineteenth-century cases, *Dred Scott v. Sanford* (1857) and the *Income Tax Cases* (1894 and 1895), are notable for the results they spawned. *Dred Scott* is often given credit for triggering the Civil War, while the public outcry over the *Tax Cases* led

to the adoption of the Sixteenth Amendment in 1913. Lucas Morel and Calvin Johnson note that the Court was far from united in these cases, and that the dissents not only helped to fuel public outrage but also set in motion events to overturn the findings.

Had this series been presented a generation ago, it is unlikely that we would have been all that interested in the views of John Marshall Harlan I. But ever since *Brown v. Board of Education* (1954), in which the Court adopted his views on the meaning of the Fourteenth Amendment's Equal Protection Clause, we have come to have a much greater respect for him, not only as a man, but as a judge, and a good part of this new look at Harlan has been the work of Linda Przybyzewski.

After studying these articles, our readers will understand why dissent has been so important, and why the dissenters—no matter how badly outnumbered they may be in a particular case—all share, to a greater or lesser extent, Mr. Justice Brandeis's explanation of why he dissented: "My faith in time is great."

In Defense of "Public Reason": Supreme Court Justice William Johnson

SANDRA F. VANBURKLEO*

For those of us who gravitate toward rebels and upstarts, Supreme Court Justice William Johnson has uncommon appeal, if only because he was the first member of the federal Bench to kick up his heels in a sustained, effective, and deliberate way. In 1954, Johnson's only biographer, Donald Morgan, proclaimed him "the first dissenter,"[1] a force for democratization in the style of Thomas Jefferson and Andrew Jackson, the man who persuaded Chief Justice John Marshall to compromise on the question of unitary opinions and institutionalize (if not applaud) publication of concurring or dissenting departures from the majority's official reasoning.

However we decide to characterize him, it is fair to say that, of all the notoriously headstrong Associate Justices, Johnson is the least well known. We might justify another look on that ground alone. But there are other, better reasons for reconsideration. Johnson's career serves as a window into the earliest decades of federal practice, when institutions were half-formed and when renegades could reasonably hope to shape future developments. Because his professional life spanned two formative eras in the nation's past—the age of revolution and the early national period, coincident with the rise of a recognizably modern Supreme Court—we are given an opportunity to step back from our own moment and consider, not only when and why judicial dissent began, but what we have gained and lost over two centuries, and what, if anything, we might want to reclaim from the federal judiciary's rapidly receding past.

We begin with basic questions: Who was William Johnson? In what sense was he a dissenter? Was he the instrumentalist variety associated, rightly or wrongly, with the likes of William Douglas and John Marshall Harlan I? An ideologue interested mainly in advancing the fortunes of political parties and leaders? Was he merely a "crank," as nineteenth-century Americans sometimes put it? How would Johnson himself want us to characterize his contributions? And why have

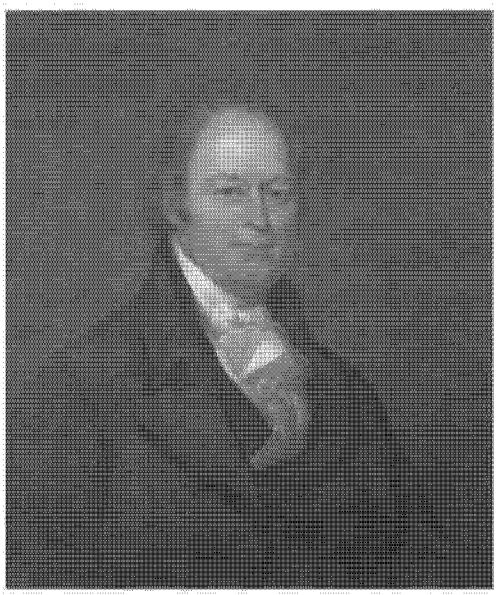
I chosen a title with an anachronistic phrase ("public reason") pirated from legal philosopher John Rawls?[2]

Remarkably, fifty years after Morgan published his still-singular biography, a number of questions about the "first dissenter" remain unanswered. When scholars consider Johnson at all,[3] he variously appears as a brilliant partisan of Thomas Jefferson or Jackson, an ill-humored thorn in Marshall's side, and a man driven mainly by vanity or vendetta. To some extent, these are mischaracterizations. It is more accurate, and perhaps more interesting, to describe Johnson as an unreconstructed Anti-Federalist (or Whiggish oppositionist), rather than as a far-sighted political or constitutional modernist. But critics also are right to say—if sometimes for the wrong reasons—that Johnson's view of courts and constitutions differed appreciably from Marshall's. His contributions to Supreme Court history thus were both anachronistic and innovative.

In many respects, William Johnson's historical moment is now a foreign country, infused with political and constitutional meanings quite unlike our own. He was born in Charleston, South Carolina, two days after Christmas in 1771, the favorite son of Sarah Nightingale and William Johnson. The senior William was a zealously patriotic blacksmith and legislator who managed to amass an impressive fortune before his late-life death. His son attended the College of New Jersey at Princeton, then under the inspired leadership of George Witherspoon, where he studied gentlemanly arts and sciences in preparation for law study. He joined prestigious literary societies to hone his writing skills and excelled in Latin translation. As colonial resistance strategies yielded to calls for independence and, finally, to war, Johnson's father joined the front lines in South Carolina—a decision that led to wartime detention in Florida and the family's exile. These were times, in the elder Johnson's words, of "dark and gloomy" dislocation, ameliorated by the justice of the American cause and the generosity of friends.[4]

By the mid-1790s, social connections, achievement, and a crying need for political talent in the young republic converged to jumpstart the younger Johnson's career. After leaving Princeton, he entered an apprenticeship in Charleston with prominent lawyer and Federalist politician Charles Cotesworth Pinkney. Johnson had allied himself with Jeffersonian Republicanism while studiously avoiding its radical strains, including the Charleston Republican Society. At the same time, he sided with Federalists on financial and apportionment questions.[5] In 1793, he passed the South Carolina bar. A scant year later, more or less at the same moment that John Jay decided to abandon the Supreme Court in frustration and disgust, Johnson married Sarah Bennett, the sister of Thomas Bennett, a future governor of South Carolina. He also assumed an elective seat in the state legislature. Ultimately, the couple parented eight children, six of whom survived; they also adopted two refugees from Santo Domingo. By age 30, Johnson boasted several terms as a state legislator (one as its presiding officer), a budding law practice, prestigious academic connections (he was a founder, for example, of the University of South Carolina), and legislative nomination at an astonishingly young age to the Court of Common Pleas, or Constitutional Court, where he supported governmental intervention in the ongoing project of economic growth and market integration.[6]

Why such attention to circumstance? As Oliver Wendell Holmes once said in a long, contemplative essay about John Marshall, "It is most idle to take a man apart from the circumstances which, in fact, were his. . . . A great man represents . . . a strategic point in the campaign of history, and part of his greatness consists in his being *there*."[7] It matters greatly that William Johnson came to public service midway through the Age of the Democratic Revolution. The swirl of revolutionary talk, a climate of watchfulness, heated discussions of basic political questions in pubs and open-air meetings—all formed an essential part of his



William Johnson, the Court's first great dissenter, is overdue for a modern biography.

political and legal education. As late as 1801, when Marshall assumed the post of Chief Justice, very little of consequence was truly settled; only a handful of controversies about the workings of government in a federated republic had been resolved. The problem of the era, moreover, was tyranny in its many forms: where to look for it, whether experimental political and constitutional structures might prevent or control it, whether the new empire would inevitably fall prey to one kind or another as the decades advanced.[8]

Of particular relevance is the way in which Johnson and other early national Americans associated civic participation with constitutionalism. English habits of mind had not evaporated with independence, and part of that legacy was a tendency to conceive of human action as if embedded in a fabric of time, accumulating gradually into "history," which concept lay at the heart of "constitutionalism." Nothing was more frightening than the prospect of establishing a polity without cultural memory; the nation's Framers did not have in mind a Constitution of decontextualized, inward-turning words and phrases. Nor could one predict what might develop through experience—the source of a neighborhood's customary constitution. Who had foreseen, after all, that British North America might one day stand partly on its own experiences of constitutionalism and declare independence? As John Dickinson explained in 1787, "It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & [i.e., the mysterious form or symbol] in the eye of those who are governed by reason .... Accidents probably produced these discoveries, and experience has given a sanction to them." Serendipity and social re-enactment, in other words, formed an essential part of what David Konig calls an "historical process of constitutionalism."[9]

To make matters more complex, Americans continued to be dependent on Europeans for critical manufactures well into the new century, and to suffer mightily from unrelenting capital and labor scarcity. Hence, the Federalist (and, by 1800–01, the Republican) leadership's keen interest in free trade, domestic manufactures, the cost of labor, and public support for internal improvements, without which commerce would flounder. In 1803, Jefferson's dazzling burst of executive energy doubled the nation's physical size, but at the cost of yet more political and cultural instability.

Finally, common-law constitutional practice was a muddle of inherited and "local" practices. In Britain, as in many of its colonies, members of the bar moved from court to court, not identified fundamentally with particular institutions. The English constitution lacked firm boundaries; that is to say, it was partly written, partly customary, a mixture of ancient and modern elements (including certain acts of Parliament, so that the constitution could and did mutate). Law courts' dependence on the King-in-Parliament also provided legitimacy and authority; departmental government, the notion that powers ought to be separated, represented a theoretical alternative to the English way well into the 1780s. Patriots of '76 shed

their English skins gradually: architectures of mind, a lifetime of loyalty to the Crown, veneration of the ancient constitution, a deep-seated need for visible signs of public power—all of these factors persisted, even as institutions, doctrines, and procedures mutated. As Jefferson told Madison in March, 1789, "The rising race are all republicans. [But we] were educated in royalism: no wonder if some of us retain that idolatry still."[10]

Federal courts also stood on unsteady ground, viewed with immense suspicion in the states, in too many respects unprecedented, tainted with the strong odor of aristocracy. Only seven years before Johnson's arrival in the federal city, Congress had all too easily adopted a constitutional amendment depriving Justices of the power to force states to appear in federal courtrooms.[11] Marshall had scored an improbable victory against Jefferson in the case of the midnight judges,[12] thereby asserting the Supreme Court's obligation to defend constitutionalism against corruption. But everyone knew that the Court's ability to function as more than an appellate tribunal depended as much upon political acquiescence as upon Marshall's intellectual and personal attributes. In the end, the Court's ability to extricate itself from the morass into which it had fallen in the 1790s would be determined by its ability to embody the notion of an apolitical rule of law and develop bodies of doctrine with which state legislators, the executive branch, and the sovereign people might be willing to comply.

All of this makes a point: In the summer of 1787, when Madison and others met to resolve a looming public crisis in Philadelphia, William Johnson was a 14-year-old lad in knee breeches. That is an impressionable age. And post-revolutionary upheaval continued well into the nineteenth century. Nothing shaped Johnson's habits of mind more powerfully than the experience of revolution and related attempts to figure out how to protect neighborhoods from federal encroachment, how to outwit historical process (which associated republics with fragility and short lives), and how to be self-governing but neither anarchic nor venal, particularly within legislative bodies.

For Johnson, as for other early American liberals, the fact of a popular sovereign functioned as a basic article of political and constitutional faith. Indeed, virtually all of Johnson's struggles as a jurist had to do with his awareness of government's dependency on the popular will—a will known to be fallible, particularly in the short run. Ordinary people "spoke" politically through elected assemblies; judges provided guidance, rules of decision, and legal interpretation, but not "law" itself, unless legislators—or, in the case of federal courts, state legislatures and courts—had not yet articulated a rule.[13] Hence, it was essential that individuals, whether ordinary citizens or public officials, maintain independence and avoid falling under the sway of tyrants. Thus, Johnson's conception of republican "constitutions"—his view of where the people deposited their conceptions of justice and good government—was multi-faceted, porous, outward-turning, deeply social—a variant of English practice.

How, then, should Americans organize a republic rooted in popular sovereignty? Such questions pressed particularly hard after 1798, when an untested general government nearly collapsed under the weight of partisanship and rhetorical violence. As with the Anti-Federalists, Johnson was caught on the horns of a dilemma: In Herbert Storing's words, if the Antis "could not consistently hold to the doctrine of state supremacy because they admitted it would lead to anarchy," neither could they accept "national supremacy because it would lead to centralized tyranny."[14] Johnson's faith in well-made legislation, particularly at the national level, may well have reflected residual attachments to Parliamentary forms, which had been retained in Carolina. But evidence on the point is sparse.

We do know that Johnson came to President Jefferson's attention in 1804 as a likely successor to Alfred Moore in part because of his youth (better-established men too often said

no) and his emerging reputation for sound republican principles and courage under fire. Jefferson had in mind clipping the federal judiciary's wings, and Johnson seemed to have what it might take. And so, in summer of 1804, Jefferson's commission arrived in Charleston, taking its recipient completely by surprise. When Johnson decided, with remarkably few misgivings, to leave his state judicial post as well as other local responsibilities, he was only 32, though we are told that he passed for a much older man. He appeared in Washington, D.C. in August 1804 and remained for twenty-nine of the most tumultuous and formative years in the Court's history—a tenure that coincided almost perfectly with Marshall's. At the same time, he advanced a literary career in fits and starts (most notably with a multivolume biography of General Nathaneal Greene of revolutionary fame, begun in 1818 and published a few years later), developed a reputation for horticultural expertise, and maintained close connections with family and business interests in South Carolina.

On the Bench, Johnson produced an impressive body of majority opinions, concurrences, and dissents—over 2,000 pages in modern format. From the outset, he assumed the role of contrarian. During his first visit to Savannah as a circuit court judge in 1805, for instance, he refrained from delivering the customary, didactic grand jury charge and instead listened attentively as the foreman of the Savannah grand jury thanked him for his ongoing respect for the law of the neighborhood. Over three decades, Johnson delivered 114 majority opinions, a number second only to Marshall's and Story's—the first in 1805 (*Lambert's Lessee v. Paine*) and the last in 1833 (*Nichols v. Fearson*), just before his death from the effects of botched jaw surgery.[15] He also published ten concurrences—the first in 1805, the last in 1830—and thirty-eight dissents, beginning with *Ex parte Bollman* in 1807 and ending with another *ex parte* hearing in 1833.[16]

The numbers, however, are problematic. First, they do not include decisions to which Johnson silently acquiesced. Second, court reporters sometimes had trouble distinguishing between concurrences and dissents: Some opinions involved a little of each, while others were written so coyly that clerical error might be forgiven.[17] Raw numbers might suggest as well that Johnson produced a steady stream of all three varieties throughout his career, and that dissents form a minor part of the corpus—only 23 percent of 162 opinions. But appearances are misleading. In the years between 1805 and 1831, when Johnson provided the majority opinion in *Hawkins v. Barney's Lessee*, only two of his majority opinions might be called major cases (*US v. Hudson and Goodwin* in 1812, and, eight years later, *Mechanics Bank of Alexandria v. Bank of Columbia*).[18] Indeed, when these cases are viewed en masse, it is hard to escape the impression that Marshall was trying to bury his antagonist under an avalanche of arcane land, admiralty, and insurance cases. The concurrences, in contrast, while fewer in number, include several key moments in the Court's history—among them, *Martin v. Hunter's Lessee* (1816), *Gibbons v. Ogden* (1824), and *Columbian Insurance Company v. Catlett* (1827).[19] The dissents—even if we eliminate a few as mislabeled—look a lot like an early judicial hit parade (for example, *Fletcher v. Peck*, *Fairfax's Devisee v. Hunter's Lessee*, *Green v. Biddle*, *Osborn v. the Bank of the United States*, *Bank of the United States v. Planter's Bank of Georgia*, *Ogden v. Saunders*, *Shanks v. Dupont*, *Craig v. Missouri*, and *Cherokee Nation v. Georgia*).[20] Most important, Johnson's majority opinions cluster in the years before 1820, while his concurrences and dissents accumulate after that year.

In stylistic and forensic terms, Johnson's opinions speak volumes about his attitudes, values, and intellectual development. Scholars complain about Johnson's many detours into supposedly irrelevant, meaning extra-legal or merely pedantic, speculation. But these detours actually illustrate an important point. Johnson valued commonsense argument, factual and doctrinal accuracy, solid annotation,

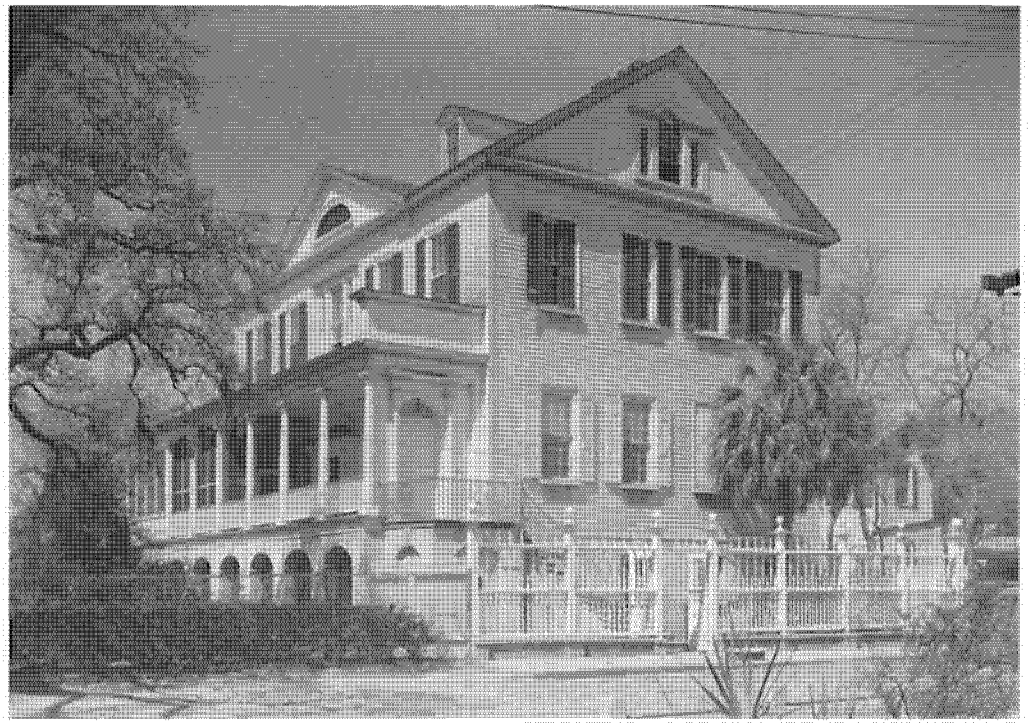
and full disclosure of the circumstances of the case—in his own writing and in everyone else's. When subjected to anything less, he could be impatient and abrasive. In his view, courts dealt in weighty matters—among them, truth and the determination of rights. Nothing prevented justice so completely as inaccurate or fraudulent accounts of law or facts. He particularly despised sloth and duplicity. Time and again, he berated his brethren for erecting verbal or technical smokescreens, for skidding over dubious circumstances that might have altered the case, for disregarding rules of rhetoric, for getting the facts wrong or failing to catch errors in printed reports. In one unguarded letter to Jefferson, he complained about lassitude, stupidity, and cowardice on Marshall's Bench. On another occasion, his extended rant in a concurrence about sloppy reportage in a minor case forced the clerk, obviously outraged, to insert a detailed defense of his headnote.[21]

By the 1830s, Johnson was habitually cantankerous. One of Marshall's biographers thought that the absence of "an embittered minority bloc" spoke to the shortcomings of Johnson, who might have "headed such a bloc. In learning, wisdom, and firmness of character," he wrote, "Johnson had few peers on the early Court. But Johnson lacked precisely those qualities of personality and temperament that so well equipped Marshall for his task."[22] Most famously, the South Carolinian flatly accused Marshall of complicity in *Fletcher v. Peck*, wherein the Court invalidated an act of the Georgia legislature rescinding fraudulent land grants as a violation of the Contract Clause—even though he agreed that legislators were not free to break promises, jeopardizing the titles of hundreds of good-faith purchasers. In one of his milder sentences, Johnson noted that he had been "very unwilling to proceed to the decision of this cause at all" because it bore "strong evidence, upon the face of it, of being a mere feigned case."[23]

Temperament aside, what have scholars made of Johnson's legal writing and motivations? First, the Justice is characterized almost universally as a loyal, even lock-step Jeffersonian Republican (and, to a lesser extent, a Jacksonian Democrat). These associations, in turn, pose as explanation for his obstreperous behavior. Jefferson, after all, put him on the Court, partly on the expectation that he would rein in the Chief Justice. Kent Newmyer is not alone—nor is he entirely wrong—in describing Johnson quite simply as "that assiduous Jeffersonian."[24]

Second, historians have divided Johnson's career into segments—first, an early warm-up period, ending in about 1819, followed by an interregnum, during which Johnson supposedly capitulated to institutional pressure, Marshall's demand for doctrinal uniformity, and (in some accounts) Marshall's charm. During these years, the Court did battle with state legislators over (to give a few examples) debtor relief legislation, state nullification of federal law, Congress's authority to charter a national bank, and executive powers. The general impression is one of a Jeffersonian temporarily seduced or co-opted. But, finally, Johnson is said to have undergone a conversion experience in about 1822, coincident with an exchange with Jefferson over the merits of seriatim judicial opinions. Thereafter, he resumed his career as a dissenter, either to please Jefferson or because he saw clearly that the Sage was right.[25]

Finally, historians often try to shoehorn Johnson's opinions into the long history of judicial review, assessing significance with a modern yardstick. Hence, on the dust jacket of Donald Morgan's biography, distinguished constitutional scholar E.S. Corwin commended the book to readers "interested in the history of... distinctive American institutions" such as "judicial review and constitutional law."[26] And, of course, Johnson did make contributions, particularly in retrospect. We find multiple defenses of Congress's interstate commerce powers, the division of police powers between nation and states, interpretations of important points in admiralty law, and



Johnson married Sarah Bennett, whose brother Thomas was governor of South Carolina. Pictured is the governor's house in Charleston.

scattered advice to students of American Indian land title, banking, and insurance. But, of course, he falls short of greatness: When reputation depends on permanent contributions to doctrine, too much about Johnson was oppositionist or dyspeptic, and too little survived as precedent.

All of these characterizations are deeply problematic, if only because they fail to take account of what Johnson actually said, particularly in his written opinions.

As to partisanship and its influence: Johnson's political sympathies clearly lay with Jefferson's Republicans and, somewhat later, with Jackson's Democrats—especially in settings where the only available alternatives were High Federalism, radical democracy (which he, along with many other Americans, called Jacobinism), or the pro-nullification, pro-slavery states'-rights positions taken after 1828–30 by John C. Calhoun's disciples. But was he a "party man," as early Americans used that term? Did he seek mainly to advance partisan creeds while writing his incendiary dissents?

We begin with Johnson's preference for separate opinions, whether in concurrence or in dissent—the trait, before all others, that has earned him a place in the pantheon of Supreme Court dissenters and the trait that historians associate most firmly with his partisan choices. Scholars regularly note that, both to suggest strength on the Bench and to leave his own intellectual imprint on the record, Marshall dispensed with the Supreme Court's customary practice of seriatim opinions in favor of a unifying "opinion of the Court" practice, initially by seniority (meaning that Marshall himself most often wrote the opinions) and then by assignment. Other Justices were given, in Johnson's words, "discretion to record their opinions," but were discouraged from doing so and were encouraged, if they persisted in their disagreeable path, to dissent without publishing the fact.[27] As G. Edward White points out, and as Johnson himself noted in

exchanges with Jefferson, a significant consequence of this change was to "free those Justices who declined to publicize their concurrences or dissents from being formally accountable for their votes."[28]

At issue is motivation. Why did Johnson insist upon inserting his own words into the record? Did he do so to please Jefferson—particularly after 1822, when he indeed received a long quasi-treatise from the Sage reminding Johnson of the merits of seriatim opinions and urging him to begin submitting them in each and every case? A pointed letter in October 1822 and the better-known exchange of December 1822 surely lend weight to that conclusion. Here and elsewhere, Jefferson eloquently laid out reasons why Johnson ought to stop toeing the line, why he should not have succumbed to Marshallian pressure (particularly in *Cohens v. Virginia*[29]), why state legislation had to be given pride of place in the law-making hierarchy, and why judges ought to be forced—or permitted—to lay out their reasons as individuals.[30] Johnson told Jefferson that he agreed entirely about seriatim practice and would begin submitting his own opinions at once. He certainly agreed that Marshall's penchant for secrecy and anonymity encouraged plain sloth.

Yet Johnson's response, while clearly compatible with Jefferson's agenda, was unremarkable in other respects. He could please Jefferson without radically altering his own behavior. In effect, Jefferson had blessed what Johnson was doing and would continue to do. To say the least, the Justice was no stranger to separate opinions. He had filed them many times before the exchange with Jefferson, each time explaining that he had a duty as a citizen and judge to speak his own mind; the practice continued and gradually intensified into the last half of his career. His opinions on the South Carolina bench had all been delivered seriatim; the Jay Court had followed the same practice.[31] Time and again, Johnson emphasized, as Jefferson had done, the threat to revolutionary idealism that Federalism still posed—the insidious tendency, for example, for ordinary men to acquiesce in small steps, in the end consigning liberty as well as a citizen's obligation to defend the republic to the dustbin. He thus reaffirmed his aversion to sycophantism and blind partisanship—including, we might suspect, lock-step Jeffersonianism.

Silences speak volumes. Johnson did not say that he regretted curtailments of state legislative power and expansions of congressional authority. He did not indicate agreement with Jefferson's assessment of the result in *Cohens* or any other case—remember that Johnson had been an economic Federalist in Carolina, had always looked to Congress for leadership in building an economic nation, and had supported the chartering of the Second Bank of the United States. Such choices perhaps explain why Jackson wanted little to do with him. He did not promise to *dissent* more regularly. To submit a separate opinion, moreover, is only to go on record with *something*—perhaps a concurrence or note, perhaps a dissent. On this score, historians have been remarkably sloppy, finding "dissent" in the very idea of separateness.[32]

Other explanations for Johnson's behavior are not hard to find. On the one hand, he surely was being called on the carpet by Jefferson—the man who had appointed him to the Bench, leader of the Republican insurgency with which he was aligned, and a man who could recommend him to presses as a likely author for histories of political organizations during the revolution and for biographies of leading figures. Jefferson was not to be antagonized.

On the other hand, Johnson did not require Jefferson's prompting to be what his temperament and education dictated—a revolutionary republican oppositionist, a man incapable of surviving under another man's wing and unwilling to sanction consolidationism for no good reason. Jefferson and Johnson undoubtedly agreed about the merits of seriatim opinions and Marshall's anti-republican tendencies. But Johnson's many separate opinions, whether concurring or dissenting, begin

invariably with a reminder that he acted in order to be his own man, to be heard in his own voice, to be accountable to readers then and later as himself and not as part of a collectivity. To modern eyes, these are rhetorical flourishes; in revolutionary republican circles, such statements flagged the speaker as a member of the loyal opposition and an opponent of sycophantism.

Moreover, Johnson's behavior weakens the case both for compliant partisanship and for that quick-and-dirty, deeply partisan periodization of Johnson's career. Examples are too numerous to list. First, Johnson plainly supported state power wherever he could—that is, wherever it did not damage the union or critical economic and diplomatic interests. But he had not hesitated to take on Jefferson or state legislatures, nor had he hesitated to side with Marshall when he thought he was right. He was less a partisan or loose cannon than a principled supporter of post-1798, Madisonian federalism. In 1808, only four years after his appointment, he defied orders of the collector for his hometown, the port of Charleston, as well as positions taken by Attorney General Caesar Rodney and Jefferson, by pronouncing executive control of maritime trade an overextension of constitutional powers. By 1818–19, Johnson regularly sided with the enemy. He signed onto Marshall's opinion in *Dartmouth v. Woodward* (1819), agreeing that state legislatures were not free to alter the terms of old grants—in this case, a royal grant organizing Dartmouth College.[33] He agreed with Marshall in *McCulloch v. Maryland* (1819), the source of one of Marshall's best-known state papers, denying states' right to levy taxes on the assets of the Second Bank of the United States on the ground that the elastic clause—and Congress's responsibility for ensuring a stable currency—reached at least far enough to permit federal chartering of a national bank.[34] He also signaled support for the Second Bank in his otherwise stringent dissent in *Osborn v. Bank of the United States* (1824), insisting that while the American people required and supported centralized banking, they would not tolerate a general grant of immunity from taxation or prosecution for an "immense monied combination," capable of destroying all in its path.[35] All of these decisions were entirely in keeping with Johnson's behavior in South Carolina, where he regularly took the Federalist side in economic matters.[36] And, by 1823, he had repeatedly expressed faith in Congress as a primary engine for economic development, on the ground that state legislatures were represented in Congress by the states' ablest men. The least capable men, he theorized, would never find their way to Washington City.

Jeffersonians—including Virginia's fieriest Jeffersonian judge, Spencer Roane—were not amused. Nor were they apt to forgive Johnson for siding with Marshall in *Cohens*, to which opinion Roane also responded with blind rage. But Johnson plunged on. A few months after *Cohens*, he lent support in the so-called Steamboat Case, *Gibbons v. Ogden*,[37] albeit in a concurring opinion—in part because in June, 1822, Charleston had again been engulfed in controversy—this time, a planned slave rebellion led by a free black, Denmark Vesey. South Carolinians brutally put down the rebellion, mounted summary trials, and executed the perpetrators; state legislators then passed a statute requiring the jailing of all free black sailors in Charleston harbor. To this, circuit court judge William Johnson could not accede: in *Elkison v. Deliesseline*,[38] he invalidated the law, largely on the ground that it invaded Congress's exclusive right to regulate interstate commerce. South Carolina defied the decision; champions of legislative autonomy targeted Johnson as a traitor to the cause of legislative autonomy; even Marshall criticized Johnson for providing ammunition to those who would "roast the Judicial Department," snagging federal judges in a "hedge composed entirely of thorny States Rights."[39] Also in 1822, with President Monroe's arguments in support of the constitutionality of the Cumberland Road project in hand, Johnson supported champions of a genuinely national

system of roadways and canals: the commerce power, he argued, surely extended to road-building and toll collection.[40] Perhaps most famously, in 1831–33, Johnson refused to defend South Carolina nullifiers, eventually removing his family from Charleston, to signal complete disgust with the legislature's anti-unionism and to ensure objectivity on the southern circuit.

Additional reasons can be found for Johnson's supposed betrayal of the Republican cause. Undeniably, in that important handful of letters to Jefferson, he said that he had not felt free to express his own views in 1819–22, so great were pressures of the day: His tenure on the Court, he wrote confidingly, had not been a "bed of roses." But he also mildly challenged Jefferson's reading of the law as it applied to *Cohens*.[41] Moreover, good historians are not permitted to read too much into a handful of surviving letters. We will never know what Johnson told other correspondents. We can suspect, too, that letters to Monticello were more apt to survive—and to be more carefully crafted—than those sent elsewhere, if only because they were more likely to be published in newspapers. A glance at the political landscape also provides ample ground for Johnson's behavior—a landscape that, by 1821–22, had increasingly become a political minefield for Jeffersonians and Federalists alike.

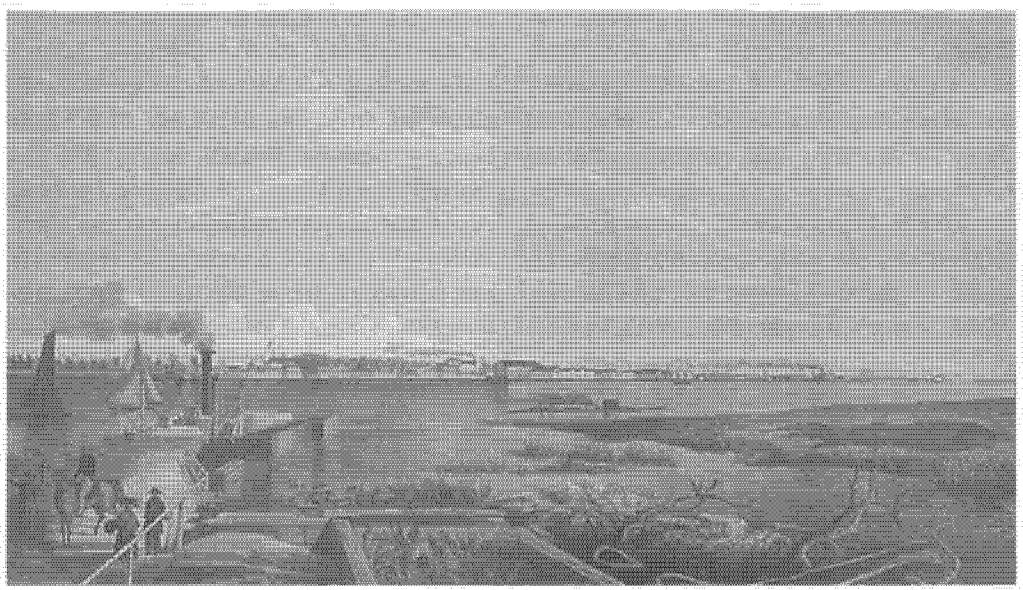
In a perfect world, Johnson might have entrusted much broader regulatory authority to states. But, after 1819, evidence mounted of moral turpitude and tyranny in legislatures and municipal courts. As early as 1816, Johnson worried aloud about the lack of "moderation" in Virginia courtrooms: Surely the Supreme Court, when confronted with irrational state decisions, should be ready to sacrifice "the pride of opinion to the public welfare" and either remand or reverse.[42] A few years later, western assemblies openly rebelled against national authority, increasing anxiety in a jurist given to supporting state legislative energy. The specter of nullification and disunionism, in other words, did not emerge as a serious threat only with the more famous nullification controversy. In the wake of the Panic of 1819, the West erupted in a series of challenges to the fabric of constitutionalism, notably in Kentucky, Tennessee, Missouri, and other emerging states. There, to give a few examples, Relief and Anti-Relief parties passed an array of debtor-relief laws (the kind expressly forbidden in the federal constitution), established "debtor banks" that issued bills of credit (again, of the sort expressly forbidden), enacted revised bank taxation statutes aimed singularly at the Second Bank of the United States, revoked dozens of bank charters without evidence of fraud or breach of charter (leaving debtors and creditors alike without a meaningful remedy), eliminated debtors' prison, and—in the case of Kentucky—flouted the terms of the Kentucky-Virginia Separation Agreement of 1792 (by which Kentucky became a state) with new, punitive occupying claimant statutes. Kentucky went so far as to disestablish the original state court of appeals by means of an ordinary statute, and to erect in its place a pro-relief court staffed with "party men"; court records were procured by means of a burglary (known because the burglars were caught half-way out of the window). Kentuckians, Tennesseans, and Missourians undertook many of these projects in the name of Jeffersonian Republicanism; they refused to recognize federal marshals when they arrived with subpoenas; they were behaving, for all the world, like Jacobins.

Johnson, always a believer in legislators' obligation to express the will of the public—the champion of what Rawls has called "public reason"—was as appalled as Story and Marshall at lawlessness, baseness, and "Burrism," as when Kentuckians tossed federal marshals bodily out of the state legislature, posted guards at the door, and threatened to reconsider statehood. Eastern newspapers dutifully reported all of these shenanigans, as did litigants rushing into federal courtrooms with land and debt cases, determined to save place and face.[43] It is also worth mentioning, in this context, that Andrew Jackson took on a good many old Relief Men—among them William Barry and Amos Kendall—and that

Kendall wrote the bulk of Jackson's speech vetoing the charter of the Second Bank of the United States. Small wonder that Johnson's relationship with Jackson was cordial at best.[44]

To what extent, then, did Johnson experience a political and jurisprudential conversion after 1822 in response to Jefferson's advice? That is, how much of Johnson's behavior can be attributed to his correspondence with Jefferson, and how much to other factors? The record permits us to say that Johnson's decision to support his Brethren between 1819 and 1822 had to do largely with the cases at hand, informed by beliefs and practices that antedated his letters to Jefferson.

Finally, we need to deal with Johnson's behavior after 1822–23, beginning perhaps with his concurrence in *Green v. Biddle*, one of those hybrid opinions that included elements of dissent and concurrence.[45] Here, we see Johnson struggling with allegiances. On the one hand, he knew that Kentuckians aimed to unsettle lawful Virginia claims to land with aggressive additions (especially in 1820) to the state's system of occupying claimant statutes—and that Kentucky had every intention of disavowing the separation agreement with Virginia, dutifully incorporated into the state constitution in 1792, in which framers promised to respect Virginia land claimants' surveys basically forever (by which they could only have meant for fifty years, the length of time specified at common law for exercising land warrants). On the other hand, Jeffersonian legislators in Kentucky had invited confrontations with Virginia land claimants. Could Johnson lend support to such a project in the name of Jeffersonian Republicanism? Surely not. And so he submitted a concurrence, agreeing with Story and Washington (there were two opinions, separated by re-argument) as to the immorality and illegality of legislative choices, but insisting that the Court ought not to peg its ruling to the federal Contract Clause. Why incur the wrath of states unnecessarily? Why give the impression of permanently curtailing a state's sovereign right to determine land titles, or to say what its public agreements might mean? The Contract Clause had been expanded beyond recognition. There were other ways to rein in state legislatures and to provide remedies—among them, general principles of justice and common law. Marshall's court could never reduce



Born in Charleston, Johnson was educated at Princeton before returning to his hometown to serve as a legal apprentice to Charles Cotesworth Pinckney. Pictured is a view of the river from the city.

a sovereign state to a condition of "hopeless imbecility."[46]

Thereafter, Johnson registered distress more than once about the Court's path, and especially its muscular reliance on this or that clause in the federal Constitution, when other solutions—legal, political—worked as well or better. Many of these outcries appear in concurrences offered in the name of accountability. On one extraordinary occasion, probably in light of the currency of nullification doctrine, he took pains to say, in response to arguments that relied only fleetingly on the Seventh Amendment, that jurists had long since "settled" the question of whether the Bill of Rights "extend[ed] to the states" (it did not).[47] Five years earlier, in a long, outraged dissent in *Ogden v. Saunders*, Johnson lambasted his Brethren for relying on the federal Contract Clause when simple comity doctrine would have sufficed.[48] Increasingly at issue was Marshall's overexpansion of judicial powers, his corruption of constitutional texts, the Court's eagerness to assume primary responsibility for the rules of the game in economic life, and its supposed insensitivity to proper balances within federalism. We should take Johnson at his word: He did this, he said, not to be a good Jeffersonian, but to be an independent man, to stand tall against misinformation, bad history, or the occasional cabal. Republican judges ought never to hide behind one another; precedents ought to be nuanced; one could trust "the public" to find the rule in multiple opinions.

Finally, Johnson's literary pursuits figure large. Historians rarely tie those efforts to his career on the Bench—but they should. One of the reasons for that protracted conversation with Jefferson was the fact of the abject failure of Johnson's Nathanael Greene biography: The *American Review* and other journals panned it for its pedantry (a true criticism), inaccuracy, and imbalance (this was to accuse Johnson of Anti-Federalist sympathies). Historians have skidded over long, florid paragraphs, floods of anguished sentences expressing both outrage and renewed worry about the inroads of consolidationism and monarchism—this time, with concerted attempts, as in 1798, to suppress dissent and control the historical record. Johnson and Jefferson agreed that republicans should act to secure the papers of leading men, to put them out of Federalist hands; Madison could be trusted to write a history of factions, but not Hamilton. Here, we have a Justice persuaded that the Anti-Federalist fear of creeping tyranny was manifest. What better evidence than the shredding of his book about a true patriot, and Marshall's silencing of noncompliant judges?[49]

For all of these reasons, the revolutionary oppositionist turned to the production of separate opinions with a vengeance, basically for the rest of his career—typically, as he put it in an 1829 case involving grudging support for what he called a "suicidal" income tax imposed by officials in his home town, so that his "reasons . . . should appear, where they cannot be misunderstood or misrepresented."[50] Marshall's aggrandizements were tyrannical in the way that the Alien and Sedition Acts had been tyrannical. If Federalists succeeded, the republic was lost. "Parties may doze," Jefferson famously told Johnson in 1822, "but they never sleep."[51] Note that the issue was public memory, history, control of the master narrative—the heart and soul of a people's self-constitution. What we forget cannot be reclaimed or reactivated. Not only did a man have to speak for himself, but he also was obliged to conserve "truth." Hence the flurry of small notes appended to Johnson's opinions, aimed sometimes at correcting the reports. In one fairly typical example, he penned a long note to be appended to *Satterlee v. Mathewson* in 1829—a case involving the meaning of the Ex Post Facto Clause, which he was sure had been misconstrued in *Calder v. Bull*.[52] Why the note? Said Johnson, "[With] a due respect for my learned predecessors," he aimed to "show that they have not proved the contrary," because they had misconstrued "the parts of speech of which it is composed." He explored

Latin and English prepositions, lavishly quoting Sir Francis Bacon and Justinian. Why? Correction, he wrote, was "owed to the public in the discharge of my duties."[53]

What about the suggestion that we should remember Johnson primarily as a contributor to the internal culture of the Supreme Court—its procedures, its jurisprudence? Here is a Justice who would have denounced what we have come to call the "cult of the Constitution," its sanctification and mystification—a man who butted heads with John Marshall time and again, not about legislatures' right to do whatever lay within their assigned orbit, but about overzealous misconstructions of federal judicial power and unreasonable (read "anti-republican" and unfaithful) constructions of constitutional language. What would he say to Corwin's suggestion that he contributed primarily to central bodies of jurisprudence and to judicial review? How would he respond were we to call him the "first dissenter," the progenitor of Harlan and Douglas?

For openers, few members of the early Court were more distrustful than Johnson of the Court- and Constitution-centered culture that Marshall aimed to create—in no small part because Johnson did not believe that "constitution" ceased at the edges of parchment folios. "Constitutions" embodied not only the convention's distillation of "public reason," but also the ongoing utterances of the people when those utterances were lawful and moral. To say that Johnson despised unwarranted, self-serving expansions of judicial power through the abuse (in his view) of implied review powers is to vastly understate the situation. Provided the union itself or the rule of law were not at stake, he preferred wherever possible to reason, not from mountains of published judicial opinions, but from commonsense principles, state legislation, and precepts of natural law, avoiding unauthorized expansions of judicial power through constitutional interpretation. Time after time, beginning perhaps with his 1809 blast against Marshallian aggression in *Fletcher v. Peck*, Johnson closely scrutinized his colleagues' opinions for undue reliance on and expansion of federal constitutional clauses when state constitutions or statutes or legislative history—or remand to lower courts—might serve as well. In *Fletcher*, Johnson concurred in part but also dissented in part, because he saw no need to tether the decision to the Contract Clause. Why not invalidate the rescinding act simply "on the reason and nature of things: a principle which will impose laws even on the Deity"?[54] Marshall's step-by-step campaign to expand the reach of the Contract Clause struck him as both unnecessary and dangerous.[55] It is instructive to note that, in *Fletcher*, the law-minded Marshall rested his decision on "principles . . . common to our free institutions," whereas Johnson was content with the less law-bound "reason and nature of things."[56] In response to the Court's rulings in *Green v. Biddle* (1821–23), Johnson again announced that, while he could not disagree with the result, he deplored an unnecessary resort to the Contract Clause. Why use cannon when a derringer would do just as well?

This is not to say that Johnson disliked, avoided, or distrusted law, or, for that matter, that he did not support the augmentation of federal power. On the contrary, he was a keen lawyer, capable of outflanking even Marshall and Story on legal detail, particularly in admiralty and real property cases. And, especially after 1822–25, he came to think of Congress as the perfect instrument for stable economic development. But, throughout his career, he refused to automatically grant jurisdiction or primacy to federal courts in cases in which legislative bodies possessed constitutional authority. And, sometimes, as if English again, he refused to say unequivocally that a written constitution per se was sufficient authority for exercises of political power. In his view, the written constitution mattered, not because it was sufficient or best authority, but because it contained a particularly rich lode of information about what the sovereign people most valued and preferred in government. The idea that a Justice's interpretation of this or

that clause might put the Supreme Court on a collision course with the public was unthinkable because it debased republicanism's popular sovereign.

Interestingly, Johnson eagerly supported virtually any project that benefited "the public"; it mattered little to him if individual men—including bankers—profited in the process, so long as profit-taking did not involve fraud (as in *Fletcher*, when, in his view, commercial men took advantage of an all-too-pliant Supreme Court), misrepresentation, or the emasculation of self-rule. Nor did it matter particularly whether such projects were undertaken by state or federal legislators, though Johnson increasingly preferred congressional leadership in economic matters—again, so long as the undertaken did not do violence to the rule of law, comported well with public opinion, and did not benefit the few at the expense of the many (which could mean a few states to the exclusion of the rest of the nation).

Were these the choices of a man who thought of himself as a "modern" legal professional, if that term implies preoccupation with professional, institutional loyalties, and doctrinal development? Johnson was far less devoted to the Supreme Court per se—to legal professionalism per se—than to the cause of republicanism. The idea (actually Marshall's and Story's idea) that one might give one's life over to defending the interests of the *Court* and its productions held little appeal. The job was to stand tall against tyranny. Johnson even held his ground against Jefferson; and he had little to do with Jackson's growing army of "party men," many of whom would have fallen on swords for their leader. He took on his home state repeatedly; and, while he owned slaves, he was no disunionist, risking home and reputation to defeat nullification.

We return to the big question: Was William Johnson the "first dissenter"? Yes, and no. We perhaps should think of him as an unwitting progenitor of a tradition of which he might not entirely approve—not because he disapproved of disputation, but because modern judicial dissent typically looks inward, exploring alternative solutions to legal problems in almost purely legal language, rarely straying from the domain of law. We distinguish regularly between political and constitutional solutions; Johnson insisted that the political realm was where the people spoke most directly about legal fundamentals. Politics, in other words, merged imperceptibly with "constitution," to the extent that the utterances of the sovereign people resounded most clearly in the polity. Who could hope to discern the sovereign people's voice in secret judicial enclaves? Introverted reliance on one's own rarified meanings to the exclusion of popular meanings epitomized arrogance and illegitimacy.

It is fairly clear that modern characterizations of him would have unsettled Johnson. His was an inclusive, social, porous conception both of the Justices' role in republican society and of what counted as authority. Only when the nation and its courts were threatened directly did he step back from this expansive view, more comfortably—though never entirely—inhabiting the landscape of law and formal constitutions. Were he sitting on the twenty-first-century Supreme Court, he would be formulating opinions for each and every case while castigating his Brethren for their obsessive noodling in minutiae, their secret conferences, their failure to take account of newspaper editorials. Independent men, we can hear him saying, speak for themselves; never do they hide behind other men.

Therein lay the strengths and limits of Johnson's Way. He was a denizen of the late eighteenth century, a man unwilling to look forward for fear of losing sight of where he had been. Says historian Joyce Appleby, "Americans in the 1780s had constitutions—a baker's dozen of them—but not a culture of constitutionalism."[57] Such a culture developed gradually; at the time of his death in 1834, it had not yet overtaken William Johnson. In his view, courts, no less than legislatures, gave voice to the collective wisdom

The Justices of the Marshall Court held winter sessions at Long's Tavern in 1808, four years after William Johnson was appointed. The tavern is the left one of what was called Carroll Row; the site on First street is now occupied by the Library of Congress.

of the people, so long as those views did not sabotage the rule of law. Judges were free to gather information about the people's intentions from many sources—treatises, juries, philosophy, newspapers, legislative proceedings, state judicial decisions—so long as utterances comported with principles of justice. To climb entirely inside constitutional texts was to close doors and windows on the extraconstitutional authors of social compacts. With Madison, Johnson did not imagine that the Constitution could mean whatever states thought it might mean. Rather, he insisted on consultation and deference wherever possible, and due regard for the sovereign power, the source of one's authority as judge. This frame of mind owes as much to the middling Anti-Federalists (to use Saul Cornell's useful term) and English Whigs as to Jeffersonian Republicans.[58] Johnson and many of his comrades gravitated to Jeffersonian societies because they were more congenial to their principles than were competing factions. But anti-party sentiment prevented slavish attachment to organizations. And, like Jefferson, Johnson saw himself as an oppositionist, a man pitted against the incremental advances of tyrannical forces of every description—including parties.[59]

Over time, Johnson has been on the losing side, a witness to the incremental erasure—for better or worse—of alternative ways of thinking about American constitutionalism. Appleby puts it this way: "Despite the celebration of popular sovereignty in America, the sovereign people were restrained once the Constitution was ratified. . . . Creating a national government [nevertheless continued to be] an open-ended goal. We speak of strengthening the government in 1787 as though there was only one way to do it, which is . . . . [a] legacy of the Federalists. There were alternatives to the one issuing from Philadelphia." Johnson would say, in addition, that there were alternatives, every step of the way, to John Marshall's consolidationism. "The dismay of Antifederalists," Appleby adds, "at . . . specific provisions of the Constitution arose as much as anything from their regret at the roads not taken. Much

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less coherent than the Federalists, the Antifederalists nonetheless articulated a defense of democracy that serves to remind us of a different American political tradition," a tradition bristling with "possibilities."[60]

By 1828–30, as both Johnson and Marshall entered old age and as Jacksonian democracy swept the nation with the force of a secular revival, Johnson settled more comfortably into his judicial responsibilities. Now, he had friends on the Bench, courtesy of Jackson. To be sure, the President had little time for Johnson—his voluminous published correspondence contains little more than a note suggesting that Johnson was interested mainly in literary fame and so could not be trusted to write a friend's biography. But by 1828 or so, Johnson anticipated the restoration not only of revolutionary republicanism as he understood that term, but also of proper constitutional balances between nation and states, judges and legislators, rulers and ruled. Had he lived, he would have been inconsolable at the prospect of Civil War—evidence, after all, of the utter collapse of "public reason."

To modern eyes, Johnson's views sometimes seem oddly outdated, even naïve. His dyspepsia stood in the way of lasting fame and wide circles of friendship: Johnson admitted more than once to an abiding loneliness.[61] We might disagree, too, about whether he should occupy the throne of First Great Dissenter. But William Johnson surely was a brave and devoted oppositionist—the sworn enemy of tyranny and intellectual or rhetorical obfuscation,[62] a defender of the people's rule of law, a patriot prepared to stand in the wind against powerful, corruptible public officials. In 2007, Americans might benefit from renewed acquaintance with such a man.

ENDNOTES

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[1]Donald Morgan, **Justice William Johnson, the First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge** (Columbia, SC: University of South Carolina Press, 1954).

[2]John Rawls, **Political Liberalism** (New York: Columbia University Press, 1993), 216 ff.

[3]Typically, historians touch on Johnson only while writing about something else. Examples are legion. *See, e.g.*, G. Edward White, **The Marshall Court and Cultural Change, 1815–1835**, abridged ed. (New York: Oxford University Press, 1991), 3, 176, 293–94, 297, 302, 350–51; R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (Baton Rouge, LA: LSU Press, 2001), 404–6, 437–438, 232–35; Jack Rakove, **Original Meanings** (New York, Vintage Press, 1996), 83, 90, 115; G. Peter Magrath, *Yazoo* (New York: Norton, 1966), 63–64, 70, and passim; Richard Ellis, **The Jeffersonian Crisis** (New York: Norton, 1971), 238–41. A fresh biography of Johnson is long overdue.

[4]*Quoted in* Morgan, **Justice William Johnson**, pp. 13–15, esp. 14.

[5]Ellis, **Jeffersonian Crisis**, 229–30.

[6]Ellis, Jeffersonian Crisis, 239; Morgan, **Justice William Johnson,** passim.

[7]Oliver Wendell Holmes, "Some Remarks on John Marshall," in Mark De Wolfe Howe, ed., **James Bradley Thayer, Oliver Wendell Homes, and Felix Frankfurter on John Marshall** (Chicago: University of Chicago Press, 1967), 130–31.

[8]For springboards into a huge literature, see two classic works, Gordon Wood, **Creation of the American Republic** (New York: Norton, 1969), and Bernard Bailyn, **The Ideological Origins of the American Revolution** (Cambridge, MA: Belknap Press of Harvard University Press, 1992). On legislative tyranny, see Marc W. Kruman, **Beyond Authority and Liberty: State Constitution Making in Revolutionary America** (Chapel Hill, NC: University of North Carolina Press, 1996).

[9]John Dickinson, *quoted in* David Konig, "Constitutional Contexts," in Sandra VanBurkleo, *et al.*, eds., **Constitutionalism and American Culture: Writing the New Constitutional History** (Lawrence, KS: University Press of Kansas, 2002), 21. *See also* Thomas Jefferson to William Johnson, March 4, 1823, in Thomas Jefferson Papers, Series 1, General Correspondence, American Memory Collection, Library of Congress, *available at* http://memory.loc.gov/ammem/collections/jefferson_papers/index.html (last visited May 27, 2007) (hereafter AMC) ("[Much was known to him] and not to another, and no one knows everything. It is the sum of individual

[knowledge] which is to make up the whole truth, and to give an [sic] correct comment thru' future time, then do not, dear Sir, withhold your stock of information. . .").

[10]Thomas Jefferson to James Madison, August 28, 1789, in Thomas Jefferson Papers, AMC.

[11]On the embarrassing Eleventh Amendment, see Clyde E. Jacobs, **The Eleventh Amendment and Sovereign Immunity** (Westport, CT: Greenwood Press, 1972).

[12]*Marbury v. Madison*, 4 U.S. 137 (1803). *See also* William E. Nelson, ***Marbury v. Madison*: The Origins and Legacy of Judicial Review** (Lawrence, KS: University Press of Kansas, 2000).

[13]These sentiments appear often. For a variation, see Johnson's dissent in *Daly's Lessee v. James*, 21 U.S. 495 (1823), 61, claiming that the Court might disregard a single decision of a Pennsylvania tribunal.

[14]Herbert J. Storing, **What the Antifederalists Were For** (Chicago: University of Chicago Press, 1981), 33.

[15]*Lambert's Lessee v.* Paine, 7 U.S. 97 (1805); *Nichols v. Fearson*, 32 U.S 103 (1833).

[16]*Ex parte Bollman*, 8 U.S. 75 (1807); *ex parte Tobias Watkins*, 28 U.S. 193 (1833); Cf. the compilation in Morgan, **William Johnson**. Lexis and Westlaw yielded enumerations radically unlike Morgan's; careful examination of the opinions confirms the accuracy of the new numbers.

[17]For one particularly ripe example, see *Hepburn and Dundas v. Colin Auld et al.*, 9 U.S. 262 (1809) (Johnson either dissenting or concurring; Marshall apparently dissenting while speaking for the majority—confusion that perhaps has to do with the implementation of new procedures).

[18]*Hawkins v. Barney's Lessee*, 30 U.S. 457 (1831); *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812); *Mechanics Bank of Alexandria v. Bank of Columbia*, 18 U.S. 326 (1820).

[19]*Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Columbian Insurance Company v. Catlett*, 25 U.S. 383 (1827).

[20]*Fletcher v. Peck*, 10 U.S. 87 (1810); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813); *Green v. Biddle*, 21 U.S. 1 (1823); *Osborn v. the Bank of the United States*, 22 U.S. 738 (1824); *Bank of the United States v. Planter's Bank of Georgia*, 22 U.S. 904 (1824); *Ogden v. Saunders*, 25 U.S. 213, 297 (1827); *Shanks v. Dupont*, 28 U.S. 242 (1830); *Craig v. Missouri*, 29 U.S. 410 (1830); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

[21]William Johnson to Thomas Jefferson, December 10, 1822, in Thomas Jefferson Papers, AMC (disparaging the abilities of Chase, Paterson, and Cushing). Among the cases in which Johnson took issue, pointedly and at length, with error, duplicity, dishonesty, or sloppiness are these: *Lambert's Lessee v. Paine*, 7 U.S. 97 (1805) (calling for clarity, common sense, attention to the mind of a testator); *Yeaton v. Bank of Alexandria*, 9 U.S. 49 (1809) (denouncing sloppy language in a law's preamble sufficient to deny a man's right); *Pierce v. Turner*, 9 U.S. 154 (1809) (insisting that the decision ignored obvious fraud); *Maryland Insurance Co. v. Le Roy et al.*, 11 U.S. 26 (1812) (against hair-splitting and inattention to the case at hand); *Dunlop v. Munroe*, 11 U.S. 242 (1812) (railing against obfuscation of facts and "the cloud of pleading"); *The Aeolus*, 16 U.S. 392 (1818) (deploring the artifice and greed of a port collector); *Gelston v. Hoyt*, 16 U.S. 246 (1818) (tacitly accusing Story of making the case into something it was not); *Columbian Insurance Co v. Catlett*, 25 U.S. 383 (1827), 397 (concurring in part; on one issue, his colleagues had "misapprehended the case, the question, and the doctrine on which it turns"); *Polk's Lessee v. Wendell*, 18 U.S. 293 (refusing to permit fraud to pass in the states); *The Mary and Susan*, 14 U.S. 46 (deploring misuse of evidence); *Russel v. Transylvania University*, 14 U.S. 432 (1816) (deploring misuse of history); and *The William King*, 15 U.S. 148 (impatiently railing against collusion). Other examples abound.

[22]W. Melville Jones, **Chief Justice John Marshall: A Reappraisal** (Ithaca: Cornell University Press, 1956), 184.

[23]*Fletcher v. Peck*, 10 U.S. 87, 147–48 (1810) (Johnson, dissenting).

[24]R. Kent Newmyer, **The Supreme Court Under Marshall and Taney** (New York: Thomas Crowell, 1968), 53.

[25]For one such treatment, see Sandra F. VanBurkleo, "William Johnson," in Kermit Hall, *et al.*, eds., **Oxford Companion to the Supreme Court of the United States**, 2d ed. (New York: Oxford University Press, 2006), which I hereby renounce.

[26]Morgan, **Justice William Johnson**.

[27]Johnson to Jefferson, December 10, 1822, in Thomas Jefferson Papers, AMC.

[28]G. Edward White, **The Marshall Court and Cultural Change**, abridged ed. (NY: McMillan, 1988), 186–87.

[29]19 U.S. 264 (1821).

[30]*See, e.g.*, Thomas Jefferson to William Johnson, October 27, 1822, in Thomas Jefferson Papers, AMC. Majority opinions, among other faults, "save [Justices] the trouble of developing their opinion methodically, and even of making up an opinion at all," thus damaging the Court's credibility by casting doubt on the intelligence of judges.

[31]Interestingly, in his correspondence with Johnson, Jefferson wanted Johnson to return to the practices of the nation's "primitive court"—meaning Jay's. Thomas Jefferson to William Johnson, June 12, 1823, in Thomas Jefferson Papers, AMC ("I have heard it often noticed, and always with high approbation, some of your brethren will be encouraged to follow it occasionally, and in time it may be felt by all, as a duty, and the sound practice of the primitive court be again restored. Why should not every judge, be asked his opinion, and give it from the bench . . .?").

[32]Johnson to Jefferson, December 10, 1822, in Thomas Jefferson Papers, AMC.

[33]17 U.S. 518 (1819).

[34]17 U.S. 316 (1819).

[35]Bank of the United States, 22 U.S. 738 (1924) 873.

[36]As one example of a variation on these themes, however, see *Humphrey Fullerton et al. v. BUS*, 26 U.S. 604 (1828), in which Johnson refused to reverse a lower court decision that benefited the Bank of the United States because doing so would compromise state control of counterfeit notes.

[37]22 U.S. 1 (1824).

[38]8 F. Cas. 493 (1823).

[39]*Quoted in* Francis N. Stites, **John Marshall: Defender of the Constitution** (Boston: Little Brown, 1981), 145.

[40]On the road, see Maurice Baxter, **The Steamboat Monopoly: *Gibbons v. Ogden*, 1824** (NY: Knopf, 1972), 75–76.

[41]Johnson to Jefferson, December 10, 1822, in Thomas Jefferson Papers, AMC.

[42]*Martin v. Hunter's Lessee*, 14 U.S. 304, 365 (1816) (Johnson concurring).

[43]For example, the defendant in *Green v. Biddle* was not a rich man, but a yeoman farmer with one share of bank stock and a herd of sheep.

[44]On the Kentucky crisis and such rulings as *Green v. Biddle*, see Sandra F. VanBurkleo, "'That Our True Republican Principles Might Not Wither': Relief Crisis in Trans-Appalachia," Ph.D. Dissertation, University of Minnesota, 1989.

[45]21 U.S. 1, 95 (1823).

[46]*Green v. Biddle*, 21 U.S. 1 (1823), 169.

[47]*Lessee of Edward Livingston et al. v. John Moore et al.*, 32 U.S. 469, 551–52 (1833).

[48]*Ogden v. Saunders*, 25 U.S. 213, 297 (1827).

[49]The longest, most anguished expression of Johnson's rage and pain at partisan criticism of his work can be found in the long letter to Jefferson of December 10, 1822, in Thomas Jefferson Papers, AMC, where the topic recurs. But, on history and its inevitable distortion at the hands of anti-republicans, particularly Federalists, see the long passages in Johnson to Jefferson, April 11, 1823, in Thomas Jefferson Papers, AMC.

[50]*Plowden Weston et al., v. City Council of Charleston*, 27 U.S. 449, 470 (1829).

[51]Johnson paraphrased Jefferson on December 10, 1822 ("...party hatred may doze but never dies"). Johnson to Jefferson, December 10, 1822, in Thomas Jefferson Papers, AMC.

[52]*Satterlee v. Matthewson*, 27 U.S. 380 (1829); *Calder v. Bull*, 3 U.S. 386 (1798).

[53]*Satterlee*, 27 U.S. at 416 n. (a).

[54]*Fletcher v. Peck*, 10 U.S. 87, 143 (1810).

[55]*Fletcher*, 10 U.S. at 143 ff. For commentary, see R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (Baton Rouge, LA: LSU Press, 2001), 231–33. For the classic account, see C. Peter Magrath, **Yazoo, Law and Politics in the New Republic: The Case of *Fletcher v. Peck*** (New York: Norton and Co., 1967).

[56]*Fletcher*, 10 U.S. at 139, 143. For this observation, see Robert K. Faulkner, **The Jurisprudence of John Marshall** (Princeton: Princeton University Press, 1968), 218.

[57]Joyce Appleby, **Liberalism and Republicanism in the Historical Imagination** (Cambridge: Harvard University Press, 1992), 212.

[58]Saul Cornell, **The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828** (Chapel Hill, NC: University of North Carolina Press, 1999), 85.

[59]Jefferson regularly used the word "opposition" to describe his group of followers, his "party." *See* Jefferson to Johnson, June 12, 1823, in Thomas Jefferson Papers, AMC.

[60]Appleby, **Liberalism and Republicanism**, 219, 221.

[61]Sometimes he attributed a sense of isolation to political estrangement, as when he told Thomas Jefferson that he had passed his "half-century" and begun "to feel lonely among the Men of the present Day." But that, too, makes a point: Johnson defined himself anachronistically—the son of revolution, the enemy of tyranny, not of his own age. Johnson to Jefferson, December 10, 1822, in Thomas Jefferson Papers, AMC.

[62]On this point, of course, Johnson and Jefferson were in complete agreement. *See, e.g.*, Jefferson to Johnson, June 12, 1823, in Thomas Jefferson Papers, AMC ("Laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rules of common sense.").

The *Dred Scott* Dissents: McLean, Curtis, Lincoln, and the Public Mind

LUCAS E. MOREL

> Then what is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision.
>
> Abraham Lincoln, 1858

> The Supreme Court of the United States is not the only power in this world.
>
> Frederick Douglass, 1857

Late in his Supreme Court career, Justice Thurgood Marshall posed a perennial question to potential law clerks: "Do you like writing dissents? If you don't, baby, this is not the office for *you*."[1] The two dissents in the most notorious Supreme Court case in American history, *Dred Scott v. John F.A. Sandford*, if one considers only their length, appear to have been written with equal relish; the day after Chief Justice Roger B. Taney read his opinion for the Court in *Dred Scott v. Sandford*,[2] Justices John McLean and Benjamin Curtis read their dissents, taking five hours to do so.

On March 6, 1857, Chief Justice Roger B. Taney, just shy of his eightieth birthday, read in a barely audible voice the opinion of the Court. Taney ruled that Scott was not a citizen of Missouri and therefore could not sue a citizen of another state to bring the case into federal court. Why? Because he was black and a descendant of slaves: According to Taney, blacks "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."[3] Taney claimed that in the eyes of "the civilized portion of the white race" during the founding era, blacks "had no rights which the white man was bound to respect."[4] In addition, Taney held that the 1820 Missouri Compromise law banning slavery from the Northwest Territory was an unconstitutional exercise of power by Congress, which is prohibited by the Fifth Amendment

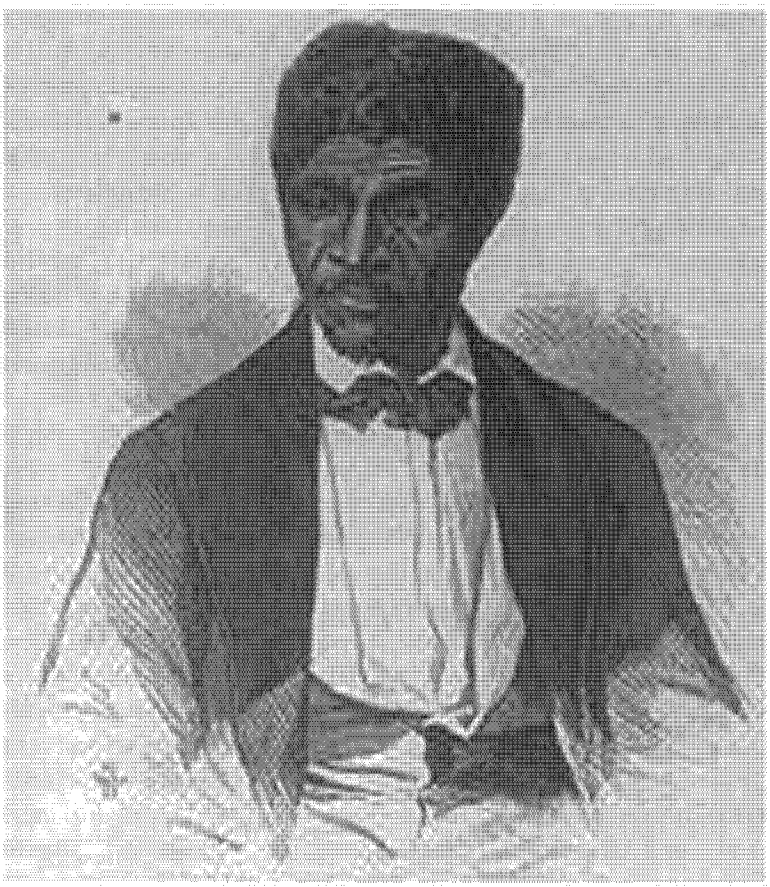
from depriving any person of "life, liberty, or property, without due process of law." This decision in *Dred Scott* marked only the second time the high court had overturned a federal law. The great debate over this latter ruling centers on the Court's decision to go on to discuss the substantive merits of the case, for if they determined that Scott was not a citizen under the Constitution, then neither the Supreme Court nor the federal circuit court had jurisdiction to hear the case. The case should have been dismissed and Scott would have remained a slave under the 1852 Missouri Supreme Court decision in *Scott v. Emerson*. This was the argument Justice Samuel Nelson offered when he was originally assigned to write the official opinion of the Court; however, pressure from influential Southerners behind the scenes eventually steered a majority of the Court to have Chief Justice Taney write the official opinion.[5] More on Taney later. Now for the loyal opposition.

Abraham Lincoln called the case "an astonisher in legal history" for the claim by his nemesis Stephen Douglas that the decision should be viewed immediately as settled law, receiving "a degree of sacredness that has never been before thrown around any other decision."[6] The controversy stirred up by the *Dred Scott* case provided an occasion for the public to think through the role of the Supreme Court in the nation's governance: Specifically, to what extent should any of its decisions become "the political rule" for the other federal branches of government and therewith the American people?[7] While commentators across the political spectrum, north and south of the Mason-Dixon line, weighed in with their affirmations or denigrations of the *Dred Scott* ruling, it was former Congressman and wannabe Senator Lincoln who drew from Justice Curtis's dissent to set the terms of public debate over the future of slavery in America—which to Lincoln's mind was all about the future of self-government. So let us consider Lincoln an honorary "third" dissenter in the case, and include his "dissent" in our consideration of the case.

First, let us briefly fill out the facts of the case. Who was Dred Scott? He was a slave who first sued for his freedom and that of his wife, Harriet Robinson,[8] and two daughters in 1846 on the basis of residing with his master John Emerson, a military surgeon, in the free state of Illinois and free territory of Wisconsin (or present-day Minnesota), as well as getting married in Wisconsin with his master's permission, before returning to the slave state of Missouri. Why was Scott suing John Sanford[9] in the U.S. Supreme Court? He was doing so because several attempts at the state and lower federal court level to secure his freedom had produced mixed results due to technicalities and cross-appeals. Also, his "ownership" passed from John Emerson to his wife Irene Emerson, who eventually turned the case and control of Scott over to her brother John Sanford, a citizen of New York. Scott, claiming citizenship as a Missouri resident, asserted jurisdiction by the federal courts under the Diversity of Citizenship Clause of the U.S. Constitution.[10]

We turn now to the dissents and dissenters. Appointed to the Supreme Court by Andrew Jackson, John McLean served as Associate Justice from 1830 to 1861, dying one month after Lincoln's inauguration. Called "The Politician on the Supreme Court," McLean was a kind of free-range political chicken, pecking around from party to party, looking for a presidential perch upon which to roost, beginning as a Jacksonian Democrat and ending as a Republican.[11] A strong antislavery man from Ohio, he was the lone dissenter in the 1842 case of *Prigg v. Pennsylvania*, which ruled that fugitive slave laws enacted by states, as opposed to Congress, were unconstitutional.[12]

McLean's dissent in *Dred Scott* ran thirty-five pages—the third longest opinion in the case. Unlike Justice Curtis, McLean did not think Sanford's challenge of the Court's jurisdiction was before them, because Scott had won at the lower court level regarding the jurisdiction question. In particular, McLean noted that Sanford did not claim that Scott could not sue in federal court because he was a slave, as



Dred Scott was a slave who first sued for his freedom and that of his wife and two daughters in 1846 on the basis of residing with his master John Emerson, a military surgeon, in the free state of Illinois and free territory of Wisconsin (present-day Minnesota). Scott and his family were set free in 1857 through a purchase by a son of Peter Blow, Scott's first owner. Scott died a year later of tuberculosis.

this would permit the Court to "embrace the entire merits of the case": Specifically, was Scott a slave or a free man? Instead, Sanford wanted the case thrown out from the outset on the basis that the circuit court did not have jurisdiction to hear the case because Scott could not be a citizen of Missouri due to three criteria: "he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves."[13] McLean argued that the Court could assume, for the sake of argument, that Scott was a citizen without prejudicing the outcome of the case, because Scott would still have to "assert his claims to freedom" before the Court. But to assume he was a slave on the jurisdictional question would be "decisive of his fate": The Court would have to dismiss the case for want of jurisdiction, for they could only hear the case if the plaintiff and defendant were, as the Constitution states, "citizens of different states."

McLean then outlined six issues he would examine to decide the case, beginning with "the locality of slavery." He believed that slavery existed "only by positive law" and stood "without foundation in the law of nature or the unwritten and common law." This meant it was "limited to the range of the laws under which it is sanctioned" and therefore existed only under local statutes: There was no presumption of its security where no laws explicitly protected it. By implication, this weakened the case for including slavery as the kind of property owed protection under the Fifth Amendment's Due Process Clause[14]—a point Curtis developed in his dissent.

The second issue was "the relation which the Federal Government bears to slavery in the

States." Simply put, "Slavery is emphatically a State institution," and McLean observed that the Constitution refers to it only in this light. As a state institution, slavery within a given state could not be interfered with by the federal government. The Fugitive Slave Clause of the Constitution did require that a slave escaping from one state to another "be delivered up," but McLean noted that "slaves were referred to as persons, and in no other respect are they considered in the Constitution." And to counter Taney's dubious assertion that "the right of property in a slave is distinctly and expressly affirmed in the Constitution,"[15] McLean pointed out that "James Madison . . . a leading member in the Federal Convention, was solicitous to guard the language of that instrument so as not to convey the idea that there could be property in man."[16] Prior to the ratification of the Thirteenth Amendment in 1865, the words "slave" and "slavery" appeared nowhere in the text of the Constitution.

Acknowledging that the new federal government "was not made especially for the colored race," McLean observed that "many of them were citizens of the New England States, and exercised, the rights of suffrage when the Constitution was adopted." This is a historical point that Justice Curtis elaborated upon at length. To refute Taney's opinion that slavery is a racial institution, McLean asked "[W]hy confine our view to colored slavery? . . . On the same principles, white men were made slaves. All slavery has its origin in power, and is against right."[17] This emphasis upon might, rather than right, as the ground of all slavery—this deliberate highlighting of the unnatural status of slavery (for whites as well as blacks have been victims of the practice)—was McLean's way of restricting protection of the "peculiar institution" to its immediate locale.

His third topic was the "power of Congress to establish Territorial Governments, and to prohibit the introduction of slavery therein." Territory ceded to the United States by Virginia and other states required formal governance to prevent lawlessness and disorder among its inhabitants. McLean highlighted the Northwest Ordinance of 1787, first adopted by the Articles of Confederation Congress and then reaffirmed in 1789 by the Congress under the new Constitution, to show Congress's authority to govern territory held on behalf of all the states. Among its provisions was the prohibition of slavery throughout this territory. Article IV, Section 3, of the Constitution states that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In essence, until a territory applies for statehood, what belongs to the nation should be governed by the national government. Therefore, Congress could provide a "temporary Government" of any federal territory until states could be formed from that territory. McLean qualified this authority by arguing that Congress does not possess "unlimited discretion"; instead, it "is limited to means appropriate to the attainment of the constitutional object," which in his mind did not include making "either white or black men slaves."[18] Reading the Constitution as "a practical instrument," McLean, like Curtis, counseled "acquiescence under a settled construction of the Constitution for sixty years," even if possibly "erroneous," and added that the Court should not control Congress's discretion in establishing the government for a territory.[19]

McLean's fourth issue was the "effect of taking slaves into a new State or Territory, and so holding them, where slavery is prohibited." The short answer for McLean was "location, location, location." Citing the 1842 precedent of *Prigg*, he argued that a master who took his slave to a jurisdiction or location where slavery is not protected could not presume to have this form of property protected by that jurisdiction. "Where no slavery exists, the presumption, without regard to color, is in favor of freedom." Put differently, McLean concluded from *Prigg* that "a slave is not property beyond the operation of the local law which makes him such." Curtis would

develop a similar argument. McLean added that a "slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man, and he is destined to an endless existence."[20] Why highlight the humanity of the slave? To reinforce the presumption of freedom over slavery—the one natural and God-given, the other a product merely of local law. This is why McLean gave a list of court decisions from southern slaveholding states—and one from Missouri—to bolster his claim of the slave's humanity and hence the peculiar nature of his being property, especially under the Constitution.

Here McLean also derided Taney's claim that slaves could be taken into federal territory just "the same as a horse, or any other kind of property."[21] He boldly announced that "[t]he question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question." McLean said he would disregard anything Taney argued that did not pertain to jurisdiction as "of no authority." This included Taney's key holdings that Congress acted without authority in 1820 when it banned slavery from the territory northwest of Missouri and that slavery was protected as property under the Fifth Amendment. Taking Taney seriously on the jurisdiction question thus permitted McLean to dismiss pretty much everything else Taney uttered in his fifty-four-page opinion.

Citing five Missouri supreme court decisions prior to its most recent decision against Scott in 1852, McLean demonstrated that the state court had ruled since 1824 that a slave's residence in a free state acts as a de facto manumission. In particular, he argued that the 1836 precedent of *Rachel v. Walker*, with facts quite similar to those in *Dred Scott*, should be the controlling legal authority.[22] This chain of rulings was broken by the 1852 case of *Scott v. Emerson*, in which the Missouri supreme court ruled 2 to 1 in favor of Scott's previous master, Dr. Emerson. Its holding there was that "when there is no act of manumission decreed to the free State, the courts of the slave States cannot be called to give effect to the law of the free State."[23] McLean cited in detail the reasoning of the dissenting judge, Chief Justice Gamble, to conclude that *Scott v. Emerson* "overruled the settled law for near thirty years": "Rights sanctioned for twenty-eight years ought not and cannot be repudiated, with any semblance of justice, by one or two decisions, influenced, as declared, by a determination to counteract the excitement against the institution of slavery in the free States."[24] He concluded his fourth point by pointing out that Missouri had long since made the common law part of its statues; because the common law includes "the great principles of international law," this would dictate that a slave becomes a free man if he legitimately finds himself in free territory.

The fifth issue was whether or not a slave freed by residence in a free territory or state reverted to slavery if returned to a slave state "under the control of his master." McLean argued that slave states had "generally" considered slaves free whose masters took them to free states or territories to reside. He added that "[t]his was the settled doctrine of the Supreme Court of Missouri," not to mention Mississippi, Virginia, Louisiana, and other slave states. The principle he drew was that of comity: "[o]ur union . . . [depends on] respecting the legal rights of each State." Slave states should continue to respect the laws of free states as the latter operated to manumit slaves that took up residence there by will of their masters. If Illinois decided against slavery within its borders, and a slave became free by virtue of a master's residence there with his slave, Missouri's laws should not trump the effect of Illinois's constitution if that said slave then returned to Missouri. McLean found another opportunity to dismiss substantive arguments of Taney's when he rejected Taney's 1851 decision in *Strader v. Graham* as inapplicable to the *Dred Scott* case: "No question was before the court in that case except that of jurisdiction. And any opinion given on any other point is *obiter dictum*, and of no authority."[25]

McLean's sixth and last issue was whether or not the decisions of the Missouri supreme court "on the questions before us" were binding on the U.S. Supreme Court. McLean stated that the U.S. Supreme Court "follow[s] them only where they give a construction to the State statutes." This went double for the Missouri supreme court, given their refusal to consider the impact a federal law and state constitution had on Scott due to his residence in free areas of the United States. With "the liberty of a human being" at stake, McLean argued for the legitimacy of the Court's consideration of the claim of the Scott family to freedom.[26]

Although McLean's dissent repeatedly highlighted the humanity of blacks, opponents of the *Dred Scott* decision found Justice Curtis's dissent a more persuasive refutation of Taney's opinion. Benjamin Robbins Curtis only served on the Court from 1851 to 1857. He was a nationalist Whig from Massachusetts who was called "the slave-catcher judge" because he supported the notorious 1850 Fugitive Slave Act and the 1854 indictment of Massachusetts citizens who attempted to free Anthony Burns, who was being held for return as an escaped slave.[27] His support of the Fugitive Slave Act led fellow Whig and President Millard Fillmore to appoint him to the Supreme Court. Although not the national figure that McLean was, Curtis made headlines in his first term on the Supreme Court with his majority opinion in *Cooley v. Board of Wardens*, which permitted state regulation of interstate commerce under the federal Constitution's Commerce Clause.[28] Curtis would go on to greater fame for his dissent in the *Dred Scott* case. He heard the case despite the fact that his brother, George Ticknor Curtis, helped argue the case for Scott. During the Civil War, Curtis would publish a critique of Lincoln's use of the war powers, including the Emancipation Proclamation.[29] He later served as defense counsel for President Andrew Johnson during the latter's impeachment trial in 1868. Curtis died in 1874.

Curtis's dissent was the longest of all the *Dred Scott* opinions, totaling seventy pages—sixteen pages longer than Taney's opinion for the Court. Like McLean, Curtis began with the question of jurisdiction: Did the federal courts have jurisdiction to hear the case at all? As noted earlier, the jurisdiction question was raised at the outset because Scott claimed to be a citizen of one state (Missouri) suing a citizen of another state (John F.A. Sanford of New York). Article III, Section 2, of the U.S. Constitution extends the judicial power of the federal courts to disputes "between Citizens of different States." If Sanford, the defendant, could establish that Scott was a slave, the circuit court would have to throw the case out for lack of jurisdiction, insofar as a slave could not be a citizen and hence could not sue in federal court. But Curtis pointed out that Sanford never claimed that Scott was a slave. Instead, Sanford plead that Scott was not a Missouri citizen because "he is a negro of African descent, his ancestors were of pure African blood, and were brought into this country and sold as negro slaves." Curtis noted that "no cause is shown by the plea why he is not so [i.e., a citizen of the United States], except his descent and the slavery of his ancestors." Here Curtis's reasoning began in earnest, as he examined "who were citizens of the United States at the time of the adoption of the Constitution."[30]

The short answer was, anyone who was a citizen of the United States under the nation's first constitution, the Articles of Confederation and Perpetual Union. Because the Articles did not empower the Confederation Congress to naturalize citizens, the states were presumed to be the only authority on the matter. Simply put, to be a citizen of any of the American states was to be a citizen of the United States under the Articles of Confederation. But under this Confederation, prior to the adoption of the U.S. Constitution in 1788, did this include "any free persons, descended from Africans held in slavery"?[31] Curtis answered:

> Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens.[32]

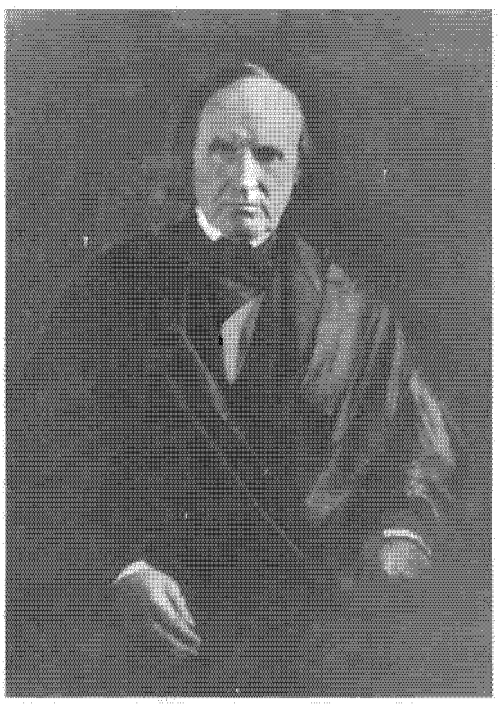
Chief Justice Taney did not reply directly to this and other claims of historical fact by Curtis. Instead, Taney claimed, "It is difficult at this day to realize the state of public opinion in relation to that unfortunate race." Nevertheless, he went on to infer from the "public history" of Europe what whites during the American Revolutionary era thought about blacks:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics . . . without doubting for a moment the correctness of this opinion.[33]

Taney's conjecture not only differed from Curtis's more reliable historical account but also contradicted an opinion Taney had given early in his legal career, when in 1818 he defended an abolitionist preacher from the charge of inciting slaves to riot:

> A hard necessity, indeed, compels us to endure the evil of slavery for a time. . . . It cannot be easily, or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means, by which this necessary object may be best attained. And until it shall be accomplished: until the time shall come when we can point without a blush, to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.[34]

Thus spake Roger Taney almost forty years before the *Dred Scott* decision—a time when



A strong antislavery man from Ohio, John McLean had been the lone dissenter in the 1842 case of *Prigg v. Pennsylvania*, which held that fugitive slave laws enacted by states—as opposed to Congress—were unconstitutional. His dissent in *Dred Scott* insisted that Congress had the power to exclude slavery from the territories and to liberate blacks voluntarily brought into free states.

he served as counsel to a protective society for free blacks, a time when he freed his own slaves, and a time when he read the Declaration of Independence as clearly inconsistent with America's peculiar institution. But in 1857, he argued that the words of the Declaration "would seem to embrace the whole human family . . . But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration."[35]

Curtis disagreed with this reading of "the great natural rights" of the Declaration and the Founders' intentions, stating that in his "own opinion," he saw no inconsistency between "these assertions of universal abstract truths" and "their own individual opinions and acts." However, he did not think resolving this question was relevant to deciding Scott's status; he was satisfied with "those substantial facts evinced by the written Constitutions of States and by the notorious [i.e., well known] practice under them": namely, "in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States."[36] Curtis went on to note that the word "white" was considered and rejected from use in the clause in the Articles of Confederation dealing with the "privileges and immunities" of "free inhabitants" of the states. Thus, the Articles of Confederation recognized free blacks as citizens, and the Constitution that replaced the Articles did nothing to "deprive them or their descendants of citizenship." Curtis also argued that under the new Constitution, except for naturalizing immigrants, "it is left to each State to determine what free persons born within its limits shall be citizens of such State, and thereby be citizens of the United States."[37]

Curtis then turned to questioning the legitimacy of Taney's addressing the constitutionality of the 1820 Missouri Compromise. He called it an "assumption of authority" and "an exertion of judicial power [that] transcends the limits of the authority of the court as described by its repeated decisions." Given that Taney ruled that the circuit court did not have jurisdiction to hear the case, he had no reason to discuss its merits. Curtis concluded, "A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached."[38] But because Scott was not shown to be a slave in Sanford's pleading, and hence Curtis considered Scott to be a citizen entitled to have his day in federal court, Curtis thought that the circuit court had jurisdiction and so gave *himself* permission to explore the merits of the case.

Curtis then considered the central question: did Dred Scott's trip with his master from slave state Missouri to free state Illinois and free territory Wisconsin act as a *de facto* manumission of Scott (and his family) prior to the filing of the case? His answer took up about two thirds of his dissent. For the sake of brevity, suffice it to say that, to prove that Scott became free during his residence in a free state and free territory, Curtis drew upon many rationales: namely, state and federal court precedents, the common law and law of nations, the principle of comity (whereby states recognize the validity of each other's governmental actions in a reciprocal fashion), Scott's marriage with Sanford's consent, the consistent practice of congressional authority over federal territories, and the inapplicability of the Fifth Amendment's due process protection to property in slaves, since they are recognized as chattel only by municipal laws, which fluctuate from state to state.

Both Curtis and McLean released their opinions to the press on March 7, the day after Taney read his opinion. However, Taney did not allow the publication of his opinion in *Howard's Reports* until May, even refusing Curtis's request for a copy. A testy correspondence between them proved unfruitful, with Curtis suspecting that Taney delayed the publication of his opinion so he could respond with additional arguments to Curtis's published dissent—a suspicion that proved to be

correct.[39] Citing financial reasons as well as doubts about his usefulness "in the present state of the court," Curtis resigned from the Supreme Court at the conclusion of the Term. His dissent in *Dred Scott v. Sandford* proved to be his swan song as a Supreme Court Justice.[40] Curtis's lengthy opinion was popular enough to be sold as a pamphlet and was said to have been carried around by Lincoln during his debates with Douglas the following year.

A year before the *Dred Scott* decision, Lincoln wrote that the "question of slavery, at the present day, should be not only the greatest question, but very nearly the sole question." As a longtime Whig and follower of Henry Clay, Lincoln had only recently joined the new Republican party, which was then running its first slate of national candidates, and he took time away from his law practice to campaign extensively as a presidential elector for John Frémont in his home state of Illinois. Two years earlier, with the passage of the Kansas-Nebraska Act, Lincoln wrote that its "repeal of the Missouri compromise aroused him as he had never been before."[41] This 1854 law permitted the territories of Kansas and Nebraska to decide for themselves if slavery would be allowed. Both were located north of the 36°30′ parallel established by the Missouri Compromise of 1820 as an area where slavery was "forever prohibited."[42] But in 1854, under the leadership of Illinois Democratic Senator Stephen A. Douglas, Congress implemented a policy of local "popular sovereignty," which permitted the settlers of either territory to decide the slavery question without interference from Congress.

This "principle of non-intervention by Congress with slavery in the States and Territories" Lincoln could not abide.[43] It represented a "gross breach of national faith" regarding the future of slavery in America.[44] Lincoln believed the American Founders intended to wean the nation off of slavery by permitting its continuance in the short run in the states where it already existed, while adopting measures to cut off its supply and restrict its expansion. In short, "the framers of the Constitution intended and expected the ultimate extinction of that institution."[45] But within a generation of the founding, cotton was well on its way to becoming king, and by the 1850s, black slavery was no longer tolerated out of necessity but openly defended as "a positive good."[46] Lincoln saw this repudiation of human equality as the greatest threat to preserving America's free institutions. "I think we have an ever growing interest in maintaining the free institutions of our country," he wrote in 1856, and to aid this process he thought citizens needed to "come to the rescue of this great principle of equality."[47] In Lincoln's mind, for free institutions to work, they required a free-thinking people—and it was his intention to help the nation recover this older way of thinking and acting.

About a month after the *Dred Scott* opinion was officially published in *Howard's Reports*, Lincoln delivered a speech criticizing Taney's opinion, along with Douglas's defense of the Court's ruling. Lincoln was already being mentioned as the presumptive successor to incumbent Senator Douglas.[48] His chief criticism of Douglas, as well as Taney, concerned the impact their reasoning might have on the public mind, especially regarding the definition and operation of self-government. Lincoln thought self-government had to do fundamentally with "the individual rights of man," which he believed included "black as well as white," while Douglas's theory of popular sovereignty was "a mere deceitful pretense for the benefit of slavery."[49]

As for Taney's opinion, Lincoln began by saying he would not discuss the merits of the case in detail, satisfied that he "could no more improve on McLean and Curtis, than [Douglas] could on Taney."[50] Lincoln's principal concern was what the nation's reaction to the decision would be. In other words, of what use is a judicial decision, especially to those who disagree with it? When does a decision of the court become a precedent binding on future cases? Lincoln suggested several criteria

for precedent-setting decisions: unanimity of Court members, lack of partisan bias, the expectation of the legal community, steady practice, historical rigor, and repeated affirmation in subsequent cases, not to mention the public's acquiescence. He went on to cite President Andrew Jackson's 1832 veto message regarding the attempted rechartering of the national bank: "Mere precedent is a dangerous source of authority."[51]

He then took issue with what he called Taney's "assumed historical facts," especially the Chief Justice's reading black Americans out of the Declaration of Independence and the Constitution. Here he enlisted Curtis's dissent to refute Taney's bad history. To wit, five states—including the slave state of North Carolina—permitted free blacks to vote when the Constitution was ratified. Thus, blacks were included as part of "the people of the United States" who ordained and established the Constitution. Moreover, Lincoln refuted Taney's assumption that "the public estimate of the black man is more favorable *now* than it was in the days of the Revolution." He argued that "a lock of a hundred keys" doomed the black man to a "prison house," all tending to make "the bondage of the negro universal and eternal."[52]

Lincoln saw this most clearly in the depreciation of the Declaration of Independence by both Taney and Douglas: "[Taney] and Judge Douglas argue that the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with the whites." He hastened to point out that the authors of the Declaration of Independence "did not at once, *or ever afterwards*, actually place all white people on an equality with one or another," adding that "they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit." Lincoln believed that the principle of human equality, the keystone of the Declaration of Independence, was the fundamental line of defense against future tyrants—what he called "a stumbling block to those who in after times might seek to turn a free people back into the hateful paths of despotism." In other words, what the citizenry thinks about the basis of their rights, and thus how their government ought to operate, is essential to preserving free government over the long haul. For Lincoln, the "Whites Only" interpretation of the Declaration by Taney and Douglas turned "our once glorious Declaration" into "a mere wreck" and "mangled ruin, . . . shorn of its vitality, and practical value; and left without the *germ* or even the *suggestion* of the individual rights of man in it."[53] Or as Lincoln put it in an 1854 speech, "It shows that the Judge has no very vivid impression that the negro is a human; and consequently has no idea that there can be any moral question in legislating about him."[54]

Lincoln concluded his June 1857 speech, his most sustained reflection on the *Dred Scott* case, with the statement, "The plainest print cannot be read through a gold eagle."[55] By "gold eagle" Lincoln meant a $20 gold piece. He implied that if the equal humanity of the negro were denied in the public-policy debate over the expansion of slavery—as Taney and Douglas did in their public statements—then the future of slavery in the United States would be determined simply by those who could make a profit from slavery. As Lincoln put it in an 1854 speech against the Kansas-Nebraska Act, "no right principle of action but self-interest" would become the political order of the day.[56] Numerical might under color of law, and not natural or civil right, would dictate the future of slavery and hence of freedom in America.

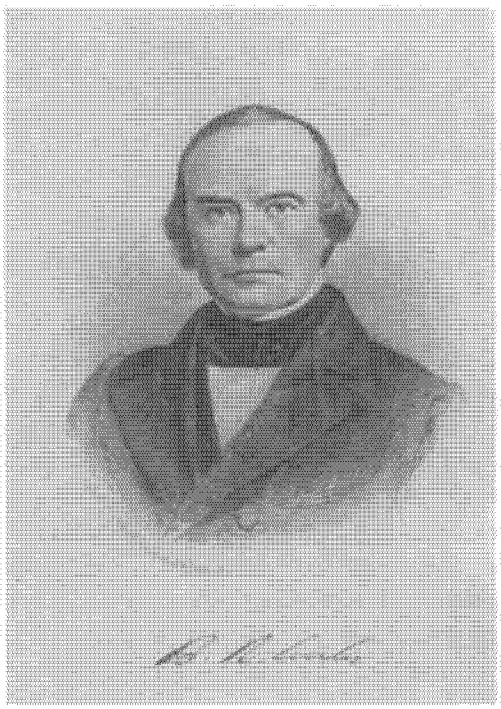
A year after the *Dred Scott* decision, Lincoln was nominated as "the first and only choice of the Republicans of Illinois for the United States Senate, as the successor to Stephen A. Douglas."[57] He accepted the nomination and that evening gave his famous "House Divided" address. In that address, Lincoln made a direct case against Douglas

as a standard-bearer for the free soil forces of the West, for Douglas had drawn favorable notice from northeastern Republicans who appreciated his efforts decrying the Lecompton Constitution of Kansas as a democratic fraud.[58] Lincoln's address was a precursor to the most famous election debates in American history.

In essence, Douglas thought he could defuse the controversy over slavery by removing it from Congress's purview; the diversity of state approaches to the peculiar institution—with some free states and some slave states—should dictate the future of slavery in the Western territories and therewith preserve the union of the states. Lincoln agreed with Douglas that preserving the Union was important, but he believed the Union had to be a certain kind of union, devoted to a particular end, in order to be worth preserving. As he put it in 1854, Americans needed to "re-adopt the Declaration of Independence," which meant its affirmation that "all men are created equal." He added, "If we do this, we shall not only have saved the Union; but we shall have so saved it, as to make, and to keep it, forever worthy of the saving."[59] What, in Lincoln's mind, would not be worth saving? A Union of American states that no longer recognized the universal basis of the rights of her citizens. Lincoln argued that Douglas's popular sovereignty was a corruption of true self-government; it "tend[ed] to rub out the sentiment of liberty in the country, and to transform this Government into a government of some other form."[60] What is remarkable about this statement is Lincoln's observation that the American regime could undergo a radical transformation without a single amendment to the U.S. Constitution being passed and ratified. To make an exception of the black man by excluding him from the Declaration equality principle was to invite a future exception on some other arbitrary basis. For Americans to forget that "liberty is the heritage of all men" was to plant "the seeds of despotism around . . . [our] own doors." As Lincoln put it:

> Familiarize yourselves with the chains of bondage, and you are preparing your own limbs to wear them. Accustomed to trample on the rights of those around you, you have lost the genius of your own independence, and become the fit subjects of the first cunning tyrant who rises. And let me tell you, all these things are prepared for you with the logic of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people.[61]

No one was more devoted to the rule of law than Abraham Lincoln, but he never counseled his



Arguing that Scott could be considered a citizen under the Constitution, Benjamin Curtis's seventy-page dissent was popular enough to be sold as a pamphlet. It is said that Lincoln carried it with him during his debates with Stephen Douglas the following year. Curtis (pictured) resigned from the Supreme Court shortly after penning his dissent.

fellow citizens to submit to their own government with a quiet acquiescence.[62]

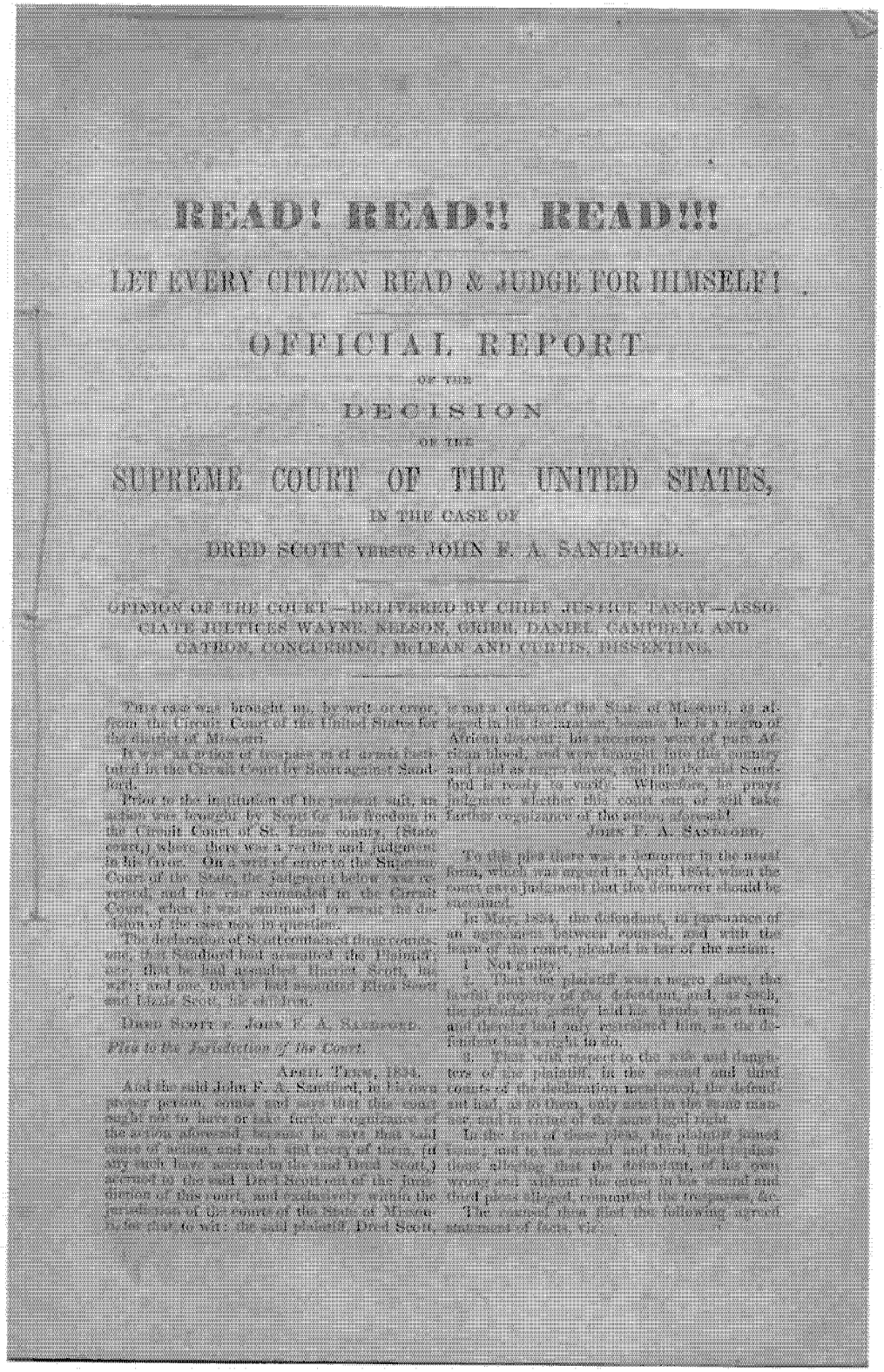
Lincoln believed that Douglas's attempt to reduce slavery agitation through the popular sovereignty policy of the Kansas-Nebraska Act actually increased national strife. Lincoln thought Americans were heading toward a "crisis" over the future of slavery; they had to address the issue once and for all. "A house divided against itself cannot stand," Lincoln observed; the nation could not "endure, permanently half *slave* and half *free*." The American Union would become one thing or the other.[63] This is why the question of slavery in the federal territories took on such significance for the rest of the country. In the person of Douglas, Lincoln saw the ghost of an American slaveocracy yet to come.

So, in his campaign for the Senate, Lincoln used the *Dred Scott* decision to force Douglas into a contradiction with the high court's ruling. Chief Justice Taney had ruled that neither Congress nor a territorial legislature had authority to ban slavery in federal territories, whereas Douglas believed that slavery should be authorized or banned solely by local authority.[64] Alluding to the Fifth Amendment's Due Process Clause, Taney stated: "The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them." He concludes that "if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them."[65] Lincoln observed, "Under the Dred Scott decision, [Douglas's] 'squatter sovereignty' squatted out of existence."[66]

But Taney and Douglas did agree on one thing: Unlike Lincoln and Justice McLean, who believed that "there is a difference between property in a slave and other property,"[67] Taney and Douglas thought that blacks were, in the words of Taney, "so far inferior that they had no rights which the white man was bound to respect."[68] Representing the free state of Illinois, Douglas conceded that he did not think blacks had to be slaves. However, the extent of their rights was "a question for each state and each territory to decide for itself," whose governments he explicitly asserted were founded "upon the white basis."[69]

Lincoln also worried that Douglas's reputation as a former Illinois supreme court judge and incumbent United States Senator would have a pernicious influence on the public mind: specifically, "to *educate* and *mould* public opinion, at least *Northern* public opinion, to not *care* whether slavery is voted *down* or voted *up*." For slavery to make its way eventually into the free states, all that was necessary was to convince Northerners not to care about it expanding into the territories. No frontal assault on freedom had to be made: Simply teach citizens to be neutral about slavery, not to care about what happens with it elsewhere, and it would, by "another Supreme Court decision," become legal everywhere.[70] Simply put, legal positivism among the people would pave the way for legal positivism in the courts.

Lincoln summed up the threat to freedom posed by the *Dred Scott* decision in his first debate with Douglas in August 1858: "[W]hat is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision. It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial Legislature can do it. When that is decided and acquiesced in, the whole thing is done."[71] Lincoln highlighted the connection between the Court's decision and the people's acquiescence to demonstrate how self-government operates, with special emphasis upon those who can shape the public mind. "In this and like communities," Lincoln declared, "public sentiment is everything. With public sentiment, nothing can fail; without it nothing can succeed. Consequently he who moulds public sentiment, goes deeper than he who enacts statutes or pronounces decisions. He makes statutes



READ! READ!! READ!!!

LET EVERY CITIZEN READ & JUDGE FOR HIMSELF!

OFFICIAL REPORT

OF THE

DECISION

OF THE

SUPREME COURT OF THE UNITED STATES,

IN THE CASE OF

DRED SCOTT versus JOHN F. A. SANDFORD.

OPINION OF THE COURT—DELIVERED BY CHIEF JUSTICE TANEY—ASSOCIATE JUSTICES WAYNE, NELSON, GRIER, DANIEL, CAMPBELL AND CATRON, CONCURRING; McLEAN AND CURTIS, DISSENTING.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

It was an action of trespass *vi et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county, (State court,) where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed, and the case remanded to the Circuit Court, where it was continued, to await the decision of the case now in question.

The declaration of Scott contained three counts; one, that Sandford had assaulted the Plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, children.

Dred Scott *v.* John F. A. Sandford.

Plea to the Jurisdiction of the Court.

April Term, 1854.

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action and each and every of them, (if any such have accrued to the said Dred Scott,) accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, to wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

John F. A. Sandford.

To this plea there was a demurrer in the usual form, which was argued in April, 1854, when the court gave judgment that the demurrer should be sustained.

In May, 1854, the defendant, in pursuance of an agreement between counsel, and with the leave of the court, pleaded in bar of the action:

1. Not guilty.

2. That the plaintiff was a negro slave, the lawful property of the defendant, and, as such, the defendant gently laid his hands upon him, and thereby had only restrained him, as he had the lawful right to do.

3. That with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner, and in virtue of the same legal right.

To the last of these pleas, the plaintiff joined issue; and to the second and third, filed replications alleging that the defendant, of his own wrong and without the cause in his second and third pleas alleged, committed the trespasses, &c.

The cause was then tried by the following agreed statement of facts, viz.:

This pamphlet of Chief Justice Roger B. Taney's opinion in the case urges the curious citizen to "Read & Judge for Himself."

and decisions possible or impossible to be executed."[72] Just what those statutes and decisions would be in the near future was forecast by the party platforms in the election of 1860, an election the outcome of which was set in motion by the *Dred Scott* decision.

After the *Dred Scott* case and Douglas's defeat of Lincoln for the Senate, the Democratic party faced competing notions of constitutional ways of dealing with slavery: namely, Southern slaveowners' demand for a federal slave code to guarantee the right to hold what they considered property, chattel slaves, in federal territories versus Senator Douglas's policy of popular sovereignty, which was the heart of the 1854 Kansas-Nebraska Act and the chief reason the Republican party came into being (especially upon the demise of the Whig party). Despite Douglas's attempt to hold the Democratic party together at the 1860 presidential nominating convention, Southern delegates bolted and nominated their own candidates for high office. In what some scholars have called the first secession of 1860, a faction of southern Democrats left the national nominating convention and nominated the incumbent Vice President, John C. Breckenridge of Kentucky, for President. Their Democratic party platform was almost entirely devoted to protecting slavery, with its first resolution stipulating that "all citizens of the United States have an equal right to settle with their property in the Territory, without their rights, either of person or property, being destroyed or impaired by Congressional or Territorial legislation." Its second resolution asserted that the federal government was obliged "to protect, when necessary, the rights of persons and property in the Territories."[73] Of course, these references to the rights of property included ownership of slaves, and the obsession over slavery in the Western territories was a direct result of the controversy stirred up by the *Dred Scott* case. As one scholar summed it up, "*Dred Scott* was a convulsive effort of the slave power, while its power lasted, to cut off the slavery question from the political process and to place property in slaves upon a foundation that could not be threatened by elected majorities."[74]

The northern Democrats, who nominated Douglas, refused to support a federal slave code for the territories. Acknowledging the lack of consensus in the party over Douglas's policy of "popular sovereignty," that platform's second resolution read: "That the Democratic party will abide by the decision of the Supreme Court of the United States upon these questions of Constitutional law." The seventh and final resolution of the platform affirmed the authority of the U.S. Supreme Court to determine "the measure of restriction, whatever it may be, imposed by the Federal Constitution on the power of the Territorial Legislature over the subject of the domestic relations," which meant slavery. The platform went on to say that any future decision of the Court on the subject of slavery "should be respected by all good citizens, and enforced with promptness and fidelity by every branch of the general government."[75] In short, as Lincoln said of Douglas's much vaunted respect for the high court, "a decision of the court" to him should be "a 'Thus saith the Lord'" for the American citizenry.[76]

As for the Republican party, the seventh resolution of its platform alluded to the *Dred Scott* case when it noted, "That the new dogma, that the Constitution, of its own force, carries Slavery into any or all of the Territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with contemporaneous exposition, and with legislative and judicial precedent; is revolutionary in its tendency, and subversive of the peace and harmony of the country." Its eighth resolution added: "That the normal condition of all the territory of the United States is that of freedom . . . and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to Slavery in any Territory of the United States."[77] The "secession" of Southern Democrats split the party and helped the

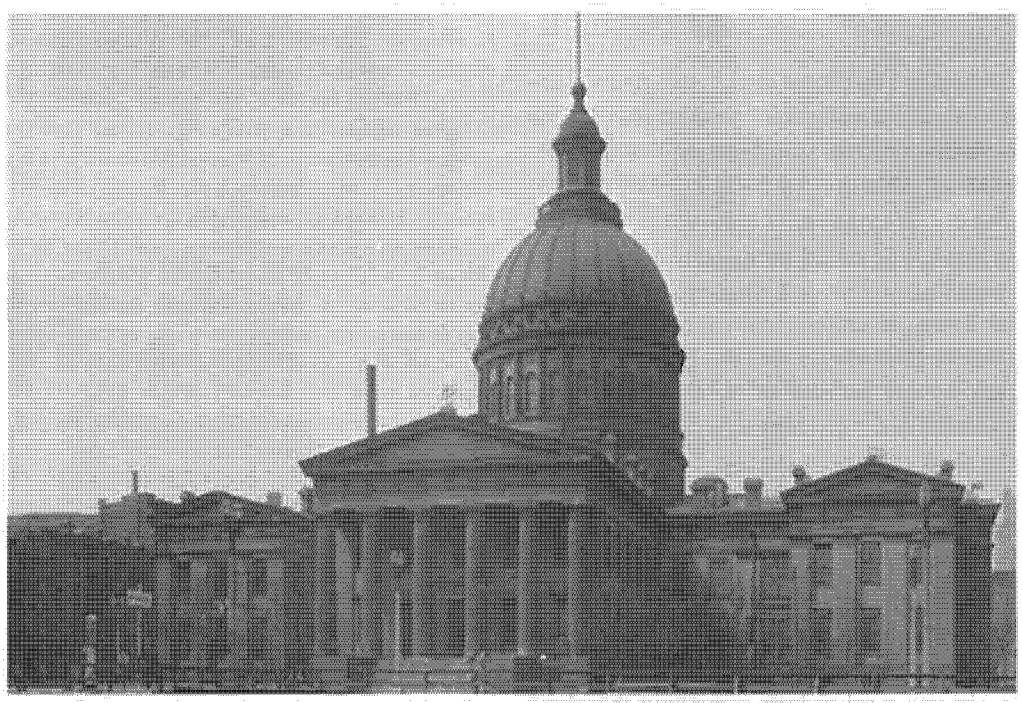
Republicans, led by the antislavery but nonabolitionist Lincoln, to victory that November.

Perhaps the clearest sign of *Dred Scott*'s imprint on the nation was Lincoln's allusion to the case in his First Inaugural Address. At his inauguration as the nation's first Republican President, seven states had declared their "secession" from the United States, elected a provisional president and vice president, and drawn up a constitution for the new Confederacy. And yet amidst the burgeoning crisis of a divided Union, Lincoln thought it necessary to consider how citizens should view decisions of the Supreme Court. After identifying secession with anarchy and explaining why constitutional majority rule is "the only true sovereign of a free people," Lincoln addressed the high court's role in deciding "constitutional questions":

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[78]

Lincoln argued for an active role for the people in a constitutional republic. To do otherwise would be to resign the government of the nation to one's rulers—it took the "self" out of "self-government." Thus, Lincoln rejected Chief Justice Taney, Senator Douglas, and former President James Buchanan in viewing the Court as setting the direction of the national government.[79]

For Lincoln, national policy thus developed out of a twofold conversation between the people and their rulers and between the various branches of government. For example,



The Court had originally intended to restrain itself to confirming the Missouri lower court as having the final word on its own state law, but political events pressured the Justices to review the merits of the *Dred Scott* case. Pictured is the courthouse in St. Louis where the case was tried.

in his 1858 campaign for the Senate, Lincoln stated in no uncertain terms how he would deal with the *Dred Scott* decision: "If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."[80] Lincoln never returned to Congress and so never got the chance to follow through on this pledge—at least not as a Senator. But he fulfilled his pledge in his second year as President, signing two laws prohibiting slavery in federal territory: the first (April 16) banned slavery in Washington, D.C. (with compensation to owners loyal to the Union), and the second (June 19) banned slavery in all federal territory.

In his December 1860 State of the Union address, President Buchanan criticized those who challenged "the correctness" of the *Dred Scott* ruling "before the people." He implied that political tempers flared needlessly because of public criticisms of the Supreme Court—tempers set initially in motion by the long-standing "agitation of the slavery question," especially by abolition societies.[81] While Lincoln agreed that some abolitionist rhetoric undermined the rule of law and respect for the Constitution,[82] he also believed that the government ruled only by the consent of the governed. This meant that the governed had a duty to watch their government to make sure it ruled according to their best interests. As he put it in his inaugural address, "While the people retain their virtue, and vigilence [sic], no administration, by any extreme of wickedness or folly, can very seriously injure the government, in the short space of four years."

In his first formal debate with Stephen Douglas in 1858, Abraham Lincoln confronted a heckler who had grown tired of Lincoln's dwelling on the *Dred Scott* case. The heckler shouted, "Give us something besides Dred Scott!" To which Lincoln responded, "Yes; no doubt you want to hear something that don't hurt."[83] Convinced that public acceptance of the Court's decision would lead to another that would open not just territories but every state of the Union to slavery, Lincoln fought rhetorically for the future of self-government. In a few short years, this war of words over slavery and freedom became a Civil War that Lincoln would interpret as a challenge for Americans to "nobly save, or meanly lose, the last best, hope of earth."

ENDNOTES

[1]Howard Ball, **A Defiant Life: Thurgood Marshall and the Persistence of Racism in America** (New York: Crown Publishers, Inc., 1998), 354.

[2]*Dred Scott v. John F.A. Sandford*, 60 U.S. (19 How.) 393 (1857). Citations to this case will be from the *United States Reports*, not *Howard's Reports*. All emphases in original unless otherwise noted.

[3]*Id.* 404.

[4]*Id.* 407.

[5]Nelson, a northern Democrat, was originally assigned to write the opinion of the Court—an opinion he proceeded to draft but ultimately submitted as a separate opinion after Justice James M. Wayne of Georgia persuaded a majority to have Chief Justice Taney write an official opinion that would address all of the issues raised. *See* Don E. Fehrenbacher, **The *Dred Scott* Case: Its Significance in American Law and Politics** (New York: Oxford University Press, 1978), 305–14.

[6]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in Roy P. Basler, ed., **Collected Works of Abraham Lincoln**, 8 vols. (New Brunswick, N.J.: Rutgers University Press, 1953), 2:495 (hereinafter cited as **Collected Works**; emphases in original unless otherwise noted). "But Judge [Stephen] Douglas will have it that all hands must take this extraordinary decision, made under these extraordinary circumstances, and give their vote in Congress in accordance with it, yield to it and obey it in every possible sense." *Id.* 2:496.

[7]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **Collected Works**, 2:495.

[8]For an examination of the role Harriet Robinson played in filing her own suit for freedom and perhaps instigating that of her husband as well, see Lea VanderVelde and Sandhya Subramanian, "Mrs. Dred Scott," 106 *Yale Law Journal* 1033 (1997). Dred Scott and his family were eventually set free on May 26, 1857, through a purchase by a son of Peter Blow, Scott's first owner. This emancipation occurred by virtue of Irene Emerson's remarriage to a Massachusetts Republican Congressman, Dr. Calvin Chafee, who was unaware that his new wife even owned the Scotts. Chafee gave up any legal rights to the Scott

family and transferred ownership to a Missouri resident, Taylor Blow, so the Scotts could be freed. Scott died a year later of tuberculosis on September 17, 1858, the 71st anniversary of the adoption of the U.S. Constitution. Walter Ehrlich, **They Have No Rights: Dred Scott's Struggle for Freedom** (Westport, Conn.: Greenwood Press, 1979), 180–83.

[9]Due to a clerical error, John Sanford's last name was misspelled as "Sandford" in the title of the case.

[10]Art. III, Sec. 2, of the U.S. Constitution extends the judicial power of the federal courts to disputes "between Citizens of different States."

[11]For a concise account of McLean's uniquely nonpartisan political activism, see Thomas E. Carney, "The Political Judge: Justice John McLean's Pursuit of the Presidency," 111 *Ohio History* (Summer–Autumn 2002), 121–44.

[12]41 U.S. 539 (1842).

[13]*Dred Scott*, 529.

[14]*Id.* 535–36.

[15]*Id.* 451.

[16]*Id.* 537.

[17]*Id.* 537–38.

[18]Curiously, McLean does argue that should Congress deem not only slaves but also "free colored persons injurious to the population of a free Territory, . . . they have the power to prohibit them from becoming settlers in it." This he asserted "on the ground of a sound national policy, which is so clearly shown in our history by practical results that it would seem no considerate individual can question it." *Dred Scott*, 543. How this squares with the Privileges and Immunities Clause of Art. IV, Sec. 2, of the Constitution or the Fifth Amendment's Due Process Clause is left unsaid.

[19]*Dred Scott*, 538–47.

[20]*Id.* 548–50.

[21]*Id.* 550.

[22]4 Mo. 350 (1836).

[23]*Id.* 552–53 (quoting *Dred Scott v. Emerson*, 15 Mo. 576, 586 (1852)).

[24]*Id.* 555–56.

[25]*Id.* 558–63 (referring to *Strader v. Graham*, 51 U.S. 82 (1851)).

[26]*Id.* 63.

[27]For a recent examination of Curtis's legal career, see Stuart Streichler, **Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism** (Charlottesville: University of Virginia Press, 2005). For a brief account of Curtis's conservative Whig jurisprudence, see Jake Lundberg's review of Streichler's book, "The Accidental Abolitionist," *Legal Affairs* (March/April 2006), *available at* http://www.legalaffairs.org/issues/March-April-2006/review_Lundberg_marapr06.msp (last visited June 3, 2007).

[28]53 U.S. 299 (1852).

[29]Benjamin Robbins Curtis, "Executive Power" (October 1862), in Benjamin R. Curtis, ed., **A Memoir of Benjamin Robbins Curtis with Some of His Professional and Miscellaneous Writings**, 2 vols. (Boston, Mass.: Little, Brown, and Company, 1879), 2:306–35; Streichler, **Justice Curtis**, ch. 6.

[30]*Dred Scott*, 558–72.

[31]*Id.* 572.

[32]*Id.* 572–73.

[33]*Id.* 407.

[34]Carl Brent Swisher, **Roger B. Taney** (New York: The Macmillan Company, 1935), 97–98. I thank Harry V. Jaffa for calling attention to Taney's reversal of opinion in **A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War** (Lanham, Md.: Rowman & Littlefield Publishers, Inc., 2000), 219–21. *See also* Gregory J. Wallace, "The Lawsuit That Started the Civil War," *Civil War Times* (March/April 2006), 49.

[35]*Dred Scott*, 410.

[36]*Id.* 575.

[37]*Id.* 575–77.

[38]*Id.* 588–90.

[39]Streichler reports that "two surviving later drafts contain several pages of the Chief Justice's handwritten additions responding to both dissenters." Streichler, **Justice Curtis**, 147–48. *See also* Fehrenbacher, **The *Dred Scott* Case**, 316–21.

[40]**A Memoir of Benjamin Robbins Curtis**, 1:250–51; Streichler, **Justice Curtis**, 145–48.

[41]Abraham Lincoln, "Autobiography Written for John L. Scripps" [c. June 1860], in **Collected Works**, 3:67.

[42]Transcript of Missouri Compromise (March 6, 1820), Sec. 8. *available at* National Archives and Records Administration, "Our Documents", http://www.ourdocuments.gov/doc.php?flash=true&doc=22&page=transcript (last visited June 3, 2007).

[43]Kansas-Nebraska Act (May 30, 1854), Secs. 14 and 32. *available at* The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/kanneb.htm (last visited June 3, 2007).

[44]Abraham Lincoln, "Speech at Springfield, Illinois" (June 26, 1857), in **Collected Works**, 2:405.

[45]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **Collected Works**, 2:492.

[46]*See, e.g.*, John C. Calhoun, "Speech on the Reception of Abolition Petitions" (February 6, 1837), in Ross M. Lence, ed., **Union and Liberty: The Political Philosophy of John C. Calhoun** (Indianapolis, Ind.: Liberty Fund, 1992), 474: "I hold that in the present state of civilization, where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slaveholding States between the two, is, instead of an evil, a good—a positive good."

[47]Abraham Lincoln, "Speech at Kalamazoo, Michigan" (August 27, 1856), in **Collected Works**, 2:366.

[48]The *Chicago Journal* (May 22, 1857) called attention to Lincoln's visit to the city, describing him as "the successor of Stephen A. Douglas in the U.S. Senate." The Lincoln Log: A Daily Chronology of the Life of Abraham Lincoln, http://www.stg.brown.edu/projects/lincoln/day.php?yyyy=1857&mm=5&dd=21 (last visited June 3, 2007).

[49]Abraham Lincoln, "Speech at Springfield, Illinois" (June 26, 1857), in **Collected Works**, 2:407, 405, 399.

[50]*Id.* 400.

[51]*Id.* 402.

[52]*Id.* 403, 404.

[53]*Id.* 405–7.

[54]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **Collected Works**, 2:281.

[55]Abraham Lincoln, "Speech at Springfield, Illinois" (June 26, 1857), in **Collected Works**, 2:409.

[56]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **Collected Works**, 2:255:

> This *declared* indifference, but as I must think, covert *real* zeal for the spread of slavery, I can not but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticising the Declaration of Independence, and insisting that there is no right principle of action but *self-interest.*

[57]Paul M. Angle, ed., **Created Equal? The Complete Lincoln-Douglas Debates of 1858** (Chicago: The University of Chicago Press, 1958; Midway Reprint, 1985), 1.

[58]*See* Kenneth M. Stampp, **America in 1857: A Nation on the Brink** (New York: Oxford University Press, 1990), 289–322.

[59]Abraham Lincoln, "Speech at Peoria, Illinois" (October 16, 1854), in **Collected Works**, 2:276.

[60]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **Collected Works**, 2:500.

[61]Abraham Lincoln, "Speech at Edwardsville, Illinois" (September 11, 1858), in **Collected Works**, 3:95–96.

[62]For an examination of Lincoln's devotion to the rule of law, especially as presented in his 1838 Young Men's Lyceum Address entitled "The Perpetuation of Our Political Institutions," see Lucas E. Morel, **Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government** (Lanham, Md.: Lexington Books, 2000), 23–44.

[63]For the definitive account of the Lincoln-Douglas debates of 1858, see Harry V. Jaffa's seminal **Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates** (Seattle: University of Washington Press, 1973; reprint ed., Chicago: University of Chicago Press, 1982).

[64]Douglas stated the issue most famously in his reply to Lincoln at their second senatorial debate in Freeport, Illinois:

> It matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a territory under the constitution, the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations. . . . [I]f the people are opposed to slavery they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst.

Stephen A. Douglas, "Second Debate with Stephen A. Douglas at Freeport, Illinois" (August 27, 1858), in **Collected Works**, 3:51–52. As Don Fehrenbacher points out—and as Douglas himself declared in the Freeport debate—this was not the first time Douglas had uttered this sentiment about the power of local regulations to trump external edicts. Nevertheless, Lincoln's raising the issue early in the debates and reprising it in subsequent debates, as well as the following year after Douglas's reappointment to the U.S. Senate, thwarted Douglas's chances to keep the Democratic party unified North and South. Southern Democrats, notwithstanding their states'-rights bona fides, now demanded a federal slave code to ensure protection of their slaves in federal territories. Most Northern Democrats stuck by Douglas and his policy of local "popular sovereignty," which meant congressional nonintervention regarding slavery in the territories. The Democratic split in 1860 gave Republicans every incentive to nominate a presidential candidate who could win in November with the electoral college votes of most or all of the free states. The antislavery but nonabolitionist Lincoln of Illinois fit this description. Don E. Fehrenbacher, **Prelude to Greatness: Lincoln in the 1850s** (Stanford, Calif.: Stanford University Press, 1962), ch. 6, "The Famous 'Freeport Question.'"

[65]*Dred Scott*, 450–51.

[66]Abraham Lincoln, "'A House Divided': Speech at Springfield, Illinois" (June 16, 1858), in **Collected Works**, 2:464.

[67]*Dred Scott*, 451.

[68]*Id.* 407.

[69]Stephen A. Douglas, "Douglas at Springfield" (July 17, 1858), in Angle, ed., **Created Equal?**, 60. Taney said as much in *Dred Scott*: "The Government of the United States . . . [left] it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require." *Dred Scott*, 426.

[70]Abraham Lincoln, "'A House Divided': Speech at Springfield, Illinois" (June 16, 1858), in **Collected Works**, 2:465, 467.

[71]A "next *Dred Scott* decision" was no hypothetical scenario, for an 1852 case dealing with the rights of slaveowners sojourning in a free state was continuing to make its way through the New York courts. *See Lemmon v. The People*, 20 New York Reports 562 (1860). For a discussion of *Lemmon*, see Paul Finkelman, ***Dred Scott v. Sandford*: A Brief History with Documents** (Boston, Mass.: Bedford Books, 19897), 47–49, 186, and his more lengthy examination in **An Imperfect Union: Slavery, Federalism, and Comity** (Chapel Hill: University of North Carolina Press, 1981), 296–332.

[72]Abraham Lincoln, "First Debate with Stephen A. Douglas at Ottawa, Illinois" (August 21, 1858), in **Collected Works**, 3:27.

[73]Donald Bruce Johnson, comp., **National Party Platforms: Volume I, 1840–1956** (Urbana: University of Illinois Press, 1978), 31.

[74]Jaffa, **A New Birth of Freedom**, 298.

[75]Johnson, comp., **National Party Platforms,** 30, 31.

[76]Abraham Lincoln, "First Debate with Stephen A. Douglas at Ottawa, Illinois" (August 21, 1858), in **Collected Works,** 3:28.

[77]Johnson, comp., **National Party Platforms,** 31–33.

[78]Abraham Lincoln, "First Inaugural Address—Final Text" (March 4, 1861), in **Collected Works**, 4:268. Lincoln juxtaposed what he called "the judgment of this great tribunal, the American people" with "that eminent tribunal" that is the Supreme Court, in an effort to show how the people and their rulers work together for the common good. He therefore used his inaugural address, as he had long done with many other public statements, to reinforce the expectation that the people play their part in American self-government. In lieu of a Supreme Court that dispenses irrevocable and incontestable judgments, he appealed to "a patient confidence in the ultimate justice of the people" as they express their political wishes through all branches of the federal government. *Id.* 4:270.

[79]Lincoln made the limited role of the Supreme Court even more explicit in his 1858 campaign for the Senate, when he cited a letter by Thomas Jefferson to support his more judicious view of the Court's authority. Jefferson observed that "to consider the judges as the ultimate arbiters of all constitutional questions" is "a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy." This contradicted Justice James Wayne's opinion in the *Dred Scott* case, in which he wrote: "The case involved private rights of value and constitutional principles of the highest importance about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision." *Dred Scott*, 454–55. Lincoln begged to differ, agreeing with Jefferson that the "Constitution has erected no such single tribunal." Thomas Jefferson, cited by Abraham Lincoln in "Speech at Springfield, Illinois" (July 17, 1858), in **Collected Works**, 2:517. For an examination of Jefferson's view of judicial review, see John Agresto, **The Supreme Court and Constitutional Democracy** (Ithaca, N.Y.: Cornell University Press, 1984), 78–86. For citizens to expect any branch of government to rule without public comment, especially on matters of the greatest moment, is tantamount to "creating a will in the community independent of the majority," as Madison put it in the **Federalist Papers**. James Madison, **The Federalist Papers**, ed. Clinton Rossiter (New York: New American Library, 1961; 2003 printing), No. 51, 320–21. Madison continued: "This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties." *Id.* 321.

[80]Abraham Lincoln, "Speech at Chicago, Illinois" (July 10, 1858), in **Collected Works**, 2:495.

[81]James Buchanan, "The Annual Message of December 3, 1860," in George Ticknor Curtis, **Life of James Buchanan: Fifteenth President of the United States**, 2 vols. (New York: Harper & Brothers, 1883), 2:340, 338.

[82]"They believe that the institution of slavery is founded on both injustice and bad policy; but that the promulgation of abolition doctrines tends rather to increase than to abate its evils." Abraham Lincoln [and Dan Stone], "Protest in Illinois Legislature on Slavery" (March 3, 1837), in **Collected Works,** 1:75.

[83]Abraham Lincoln, "First Debate with Stephen A. Douglas at Ottawa, Illinois" (August 21, 1858), in **Collected Works**, 3:29.

The Dissents of John Marshall Harlan I

LINDA PRZYBYSZEWSKI*

I want to start by offering you two quotations. Both are from Harlan's famous dissent from *Plessy v. Ferguson* in 1896, when the rest of the Justices held that it was constitutional to segregate people according to their race. The first quotation is famous; the second is not well-known—in fact, some of you may have never heard it before. Here is the first quotation:

> [I]n the view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens.

And here is the second:

> Every true man has pride of race, and under appropriate conditions when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.

When we speak of racial equality in the twenty-first century, we do not usually think of racial pride as anything but a barrier to the achievement of that equality. But Harlan lived in the nineteenth century, and he drew upon his own racial pride and that of his family in order to achieve racial equality. In fact, that pride explains how Justice Harlan, who came from a slave-holding family and who owned slaves himself, became the sole champion of black civil rights on the U.S. Supreme Court at the turn of the nineteenth century.

Harlan was born in Kentucky in 1833. His mother was Eliza Harlan, the daughter of farmers. His father was James Harlan, a Whig politician, lawyer, and state attorney general who owned some half a dozen slaves, who worked in the house and gardens that surrounded it. James was allied with Henry Clay, the great Senator from Kentucky, who urged the end of slavery through gradual emancipation. But James Harlan was no racial radical. In a letter marked with blots and strikeout, which indicate how much care he took to compose it, he once wrote during a political campaign that the man who called him an abolitionist "lies in

his throat." James did bring what were called freedom suits—lawsuits brought on behalf of people who claimed to be unlawfully held in bondage—but such suits actually confirmed the legality of slavery in all other cases. Like many slaveholders, James Harlan told himself that he was a righteous man and a benevolent slaveholder. It was a belief that John Harlan shared.

All families have stories they tell, stories that serve to identify the core values of their families. The one that the Harlan family told about James—a story they were still telling in the twentieth century—occurred one Sunday morning as he was walking to church with his son. This is the version of the story recorded in the memoirs of John's wife, Malvina Shanklin Harlan:

> One Sunday morning, on his way to church, he passed in the main street a company of slaves that were being driven to the "Slave Market" in a neighboring town. The able-bodied men and women were chained together, four abreast, proceeded by the old ones and the little "'pickaninnies," who walked unbound.
>
> This pitiful procession was in charge of a brutish white man, belonging to a class which in those days were called "Slave-drivers." . . . Their badge of office was a long, snake-like whip made of black leather, every blow from which drew blood.
>
> The sight stirred my father-in-law to the depths of his gentle nature.
>
> He saw before him the awful possibilities of an institution which, in the division of family estates, and the sale of slaves, involved inevitably the separation of husband and wife, of parent and children. . . .
>
> My father-in-law could do nothing to liberate the poor creatures then before him; but he was so filled with indignation that any one calling himself a man should be engaged in such a cruel business that, walking out to the middle of the street and angrily shaking his long fore-finger in the face of the "Slave driver," he said to him, "*You are a damned scoundrel. Good Morning, sir.*" After having thus relieved his feelings he quietly pursued his way to the House of Prayer.

Although we should not underestimate the significance of cursing to a serious Presbyterian in the 1840s, it does seem a little short of the righteous indignation we may have been hoping for. (But then we're all abolitionists now, aren't we? After all, it's easy to be one; they won). But to the Harlan family, this story showed how James Harlan could be a good man and a slaveholder—a good slaveholder, in fact. Not only does James condemn the slave trade, he condemns the brutalities of another slaveholder. Malvina Harlan concluded her story with this comment:

> To those who heard and saw him that day, there was no suggestion of profanity in his language. Like some old Testament prophet he seemed to be calling down Heaven's maledictions upon the whole institution of Slavery.

Like all stories that become legends by being told and retold, this one was surely shaped over time. It was deliberately shaped to distance the Harlan family from slavery's cruelties. Notice how the slaves were being brought to slave-market in a neighboring town, as though the Harlan's hometown of Frankfort did not have its own slave-market. Malvina suggested that slave families were broken up only by "the division of family estates"—that is, when white slaveholders died and their property was sold or inherited—as though slaveholders did not have the option of freeing their slaves in their wills, as though Kentucky was not a slave export state that regularly sold young men and women down the river to cotton plantations in the Deep South. The Harlans themselves, although they denied it in their

Family lore has it that when James Harlan, father of the Justice, passed a slave auction on his way to church one Sunday, he pointed his finger at a slave-driver with a whip and said "You are a damned scoundrel. Good Morning, sir."

memories, bought and sold slaves for profit or convenience.

We can recognize the fictional qualities of this story and still appreciate the power it held for John Harlan. When faced with the most important political and moral dilemma of his life, James's son seems to have remembered what his father's example taught him.

John Harlan faced that dilemma after the Civil War. When the war broke out, he had thought his duties clear. The Whig party had fallen apart over the slavery question in the 1850s. John Harlan claimed allegiance with the Union party when the governor of Kentucky tried to straddle the fence and declare Kentucky "neutral." But local sentiment turned strongly towards Union when the Confederates actually raided Kentucky. The state declared itself for Union, and Harlan, along with about 30,000 other men, joined the Union Army. He raised his own regiment of over 800 men, the Tenth Kentucky Infantry, in the fall of 1861. Like many white Kentuckians, Harlan fought for the Union *as it was*, with slavery still intact in the Southern states. And President Abraham Lincoln refused to make emancipation a war aim early on precisely because he did not want to alienate the border states. Lincoln is supposed to have said that he would like to have God on his side, but he *must* have Kentucky.

But Lincoln had long been an anti-slavery man, and emancipation became a part of his larger strategy for winning the war. On January 1, 1863, the Emancipation Proclamation officially declared free all slaves held in disloyal territory. Harlan resigned his commission that year, in response to his father's death and the needs of the family law firm. Malvina Harlan explains that in order to keep all the slaves in the family—since Eliza Harlan, as a widow, was only entitled to one-third of James's estates—Harlan pledged himself for the value of these slaves and so became the owner, in effect, of eight human beings: Bob, Lewis, Henry, Sarah, Jenny, Silva, Maria, and Ben.

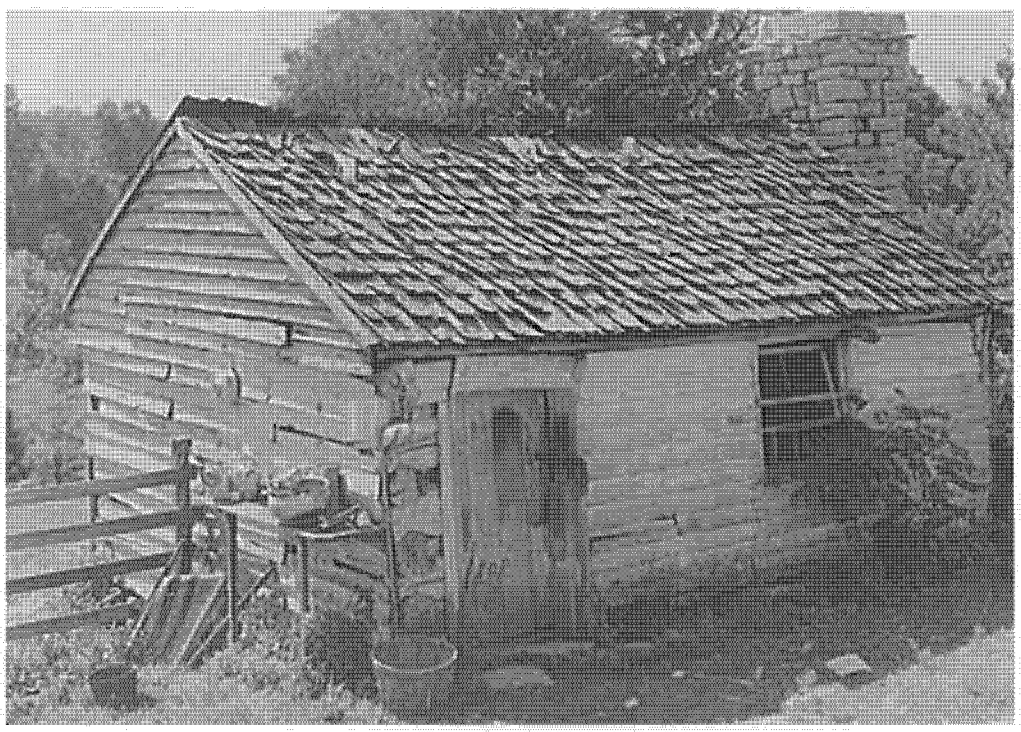
Harlan may not have resigned his commission out of disgust with Lincoln's policies, but he made clear his opposition to Lincoln from then on. He campaigned against him in 1864 and reminded his audiences in Kentucky and Indiana that the war was fought for Union, not for emancipation. He complained of "the ruinous effects of such a violent change in our social system" and declared the Thirteenth Amendment, which freed the slaves, "a flagrant violation of the right of self-government." (The self-government of white Kentuckians, of course.) When Union General John M. Palmer recruited male slaves after the end of the war in order to free them and their families, John Harlan was state attorney general, and he had Palmer indicted for violating the slave code of Kentucky in 1866.

Even as Harlan was arguing hopelessly for the Union as it was, white terrorism had broken out in Kentucky. Around 10,000 white Kentucky men had fought for the Confederacy. Now they came home, and many of them were angry. With the blessing of the Democratic party, they formed into gangs called Regulators or named after their leaders—Skagg's Men, Rowzee's Band—and began working violence upon whites and blacks across state. The Freedman's Bureau report on Kentucky for 1867 lists

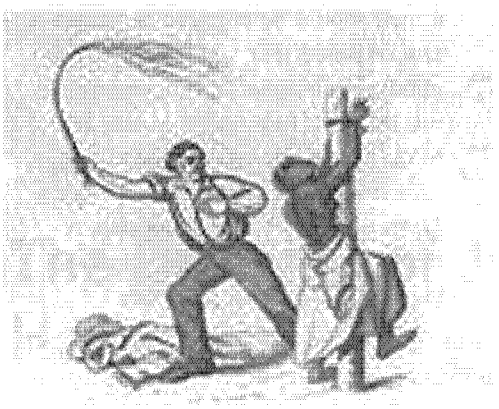
twenty murders, eleven rapes, and 270 cases of maltreatment—and those are just the instances that someone was brave enough to report. Blacks from Frankfort, Harlan's hometown, reported that white gangs rode over the countryside "going from county to county spreading terror wherever they go, whipping, ravishing and killing our people without provocation." They listed sixty-four attacks in their petition to Congress: Here are just a few of them:

> Colored schoolhouse burned in Breckinridge, December 1867
> Samuel Davis hung by mob in Harrodsburg, May 1868.
> William Pierce hung by mob in Christian, July 1868
> George Roger hung by mob in Bradfordville, July 1868
> Colored schools exhibition attacked by mob, July 1868
> Silas Woodford, aged sixty, badly beaten by disguised mob,
> Mary Smith Curtis and Margaret Mosby, also badly beaten in Jessemine County, August 1868.

John Harlan faced a choice. The Harlans had always told themselves that they upheld the rule of law and the white supremacy that law enshrined; they told themselves that their practice of white supremacy under slavery had been benign, even benevolent. But in Kentucky after the war, the rule of law meant a federal Constitution that had been amended under the leadership of the Republican party. The law ordered that slavery be ended, and black men and women were soon to be citizens of the United States. White supremacy no longer meant the rule of law. The Democratic party practiced a white supremacy that was clearly lacking the legendary benevolence of James Harlan.



Although the family has denied it, the Harlans bought and sold slaves for profit or convenience. But John and his father James were benevolent slaveholders who believed they were treating their slaves well. Pictured are typical slave quarters on a Kentucky farm.



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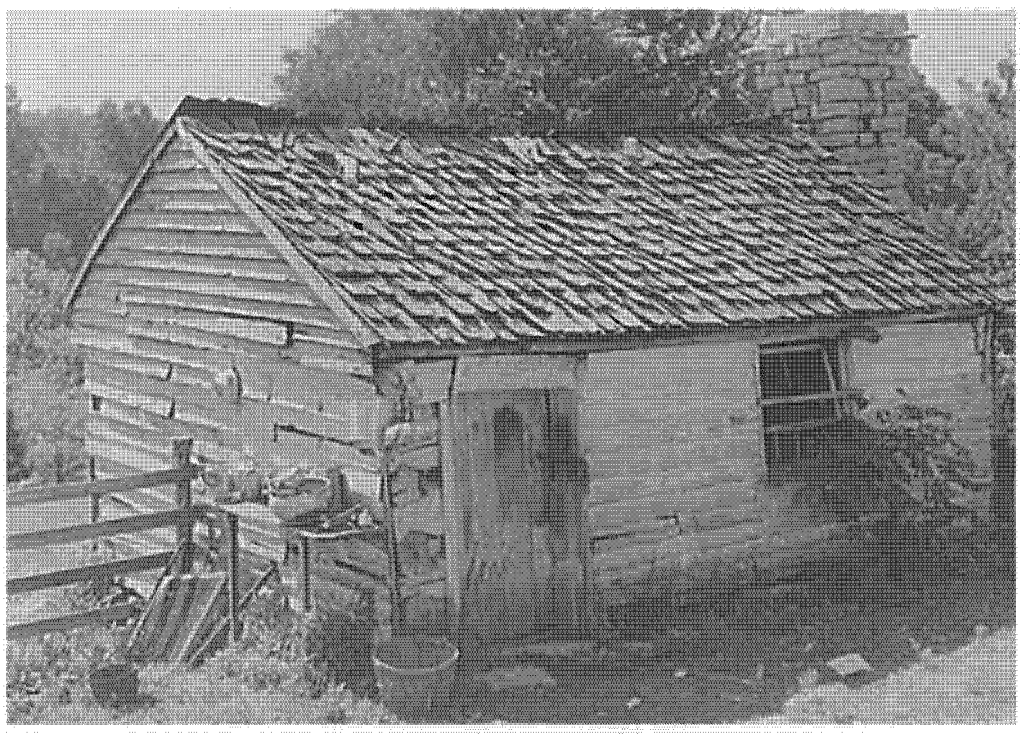
twenty murders, eleven rapes, and 270 cases of maltreatment—and those are just the instances that someone was brave enough to report. Blacks from Frankfort, Harlan's hometown, reported that white gangs rode over the countryside "going from county to county spreading terror wherever they go, whipping, ravishing and killing our people without provocation." They listed sixty-four attacks in their petition to Congress: Here are just a few of them:

> Colored schoolhouse burned in Breckinridge, December 1867
> Samuel Davis hung by mob in Harrodsburg, May 1868.
> William Pierce hung by mob in Christian, July 1868
> George Roger hung by mob in Bradfordville, July 1868
> Colored schools exhibition attacked by mob, July 1868
> Silas Woodford, aged sixty, badly beaten by disguised mob,
> Mary Smith Curtis and Margaret Mosby, also badly beaten in Jessemine County, August 1868.

John Harlan faced a choice. The Harlans had always told themselves that they upheld the rule of law and the white supremacy that law enshrined; they told themselves that their practice of white supremacy under slavery had been benign, even benevolent. But in Kentucky after the war, the rule of law meant a federal Constitution that had been amended under the leadership of the Republican party. The law ordered that slavery be ended, and black men and women were soon to be citizens of the United States. White supremacy no longer meant the rule of law. The Democratic party practiced a white supremacy that was clearly lacking the legendary benevolence of James Harlan.



Although the family has denied it, the Harlans bought and sold slaves for profit or convenience. But John and his father James were benevolent slaveholders who believed they were treating their slaves well. Pictured are typical slave quarters on a Kentucky farm.

White supremacy now stood for the burning of schoolhouses, the murder of men, the beating of women. How could a boy who remembered his father's disgust at the brutality of a white slavedriver become a man who would join a political party that urged the murder of blacks in the dead of night?

By 1868, Harlan made his choice. He became a Republican and rode through the state denouncing white terrorists during his candidacy for governor in 1871 and 1875. "These Ku Klux are enemies of all order," he declared. Anyone who opposed the exercise of black civil rights "is no friend of the law, is an enemy of our free institutions."

Harlan acknowledged how he himself had changed:

> It is true fellow-citizens that almost the entire people of Kentucky, at one period in their history, were opposed to freedom, citizenship and suffrage of the colored race. It is true that I was at one time in my life opposed to conferring these privileges upon the freedman, but I have lived long enough to feel and declare, as I do this night, that the most perfect despotism that ever existed on this earth was the institution of African Slavery. I rejoice that it is gone! I rejoice that the Sun of American Liberty does not this day shine upon a single human slave upon this continent!

In order to make sense of the metamorphosis that the nation and he had undergone, Harlan would come to see the chaos and horror of the Civil War through the lens of a national mission. As he did with his own father, Harlan downplayed the Founding Fathers' responsibility for slavery. He lectured on constitutional law here in Washington. We have a verbatim transcript of these lectures from 1897–98 by two students who took them down in shorthand and then typed them out. These lectures portrayed such men as Jefferson and Washington as reluctant slaveholders. Harlan explained that their unwillingness to actually use the word "slavery" in the Constitution was proof of their directive for the future generations: slavery had to be destroyed.

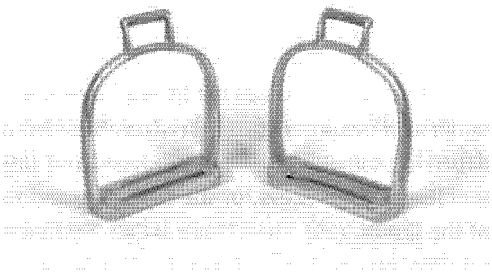
Harlan even explained the *Dred Scott* case of 1857 as part of this plan. Actually, it was a test case brought by antislavery people who wanted the Supreme Court to determine whether or not a slave was made a free man when he entered into a free territory. The result was a decision that shocked many people; it declared, not only that Congress had no power to ban the spread of slavery into the territories, but also that a black man—even if free—had no rights that a white man was bound to respect.

Anti-slavery people found the decision appalling at the time. But, looking back, Harlan made it into a crucial step towards emancipation:

> I think I may say that that case was a work of special Providence to this country, in that it laid the foundation of a civil war, which, terrible as it was, awful as it was in its consequences in the loss of life and money, was in the end a blessing to this country in that it rid us of the institution of African Slavery.

(I should add that Harlan also thought the Supreme Court itself a providential blessing). This is why Justice Harlan, who came to sit on the Supreme Court Bench in 1877, saw the undoing of *Dred Scott*, both by the Civil War and by the constitutional amendments that resulted from it, as so important to understanding the meaning of citizenship for blacks.

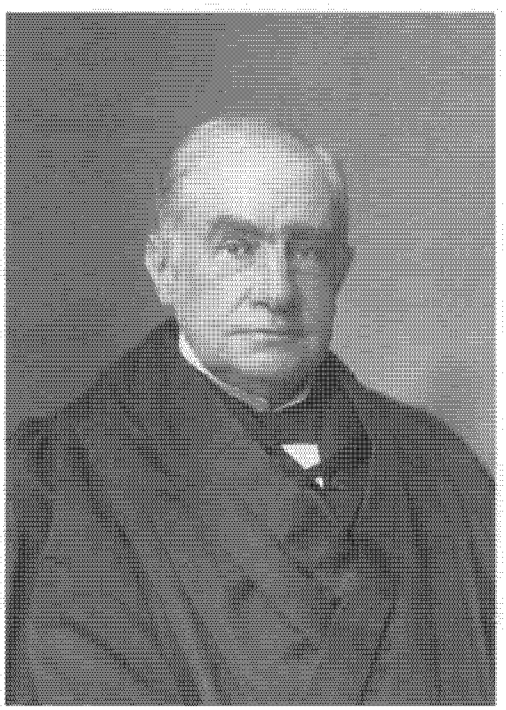
When the *Civil Rights Cases*—the first important decision on the Civil War amendments—came before the Supreme Court in 1883, the Court had to determine whether emancipation and black citizenship meant that the races could be segregated or excluded by the owners of railroads, hotels, theaters, and other public accommodations. The majority of the Court decided that neither the Thirteen Amendment's ban on slavery nor the



These stirrups were used by Harlan (pictured at right in uniform) when he served as a colonel in the Tenth Kentucky Infantry. He raised 800 men to fight for the Union in 1861 but, like most Kentuckians, he was fighting to retain a South *with* slavery.

Fourteenth Amendment's prohibition against state action reached such private actions. Segregation and exclusion did not amount to slavery, they reasoned. And the individuals who owned these businesses could not be reached under an amendment that barred *any state* from depriving citizens of their privileges and immunities, due process, or the equal protection of the law.

No one had raised the *Dred Scott* case in the proceedings. But Harlan used it to prove that prior to the Civil War amendments, blacks—even if free—had been considered part of a slave race without rights that any white man was bound to respect before the Constitution was amended. To give just one example of that idea, one Freedmen's Bureau official reported in 1865 that Southern white men "still have the ingrained feeling that the black people at large belong to the whites at large." Discriminations such as segregation and exclusion were allowed only because blacks held the status of members of a slave race; therefore, such discriminations were prohibited when blacks were raised to the status of citizen with the Fourteenth Amendment.



Justice Brown, the author of the *Plessy* opinion, wrote that the state legislature had the right to discriminate against Homer Plessy in order "to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

As I said, no one had raised the *Dred Scott* case in the proceedings, so where did the idea come from? The inspiration was an inkstand owned by Chief Justice Roger Taney, who had penned the infamous words in the *Dred Scott* case. Justice Harlan had gotten it from the marshal of the Court. He had almost lost it when a descendant of Justice Taney's asked him if she might have it. But Justice Harlan's wife Malvina—who reasoned, faultily, "He values it more than it is possible for any woman to do"—hid it from him and claimed she had no idea where it had gone. That is, until she found her husband wrestling with his dissent in the *Civil Rights Cases*. He was the youngest member of the Court and surprised to find himself standing alone when the whole country was waiting to hear the outcome of the decision. She took the inkstand out of hiding, cleaned it, filled it, and left it on his desk "as a bit of inspiration." Justice Harlan quickly finished the dissent. Malvina considered it "poetic justice."

When the Court held in the *Civil Rights Cases* that private individuals might discriminate against citizens on the basis of their race under the Fourteenth Amendment, it refused to rule on the question of whether the states themselves might be barred from enacting such discrimination. A group of black men in New Orleans decided to find out whether such state action was prohibited. They decided to bring a suit—*Plessy v. Ferguson* in 1896—to challenge a Louisiana law that required "equal but separate accommodations" for the races. Again, Harlan dissented alone.

Justice Henry Brown explained for the Court majority that the law was constitutional because it did not touch civil rights, but only what he termed "social rights"—this, despite the fact that it was state action and presumably therefore "civil" by definition. In justifying his

reasoning, Justice Brown drew upon the very history that Harlan saw as overturned by the Civil War amendments. Brown wrote that "[i]n determining the question of reasonableness," the Louisiana state legislature "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

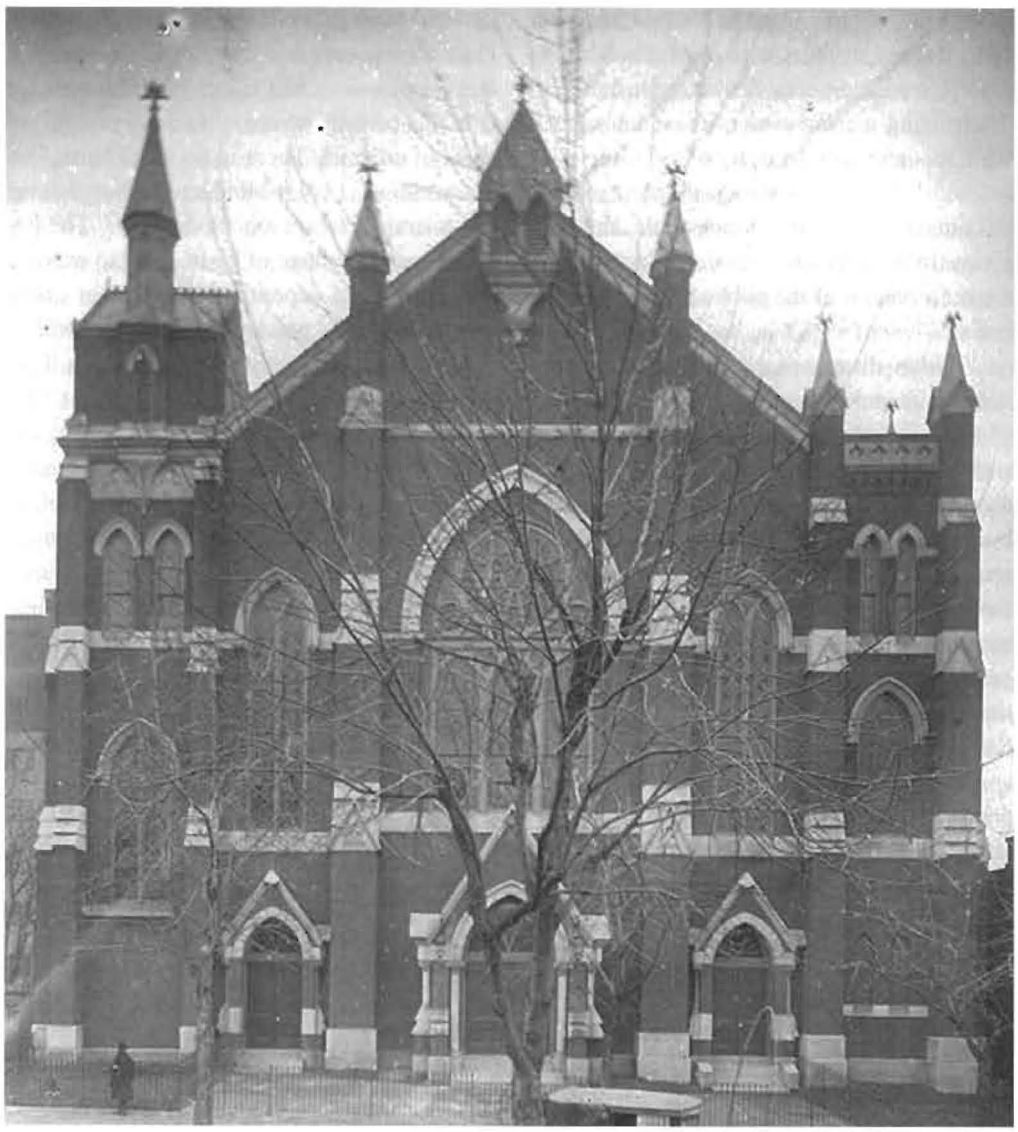
Harlan dismissed all of Brown's precedents as meaningless: Those from before the Civil War were irrelevant, and those after the war "were made at a time when . . . it would not have been safe to do justice to the black man; and when, so far was the rights of blacks were concerned, race prejudice was practically, the supreme law of the land." The Civil War amendments had undone these precedents because they undid the slavery and discrimination that Justice Taney had upheld in *Dred Scott*.

We find Brown's references to "social prejudices" and "racial instincts," to be offensive. Yet as Harlan developed his argument, he himself appealed to white racial pride, but in the pursuit of equality. He appealed to whites, as whites, to uphold the achievements of the Civil War and to fulfill the American mission. This is what he said: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power." You might notice he called the white race dominant, not superior. History might account for this domination, but Harlan held out the possibility of future dominance, so long as whites remained true to their nation's mission of human equality: "So, I doubt not, it will continue to be for all time, *if* it remains true to its great heritage and holds fast to the principles of constitutional liberty" (emphasis added). What made white people great was not how they looked, but how they behaved.

Anglo-Saxons had long told themselves that their race had a special ability to establish free, democratic governments under the rule of law. Harlan appealed to white racial pride as he demanded a legal system that was blind to race. His next sentence was this: "But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens." The peculiar racial heritage of whites was to express whatever racial superiority they might claim by yielding legal power. This was why whites damaged themselves by wronging blacks. This is why Harlan warned his Brethren that "the destinies of the two races, in this country, are indissolubly linked together, and the interests of both require the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." By allowing the states to incorporate racial prejudice in law, the Supreme Court had betrayed the national mission. It was a mission set out by the Founders, one that the Civil War generation had taken one bloody step further. It was a mission that made the United States, in Harlan's words, "a light to guide the oppressed of all lands in their struggle for freedom." These hopes for the American mission explain the anger and sorrow with which Harlan wrote in *Plessy* that

> [w]e boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

There are other decisions by Harlan—ones that are not celebrated—in which he did not invoke the color-blind rule as he logically should have. One involves the public schools, the other interracial intimacy. In 1882, *Pace v. Alabama* let stand a state law that punished mixed-race adultery more severely than



When Harlan died in 1911, the African Methodist Episcopal Church (pictured) held a memorial service in his honor. Harlan had attended Frederick Douglass's funeral there in 1895.

same-race adultery on the grounds that the black man and the white woman punished in the case were punished equally. Harlan was part of a unanimous Court. The public school case was *Cumming v. Richmond County Board of Education*, in 1899. The school board had closed a black high school in order to use the money to keep open the black grammar school. Black parents sued to have the white high school closed. Harlan handed down the Court's opinion refusing to close the white high school or to find any ill intent in what the board had done. The situation here was not as clear as it might appear. The public school system mixed public and private funds at the time, and there was a black private high school available that charged the same fees as the black public high school had.

Historians have pointed to these two decisions in order to prove that Harlan was a

hypocrite or a racist or simply that he made no sense. I would argue that Harlan's jurisprudence did make sense. It grew out of his understanding of his own history and the history of his country. He built upon what he knew. The legend of James Harlan as the righteous slaveholder led his son to join the Republican party and to embrace the Civil War amendments. As a white man, Justice Harlan learned to yield legal power in order to prove the superiority of his own racial legacy. That white identity could be lost by failing to act ethically, but it could also be lost literally, through racial mixing. It is hard for us today to understand what Harlan was doing, because we see racial identity as a barrier on the road to legal equality. But to Harlan, it was a bridge. That does not mean that the source of his racial jurisprudence did not create logical problems for him. Harlan's failure to speak out in those two cases involving so-called social rights indicates that he did see the logical difficulty.

Despite these inconsistencies, however, Harlan stands out in the historical record. In a period often dubbed the nadir of race relations in America, when the number of lynchings increased every year, he was one of the few white people in power to insist that black Americans had an unlimited potential, which they should be free to pursue. He once told his law students this:

> You occasionally meet with a [white man,] as I did about a year ago, who never did an honest day's work in his life, and who never earned the salt that he ate on his food. . . . This man was greatly disturbed at the probability, that [the black] race would come into contact with the Whites in this country. Well the white man who has got self-respect, that has got humanity in his nature, who has respect for a human being, because he is one, wherever he sees him; that sort of man is not much disturbed by the fact, that the black man is bettering himself, here and there, taking an education, laying up a little property, learning a trade, and are advancing. I am ready to say that if there is a black man who can get ahead of me, I will help him along, and rejoice, and his progress in life does not excite my envy. This world is big enough for us all, and this country is big enough for us all. And if a man gets along, whether he be white or black, there is room in this broad free land of ours, for all of us.

Harlan was trying to encourage his students to share this sentiment with him. Better to copy a Supreme Court Justice in his pursuit of justice than to act like some white loser who could not even keep a job.

When Harlan died in Washington, D.C. in 1911 after some thirty-four years of service on the Court, the Metropolitan African Methodist Episcopalian Church over on M Street held a memorial service in his honor. This was the church that Frederick Douglass had attended. Harlan was one of the few whites who had walked into the church as part of Douglass's funeral procession in 1895. The program for the Harlan service in 1911 had the Justice's photograph on the cover and below it the words "A True Friend of the People." The service began with Beethoven's "Upon the Death of a Hero."

Sometimes, looking back, we are quick to judge those in the past for not being as brave as we tell ourselves *we* would have been, when, of course, we have never faced such challenges (most of us, anyway). Whenever I have heard legal scholars complain that Harlan did not live up to his color-blind Constitution, and that his failure to do so meant he was not much worth admiring, I have thought of the congregation of that AME church, and I have thought that they probably knew what they were talking about.

*This lecture draws on Professor Przybyszewski's book **The Republic According to John Marshall Harlan** (University of North Carolina Press, 1999).

The Four Good Dissenters in *Pollock*

CALVIN H. JOHNSON*

The overall theme of this lecture series is great dissenters. This contribution to the series is on the dissenters in the 1895 case of *Pollock v. Farmers' Trust & Loan Co.* In *Pollock*, the Supreme Court decided, by a vote of 5–4, that the 1894 federal income tax was unconstitutional. The four dissenters—Justice Henry Brown of Michigan, Justice John Marshall Harlan of Kentucky, Justice Howell Jackson of Tennessee, and future Chief Justice Edward D. White—would have upheld the tax.

Dissenters appeal to "future historians,"[1] or, as Justice Jackson said, dissenting in *Korematsu*, to the "moral judgments of history."[2] As to *Pollock*, we have become the history that makes the judgments. This small slice of historical judgment concludes that the four dissenters in *Pollock* did just fine. These four are conservative, sound, good Justices, loyal to settled doctrine, good sense, history and the original intent of the Constitution.

Under the Constitution, direct taxes have to be apportioned among the states by population. Originally, the formula was population counting slaves at three-fifths—and, indeed, taxing slaves was the original reason why apportionment came into the Constitution. The dissent and the majority in *Pollock* disagreed on whether the income tax was a direct tax.

The four dissenters in *Pollock* would have followed existing case law. The Supreme Court had twice before held that an income tax was not a direct tax.[3] Under the established doctrine going back to the time of the Founders, apportionability was a necessary element of "direct tax." If apportionment was not reasonable, therefore, the tax was not direct.[4] The rationale for the line of cases with the most "cogency and force," said Joseph Story, was that "no tax could be a direct one, in the sense of the constitution, which was not capable of apportionment according to the rule laid down in the constitution."[5] All four of the dissenters said that the century of precedents settled the issue.[6]

The majority in *Pollock* decided that the income tax was a direct tax that failed for want of apportionment. The majority believed that the function of allocation by population was to prevent an assault on wealth, so they applied the allocation requirement aggressively. In April 1895, the majority decided that a tax on land was a direct tax, and then decided that

an income tax on rents from land was so tantamount to a tax on land that it was also direct.[7] In May, the Court returned to decide, 5–4, to kill the rest of the 1894 income tax.[8]

The Sixteenth Amendment to the Constitution, ratified in 1913, now allows an income tax without apportionment, overriding *Pollock* on the specific tax before it. The Court itself also retreated from *Pollock*. By the time of the Sixteenth Amendment, the Court had held that all the taxes that came before it were not direct taxes—sometimes quite creatively, but always distinguishing *Pollock*[9] and what it later called *Pollock*'s "mistaken theory."[10] Still, *Pollock* is not quite dead. It is still used to support a narrow interpretation of the Sixteenth Amendment.[11] It has been overruled on a separate issue, its holding that Congress may not tax interest paid by state and municipal borrowers,[12] but it has not been expressly overruled on its aggressive application of the apportionment requirement. There are also people who like *Pollock*'s tax-killing result, so you never can tell.

I. The Perversity of Apportionment

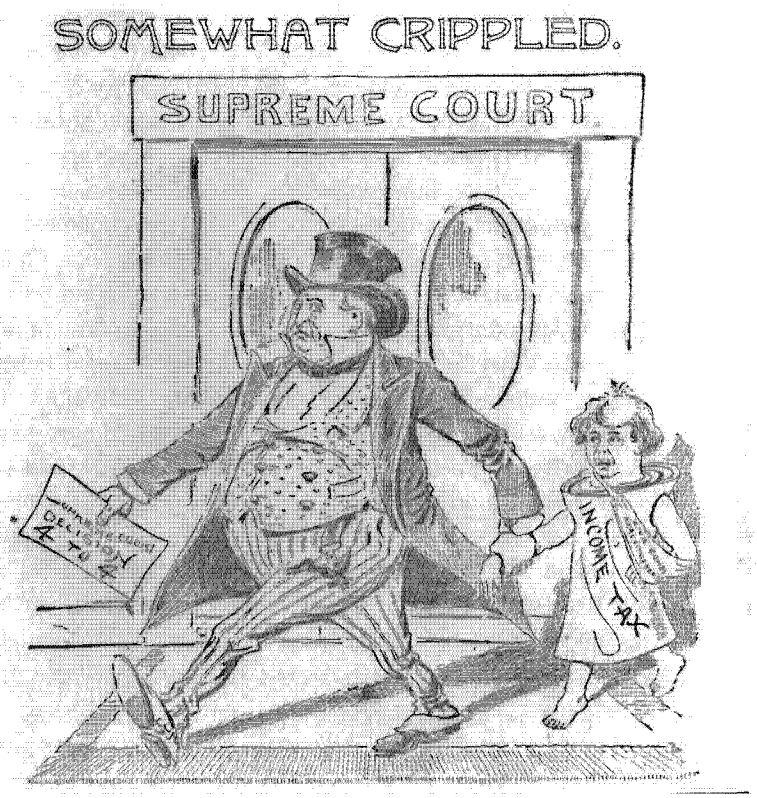
Apportionment of tax cries out for an explanation of what it is doing in a good neighborhood like the Constitution. When the per capita tax base is uneven between any two states, apportionment by population is perverse. Take, for example, a carriage tax, the subject of the Court's 1796 case *Hylton v. United States*,[13] which started the line. Carriages require streets and roads, and the Court hypothesized that New York might have ten times more carriages per capita than Virginia.[14] To meet apportionment under that assumption, tax rates would have to be ten times higher on a carriage in Virginia than on a carriage in New York. There was never any reason why people in Virginia should pay ten times higher tax rates on a carriage. A carriage tax was a common tax,[15] and there is nothing especially suspect about it. The absurdity is forced by the rule of apportionment. Apportionment makes the rates very high in states where the objects of tax are rare. It could be even worse: If Kentucky has no carriages, for example, then the state's entire quota would hover over the border waiting to pounce down upon the first fool with a carriage to drive across the state line.

Apportionment by population especially victimizes poor states. Connecticut, for instance, has roughly twice the per capita wealth, income, or consumption that Mississippi has.[21] An apportioned federal tax on consumption, income, or wealth would mean that Mississippians would have to pay tax at rates roughly twice as high as in Connecticut. The reason why poor Mississippi citizens would pay tax at twice the rates is that Mississippi is a poor state and has less tax base over which to spread its quota, whereas Connecticut is a rich state and can spread its quota with low rates over a large base. When the tax base is uneven between any two states, apportionment is a perverse rule, without positive justification. It can serve only to kill the tax.

In *Hylton*, the Justices were Founding Fathers who still walked on earth. Each of the *Hylton* Justices had contributed to the original debates on apportionment and direct tax: Justice James Wilson,[16] William Patterson,[17] Samuel Chase[18] and James Iredell,[19] with Chief Justice Oliver Ellsworth looking on.[20] In *Hylton,* the Founders, sitting as Justices, decided that the consequence rebutted the premise that the tax on carriages was direct. No tax could be a direct one if it was not capable of being apportioned.

Consistently, the reason why the Supreme Court had held twice previously before *Pollock* that the income tax was not direct is that the rates would be draconian where income was sparse.[22] The four dissenters in *Pollock* all cited the perversity of apportionment, each in his own way.[23]

A killing requirement in the Constitution is quite a historical puzzle. The Constitution overall is a tax document—a pro-tax document—written to give the federal government enough revenue to pay the war debts.



In April 1895, the Supreme Court decided that Congress could not tax income from municipal bonds or rents from real estate, but they were divided 4–4 on the rest of the tax. The *Washington Post* cartoon said the little girl symbolizing the income tax was "somewhat crippled." In May 1895, the Court returned to the issue and decided 5–4 that the rest of the tax could not be separated from the unconstitutional parts and killed the whole tax.

Under the Articles of Confederation that preceded the Constitution, Congress could raise funds only by requisitions upon the states. After the Revolutionary War ended, the states stopped paying their quotas. The desperate immediate need for the Constitution was to give the federal government enough tax to pay enough of the war debts to restore the federal credit. We could stiff the veterans—immoral, but what are they going to do? We could stiff the suppliers—where were they going to go? We could stiff the French—their support had won the war, but they were now bankrupt and could not lend again. But we could not stiff the Dutch on the debts we owed them, because in the next and inevitable war, the federal government would need to borrow from the Dutch again.[24] A serious hobble on federal tax would have been inconsistent with the desperate purpose for which the Constitution was adopted.

The proponents of the Constitution also fought hard for federal power to lay direct taxes. The Anti-Federalist opponents of the Constitution proposed an amendment in the state ratification conventions that would have prevented federal use of direct tax, except where a state failed to pay its quota of a requisition.[25] The fight over the direct tax was the most fiercely contested issue in the ratification. In the darkest days of the ratification period, George Washington wrote to Thomas Jefferson that he thought the direct tax restriction was the amendment that the Anti-Federalists "were demanding most strenuously" and that it was also the only one of their amendments to which he had any serious objection.[26] For their part, Anti-Federalists said that "[t]o render the Congress safe and proper, . . . take from it one power only: that of direct taxation."[27] In the end, the Federalists prevailed and denied the Anti-Federalists restrictions on direct tax.

The surprising thing about the debate over direct tax is that neither side saw apportionment as a restriction, much less a killer requirement. The federal power to lay direct

tax had to be apportioned, but both sides to the fight described the direct tax at issue as "unrestricted." Anti-Federalist leader Patrick Henry told Virginia that "the clause before you gives a power of direct taxation, unbounded and unlimited."[28] New York Anti-Federalist leader John Lansing opposed the clause giving the general government what he called the power "of laying direct taxes without restriction."[29] Apportionment did not come out of Anti-Federalist opposition to direct tax, but was in place in the document when the Anti-Federalists decided to oppose all federally decided direct tax. On the other side of the debate, Alexander Hamilton opposed adding any restrictions on direct tax because emergencies calling for more tax revenue "cannot be fixed or bounded, even in imagination."[30] If the Anti-Federalists had perceived apportionment to be a killing requirement, in place already, then why did they fight so hard to deny direct taxes? If Federalists had perceived direct tax to be dead already by the apportionment, then why would they take the debate as seriously as they did? No one for or against the Constitution understood at the time that apportionment was a killing requirement. Why? That is a deep historical puzzle, akin to asking the question from Sir Arthur Conan Doyle's **The Hound of the Baskervilles**: "Why did the hound not bark?" Solution to the first puzzle leads immediately into the second: What was the rationale beneath apportionment in the original meaning of the Constitution? What was apportionment trying to accomplish?

II. The Original Meaning of Apportionment of Direct Tax

We can get a better understanding of the historical intent of apportionment than was available to the *Pollock* Court, because we can collect a better survey of the original sources. As a part of this overall project, I tried to figure what apportionment was about by going back into the original debates and collecting illuminating references to "direct tax." My collection of samples of "direct tax"—my butterfly collection—now numbers over seventy, many collected by the new and wonderful technology of searches of digitalized archives of the surviving material.[31] Both the majority and the dissents in *Pollock* relied on a comparatively sparse collection of historical materials. My collection of "direct tax" samples supports the argument that the hundred-year chain of precedents before *Pollock* and the four dissenters in *Pollock* itself are true to the original intent of the framers of the Constitution. Reasonable apportionability is a necessary element of the definition of "direct tax" in the original meaning. The reason why apportionment was never considered a hobble was that a tax was a direct tax only when it was part of an apportionment. The butterfly collection also provides evidence that the majority explanation for apportionment has the function of apportionment backward: that is, apportionment by population was not written to protect wealth from tax, but rather to reach the wealth of a state.

A. "Direct Tax" Was Tax within Apportioned Requisition

Apportionment is a product of the requisition system. Under the Articles of Confederation, requisitions were the only way Congress could raise revenue.[32] The requisition system arose when Congress was an illegal assembly, without employees except for its clerks. The Continental Congress raised funds for the Revolutionary War by telling each delegate to return to their states and bring back some soldiers and some money, so as to fight for independence from the most powerful nation on earth.[33] A requisition system requires apportionment under some formula or other to determine a state's quota.

The term "direct tax" was a neologism coined not long before the Constitution. I can find no references to "direct tax" in the American published literature or letters before the end of 1782. In 1781 and again in 1783, Congress proposed that it be allowed its own tax, a five-percent tax on imports, called the impost.[34] "Direct tax" originally meant a tax that was not the impost. Since the only

alternative to the impost at the time was requisitions, "direct tax" was a reference to a federal requisition or to the state taxes that would be used to satisfy a requisition.

The 1781 proposal to give Congress the five-percent impost required approval by all states as an amendment to the Articles of Confederation. Rhode Island vetoed the proposal.[35] The rest of the country was appalled by the veto. Rhode Island was said to have "injured the union more than the whole state was worth."[36] After the veto, Rhode Island was Rogue Island,[37] the "quintessence of *villainy*,"[38] that "perverse sister."[39] According to the scholarly Noah Webster, Rhode Island was that "little detestable corner of the Continent."[40]

The impost was considered to be the best federal tax. It could be collected out of a few federal customs houses located only in the deep-water ports. A federal impost would be hard to smuggle around because on the federal level, there was only one side to guard, the Atlantic.[41] Merchants who paid the impost could pass the tax onto buyers who had the money and were willing to buy imported goods. The impost was the "easiest, most just, and most productive mode of raising . . . revenue;" James Wilson explained, "because it is voluntary. No man is obliged to consume more [imports] than he pleases, and each buys in proportion only to his consumption. The price of the commodity is blended with the tax, and the person is often not sensible of the payment."[42] Since most imports were from Great Britain, moreover, an impost would have the considerable virtue, according to Madison, of injuring Great Britain.[43] The impost would interfere with the internal police of the states the least of all federal taxes.[44]

These were also mercantilist times, and under mercantilist economics, imports were considered the bane of the economy because they drained the country of precious specie. According to Washington, imports represented "luxury, effeminacy, and corruptions."[45] The impost had the virtue of suppressing enervating imports.

The failure of the impost proposal ultimately required the Constitution. Had Rhode Island not vetoed the proposal, we would have limped along in confederation mode, without need for a national government or a new Constitution. As Hamilton put it, "Impost begat Convention."[46]

Without the impost, the federal government would need to restore the federal credit by reliance on requisitions, called direct taxes. If we do not employ the impost, Hamilton told New York in February 1787, "we must find other [resources] in direct taxation."[47] It was clear to all that direct taxes were a terrible alternative. A January 1783 letter, very early in my sample, said with the failure of the impost proposal, the states would need to restore federal credit by "the irksome Task of laying immediate, and direct Taxes upon their Citizens."[48] "Direct tax" would be extremely difficult to raise, said a December 1782 letter, the earliest in the sample, because the "country . . . has hitherto scarcely known a tax beyond what was necessary for the support of its own [very] frugal governments."[49] People did not have money to pay direct taxes, Governeur Morris said, and if you "[s]eize and sell their effects, . . . you push them into Revolts."[50]

Before the Constitution, "direct tax" referred to both the requisitions upon the states and the taxes that the states would lay within the state to pay their quota of a requisition. One Eliphet Dyer wrote two letters to one Jonathan Trumball within a month in 1783, early in the sample, one describing them as "direct taxes on each *state*, justly proportioned"[51] and in the next describing them as "[d]rye, forced and direct taxes . . . on the bodies of people" achieved by "disagreeable force of a tax collector."[52] A 1796 Treasury inventory of "direct taxes" is nothing but a survey of all the various state taxes that would be used to satisfy an apportionment.[53] Direct taxes were the state taxes other than an impost. Iredell told North Carolina that while other states have imports of consequence, "[o]ur state legislature has no way of raising any considerable sums but by laying direct taxes."[54] Once imposts were

not available, John Dawes told Massachusetts, "our only course was, to a direct taxation."[55] The impost was called the indirect tax,[56] and everything else was a direct tax.[57] The impost was the "external" tax. "Internal tax" and "direct taxes" were synonyms.[58]

The definition of "direct taxes" originally included excises and duties, because excises and duties are not imposts. The Constitution explicitly gives Congress the power to lay duties and excises if the rates are uniform.[59] In the text of the Constitution, "duty" is apparently a euphemism for stamp tax. The Founders wanted to give the federal government the power to lay a stamp tax, but the stamp-tax crises had been one of the contributory causes of the Revolutionary War, so the drafters wanted to avoid the term.[60] "Excise" originally meant the "whiskey tax,"[61] but it was expanded in New England to mean Puritan sumptuary taxes to discourage luxuries and frivolities.[62] Excises in New England were imposed not just on distilled liquor, but also on things such as billiard tables, playing cards, and, of course, chocolate.

Early in the debates, it is common to find references to direct tax that explicitly included excises and duties. Anti-Federalist Brutus conceded that the federal government might be given the authority to lay the impost, but he contested federal power over "direct taxes; these include excises, duties on written instruments, on every thing we eat, drink, or wear."[63] "Consider the [injuries] to which this country may be subjected by excise law,—by direct taxation of every kind," commanded Anti-Federalist the Impartial Examiner.[64] Nobody but the Virginia legislature should have the power of *direct* taxation, said Anti-Federalist Cato Uticensis, "if it should ever be found necessary to curse this land with hateful *excisemen*."[65] Excise taxes and duties were internal taxes, and according to the Anti-Federalists, the federal government should have only external taxes.[66] Excises and duties were also direct taxes because they were part of the package of state taxes used to satisfy requisitions. James Madison, the most important cause and shaper of the Constitution, called the whiskey tax a direct tax[67] and assumed that the stamp tax would have to be apportioned.[68]

The first decision in the Income Tax Case was split 4–4 because Justice Howell Jackson (pictured) was on his deathbed at home in Tennessee. Jackson managed a dramatic return to Washington by train to cast his vote because he felt it was essential that the full Court be present to settle the issue conclusively. In his dissent, Jackson called the Court's decision to invalidate the tax "a disastrous blow" to the power of Congress.

Under the Constitution, however, it became impossible to apportion a federal excise or duty. The Constitution requires that direct taxes, imposts, and duties must have uniform rates throughout the country. A tax that is apportioned will have different rates in different states, except under the impossible condition that the item taxed is held in each state precisely in proportion to population, counting slaves at three-fifths. Apportioning the tax destroys uniform rates, and uniform rates prevent apportionment. As the ratification debates went on, it became more common to see excises and duties explicitly excluded from the meaning of direct tax.[69]

The inclusion of excise and duties in "direct tax" and the later exclusion of excises and duties from "direct taxes" show that apportionability was a necessary element of a direct tax under the original meaning. Excises and duties were originally direct taxes because they were part of the taxes a state might use to satisfy an apportioned requisition, but they ceased to be direct taxes when the uniform-rate requirement made apportionment impossible. All this happened without any special notice, but simply because direct tax implicitly meant apportioned tax. Neither the Federalist proponents of the Constitution nor the Anti-Federalist opponents understood apportionment to be a burdensome or killing requirement—the hound did not bark—because the debaters on both sides carried in their known definition of direct taxes the requirement that all direct taxes would be reasonably apportioned. Apportionment was tolerated within a document, the Constitution, written to restore the federal credit because apportionment only applied where it was easy and proper. Under the original understanding, apportionment was never perverse. Under the original meaning, a tax ceased to be a "direct tax" when it ceased to be apportioned.

B. The Original Function of Mandatory Apportionment

The second grand historical puzzle as to direct tax is the question of why apportionment was required. If apportionment was not intended to kill any tax, what constitutional value did it have? The searches in the 1780s archives—our butterfly collection—provide a solution to this puzzle as well. Apportionment originally had a specific purpose in the Constitution: to tax slaves to discourage slavery. But the tax would be rare, the consensus assumed, so that apportionment would yield only a modest penalty on slavery. Once slavery ended, the original function of apportionment of tax ended. The original bargain, however, tolerated never having a direct tax again.

The majority opinion in *Pollock* read the apportionment requirement aggressively because it thought that apportionment was designed "to prevent an attack upon accumulated property from the mere force of numbers."[70] If that were a constitutional value, it presumably should be enforced. The purpose to protect wealth, however, which the majority found, turns the original intent upside down. In all the original debates, population counting slaves at three-fifths was understood to be the best measure of wealth available. Apportionment was written to reach the wealth of a state, not to exempt wealth from tax.

1. Reaching Wealth

The Articles of Confederation set a state's quota under a requisition according to the value of land and improvements within each state.[71] Valuation of real estate proved impossible to administer, however, because Congress had no employees and no ability to ascertain the value of real estate for itself. States thought that other states cheated on the appraisals that were submitted.[72] Valuation of land and improvements, it was said, generated "contentions," "clamors," and "jealousy" among the states.[73]

In 1783, Congress proposed to switch apportionment away from real-estate values and over to population. Population was considered to be an estimate of wealth of the states that could be administered feasibly on the federal level. Population was not an exact measure of wealth, but it was close enough, given the inability to do any better. At the Philadelphia constitutional convention in 1787, James Wilson reported that in Pennsylvania, it did not make much difference as to whether state tax was apportioned between cities and rural counties by population or by valuation.[74] Nathaniel Gorham reported the same for Massachusetts.[75] So long as migration was not restricted, people would move to wealth, it was said, and "the population and fertility in any tract of country will [always] be proportioned to each other."[76]

Population and wealth were considered to be fair measures of each other.[77] The Justices in *Hylton*, who waived apportionment when it was not reasonable, knew that population functioned within apportionment as a measure of wealth because three of the Justices on hand had so argued in the original debates.[78]

2. *Taxing Slaves*

Slaves were counted at three-fifths in the 1783 apportionment proposal because of a hard-fought compromise over how much slaves contributed to the wealth of a state. For tax purposes, the North argued that the slaves worked long hours and through the winter and that woman slaves worked in the fields, meaning slaves contributed to wealth as least as much as free working people in the North and should be counted at 100 percent.[79] The South argued that the wage rate in the South was only half that in the North, implying slaves contributed only at half value.[80] Counting slaves, the South argued, was like counting oxen, double-counting both Southern wealth and the use to which it was put.[81] The difficult compromise reached first in 1783 counted slaves at three-fifths, both sides despairing of doing any better.[82] The 1783 proposal never became law, but the three-fifths formula worked out in 1783 was brought into the Constitution in 1787.

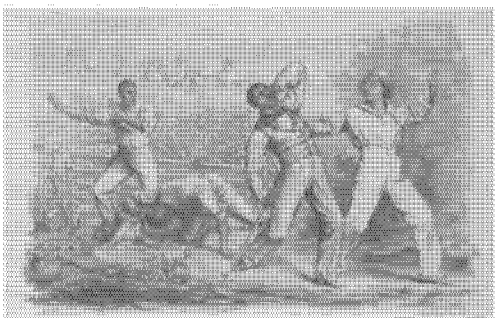
Apportionment was brought into the Constitution only because the 1783 formula taxed slaves. Early in the Philadelphia Convention, the delegates voted by nine states to two to apportion votes in the Congress by population, counting slaves at three-fifths.[83] Indeed, the vote would have been unanimous except that the small states of New Jersey and Delaware were holding out for a rule giving equal votes to each state, without regard to population. While showing the consensus, the vote was not binding, however, because it was in the Committee of the Whole for discussion only.

Even when determining votes in Congress, the 1783 tax formula should probably be considered still a formula for determining wealth. For many, perhaps most of the delegates, wealth should determine votes.[84] Using population to measure wealth avoided the need to determine whether people or property was the source of legitimacy as to votes. As William Samuel Johnson of Connecticut put it, wealth and population were each the "true, equitable rule[s] of representations," but these "two principles resolved themselves into one, population being the best measure of wealth."[85]

The apparent consensus in the Convention over using the three-fifths ratio for congressional votes broke down, however, over a recurrence of the bitter fights on what weight to give to slaves. When the issue was not tax, but rather power in the Congress, the motives of North and South were reversed and the sides used each others' previous analogies.[86] The South firmly maintained that slaves should be counted at 100 percent, just as free workers were counted in the North.[87] The North would not accede to counting slaves at 100 percent in allocating votes in Congress. Governeur Morris of Pennsylvania said that he "could never agree to give such encouragement to the slave trade as would be given by allowing them a representation for their [slaves]."[88] The admission of slaves into the Representation, he said,

> comes to this: that the inhabitant of Georgia and S.C. who goes to the Coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections & dam[n]s them to the most cruel bondages, shall [thereby] have more votes [in Congress] in a Govt. instituted for protection of the rights of mankind.[89]

In the Convention, Morris proposed that not only votes in the Congress but also direct taxes should be apportioned counting slaves at



The purpose of apportionment of direct tax was to penalize slavery; it was adopted by the Founders to erect a bridge so that North and South could reach compromise over votes in Congress.

three-fifths. It was his motion that was passed and became part of the Constitution.[90] With a tax on slaves, the Southern incentive to enslave more Africans would be reduced. Morris's motion changed votes in the North. In comparison with the four-states-to-six defeat on the issue of apportionment of congressional votes (counting slaves at three-fifths) only the day before, with a tax on slaves, Pennsylvania and Maryland changed their votes from "no" to "yes," and Massachusetts changed its vote from "no" to divided. The compromise counting slaves at three-fifths in both votes and apportionment of direct passed six states to two, with two divided.[91] The purpose of apportionment of direct tax was, thus, to penalize slavery. Apportionment was adopted as a slavery issue to erect a bridge so that North and South could reach compromise over votes in Congress.

The penalty imposed on the South from the apportionment of direct taxes was expected to be a light one. The North had already voted overwhelmingly for apportionment of Congress counting slaves at three-fifths early in the convention, so it did not need much of an advantage from apportionment of tax to return to the rule. Direct taxes were also unloved. The author of apportionment of direct tax, Morris, himself said that the people did not have money to pay direct taxes and that if you "[s]eize and sell their effects, . . . you push them into Revolts."[92] Federal power over direct taxes also proved to be the single most popular target for opponents of the proposed Constitution, so the proponents of the Constitution took the position that the new government would rarely use them. The government would need direct taxes in case of war, but in the ordinary cases, imposts would probably be sufficient.[93] Hamilton told Vermont that if it came into the Union, the natural course of things would exempt Vermont in ordinary times from direct taxes "on account of the difficulty of exercising in so extensive a country."[94] Congress would also undoubtedly use requisitions for direct taxes, instead of its own taxes, if the states would just pay their quota.[95] It was not that Congress was required or expected to use direct taxes, but only that if it did apportion a tax, it would have to include slaves in the apportionment formula.

The overall bargain that slaves determined apportionment of both votes and direct tax was a more Southern solution than the country as a whole would have adopted. Three Northern states were absent when the bargain was struck: Rhode Island boycotted the Convention, New York stomped out when it was clear that a real national government would be proposed, and New Hampshire was irregular in attendance and absent on July 12 when the deal was struck. The absence of three Northern states turned what would have been a Northern majority of seven to six (New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania versus Delaware, Maryland, Virginia, North and South Carolina, and Georgia) into a Southern majority of six to four. It would not be unreasonable to start with a pro-Northern viewpoint and consider slaves as indicators of wealth, included in the tax base but not properly included in determining votes. The Southern Congressman whose voting power was increased by slaves did not represent the slaves. On June 11, however, the Convention had voted to include slaves in votes, but not tax, and from that baseline,

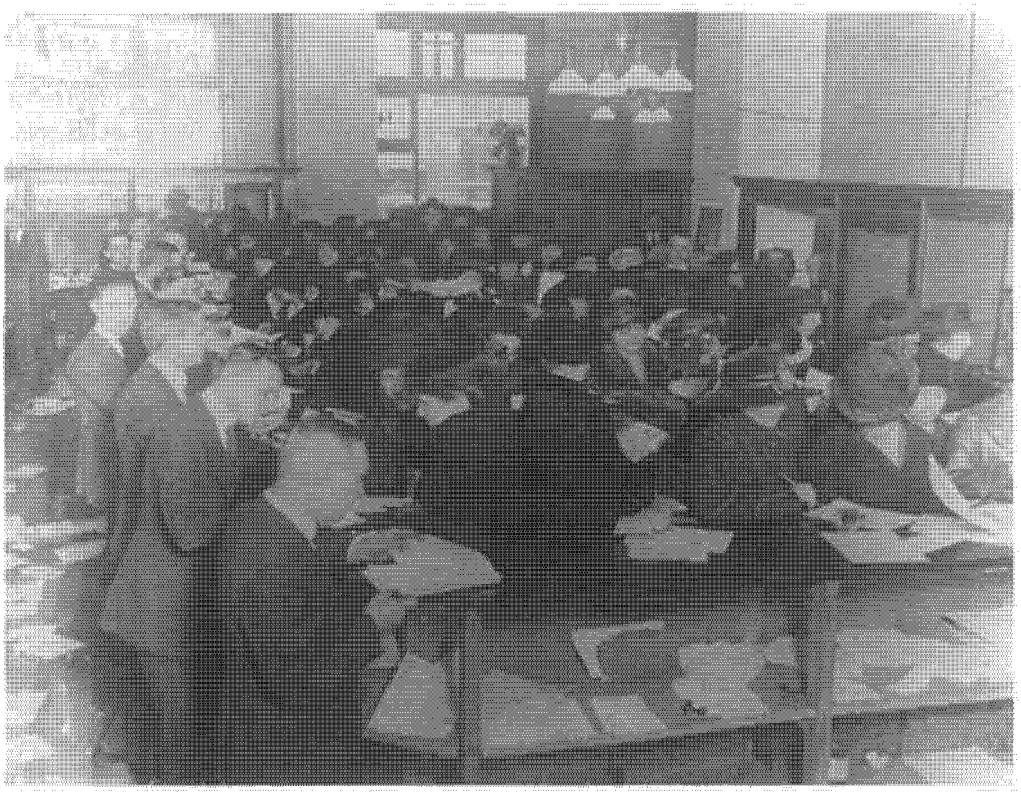
the apportionment rule for direct tax is adverse to the South. In any event, apportionment of tax in its original meaning is a slavery issue.

3. The Pauper and the Rich Man

Apportionment should also be read as trying to reach property, rather than exempting it, because the Founders abhorred a rule that would require the same amount of tax per person. If you do not know the history, then apportionment by population sounds like a principle that each person must pay the same amount of tax. That is an extraordinary rule. Under it, the pauper must pay the same amount of tax as the richest man on earth, and the richest man cannot be asked for a dollar more than the pauper pays. If the little Match Girl is exempt from tax because taking her last dollar would freeze her to death, it follows the richest man on earth must be exempt.

As John Adams put it, it must be made clear that the numbers of people were taken in the apportionment rule "as an index of the wealth of the state and not as subjects of taxation."[96] The Founders found that a tax that was equal on pauper and rich man was "abhorrent to the feelings of human nature,"[97] "a distressful tax, which would never be adopted,"[98] "a tax injurious to the industrious poor" (Hamilton),[99] and an "odious tax" (Madison).[100]

Population within the apportionment formula was intended to reach wealth, rather than to protect wealth from assault. If New York was wealthier than other states, then under the intent of the clause, New York should pay more taxes. If the majority in *Pollock* had understood that the Founders intended to reach wealth by



Once the specter of Populism had passed, the Republican party accepted the income tax as a normal way to raise revenue to pay off war debts and actively supported the Sixteenth Amendment in 1913. Pictured are income-tax filers in the 1920s.

tax, rather than to exempt wealth, then it would not have been the majority.

III. Passing of the Specter

Looking back, Oliver Wendell Holmes, Jr. judged that *Pollock* was an inappropriate overreaction. "Twenty years ago," he said, "a vague terror went over the earth and the word socialism began to be heard. I thought and still think that fear was translated into doctrines that had no proper place in the Constitution."[101] There is something to that. Pollock's attorney Joseph Choate harangued the Court, saying that the tax was "communistic in its purposes and tendencies."[102] Justice Stephen Field announced, apocalyptically, that the income tax was but the first step in an intense and bitter war of the poor against the rich.[103] Justice Brown, a conservative Republican, concluded his dissent by saying that

> [e]ven the specter of socialism is conjured up to frighten [C]ongress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the constitution of the United States and upon a democratic government that [C]ongress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state.[104]

Once the threat of William Jennings Bryan had passed, the Republican party changed its mind about the income tax. The 1894 income tax invalidated by *Pollock* had been a party tax, supported by Democrats but opposed by seventy-four percent of congressional Republicans.[105] The Democratic party was blamed, however, for the economic collapse that started with the Panic of 1893, and after the 1894 election it became a distinctly minority party. Eventually, Bryan and the Populists stopped being perceived as such a threat. Once the specter passed, the Republicans in charge accepted the income tax as a normal way to raise revenue to pay off the war debts. Just eighteen percent of congressional Republicans opposed the Sixteenth Amendment to allow an income tax, and only twenty-one percent of Republicans opposed the income tax in 1913 once the amendment allowed it.[106] Senator Nelson Aldridge, leader of the conservative wing of the party, advocated the Sixteenth Amendment in 1909. He described the income tax of 1894 as a proposition advocated only by "Populists or by others who sympathized with them in a desire to redistribute the wealth of the United States."[107] But in 1909, he could say "Not now, I think."[108] Republican Senator Jacob Gallinger had described the income tax in 1894 as "inequitable, inquisitorial, and sectional,"[109] but in 1913, he could announce that "I never have brought myself to believe that an income tax is an unjust tax, and today I cordially give my assent to the proposition that . . . an income tax is a very proper mode of raising revenue."[110]

The four dissenters to *Pollock* were conservatives, by any fair measure. A biographer of Justice Brown describes him as a conservative, against redistribution, and an adherent of the fundamental laws of supply and demand and social Darwinism.[111] Justice White was a staunch opponent of government interference with business and "noxious" federal tax.[112] Justice Jackson is described as a centrist, not much different from the rest of the Court.[113] And Justice Harlan is described as "firmly conservative" on the "sanctity of property."[114] There were no Socialists, Populists, or Bryanites on the *Pollock* Court, even among the wise dissenters.

ENDNOTES

*I have previously written on *Pollock* in "Fixing the Constitutional Absurdity of the Apportionment of Direct Tax," 21 *Const. Commentary* 2 (2004) and "Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution," 7 *William & Mary Bill of Rights J.* 1 (1998), and this paper draws freely from those articles.

Short-form cites to documentary collections

Short Cite	Full Cite
Annals	**Annals of Congress** (Joseph Gale, ed. 1834–56)
Documentary History	**Documentary History of the Ratification of the Constitution** (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino ed., 1976–), 24 vols.
Elliot's Debates	**Debates in the Conventions of the Several States on the Adoption of the Federal Constitution** (Jonathan Elliot ed., 1907), 5 vols.
Farrand's Records	**Records of the Federal Constitution of 1787** (Max Farrand ed., rev. ed. 1937), 4 vols. Citations are to Madison notes unless otherwise specified.
The Federalist	**The Federalist** (Jacob E. Cooke ed., 1961). Dates cited are to first appearance in New York newspapers.
Hamilton Papers	**The Papers of Alexander Hamilton** (Harold C. Syrett ed., 1961–87), 27 vols.
JCC	**Journals of the Continental Congress, 1774–1789** (Worthington C. Ford et. al. ed., 1904–37), 34 vols.
Letters of the Delegates	**Letters of Delegates to Congress, 1774–1789** (Paul H. Smith et. al. eds., 1976–2000), 25 vols.
Madison Papers	**Papers of James Madison** (William T. Hutchinson & William M.E. Rachal eds., 1962–1991), 17 vols.

[1]*Dennis v. United States*, 384 U.S. 855, 881 (1966) (Black, J. concurring and dissenting in part) (appealing to "future historians"). *See also Shepard v. United States*, 544 U.S. 13, 26 n5 (2005) (Souter, J.) ("It is up to the future to show whether the dissent is good prophesy.").

[2]*Korematsu v. United States*, 323 U.S. 214, 248 (Jackson, J.) (saying that "[t]he chief restraint upon those who command the physical forces of the country . . . must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history").

[3]*Pacific Ins. Co. v. Soule*, 74 U.S. 433, 446 (1868); *Springer v. United States*, 102 U.S. 586, 600 (1881). *See also Scholey v. Rew*, 90 U.S. 331, 343 (1875) (saying, in upholding an inheritance tax, that no Congress would dare apportion an income tax).

[4]*Hylton v. United States*, 3 U.S. 171, 174 (1796) (Chase, J.) (saying apportionment required only when reasonable); *id.* at 181 (Iredell, J.) (saying Constitution contemplated no tax as direct except those that could be apportioned); *id.* at 179 (Patterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious"); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 546 (1870); *Scholey*, 90 U.S. at 343.

[5]Joseph Story, **1 Commentaries on the Constitution of the United States § 956** (Thomas Cooley ed., 4th ed. 1873), cited by Mr. Justice Harlan, dissenting 158 U.S. at 661.

[6]Justice White, 158 U.S. at 706 (saying the majority overturns "settled construction of the Constitution, as applied in 100 years of practice"); Justice Harlan, *id.* at 662–63 (saying the Court has given too little respect to *stare decisis* and the practices of a century); Justice Brown, *id.* at 690 ("These cases, consistent and undeviating as they are, and extending over nearly a century of our national life, seem to me to establish a canon of interpretation which it is now too late to overthrow, or even to question."); Justice Jackson, *id.* at 689 (saying the precedents "in my judgment, settle and conclude the question now before the court, contrary to the present decision").

[7]157 U.S. 429 (1895).

[8]158 U.S. 601 (1895).

[9]"Excise" taxes are not direct taxes (*see* discussion in text accompanying *infra* note 69). "Excise" originally meant whiskey tax and similar taxes to encourage morality and suppress vice (*see* discussion in text accompanying *infra* notes 61–62), but the term was expanded after *Pollock*

to allow tax on commodity trades (*Nicol v. Ames*, 173 U.S. 509, 519 (1899)), progressive estate tax (*Knowlton v. Moore*, 178 U.S. 41, 79 (1900)), tax on corporate gross receipts (*Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397, 413 (1904)), and tax on corporate income (*Flint v. Stone Tracy Co.*, 220 U.S. 107, 150 (1911)).

[10]*Stanton v. Baltic Mining Co.*, 240 U.S. 103, 113 (1916).

[11]*See, e.g.*, Erik M. Jensen, "The Taxing Power, the Sixteenth Amendment, and the Meaning of 'Incomes,'" 33 *Ariz. St. L. J.* 1057 (2001), reprinted as shortened, 97 *Tax Notes* 99 (2002) (arguing that apportionment should not be avoided by judicial construction of word "income"); Leon Gabinet & Ronald J. Coffey, "The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems," 27 *Case W. Res. L. Rev.* 895, 926 (1977) (arguing that apportionment prevents shareholder tax on undistributed corporate earnings); John S. Nolan, "The Merit In Conformity of Tax to Financial Accounting," 50 *Taxes* 761, 767–69 (1972) (arguing that prepaid receipts are not taxable under the Constitution); Henry Ordower, "Revisiting Realization: Accretion Taxation, the Constitution, *Macomber*, and Mark to Market," 13 *Va. Tax Rev.* 1 (1993) (arguing that economic improvements achieved while avoiding incoming cash cannot be taxed constitutionally as income).

[12]*South Carolina v. Baker*, 485 U.S. 505 (1988).

[13]3 U.S. 171 (1796).

[14]3 U.S. at 174.

[15]4 **The Law Practice of Alexander Hamilton** 300–302 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980) provides a catalogue of state taxes on carriages.

[16]*See, e.g.*, James Wilson, Speech to the Federal Convention, July 11, 1787, 2 **Farrand's Records** 587–88 (arguing that population was fair measure of wealth, day before apportionment of direct tax was adopted by the Convention).

[17]*See, e.g.*, William Patterson, Speech to the Federal Convention, July 9, 1787, 1 **Farrand's Records 561** (objecting to giving federal power over direct tax and objecting to including slaves in determining congressional votes).

[18]*See, e.g.*, Samuel Chase, Speech to the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 438 (arguing that the number of inhabitants within the state is a "tolerably good criterion of property" for apportionment of tax given the difficulties of valuation).

[19]*See, e.g.*, James Iredell, Debate in the North Carolina Ratification, July 28, 1788, 4 **Elliot's Debates** 146 (arguing in favor of giving federal power over direct taxes).

[20]Ellsworth had been appointed Chief Judge and presumably supped with the other Justices, but he did not hear the oral arguments and declined to participate. In the Convention, on the day that apportionment of direct tax was voted into the Constitution, Ellsworth had made the motion that population be used as the basis of apportionment, "until some other rule that shall more accurately ascertain the wealth of the several states can be devised." Oliver Ellsworth, Speech to the Federal Convention, July 12, 1787, 1 **Farrand's Records** 594. Ellsworth had voted for the carriage tax as Senator from Connecticut. 2 *Annals* 120 (June 4, 1794); *id.* at 849 (March 2, 1795).

[21]In 2001, Connecticut had per capita personal income of almost $42,000 and Mississippi had per capita personal income of almost $22,000. 2002 *U.S. Census Dept. Statistical Abstract of the United States*, at 426.

[22]*See supra* note 3.

[23]Justice Harlan, 158 U.S. at 674; Justice Brown, *id.* at 688–89 (apportionment result "so monstrous that the entire public would cry out against it"); Justice Jackson, *id.* at 700 (tax on commodities not common in all states would be "utterly frivolous and absurd"); Justice White, 158 U.S. at 713.

[24]Calvin Johnson, **Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution** 15–39 (2005).

[25]*See id.* at 154–60.

[26]Letter from George Washington to Thomas Jefferson, August 31, 1788, 30 **Writings of George Washington** 82–83 (John C. Fitzpatrick's 1931–44).

[27]James Monroe, Debates in the Virginia Ratification Convention, June 10, 1788, 9 **Documentary History** 1109.

[28]Patrick Henry, Debate in the Virginia Ratification Convention, June 5, 1787, 3 **Elliot's Debates** 51.

[29]John Lansing, Debates in the New York Ratification Convention, June 28, 1788, 2 **Elliot's Debates** 371.

[30]Alexander Hamilton, Speech to the New York Ratification Convention, June 27, 1788, 2 **Elliot's Debates** 351.

[31]Calvin H. Johnson, "Really Cool Stuff: Digital Searches into the Constitutional Period," *Const. Commentary* (forthcoming 2007), provides a survey of the available online archives and a paean to what can be accomplished exploiting them.

[32]Articles of Confederation, art. VIII, 19 **JCC** 217 (March 1, 1781).

[33]*See, e.g.*, Benjamin Franklin, Draft of Articles of Confederation, Art. VI, July 21, 1775, 2 **JCC** 196 (saying that all charges of war and general expenses shall be "defrayed out of a common Treasury supplied by each Colony" by taxes laid under the Laws of each Colony); John Dickenson, Draft of Articles of Confederation, article 12, June 17, 1776, 4 **Letters of the Delegates** 250 (similar provision).

[34]Resolution, Feb. 3, 1781, 19 **JCC** 112; Resolution, April 18, 1783, 24 **JCC** 258.

[35]Johnson, **Righteous Anger**, *supra* note 24, at 27.

[36]Irvin H. Polishook, **Rhode Island and the Union, 1774–1795**, at 96 (1969) (quoting "A Fable," *Exchange Adviser* (Boston), Feb. 11, 1786).

[37]J.K. Alexander, **The Selling of the Constitutional Convention** 23 (1990) (quoting *Salem, Massachusetts Mercury* (1787)).

[38]*Id.*

[39]Letter of James Madison to Edmund Randolph, Nov. 19, 1782, 5 **Madison Papers** 289.

[40]Noah Webster, "America," *New York Daily Advertiser*, Dec. 31, 1787, *reprinted in* 15 **Documentary History** 201.

[41]**The Federalist** No. 12, at 77, Nov. 27, 1787 (Alexander Hamilton).

[42]James Wilson, Debates in the Pennsylvania Ratification Convention, December 4, 1787, 2 **Elliot's Debates** 467.

[43]Letter of James Madison to Thomas Jefferson, New York. Dec. 9th. 1787, 24 **Letters of the Delegates** 576.

[44]Oliver Ellsworth, Debate in the Connecticut Ratification Convention, Jan. 7, 1788, 2 **Elliot's Debates** 193.

[45]*See* letter from George Washington to James Warren, Oct. 7, 1785, 3 **Papers of George Washington: Confederation Series** 299–300 (W. Abbot ed., 1994).

[46]Alexander Hamilton, Notes for Second Speech of July 17, 1788 to New York Ratification Convention, 5 **Hamilton Papers** 173.

[47]Alexander Hamilton, Speech to New York Assembly, Feb 15, 1787, 4 **Hamilton Papers** 89.

[48]Letter of Samuel Wharton to John Cook, Jan. 6, 1783, 19 **Letters of the Delegates** 551.

[49]Letter of Robert Livingston to Frances Dana, Philadelphia, December 17, 1782, 6 **The Revolutionary Diplomatic Correspondence of the United States** 147 (Francis Wharton ed. 1888).

[50]Governeur Morris, Speech to the Federal Convention, Aug. 16, 1787, 2 **Farrand's Records** 307.

[51]Letter of Eliphalet Dyer to Jonathan Trumbull, Sr., March 18, 1783, 20 **Letters of the Delegates** 45 (emphasis added).

[52]Letter of Eliphalet Dyer to Jonathan Trumbull, Sr., April 3, 1783, 20 **Letters of the Delegates** 139.

[53]Oliver Wolcott, Jr., Direct Taxes, H.R. DOC. NO. 100–4 (1796), 1 **American State Papers: Class III Finance** 419 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

[54]James Iredell, Debate in the North Carolina Ratification Convention, July 28, 1788, 4 **Elliot's Debates** 146.

[55]John Dawes, Debate in the Massachusetts Ratification Convention, January 18, 1788, 2 **Elliot's Debates** 41.

[56]Arthur St. Clair, Description of John Jay Report, Aug. 1786, 23 **Letters of the Delegates** 482 (saying that Spanish impost is an "indirect tax by which the Spanish Monarch draws Money from the pockets of his Subjects"); "Connecticutensis, To the People of Connecticut," *Am. Mercury*, Dec. 31, 1787, *reprinted in* 3 **Documentary History** 512 ("*indirect* tax[es, meaning] duties laid upon those foreign articles which are imported and sold among us").

[57]James Madison, Debates in the Virginia Ratification Convention, June 11, 1788, 9 **Documentary History** 1146 (saying that the Southern states will bear more of the impost because they import more, but the inequality will be lessened if Congress could also impose "direct taxes"); James Wilson, Speech in the State House Yard, Philadelphia, Oct. 6, 1787, 13 **Documentary History** 342–43 (stating that although imposts would probably be sufficient, Congress needs the power of direct taxes within reach in cases of emergency, and that there is no greater reason to fear a direct tax than an impost); Alexander Hamilton, Speech to the New York Ratification Convention, June 27, 1788, 2 **Elliot's Debates** 351 ("Possibly, in the advancement of commerce, the imposts may increase to such a degree as to render direct taxes unnecessary.").

[58]Federal Farmer, Letter III, Oct. 10, 1787, 14 **Documentary History** 35–36 (asking whether it was wise to vest internal taxes, such as poll, land, excises, and duties in the federal government, and saying that external tax, that is, the impost duty on imported goods, was different); "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents," Dec. 18, 1787, 15 **Documentary History** 30–31 (saying that "the power of *direct taxation* will further apply to every individual as congress may tax land, cattle, trades, occupations, & to any amount, and every object of *internal taxation*"); An Old Whig, Letter VI, *Philadelphia Indep. Gazetteer*, Nov. 24, 1787, *reprinted in* 14 **Documentary History** 218 (arguing that the true line between the powers of Congress and the several states is between internal and external taxes); Letter from Thomas Jefferson to William Carmichael, Dec. 25, 1788, 14 **Papers of Thomas Jefferson** 385 ("Many of the opposition wish to take from Congress the power of internal taxation.").

[59]U.S. Const. Art. I, § 8, cl. 1.

[60]Luther Martin, "Genuine Information VI," *Balt. Md. Gazette*, Jan. 15, 1788, *reprinted in* 15 **Documentary History** 374, 376.

[61]Letter from Thomas Jefferson to Sarsfield, Apr. 3, 1789, 15 **Papers of Thomas Jefferson** 25 (Julian Boyd ed., 1958) (saying that excise in New England meant only the whiskey tax); Letter from Alexander Hamilton to George Washington, Aug. 18, 1792, 12 **Hamilton Papers** 235 (espousing an excise because "[t]here is perhaps, . . . no article of more general and equal consumption than [whiskey].")

[62] **The Law Practice of Alexander Hamilton** at 302 (describing New England excises "for the Suppression of Immorality, Luxury and Extravagance").

[63]"Brutus V to the People of the State of New York," Nov. 27, 1787, *N.Y.J.* (Dec. 13, 1787), *reprinted in* 14 **Documentary History** 427.

[64]"The Impartial Examiner I," *Virginia Independent Chronicle*, March 5, 1788, *reprinted in* 8 **Documentary History** 462.

[65]*See* "Cato Uticensis," *Virginia Independent Chronicle*, Oct. 17, 1787, *reprinted in* 8 **Documentary History** 75.

[66]Federal Farmer, Letter III, Oct. 10, 1787, 14 **Documentary History** 35–36.

[67]James Madison, Speech to the House of Representatives, Dec. 27, 1790, 14 **Documentary History of the First**

Federal Congress 189, 190 (William C. diGiacomantonio et al. eds., 1995).

[68]Letter from James Madison to Alexander Hamilton (Nov. 19, 1789), 12 **Madison Papers** 450.

[69]*See, e.g.*, Benjamin Gale, Speech Before Killingworth Town Meeting in Connecticut (Nov. 12, 1787), 3 **Documentary History** 424 (arguing that they will not only tax "by duties, impost, and excise but to levy direct taxes upon you"); Robert Dawes, Speech to the Massachusetts Ratification Convention (Jan. 18, 1788), 2 **Elliot's Debates** 42 (arguing that it is easier for Congress to resort to impost or excises than to tax wholly by direct taxes); Francis Dana, Speech to the Massachusetts Ratification Convention (Jan. 18, 1788), 2 **Elliot's Debates** 42 (arguing that Congress would not levy direct taxes unless imposts and excises were insufficient); Resolution adopted in Massachusetts Ratification Convention, Feb. 7, 1788, 1 **Elliot's Debates 322–323** (recommending amendment "[t]hat Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies"); Resolution adopted in South Carolina Ratification Convention, May 23, 1788, 1 **Elliot's Debates** 325 (same); Samuel Spencer, Debate in the North Carolina Ratification Convention, July 26, 1788, 4 **Elliot's Debates** 75–76 (arguing that Congress might be allowed to lay imposts and excises, but not direct taxes).

[70]157 U.S. at 583.

[71]Articles of Confederation, art. VIII, 19 **JCC** 217 (March 1, 1781).

[72]Report of the North Carolina Congressional Delegates to Governor Alexander Martin, Mar. 24, 1783, 20 **Letters of the Delegates** 90 (North Carolina delegates complaining about Pennsylvania underappraisals).

[73]*See* James Madison, Debates in the Continental Congress, Mar. 27, 1783, 25 **JCC** 948 ("contentions"); Nathaniel Gorham, Debates in the Continental Congress, Mar. 27, 1783, 25 **JCC** 948 ("clamors" in Massachusetts, especially since the war ended); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (Patterson, J., concurring) (stating that unequal contributions both engendered discontent and fomented "jealousy").

[74]James Wilson, Speech to the Federal Convention, July 11, 1787, 1 **Farrand's Records** 587–88.

[75]*Id.* at 587.

[76]"The Landholder, Letter XI," *Conn. Courant*, Mar. 10, 1788, *reprinted in* 16 **Documentary History** 368.

[77]James Madison, Speech to the Federal Convention, July 11, 1787, 2 **Farrand's Records** 585.

[78]*See supra* notes 16, 18, and 20 (Wilson, Chase, and Ellsworth arguing that population was acceptable measure of wealth, given difficulties of alternatives).

[79]*See, e.g.*, John Adams (Mass.), Debate in the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 439–40; James Wilson (Pa.), July 12, 1776, 4 **Letters of the Delegates** 440.

[80]Benjamin Harrison (Va.), Debate in the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 440; Edward Clarke (N.J.), Debate in the Continental Congress, March 27, 1783, 25 **JCC** 948 (1783); Report of the North Carolina Congressional Delegates to Governor Alexander Martin, March 24, 1783, 20 **Letters of the Delegates** 90–91.

[81]Samuel Chase (Md.), Debate in the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 439.

[82]25 **JCC** 952 (April 1, 1783).

[83]Madison's Notes on Debates in the Federal Convention, June 11, 1787, 1 **Farrand's Records** 201.

[84]*See, e.g.*, Rufus King, Speech in the Federal Convention, July 6, 1787, 1 **Farrand's Records** 541, 562 (arguing that representation should follow property because property was the primary object of society); Pierce Butler, Speech in the Federal Convention, July 6, 1787, 1 **Farrand's Records** 542 (arguing that property was the only just measure of representation because it was the "great object of Govern[men]t").

[85]William Samuel Johnson, Speech to the Federal Convention, July 12, 1787, 1 **Farrand's Records** 593.

[86]*See, e.g.*, Eldrige Gerry, Debate in the Federal Convention, June 11, 1787, 1 **Farrand's Records** 201 (asking "[w]hy then shd. the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North").

[87]*See* James Madison's Notes on Debates in the Federal Convention, July 11, 1787, 1 **Farrand's Records** 586–88.

[88]Governeur Morris, Speech to the Federal Convention, July 11, 1787, 1 **Farrand's Records** 588.

[89]Governeur Morris, Speech to the Federal Convention, Aug. 8, 1787, 2 **Farrand's Records** 222. Morris's complaint came in the debate over banning the slave trade, after the taxation of slaves in apportionment of direct tax had been settled, indicating that his irritation at including slaves in representation had not been fully assuaged by his tax proposal. *See also* Rufus King, *id.* at 220 (strenuously objecting to including slavery in representation if importation of slaves were not limited).

[90]*See* Governeur Morris, July 12, 1787, 1 **Farrand's Records** 592–93.

[91]*Compare* 1 **Farrand's Records** 588 and 597. The two "no" votes, New Jersey and Delaware, were plausibly holding out for equal votes per state, which became the rule for Senate, but only later with a July 16, 1787 vote. 2 **Farrand's Records** 15.

[92]Governeur Morris, Speech to the Federal Convention, Aug. 16, 1787, 2 **Farrand's Records** 307.

[93]James Wilson, Speech in the State House Yard, Philadelphia, Oct. 6, 1787, 13 **Documentary History** 342–43.

[94]Letter of Alexander Hamilton to Nathaniel Chipman, September 1788, 25 **Letters of the Delegates** 397.

[95]Letter from Roger Sherman and Oliver Ellsworth to Samuel Huntington, Governor of Connecticut, Sept.

26, 1787, 13 **Documentary History** 471 (saying that Congress's authority over direct tax need not be exercised if each state would furnish its quota); **The Federalist** No. 45 at 312–3 (James Madison) (Jan. 26, 1788) (Congress would probably allow states to supply their quotas by their own collections).

[96]John Adams (Mass.), Debate in the Continental Congress, July 12, 1776, 4 **Letters of the Delegates** 439.

[97]Francis Dana, Debates in Massachusetts Ratifying Convention, Jan. 18, 1788, 2 **Elliot's Debates** 43.

[98]Nathaniel Gorham, Debate in the Massachusetts Ratification Convention, Jan. 25, 1788, 2 **Elliot's Debates** 106.

[99]Alexander Hamilton, Report on the Subject of Manufactures, Dec. 5, 1791, 10 **Hamilton Papers** 312.

[100]Letter from James Madison to Jos. C. Cabell, Sept. 18, 1828, 4 **Elliot's Debates** 605.

[101]Oliver Wendell Holmes, Jr., "Law and the Courts," Speech at the Harvard Law School Association of New York, Feb. 19, 1913, *reprinted in* **The Mind and Faith of Justice Holmes** 390 (Max Lerner, ed. 1943).

[102]157 U.S. at 532.

[103]157 U.S. at 607.

[104]158 U.S. 601, 695 (1895) (Brown, J., dissenting).

[105]Charles V. Stewart, "The Federal Income Tax and the Realignment of the 1890s," **Realignment in American Politics: Toward a Theory** 266 (Bruce A. Campbell and Richard J. Trilling eds., 1980).

[106]*Id.*

[107]44 *Cong. Rec.* 1536 (1909).

[108]*Id.*

[109]26 *Cong. Rec.* 3893 (1894).

[110]50 *Cong. Rec.* 3813 (1913).

[111]Jack Goldfarb, "Henry Billing Brown," 2 **The Justices of the United States Supreme Court** 767 (Leon Friedman & Fred L. Israel, eds., 1997).

[112]James F. Watts, Jr., "Edwin Douglass White," 3 **The Justices of the United States Supreme Court** 813.

[113]Robert Stanley, "Howell Edmunds Jackson," **The Supreme Court Justices: A Biographical Dictionary** 255 (Melvin I. Urofsky, ed. 1994).

[114]Louis Filler, "John M. Harlan," 2 **The Justices of the United States Supreme Court** 630.

Chief Justice Taft and Dissents: Down with the Brandeis Briefs!

JONATHAN LURIE

Introduction

In 2007, we celebrate the 150th anniversary of William Taft's birth, and thus it is especially appropriate to reconsider some aspects of his career and contributions to this Court, which he revered over all others. Although they may not be aware of it, any visitor to the Supreme Court and to the "Great Hall," replete with its majesty and grandeur, immediately comes into contact with an example of these contributions: the building itself. Chief Justice Taft planned for it, pushed for it, persuaded the congressional leadership of its necessity, and personally selected its architect, Cass Gilbert. As his health failed in the late 1920s, he wrote to his daughter Helen on July 27, 1927, that "[w]hat I am praying for is that I can live and be on the Court until we move in. But that is a good deal to hope for."[1] Indeed it was: Taft did not live even to see ground broken for the building's construction. Yet, in a very real sense, the Court's majestic home is his most enduring monument.

This paper does not propose to dwell extensively on Taft's life and career, although that remains remarkable in scope: trial judge, solicitor general, circuit judge, Governor General of the Philippines, Secretary of War, President, professor of law (Taft declined the presidency of his alma mater, Yale University, because he felt that it was not yet ready to welcome a Unitarian who declined to accept the divinity of Christ), and Chief Justice.[2] Nor will it detail his fascinating actuarial agonies as President, when he considered whom to appoint as Chief Justice in 1910. For the first time in our history, a President reached within the Court to appoint a sitting Justice as Chief.[3] Taft selected a Democrat and former Confederate soldier, Edward D. White. One high court Justice, Charles Evans Hughes, was just too young and too healthy! On the other hand, White—like Hughes, a current member of the Court—was seventeen years older than Hughes and a dozen years older than Taft himself. Given the

vicissitudes of time, Taft hoped against hope that he might yet become Chief Justice. With a Republican sweep in 1920, what had seemed impossible became quite probable. And when President Harding appointed him in 1921, Taft might have recalled what he had said earlier about the judiciary: "I love judges and I love courts. They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."[4] Indeed, as Chief Justice, noted one observer, he seemed to be "one of the high gods of the world, a smiling Buddha, placid, wise, gentle, sweet."[5]

Nor will this essay spend much time on the well-known fact that Taft was exceedingly ample in girth as well as intellect. Thus, there will be minimal recounting of the many comments about his size. One may note, however, perhaps the most famous line in Secretary of State Elihu Root's response to Taft's report from the Philippines that his health was much improved and he had been able to ride on horseback for some twenty miles. In reply, Root telegraphed, "How is the horse?"[6] Taft's response is less well known and reflects the self-deprecating nature of the man: "Your cable inquiry about the condition of the horse . . . was too good to keep, so I published the dispatch and have been made the subject of joke in the local newspapers ever since."[7] Many contemporaries commented on the kindly and genial nature that Taft radiated. He was, quoted one of his closest confidants, Gus Karger, "America's best liked and best licked president."[8] Even Justice David Brewer could not resist observing that he had been informed that "Taft is the politest man alive. I heard that recently he rose in a street car and gave his seat to three ladies."[9] He looked, wrote another observer, "like an American bison, [albeit] a gentle kind one."[10]

I

But beneath this exterior amiability, Taft revealed perceptive insights on men and events of his time—at least to those correspondents whom he trusted. A few samples may serve to round out this very brief introduction, and they still resonate with scholars of today. See, for example, his angry comments on Henry Cabot Lodge and Woodrow Wilson as the Senate debated and doomed American participation in the League of Nations during 1918 and 1919. Taft faulted both men, who continued "to exalt their personal prestige and the saving of their ugly faces above the welfare of the country and the world."[11] On November 3, 1919, he wrote to Karger that "[t]he whole world has suffered through the bitter personal antagonism, vanity and smallness of two men, Henry Cabot Lodge and Woodrow Wilson."[12] "As between Lodge and Wilson there is very little difference, in my estimation."[13] "Wilson . . . has just as much of vanity and egotism and a disregard of the country's welfare and that of the world as has Lodge."[14]

Or consider his candor in 1920: "I am suffering a good deal in my pride of country and hope for better things when I consider the mediocre men we have to vote for this year. I much prefer Harding to Cox [the Democratic presidential nominee]. But [Harding] falls so far below the standard for Presidents we like to form in our mind that it distresses me."[15] Or his comments on his fellow Justice James C. McReynolds, probably the most obnoxious member of the Court in its entire history: "The man on the Court who is least like a colleague is McReynolds. He is . . . selfish to the last degree, an able man, but fuller of prejudice than any man I have known, and one who seems to delight in making others uncomfortable. He has no high sense of duty. He has a continual grouch, and . . . really seems to have less of a loyal spirit to the Court than anybody."[16]

Consider also Taft's telling assessment of former Cabinet member Root: "[H]e has not the qualities of leadership that Roosevelt had—that is, he has not the courage and the instantaneous grasp of situation for leadership that Roosevelt had, but his judgment of political and state issues was much more trustworthy and wise and prudent. He was a most admirable complement to Roosevelt in the conduct of government, and it was only after Roosevelt cut himself loose from Root's influence that he

Taft was appointed Governor General of the Philippines protectorate by President William McKinley in 1901 after helping to ensure a smooth transition from military to civilian government in the aftermath of the Spanish-American War. This photograph was taken in 1903, as Taft applied his considerable administrative skills to improving the island's economy and uniting its political factions.

made the really great mistakes of his life."[17] Or Taft's perceptive insight into the differences between the distinguished federal judges Learned and Augustus Hand: "Gus is not as bright and scintillating as Learned, but he has better judgment and on the whole is the safer better judge—but both are good."[18]

Finally, we might offer two examples of Taft's wry sense of humor, sometimes understated but frequently evident in his correspondence. Reporting to his daughter that Mrs. Taft had attended a dinner at which she sat between President Coolidge ("Silent Cal") and Justice McReynolds. Taft observed: "I don't think that their company added to the excitement of the evening."[19] Or his recollection that "Major Barker, of Mobile, a solid Republican who stood by me in two national conventions . . . called on me for advice. He is 92. I asked him how he was, because he looked spry and alert, and he said he was all right, but that he thought being run over twice by [an] automobile was something that a man of 92 ought to avoid. He said it was not good for him."[20]

II

This is the man who became Chief Justice in June 1921. His tenure lasted about eight and a half years. He joined a Court noted during the term of his predecessor for its occasionally intense internal frictions, a tribunal on which outstanding jurists such as Oliver Wendell Holmes, Jr. and Louis D. Brandeis had sat along with conservatives such as Willis Van Devanter and a truly disagreeable individual, McReynolds. To be sure, the Court under Chief Justice White never reached the antagonistic level of the Bench in an earlier era. According to Charles Evans Hughes, the High Court in "the days of Joseph Bradley and John Marshall

Harlan . . . was a brutal court in personal relations. I heard they actually shook fists at one another."[21] However, after barely one year with Taft as Chief Justice, Holmes could write that his new Chief "is amiable and comfortable . . . [He] continues a very agreeable presiding officer . . . [H]e carries things along with good humor and is disinclined to put cases over—so we get work done."[22] Brandeis concurred. "Things go happily in the Conference room with Taft," he noted.[23] Possibly with some understandable envy, Felix Frankfurter believed that Taft "always had the love and affection of his colleagues."[24]

Yet throughout his tenure, dissents—some of them heartfelt and eloquent—were filed, even as his fellow Justices continuously praised his leadership. How did Taft deal with dissents? How did he attempt to, and with what degree of success did he, minimize their number? These are the questions on which the remainder of this essay focuses.

At the outset, one should remember that while some of the dissents in Taft's Court—such as those coming from Holmes or Brandeis—are still cited,[25] the fact is that their frequency can be exaggerated. As Professor Robert Post noted in 2001, between the 1921 Term and the 1928 Term, more than 1,550 opinions were handed down, and eighty-four percent of them were unanimous. By contrast, Post points to the Rehnquist Court between 1993 and 1998, with a twenty-seven-percent rate of unanimity.[26] To be sure, enactment of the Certiorari Bill in 1925—a measure for which Taft had every right to take major credit—greatly reduced the number of cases that the Court felt compelled to consider. Even so, the contrast is unusual. Furthermore, to a much greater extent than today, members of the Taft Court "felt presumptively obligated to join Court opinions, even if they disagreed with their content, so as to preserve the influence and prestige of the Court."[27] How can this tendency be explained?

In 1921, Taft took the center seat even as opposition to recent court decisions, seized upon by Senator Robert La Follette, increased. Published dissents provided ammunition for such critics, and in the mid 1920s, even Brandeis—who, along with Holmes, dissented more often than any other members of the Taft Court—noted that "the drive against the Court had tended to reduce dissents."[28] A number of Taft's colleagues—especially Van Devanter, the one remaining Justice whom as President he had named to the Court—agreed with their Chief that wherever possible, dissents ought to be suppressed. An exceedingly influential and persuasive member of the Court, in spite of his extremely low output of written opinions, Van Devanter was aptly described by Brandeis as a "Jesuit general . . . [He] would have been the best of Cardinals. He is . . . on good terms with every body, knows exactly what he wants & clouds over difficulties by fine phrases & deft language."[29,30] With some frequency, Taft sent drafts of opinions to Van Devanter before he circulated them to the other Justices. It is interesting that, to a lesser extent, Brandeis followed the same practice.

Although levels of unanimity among the Justices were high in the late nineteenth century, during the first part of Taft's eight-year tenure they were even higher. Part of the reason for this fact lies in the great extent of Taft's willingness to avoid dissent. Consider the fact that in eight Terms (1921–29), he wrote 249 opinions for the Court and dissented in only seventeen, with just three written dissents filed. But his reluctance to dissent long predated his tenure as Chief Justice. In his eight years as a circuit judge, Taft attained a similar record: 200 opinions for the court, and only one dissent.[31] Early in his tenure as Chief Justice, he offered his creed on elaborate dissents. Essentially, they "are a form of egotism. They don't do any good and only weaken the prestige of the Court. It is much more important what the Court thinks than what any one thinks."[32] According to Mason, during his eight full terms as Chief Justice, Taft suppressed "at least two hundred dissenting votes," so eager was he "to stand by the Court . . . [rather] than merely

to record my individual dissent where it is better to have the law certain than to have it settled either way."[33]

As Chief Justice, especially in his early years at the center seat on the Bench, Taft demonstrated patience, tact, forbearance, and flexibility in bringing his colleagues to agreement. Aided by Van Devanter, whose frequent informal conversations with his Brethren were quite influential, Taft willingly deleted parts of a draft opinion, changed its wording, or more often silently concurred. As Chief Justice, he exemplified a trait that he had apparently sometimes been unable to master as President: that in some instances, to get along, one needs to go along. Sometimes, he would reassign an opinion to another Justice, or—as happened on more than one occasion—take the insights of a threatened dissent and turn them into an opinion that ultimately commanded the votes of the entire Court. Brandeis later commented to Frankfurter that "if it is good enough for Taft, it is good enough for us, they say—and a natural sentiment."[34]

When it did become necessary for Taft to dissent—as, for example, in the famous minimum wages case in 1923, *Adkins v. Children's Hospital*[35]—he focused heavily on *stare decisis*. He examined past decisions dealing with hours and wages and concluded that the notorious *Lochner* decision of 1905[36] had been "overruled sub silentio." In other words, Taft's dissent was based more upon his desire for stability and consistency than on his belief that his close friend Justice George Sutherland had been mistaken in his opinion for the Court.[37] Also dissenting, but by himself, Justice Holmes had dismissed liberty of contract as outworn "dogma," and added among other points that "the criterion of constitutionality is not whether we believe the law to be for the public good."[38] Taft wrote of his "inability to agree with some general observations in the forcible opinion" of Holmes.[39] For his part, Holmes later recalled that "the CJ and Sanford seemed to think I had said something dangerous or too broad[,] so they dissented separately . . . I think that what I said was plain common sense."[40]

For Taft, Holmes' all-too-typical comments demonstrated what was wrong with dissents that veered from a narrow focus—such as his in *Adkins*—on a legal concept such as *stare decisis*. With increasing frequency he railed against Holmes, who "has more interest in, and gives more attention to, his dissents than he does to the opinions he writes for the Court, which are very short and not very helpful."[41] Holmes commented that his pleasure in writing dissents was "that you can say just what you think, and don't have to cut out phrases to suit the squeams of your brethren."[42] Taft, however, was sometimes less inclined to blame Holmes than Brandeis who, Taft was convinced, had the elderly jurist totally under his thumb. "Holmes is so completely under the control of Brother Brandeis that it gives to Brandeis two votes instead of one."[43] Indeed, Holmes' "unsound" strictures on constitutional law resulted in large measure from "the influence which Brandeis has had on him."[44] Taft even wrote to his son Robert that if his Court had followed Holmes, "I don't think we would have had much of a constitution to deal with."[45]

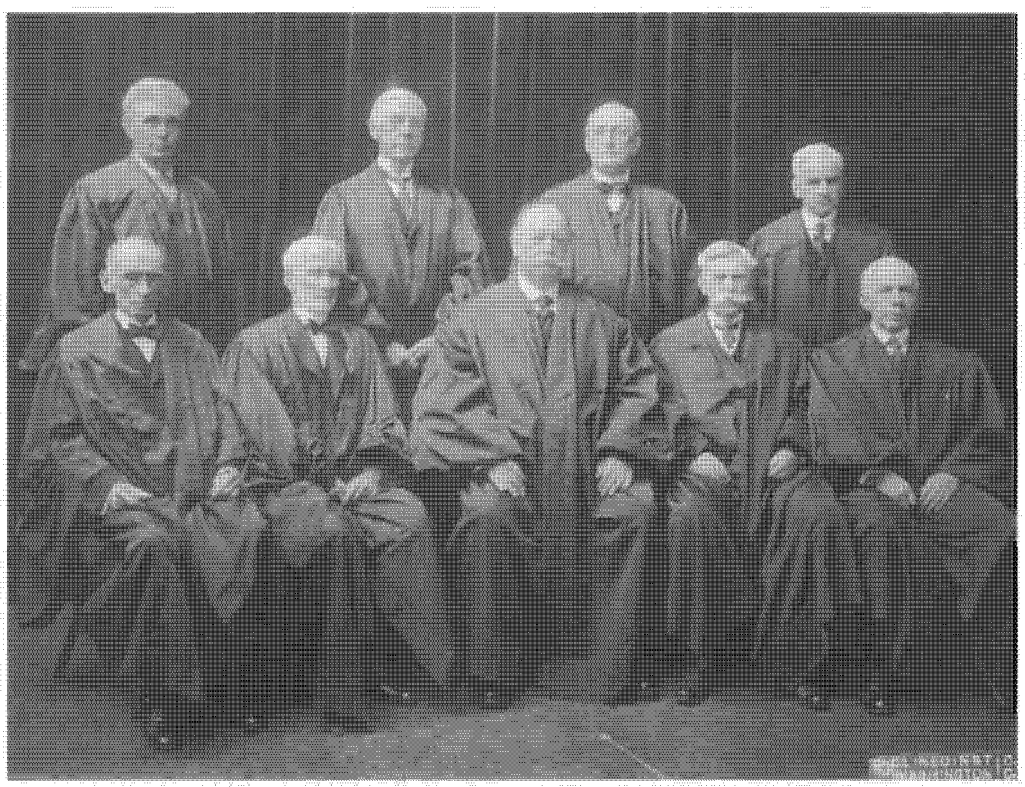
Concerning Taft's strictures, one suspects that he objected as much to the tone and content of the dissents as to their constitutional basis. Here, he had no doubt that Brandeis was most responsible for this failing. From the Ballinger-Pinchot controversy during his presidency, Taft retained unpleasant memories of Brandeis's skill as an articulate and aggressive advocate. Taft's other close friend on the Court, Justice Sutherland, had similar recollections: "My, how I detest that man's ideas, but he is one of the greatest technical lawyers I have ever seen."[46] Now Brandeis's colleague, Taft found that dissents from Brandeis bristled with insights, facts, references to law review articles, and—worst of all—footnotes. Taft had no brief for such a format.

He was not alone in pointing to Brandeis's apparent obsession with facts and data. "Pound and I agreed yesterday," wrote Harold Laski to

Holmes, even before Taft had joined the Court, "that if you could hint to Brandeis that judicial opinions aren't to be written in the form of a brief, it would be a great relief to the world."[47] Holmes later wrote to Laski that "in consideration of my age and moral infirmities [Brandeis] absolved me from facts for the vacation and allowed me my customary sport with ideas."[48] The way "that cuss is loaded with facts on all manners of subjects," he commented some years later, "leaves me gawping."[49]

Taft found Brandeis's exploration of facts and detailed analysis of issues that went far beyond the basic legal question out of place in an opinion. Brandeis, he complained, "can not avoid writing an opinion . . . in which he wishes to spread himself as if he were writing an article for the *Harvard Law Review*. When that is not on his mind, he writes a very concise and very satisfactory opinion, but his dissents are of a different character."[50] In the *Myers* case (1926),[51] which Taft considered a magnum opus on his part, Brandeis's dissent ran to forty-one pages, observed the irritated Chief, "with an enormous number of fine-print notes, and with citations without number."[52]

But Chief Justice Taft saw more to fear from Brandeis's dissents than mere length. They threatened to undermine what Post has aptly described not so much as a "norm of consensus" as "a norm of acquiescence;" something that Taft had painstakingly nurtured.[53] It was based on the assumption of the Justices that while privately disagreeing with each other, to a great extent "these differences should be put aside so that the Court can present a united front to the public," one that presented "the impact of monolithic solidarity" so necessary to the credibility of the Justices as they rendered judgment.[54] Taft's



After barely one year with Taft (center) as Chief Justice, Oliver Wendell Holmes (second from right, seated) wrote that the new Chief "is amiable and comfortable . . . [He] continues a very agreeable presiding officer . . . [H]e carries things along with good humor and is disinclined to put cases over—so we get work done."

Court, especially in the first four years of his tenure, worked within this framework to a great extent. Dissenters such as Holmes and especially Brandeis realized that "there is a limit to the frequency with which you can [dissent] without exasperating" your colleagues.[55] With some candor, Brandeis added that "you may have an important case of your own as to which you do not want to antagonize on a less important case."[56] In other words, a kind of judicial horse-trading, while perhaps not so labeled, was indeed a possibility. But beyond a certain point, the norm of acquiescence fractured.

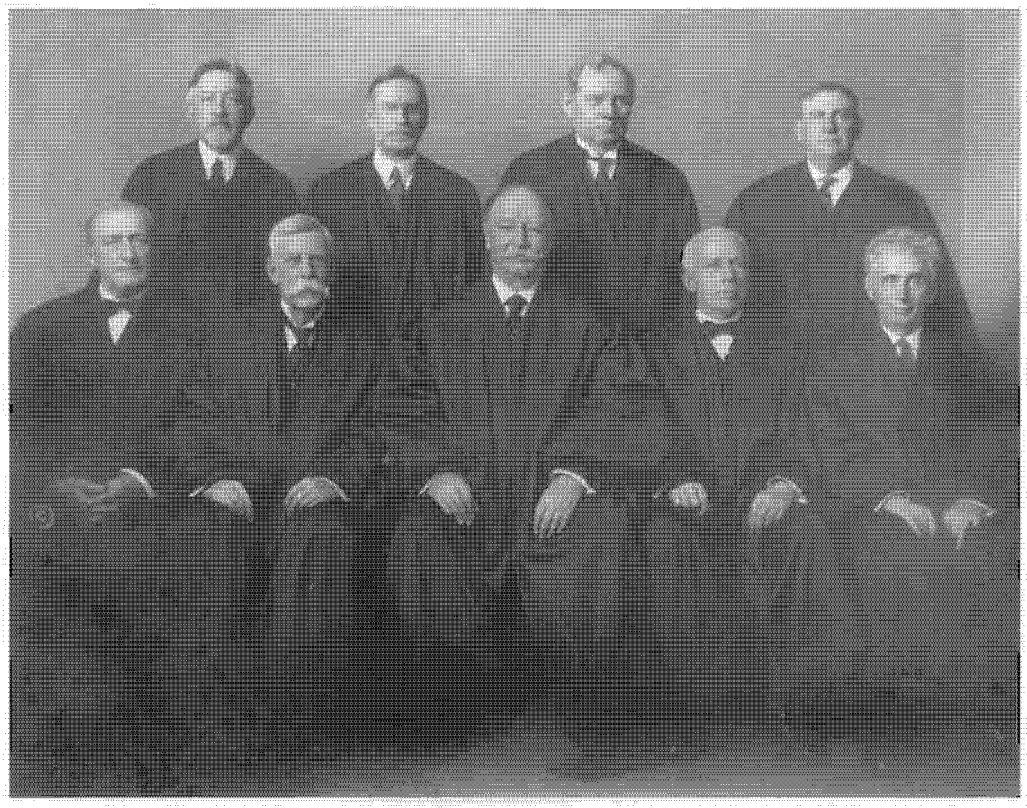
Towards the end of Taft's tenure, Holmes admitted that "I do not like being made to appear as a dissenting judge, though no doubt I have dissented more than some because I represent a minority on some very fundamental questions, upon which both sides should be heard."[57] Earlier, he had commented to Laski that a dissent could give him a chance to react again to an earlier case in which he unwillingly concurred, "and some day a dissent may bear fruit."[58] Brandeis wrote that in "ordinary cases," the goal is a clear standard, and "it doesn't matter terribly how you decide, so long as it is settled." But in "cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."[59] Further, as he argued in a draft dissent, the Constitution "is a living organism. As such it is capable of growth . . . Because [it] possesses the capacity of adaptation, it has endured as the fundamental law of an ever developing people."[60] Taft refused to join the dissent unless Brandeis deleted these sentences, which he did, writing to the Chief Justice that while he believed very strongly in what he had written, "they are not necessary and I am perfectly willing to omit them."[61] The incident represents an excellent example of Post's norm of acquiescence.

Brandeis believed adaptation and change were part and parcel of constitutional interpretation. Taft was not so sure, fearing what Post describes "as experimentation with the fundamental rights of the individual."[62] There were, Taft believed, "certain rights beyond the reach of experimentation."[63] Brandeis urged the Court always to be aware of the danger in turning one's prejudices into legal principles. "If," he wrote in a famous dissent after Taft's death, "we would guide by the light of reason, we must let our minds be bold."[64]

The Chief Justice probably would have felt more comfortable with the statement of Justice Brewer in a 1905 decision. Brewer had written on behalf of a majority—which seems to have included Justice Holmes—that "the Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable."[65]

Moreover, Taft doubtless would have concurred with his predecessor Justice White, who, although writing in dissent, conceded that "the only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the [majority] opinion, and thus engender want of confidence in the conclusions of courts of last resort."[66] Towards the end of his life, in rapidly failing health, Taft no longer had the ability to accommodate, cajole, and persuade, nor did he possess the doctrinal flexibility manifest in the first years of his term. By his last full Term, 1928–29, Taft increasingly believed that through his dissents, Brandeis was attempting to do just what White had noted earlier.

For the ailing Chief, the dissents of Brandeis and Holmes in the famous *Olmstead* wire-tapping case of 1928 proved the point. In a case dealing with enforcement of the prohibition laws, Taft upheld wire-tapping by the Government by a 5–4 vote, holding that that the central issue before the Court was simply the legality



Five years into his eight-year Term as Chief Justice, Taft had already managed to foster a norm of consensus and reduce the number of dissents. Critical dissents by Brandeis (seated at right) threatened this harmony, however, and Taft grew increasingly irritated when Brandeis stuffed so many facts into his opinions that they resembled briefs.

of the practice, rather than the unsavory ethics involved in its application.[67] As he wrote to his youngest son even before the decision was announced, "it has been a hard case to decide, and the opinion[s?] will doubtless awaken condemnation, but . . . I am strongly convinced it is according to law."[68]

In a brief dissent, Holmes had written of two choices: one, detecting the criminals, and two, that the government "should not itself foster and pay for other crimes when they are the means by which the evidence is to be obtained." For this eighty-eight-year-old jurist, the case did not represent a difficult issue, "and for my part, I think it a less evil that some criminals should escape than that the government should play an ignoble part. . . . I hardly think," he added, "that the United States would appear to greater advantage when paying for an odious crime against state law than when inciting to the disregard of its own."[69]

In his dissent, Brandeis went into the ethics of wire-tapping. It mattered not "that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[70] Brandeis ended his dissent with what Taft conceded to be eloquent but condemned as irrelevant, regarding an issue that was not before the Court: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the

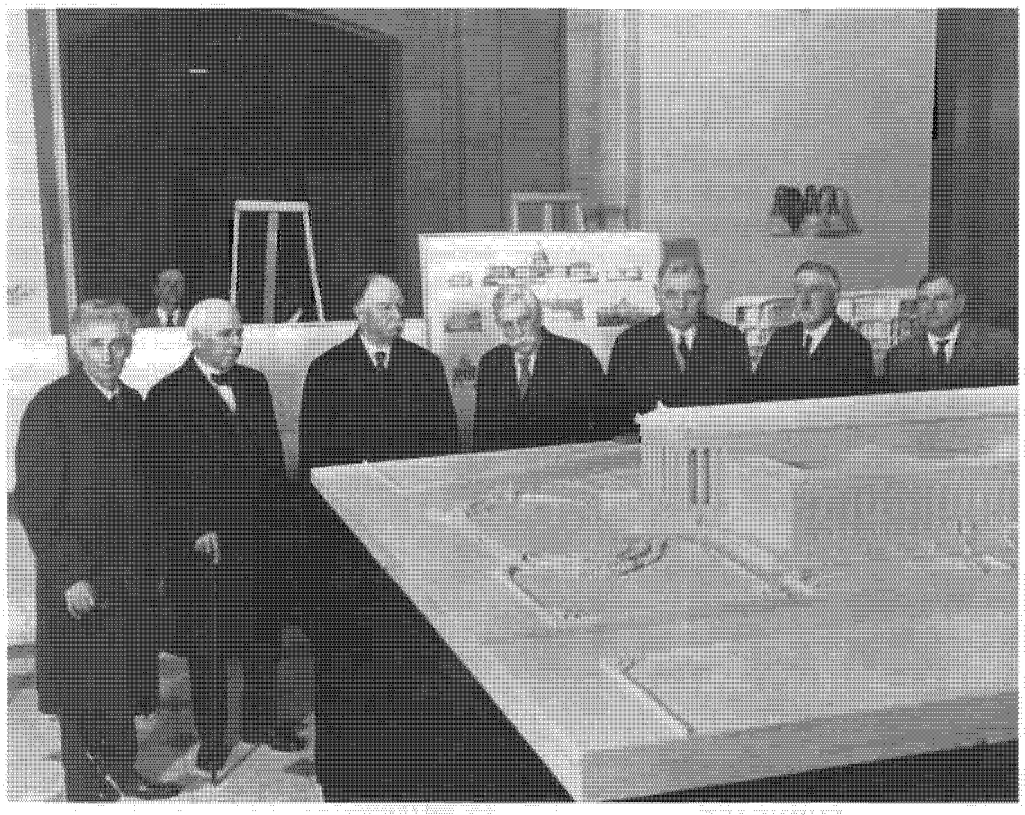
potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."[71]

Having supposedly agreed to limit his dissent to the legal issues, according to Taft, Brandeis went beyond the pale. "When we make a limitation we ought to stick to it, and I think anyone would have done so but the lawless member of our Court." Even more galling to Taft was the fact that Brandeis had persuaded Holmes to change his original vote and dissent.[72] "They went on general principles completely unsustained by the great mass of precedent," with Holmes writing the "nastiest opinion in dissent." As for the appeal to morality displayed by Brandeis in his final paragraph, "it is rather trying to have to be held up as immoral by one who is full of tricks all the time."[73]

Far from pushing the norm of acquiescence, in his last full year on the Court, Taft emphasized the more mundane challenge simply of keeping a majority of his court so as to "prevent the Bolsheviki from getting control." He had no doubt as to their identity. The group included Brandeis, who "is of course hopeless, as Holmes is, and as Stone is." All Taft could hope for was that this "dissenting minority of three" could be blocked with "our six to steady the Court." With any luck, the future would see the "continued life of the present membership . . . to prevent disastrous reversals of our present attitudes."[74] Nor did Taft place any reliance on President Hoover, even though the age and health of several of the Justices made new appointments to the Court a virtual certainty. "The truth is," he griped only a few months before he died, "that Hoover is a Progressive just as Stone is, and just as Brandeis is and just as Holmes is." Indeed, "I don't think Hoover knows as much as he thinks he does." But Taft was particularly disillusioned with Harlan Stone, who, although he had been on the Court for only a few years, now "hungers for the applause of the law-school professors and the admirers of Holmes."[75]

More than Taft's illness and the resulting inability to nurture and encourage the norm of acquiescence contributed to its decline. The Chief Justice may not have comprehended the significance behind Brandeis's conception of law as a continually evolving and changing phenomenon. By the 1930s, the Brandeisian view of law was in the ascendant. Justices who might, in an earlier time, have subscribed to the norm of acquiescence could now view a dissent in a more significant light: as Charles Evans Hughes put it, as "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[76] Post points to a growing call for legal flexibility and adaptability, instead of or in addition to the usual norms of "stability and firmness."

If the norm of acquiescence broke down as the Taft Court passed into history, the fact that it was in vogue for most of Taft's tenure as Chief Justice is due, I think, not only to his traits mentioned earlier, but also to his unique conception of his role as the Chief. Augustus Hand was not inaccurate when he wrote to Taft late in 1929 that "[y]ou have a certain leadership in the Court that is enormously important[,] and I don't believe has ever existed since the days of Marshall himself."[77] With only a few months left to live, Taft probably enjoyed being compared with John Marshall. He harbored no illusion that his judicial opinions would ever receive the historical regard (if not reverence) afforded Marshall's great pronouncements. But he understood that Hand was referring, not to his judicial craftsmanship, but rather to his judicial leadership.



Chief Justice Taft (third from left) and the Associate Justices admire architect Cass Gilbert's model for the new Supreme Court building in 1929. Taft not only persuaded Congress to fund the building, which would give the Supreme Court its own home for the first time, but also oversaw its planning. Sadly, he died before ground was broken.

In retrospect, Hand was correct. No other Chief Justice, not even Marshall, has ever accomplished what Taft did in modernizing the high court—and this in barely eight years, not like Marshall's thirty four. It is in this context that Taft's nurturing of the norm of acquiescence should be seen and understood. Certainly the modern Court still struggles with the place of dissent—an inherent component of its function, and very much with us. Brandeis's successor, Justice William Douglas—whom Post interestingly calls "perhaps the most consummate dissenter in the history of the Court"—laid out the contemporary spin on the norm of acquiescence: "For it is the Constitution which we have sworn to defend, not some predecessor's interpretation of it . . . The Constitution was written for all time and all ages. It would lose its great character and become feeble, if it were allowed to become encrusted with narrow legalistic notions that dominated the thinking of one generation."[78]

Has the norm of acquiescence passed, and has what Taft dreaded now become commonplace? In at least one instance—the *Brown v. Board of Education* case in 1954[79]—the fourth Justice to hold the center seat after Taft, Earl Warren, used the techniques honed by his predecessor to great advantage to aid in arriving at an opinion that garnered nine votes. While, more than half a century later, there is some criticism of *Brown*, no one will deny that its unanimity was a great factor in whatever success it has enjoyed.[78] Nurturing a norm of judicial acquiescence is not much in vogue today, and indeed the tensions between the quest for

legal certainty and the yearning for change can never be permanently resolved. The judicial environment in which Taft functioned is long gone. But if we would know where we are, it is essential to know where we have been. Every Chief Justice since Taft—and as of 2007 there have been seven of them—has had the opportunity to run that office with the tools and administrative accomplishments he left behind.

Currently, the Taft Court and the man himself are the subjects of ongoing scholarly research. Concerning his tenure as Chief Justice, one must consider the total picture: the man and his accomplishments, both administrative and extrajudicial, as well as the decisions he wrote on behalf of the Court. Not surprisingly, one suspects that the result will be a mixed bag. But for a former President who loved the law and proudly confessed that "I love judges and I love courts," Taft's legacy of administrative leadership on the Court remains impressive.

ENDNOTES

[1]Helen Taft Manning Papers, Library of Congress.

[2]Taft's career as a whole will be reassessed in my forthcoming biography, **William Howard Taft and the Travails of a Progressive Conservative.**

[3]It has happened only twice since.

[4]Judith Anderson, **William Howard Taft: An Intimate History** (New York: W.W. Norton & Co., 1981), 259.

[5]*Ibid.*

[6]*Quoted in* Henry F. Pringle, **The Life and Times of William Howard Taft,** vol. 1 (New York: Holt, Rinehart and Winston, 1939), 236.

[7]Taft to Elihu Root, May 13, 1903, in Root Papers, Library of Congress.

[8]Gustave J. Karger Papers, box 1, folder 4, Cincinnati Historical Society.

[9]Pringle, vol. 1, 334.

[10]Robert Post, unpublished essay, "Prologue: Mr. Taft Takes Charge," p. 3, quoting William Allen White. I am greatly indebted to Professor Post, the leading expert on the Taft Court, for his kindness and generosity in making available to me much of his own materials on Taft and his Court.

[11]Pringle, vol. 2, 949.

[12]November 3, 1919, Karger Papers.

[13]*Ibid.*, November 11, 1919.

[14]*Ibid.*, December 7, 1919.

[15]*Ibid.*, August 23, 1920.

[16]June 11, 1923, Manning Papers. Taft was, apparently, very accurate in this assessment. *See also* Albert Lawrence, "Biased Justice: James C. McReynolds of the Supreme Court of the United States," 30 *Journal of Supreme Court History* 244–70 (2005). In 1926, McReynolds wrote to Justice Harlan Stone, objecting to the time for a proposed Court photograph, "Do get your spavined team out at an earlier hour." May 10, 1926, Harlan Fiske Stone Papers, Library of Congress.

[17]January 10, 1926, Manning Papers.

[18]*Ibid.*, June 5, 1927. Taft's comments reflected the maxim well known in legal circles during the 1920s: that one should quote Learned, but follow Gus.

[19]*Ibid.*, January 17, 1926.

[20]*Ibid.*, October 25, 1927.

[21]*See* Jonathan Lurie, "Mr. Justice Bradley: A Reassessment," 16 *Seton Hall Law* Review 343, 374 (1986).

[22]Mark D. Howe, ed. and Alger Hiss, abr., **Holmes-Laski Letters: The Correspondence of Justice Oliver Wendell Holmes and Harold J. Laski**, vol. 1 (New York: Atheneum, 1963), 424, 339.

[23]Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 7 *The Supreme Court Review* 322 (1985).

[24]Post, "Prologue," 25.

[25]Landmark statements such as those in *Gitlow*, *Whitney*, and *Olmstead* immediately come to mind. *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927); *Olmstead v. United States*, 277 U.S. 438 (1928). Strictly speaking, Brandeis and Holmes did not dissent in *Whitney*, as the opinion was unanimous. But Brandeis's statement was so critical of the Court's reasoning that in many ways it may be described as a dissent. *See infra* text accompanying notes 68 and 69 for further comments concerning Brandeis's dissent in *Olmstead*.

[26]Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," 85 *Minnesota Law Review* 1267, 1283 (2001).

[27]*Ibid.*, 1274.

[28]*Ibid.*, 1318.

[29]*Ibid.*

[30]Urofsky, 310. Van Devanter, added Brandeis, "is always helpful to everybody."

[31]Alpheus Thomas Mason, **William Howard Taft: Chief Justice** (New York: Simon and Schuster, 1965), 223.

[32]Post, "Supreme Court Opinion," 1311.

[33]Mason, 223–24.

[34]*Ibid.*, 203.

[35]261 U.S. 525 (1923).

[36]198 U.S. 45 (1905).

[37]Mason, 251.

[38]*Adkins*, 261 U.S. at 570 (Holmes, J., dissenting).
[39]*Adkins*, 261 U.S. at 567.
[40]**Holmes-Laski Letters,** 356.
[41]Post, "Supreme Court Opinion," 1292.
[42]*Ibid.*
[43]Mason, 220.
[44]*Ibid.*
[45]*Ibid.*
[46]Philippa Strum, **Louis D. Brandeis: Justice for the People** (Cambridge, MA: Harvard University Press), 302.
[47]**Holmes-Laski Letters**, 93.
[48]*Ibid.*, 212.
[49]*Ibid.*, 353.
[50]Mason, 226.
[51]272 U.S. 52 (1926).
[52]*Ibid.*
[53]Post, "Supreme Court Opinion," 1344.
[54]*Ibid.*
[55]*Ibid.*, 1345.
[56]*Ibid.*
[57]*Ibid.*, 1344.
[58]**Holmes-Laski Letters**, 314.
[59]Post, "Supreme Court Opinion," 1351.
[60]Post, "Supreme Court Opinion," 1352.
[61]*Ibid.*, 1353.
[62]*Ibid.*
[63]Mason, 293.
[64]*New State Ice Co., v. Liebman*, 285 U.S. 262, 311 (1932).
[65]*South Carolina v. United States*, 199 U.S. 437, 448–49 (1905).
[66]Post, "Supreme Court Opinion," 1348.
[67]*Olmstead v. United States*, 277 U.S. 438 (1928).
[68]Taft to Charles Taft, June 21, 1928, Charles Taft Papers, Library of Congress.
[69]*Olmstead*, 277 U.S. at 470.
[70]*Ibid.*, 478–79.
[71]*Ibid.*, 485.
[72]In an earlier case, Brandeis had argued that the "Government may not provoke or create a crime and then punish the criminal, its creature." Brandeis dissented from the majority opinion by Holmes, which sustained the government's actions. Perhaps, as Taft implied, by the time of *Olmstead*, Brandeis had persuaded Holmes that he was wrong. *See* Strum, p. 323.
[73]Mason, 228.
[74]*Ibid.*, 294.
[75]*Ibid.*, 228. Taft found Stone's apparent defection to the Holmes-Brandeis view especially frustrating because he had been a vigorous supporter of Stone's nomination. Indeed, he even claimed much of the credit for Coolidge's decision to appoint Stone in 1925. Stone, incidentally, was the first judicial nominee to appear before the Senate Judiciary Committee.
[76]Post, "Supreme Court Opinion," 1353.
[77]Robert Post, "Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft," 23 *Journal of Supreme Court History* 53 (1998).
[78]Post, "Supreme Court Opinion," 1355.
[79]347 U.S. 483 (1954).
[80]One of the most interesting, provocative, and persuasive re-evaluations of *Brown* is found in Derrick Bell's analysis, **Silent Covenants: *Brown v. Board of Education* and the Unfulfilled Hopes for Racial Reform** (New York: Oxford University Press, 2004).

The Judicial Bookshelf

D. GRIER STEPHENSON, JR.

Citizens, elected officials, legal practitioners and scholars, and most certainly readers of this journal can surely agree on one verity concerning the U.S. Supreme Court: that an abundance of literature in print and, increasingly, in digital form exists about this capstone institution of the third branch of government. For confirmation, one has only to conduct an online subject search in even a modest-sized library or at one of the Internet-based bookstores to reveal literally hundreds of titles on virtually every aspect of the Court's work as well as the Justices who have sat on its Bench.

Yet in contrast to this present-day cornucopia of perspective and information is the fact that, with barely a handful of exceptions, systematic study of the Court began just short of a century ago, as history, law, and political science emerged as distinct professional academic disciplines. Some readers may be surprised to learn that the first edition of so essential a mainstay today of judicial history—particularly for the early nineteenth-century Court—as Charles Warren's **The Supreme Court in United States History** was not published until 1922. Warren's three-volume work[1] itself appeared a scant six years after Senator Albert J. Beveridge's magisterial four volumes of **The Life of John Marshall**.[2] This was also about the same time that Edward S. Corwin began to publish his seminal studies of the origins of judicial review.[3] The timing of the works of all three authors was revealing. While it had been fully apparent since Marshall's day that the Court was a politically—not merely a legally—significant institution, it had become abundantly clear by the second decade of the twentieth century (if any doubters remained) that the Court had moved well beyond its initial dispute-resolution role and had become a maker of public policy for uniform application across the nation. Indeed, as Warren noted in the 1926 revised edition of **The Supreme Court in United States History**, his objective was to provide "a narrative of a section of our National history connected with the Supreme Court. . . . As words are but 'the skin of a living thought,' so law cases as they appear in the law reports are but the dry bones of very vital social, political, and economic contests: they have lost all fleshly interest." For Warren, his book was an attempt to "revivify the important cases

decided by the Court itself from year to year in its contemporary setting."[4] Yet, surveying the books of his day, Warren lamented the fact that "few published works" existed for "those who wish to view the Court and its decided cases, as living elements and important factors in the course of the history of the United States." Aside from Beveridge's biography of Marshall, there was little besides Gustavus Myers's **History of the United States Supreme Court**, which Warren described as written "from a purely Socialistic perspective."[5]

Of course, the deficiencies in the literature that Warren noted have long since been corrected. While it would clearly be a colossal exaggeration (and an error) to insist that subsequent writing on the Court can be traced back to Warren, it does not seem an excessive overstatement to suggest that Warren inspired much of what followed. Historians, lawyers, and students of politics in subsequent years have sought to understand what the Court has done, not because of a client-centered necessity to win cases, but because of the reason-centered desire to comprehend the Court, as Warren did, as a component in the political system and a force in shaping the nation. Moreover, they have endeavored to move beyond or beneath the "what" by seeking also to explain judicial decisions: that is, to probe the "why" as well. This double-barreled thrust accounts for much of the multidisciplinary character of judicial studies today. The result of these labors has been a vast body of writing that divides easily into at least five groups: constitutional interpretation, general and period history, biographies or Justice-centered analyses, case studies, and the judicial process. Recent books on the Court nicely illustrate several of these categories.

Following Chief Justice William Rehnquist's death in early September 2005, there were probably few who were surprised to find nearly instant evaluations of his Chief Justiceship in the press. Such commentary, both positive and negative, on departed Chiefs began in 1835 with John Marshall, the first Chief Justice to die in harness, and has been routine for each of his successors.[6] "That he should develop any great strength as a judge was not to be expected of him, and the public expectation was not disappointed," remarked the *American Law Review* soon after Chief Justice Morrison Waite's death in March 1888. "Certain it is that he left no great memorials of his strength as a judge," the influential journal continued. "[A]nd it is saying much in favor of the character of Chief Justice Waite to say that he was able to avoid the display of any great deficiencies as a lawyer while occupying the seat of Chief Justice."[7] Because Waite was so closely identified with the decisions of his Court, the faint praise of this "it-could-have-been-worse" appraisal would seem to be as much a commentary on the Court as a whole as it was on its late presiding judge.

Combined book-length assessments and substantial treatments in law reviews of both Chief and Court became commonplace once the literature on the Supreme Court expanded in the twentieth century. Thus, one finds studies such as Samuel J. Konefsky's **Chief Justice Stone and the Supreme Court,** which was published in the year of Stone's death (1946), **The Burger Court** by Vincent Blasi, Bernard Schwartz's **The Burger Court**, Bernard Schwartz's **The Warren Court**, and **The Warren Court in American Politics** by L.A. Powe, Jr..[8] Likewise, one would have expected book-length appraisals of the Rehnquist Court (1986–2005) to follow Rehnquist's Chief Justiceship. After all, he was only the third Chief to have been selected from the ranks of sitting Associate Justices, and his long tenure ranked him fourth on the all-time list of Chiefs, behind Marshall, Roger B. Taney, and Melville W. Fuller. At least one volume had been part of the literature since 2000,[9] and two additional books were published within a year of his death. Indeed a third book arrived just as work on this review essay was nearing completion in early 2007.[10]

Edited by former Rehnquist law clerk Craig M. Bradley of the Indiana University

Law School in Bloomington, **The Rehnquist Legacy**[11] is a collection of eighteen essays by as many authors examining various elements of the jurisprudential record of the Rehnquist Court, ranging from federalism and freedom of speech to criminal justice and the right to die. Besides an introductory chapter, the editor contributed one of the essays. The "Foreword" is the handiwork of Linda Greenhouse of the *New York Times*. In Bradley's view, the essays present a "legal biography" of Chief Justice Rehnquist in that they attempt to assess his legacy by analyzing his majority and dissenting opinions "in those areas of constitutional law in which Rehnquist is thought to have had the greatest impact."[12] The book thus omits treatment of many legal topics on which Rehnquist authored opinions, including even capital punishment. "[W]hile on the winning side of the battle over the constitutionality of the death penalty," Rehnquist "did not author major decisions"[13] on the subject and then found himself on the losing side of some of the recent noteworthy rulings thereon, including cases affecting the death penalty for juveniles and the retarded.[14] Thus, for Bradley, capital punishment, though a worthy topic for discussion had space permitted, should not properly be considered a part of the Chief Justice's legacy. Nonetheless, in his introduction, Bradley does portray Rehnquist on a subject closely tied to the death penalty, which was very much part of the record of a Court that succeeded in a "nearly complete reversal of the Warren Court's habeas corpus expansions [that] severely restricted the opportunities for state criminal defendants to litigate violations of their rights in federal court."[15]

Bradley suggests that Rehnquist's legacy be considered alongside two goals Rehnquist set for himself. The first was to "'call to a halt'" some of the Warren Court rulings on criminal justice. The second was to be "remembered as a good administrator" by running a "relatively smoothly functioning Court."[16] The first deals with jurisprudence and public policy, the second with the workings of the Court itself. Both implicate leadership, a subject that is better understood in the judicial context when one recalls that the Chief Justice is *primus inter pares*—first among equals.[17] Yet, as the administrative head of the Court, the Chief Justice is officially "in charge" with respect to the eight Associate Justices only in a very limited sense. Reality reflects more the *pares* than the *primus*. While the Chief traditionally controls the assignment of opinions, even that power applies only when he is in the majority. Moreover, his vote in deciding cases is worth no more than the vote of any of his colleagues. Similarly, the Associate Justices are not accountable to the Chief Justice. They do not work "for" him. There is no chain of command on the Bench. The Supreme Court is no well-oiled machine, but rather seems to consist of nine little law firms where each Justice "is his own sovereign."[18] A right to preside does not carry with it a right to prevail. Nor does it entitle a Chief to influence over "his" Court. "Being Chief Justice," as Justice Harlan F. Stone is supposed to have laconically remarked after observing William Howard Taft at work for five years, "is a good deal like being Dean of the law school—he does what the janitor is unable or unwilling to do."[19]

Nonetheless, even without the usual accouterments of power, some Chief Justices have been known as Court leaders. When examined in the context of a small group such as the Supreme Court, leadership has both task and social dimensions. Someone who excels in social leadership relieves tensions, encourages solidarity and agreement, attends to the emotional needs of colleagues, and is often the best-liked member of the Bench.[20] And within in the idea of task leadership are managerial and intellectual considerations.[21] A Chief Justice as managerial leader keeps the Court abreast of its docket, maintains a maximum degree of Court unity, provides expeditious direction of the judicial conference, and assigns opinions thoughtfully and purposefully.

As intellectual leader, a Chief Justice presents his views persuasively and is a principal source of ideas and doctrine. If one applies these criteria to Bradley's estimate, Rehnquist can be said to have excelled at social leadership, to have performed superbly as Court manager, and certainly to have provided adequate intellectual leadership.

Rehnquist's skills as managerial leader were acknowledged even by his "political opponents on the Court," writes Bradley. "Thurgood Marshall deemed him a 'great Chief Justice,' and Justice William Brennan described him as 'the most all-around successful' chief he had known—including Earl Warren."[22] Bradley attributes this success to an agreeable personality, to fairness and purposefulness in assigning opinions, and to the discipline Rehnquist applied both during oral arguments and in conference. In both places he ran a "tight ship."[23] In the latter, for example, while allowing each Justice to state her or his views in order of seniority, he "did not allow debate among the Justices, being of the opinion that, since most had already made up their minds, extended discussion was a waste of time."[24] Outside of conference, as for leading his colleagues toward his own point of view on a case, Rehnquist could be very persuasive in justifying a conclusion but was disinclined toward "politicking his fellow Justices, preferring to confine his arguments to the logic of the opinion he drafted."[25] Besides, politicking carried risks of back-firing, as is supposed to have happened when Chief Justice Warren Burger drove "his fellow Minnesotan Harry Blackmun into the welcoming arms of the liberals."[26] Neither was the Bench over which Rehnquist presided necessarily one that would have been amenable to being pushed or wooed by the center chair. It was a Bench packed with talent. No one was in need of tutoring on federal constitutional basics, "as Chief Justice Warren is alleged to have done with Justice [William J.] Brennan."[27] "Had Rehnquist tried to twist the arms of these independent thinkers, he might have succeeded only in weakening his status as a Chief Justice whose *written* views were highly respected by his colleagues."[28] And those views derived from three principles: "strict construction, judicial restraint, and federalism."[29] As then-Justice Rehnquist explained in 1976, "It is almost impossible . . . to conclude that the [Founding Fathers] intended the Constitution itself to suggest answers to the manifold problems that

Craig M. Bradley, a former Rehnquist clerk who now teaches at the Indiana University Law School in Bloomington, has edited a collection of essays titled *The Rehnquist Legacy* that examine how the Chief Justice accomplished his two main goals: to roll back what he believed were some of the excesses of the Warren Court, and to be a good administrator.

they knew would confront succeeding generations. The Constitution that they drafted was intended to endure indefinitely, but the reason for this well-founded hope was the general language by which national authority was granted to Congress and the Presidency. These two branches were to provide the motive power within the federal system, which was in turn to coexist with the state governments; the elements of government having a popular constituency were looked to for the solution of the numerous and varied problems that the future would bring."[30] In other words, power lay with the people through the elected branches, not with the courts. The Constitution did not make "this Court (or the federal courts generally) into a council of revision," and the Framers "did not confer on this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest."[31]

As effective an advocate as Rehnquist was, the Rehnquist Court still rendered high-profile decisions on subjects such as homosexual sodomy,[32] abortion,[33] school prayer,[34] and affirmative action,[35]—decisions from which Rehnquist dissented, and decisions where he lost the votes of some key co-Republicans on the Bench. Yet to blame these defeats and/or defections on failures in Rehnquist's leadership would be "misguided," Bradley believes.[36] While no one knows how the Rehnquist legacy will fare in the Supreme Court under Chief Justice John Roberts, Bradley seems convinced that it is "unlikely to be diminished."[37]

The Rehnquist Court by Kent State University political scientist Thomas R. Hensley, with Kathleen Hale of Auburn University and Carl Snook of Michigan State University listed as contributing authors, is the second appraisal of the late Chief Justice's tenure to have been published in 2006.[38] It is also the most recent entry in the *Supreme Court Handbooks* series that has taken shape under the general editorship of political scientist Peter G. Renstrom of Western Michigan University.[39] Twelve volumes on as many Chief Justiceships have appeared to date.[40] Still to be completed are those on the Jay-Ellsworth Court and the Marshall Court.

Like the other books in the *Handbooks* series, the Hensley volume adheres to a format consisting of two parts. Part one contains four substantive chapters that examine: (1) the Court in the context of its times, including the circumstances surrounding the appointment of each Justice who served during the particular period; (2) the individual Justices in terms of their backgrounds and jurisprudence; (3) significant decisions; and (4) the Court's legacy and impact. Drawing from a Supreme Court data set originally developed by Professor Harold Spaeth of Michigan State University, part one is also statistically rich in its presentation of decisions and voting patterns. Part two, which consumes about one-quarter of the book, includes a variety of useful reference materials that relate to personalities, policies, decisions, and events addressed in part one.

While of obvious value to the academic community and the legal profession, **The Rehnquist Court**, like previous entries in the series, is intended to reach a wider and more general audience as well. This goal seems beneficially to distinguish the *Supreme Court Handbooks* series from two others. The tomes published so far in the *Holmes Devise History of the Supreme Court of the United States* are truly treasures for the expert but are hardly written for the novice and pose a navigational challenge even to the generalist. The more recently conceived *Chief Justiceships of the United States Supreme Court*, under the general editorship of Herbert A. Johnson, is more accessible—and modest in scope—than the *Holmes Devise* series and seems more comprehensive than the *Handbooks* series in terms of the number of legal issues addressed.[41] The *Handbooks* series, in contrast, promises a sharper focus on selected issues and a

greater emphasis on individuals, context, and impact.

Similar to Bradley's volume on the Rehnquist legacy, the organizing question for Hensley's study is "whether the U.S. Supreme Court under the leadership of William Rehnquist engaged in a conservative constitutional counterrevolution by creating major new precedents supporting the government against claims of individuals that their civil rights and liberties had been violated."[42] For anyone familiar with the Court's history during the past four decades, Hensley's is an obvious question to pose. Rehnquist's own nomination as Associate Justice to fill the vacancy occasioned by the retirement of Justice John Harlan in 1971 followed assurances by presidential candidate Richard Nixon in 1968 that he would build a Supreme Court very much unlike the Warren Court, then in its twilight years. As explained later in this essay, the Warren Court had become an election issue because of a series of rulings between 1953 and 1968, particularly in the arena of criminal justice, that had roiled the political system—rulings that left virtually no aspect of life in America untouched.

As events unfolded, Nixon was able to make four appointments to the Court during his abbreviated presidency, each with the same objective in mind. Aside from Rehnquist's appointment, there were Warren Burger's as Chief Justice in 1969, Harry Blackmun's in 1970, and Lewis Powell's in 1971. President Gerald Ford named John Paul Stevens to take the place of liberal Justice William O. Douglas in 1975. President Ronald Reagan's selection of Sandra Day O'Connor in 1980, of Antonin Scalia in 1986, of Rehnquist as Chief Justice in 1986, and of Anthony Kennedy in 1988 particularly stemmed from a much publicized objective to advance a conservative social agenda through judicial appointments. President George H.W. Bush's appointments of David Souter and Clarence Thomas in 1989 and 1990, to replace departed liberals William J. Brennan and Thurgood Marshall respectively, were similarly motivated.[43] Despite these efforts by Republican Presidents beginning with Nixon in 1969, however, a consensus exists today that the Court under Warren Burger (1969–1986) did not engage in a "conservative constitutional revolution."[44] Ironically, the Burger Court unexpectedly engaged in its own variety of activism, which, in certain categories—privacy and abortion, establishment of religion, and gender discrimination—went well beyond Warren Court landmarks. Hence, given the additional opportunities Republican Presidents enjoyed to reshape the Bench after Rehnquist became Chief Justice, the natural query is whether the Rehnquist Court (1986–2005) managed to accomplish the jurisprudential change that eluded the Burger Court.

Hensley's answer is consistent with Bradley's and should give pause to any future President who believes that she or he may reorient the Supreme Court through discerning appointments. Rather than shifting constitutional law in a decidedly conservative direction, the findings of **The Rehnquist Court** are that there was more continuity than change during the Rehnquist years. While there was some movement in a conservative direction, those changes were "moderately rather than radically conservative."[45] Indeed, the Bench "created several new liberal precedents that may prove to be the most important legacy of the Rehnquist Court."[46] Moreover, if one places the Rehnquist Court alongside the Burger Court, a remarkably similar picture emerges. First, data "show identical records in regard to civil rights and liberties cases, with both Courts voting liberally in 44 percent of the cases."[47] Second just as the Burger Court refrained from overturning outright any decision of the Warren Court, so the Rehnquist Court declined to overturn any "major" Warren or Burger Court decision,[48] although both Courts made sometimes significant modifications to decisions by their predecessors.[49]

Two noteworthy books about Supreme Court clerks were published in 2006: *Sorcerers' Apprentices*, by political scientists Artemus Ward of Northern Illinois University and David Weiden of Illinois State University, and *Courtiers of the Marble Palace*, by political scientist Todd C. Peppers of Roanoke College. Pictured is Thomas Russell, the very first Supreme Court law clerk (to Horace Gray), in full curling regalia.

As to why shifts in constitutional law were not more substantial, Hensley offers several possible explanations. The first is a phenomenon that virtually every Justice-appointing President[50] since Thomas Jefferson[51] has encountered: judicial surprises. The positions taken in cases by a President's picks for the Bench are sometimes substantially at odds

with presidential calculations. A Justice turns out to be more liberal or conservative than was supposed. Moreover, the effects of such excursions off the reservation are magnified when the Bench is already closely divided, or when the membership of the Court is unusually stable for a relatively long period of time, both of which situations prevailed during most of the Rehnquist years. As a second factor, when vacancies occurred after 1992 they fell during the Clinton presidency, thus interrupting the long-running series of Republican appointments that offered at least the hope of one or more additional conservative jurists.[52] Third, the Court, in Hensley's assessment, "has historically been in line with the views of the American public, and public opinion during the Rehnquist era favored moderate policies regarding the contentious issues facing the nation," although the author does not explain why this link between public opinion and judicial decisions exists.[53] Fourth, the Justices of the Rehnquist Court generally took seriously the principle of *stare decisis*, thus reducing the likelihood that long-standing rulings would be pushed aside. Finally, perhaps the Court "felt the need to rein in conservative lower-court judges who were wiling to engage in radical change in constitutional law." Yet the record of the Rehnquist Court does not determine the future for other Courts and other Justices, as the "battles of the culture wars continue to rage."[54]

When President Bush named Judge Roberts to the Chief Justiceship following the death of Chief Justice Rehnquist, one piece of background information that surfaced almost immediately about the nominee was that Roberts had once been a law clerk to Rehnquist. With Supreme Court clerkships being among the most sought-after positions for recent graduates from the best law schools, that fact alone placed Roberts among very select company. Indeed, Rehnquist himself had once clerked for Justice Robert H. Jackson. Moreover, two colleagues of the new Chief Justice were former Supreme Court clerks. Justice Stevens clerked for Justice Wiley Rutledge, and Justice Stephen Breyer was once a law clerk to Justice Arthur J. Goldberg. Had Justice Felix Frankfurter not been reluctant to "hire a woman" when her professor at Harvard Law School had recommended her to Frankfurter in 1960,[55] Justice Ruth Bader Ginsburg might well be on the list of former Supreme Court clerks today, too.

Yet, even though the identity of law clerks at the Supreme Court has long been a matter of public record, the nature and extent of their role have not. As an element in the judicial process the clerkship institution at the Court—what Justice Douglas once referred to as the "junior Supreme Court"[56]—has long been largely uncharted territory. Indeed, because of the confidentiality that necessarily accompanies a clerkship, one might say that as far as publicity is concerned, the institution is forbidden territory as well.

Ironically, it was Rehnquist himself who, as a young attorney in the 1950s, helped to turn one of the first spotlights on clerkships at the Supreme Court. In a nationally circulated article, he suggested that the clerks had too much influence and perhaps injected a liberal bias into judicial decision making.[57] The controversy ignited by Rehnquist's article continued after he joined the Court, with publication of **The Brethren** by journalists Bob Woodward and Scott Armstrong in 1979 and **Closed Chambers** (1998) by Edward Lazarus, a former clerk to Justice Blackmun.[58] With varying emphases and examples, both books claimed that the clerks wielded too much power within the Court, although neither volume was scholarly rigorous in making its claims.[59] In a class by itself remains **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington** (2002).[60] This account of Knox's clerkship with Justice James C. McReynolds stands as a reminder to any prospective clerk

that one should be wary lest one's wishes be granted.

For a time, systematic study of the clerkship institution was limited to a handful of books. **Law Clerks and the Judicial Process** (1980) by John Bilyeu Oakley and Robert S. Thompson explored the use of clerks from the perspective of judges in California. H.W. Perry's **Deciding to Decide** (1990) built on the work of Doris Marie Provine's **Case Selection in the United States Supreme Court** (1980) in examining the certiorari-granting/denying process, and demonstrated that clerks played a major role in the Court's case-selection process. Bradley J. Best's **Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court, 1935–1995** (2003) highlighted the role of clerks in opinion-writing, the increase in the number of concurring and dissenting opinions, and the formation of voting coalitions within the Court.[61] This short list has now been augmented by a pair of recent books, each of which makes a notable contribution to the judicial literature: **Sorcerers' Apprentices**,[62] by political scientists Artemus Ward of Northern Illinois University and David Weiden of Illinois State University, and **Courtiers of the Marble Palace**,[63] by political scientist Todd C. Peppers of Roanoke College.[64] While none of the authors has had experience as a Supreme Court clerk, Peppers clerked for a United States district court in Nebraska and for a United States magistrate judge in Virginia.

One would be hard-pressed to choose between these two new contributions. For anyone interested in the Court, either book stands on its own as a prized and amply documented source of information and represents a worthy investment of a reader's time. Because each one contains at least some material lacking in the other, the books should be read together if possible. For example, Peppers includes as Appendix 4 a table listing the names of all law clerks, by Justice, from 1882 to 2004.[65] Ward and Weiden provide a table listing the twenty-one clerks, also by Justice, who served for two Terms instead of the usual one during the Rehnquist years between 1986 and 2002.[66] The same authors reprint several internal Court documents relating to clerks, including Justice Blackmun's "Talking Points for Interviewing Prospective Clerks" and Stephen G. Breyer's clerkship application letter to Chief Justice Warren in 1963.[67] A helpful addition to either would have been the *Law Clerk Code of Conduct*, which was first issued in 1987, although each book makes some reference to its contents. Apparently, no copies of the *Code* are publicly available, although Peppers notes that a copy lies with the Thurgood Marshall Papers at the Library of Congress.[68] Both describe in detail the various methods the Justices have employed over time to select their clerks, leading the reader to the conclusion that landing a Supreme Court clerkship is doubtless the most difficult professional hurdle any recent law school graduate can possibly encounter.[69] Each volume presents data on ethnic and gender diversity as well as the backgrounds of the clerks, including comparative information on both "feeder" schools (those law schools educating the largest numbers of clerks) and "feeder" judges and courts (those lower court judges and courts enjoying the greatest success rate in placing one of their own clerks at the Supreme Court).

The reader also discovers that the three authors employed a similar methodology—a mail survey with former clerks and in-person interviews with a few of them. Peppers augmented his research with an interview with both Justice Scalia and Justice Stevens. As might be expected, the documentation in both books demonstrates a thorough familiarity with published sources, including articles by and about former clerks, as well as a substantial reliance on archival material, especially oral histories and the collected papers of former Justices. Particularly in the surveys and interviews, the authors throughout seem wisely to have discounted for any self-inflation

by the clerks of their own importance. "You get an inappropriate idea of your own importance in the world for a year," Justice Stevens cautions, "and then you're out doing mortgage foreclosures. After you leave, there's a real letdown."[70]

Both volumes agree that credit for the founding of the clerkship institution goes to Justice Horace Gray. He was not only the first Supreme Court Justice to hire a recent law school graduate as a clerk—in 1882, at his own expense—but probably also the "first U.S. judge—state or federal—to hire a law clerk during his tenure on the Massachusetts Supreme Court."[71] Gray was both the originator of the law clerkship and "the first justice to graduate from law school *and* read law as an apprentice."[72] Gray's 1882 innovation received a boost from Attorney General Augustus H. Garland, who used the occasion of his annual report in 1885 to recommend to Congress that "it would greatly facilitate the business of the Supreme Court if each justice was provided with a secretary or law clerk, to be a stenographer, to be paid an annual salary sufficient to obtain the requisite qualifications, whose duties shall be to assist in such clerical work as might be assigned to him. The labor of the judges of the court in investigating questions and preparing their opinions is immense, and while heads of Departments and Senators have this assistance, I do not think there is any good reason that the judges of this court should not also have it."[73] The language leaves unclear whether Garland foresaw the new assistant being merely a stenographer, a trained attorney, or some combination of both. In any event, Garland's plea that the Justices needed help was successful. In 1886 Congress authorized the hiring of "a stenographic clerk for the Chief Justice, and for each associate justice of the Supreme Court, at not exceeding one thousand six hundred dollars each."[74]

Ward and Weiden believe it is significant that the law clerkship emerged at about the same time that law schools were beginning to supplant the traditional apprentice model of legal education, by which most attorneys in the United States had been trained since colonial days. Alongside Garland's entreaties and the conventional wisdom[75] that a ballooning docket at the Supreme Court led to the first clerkships—the Court of the late nineteenth century was deciding more cases than it ever had or, indeed, ever would again[76]—Ward and Weiden explain the creation of the institution and the early role conceptualization of the clerk as a reflection of the "legal apprentice/mentor model of legal education that had been imported from England and was not a response to the growing workload of the Court."[77] As a "manifestation of the last vestiges of the apprentice model in American law . . . the clerk occupied a dualistic position—that of student as well as secretary and clerical assistant."[78] In the view of Ward and Weiden, the arrival of the clerk was more of a "historical accident"[79] than a conscious response to increased demands on the Justices.

Nonetheless, there "is no question that the workload thesis helps to explain the *growth* of the institution of the clerk."[80] Explaining that growth consumes the bulk of both **Courtiers** and **Sorcerers' Apprentices**. Peppers tracks that growth in terms of a series of evolutionary stages. "The Law Clerk as Stenographer" is followed by "The Law Clerk as Legal Assistant," which then becomes "The Law Clerk as Firm Associate." For Ward and Weiden, there is a similar pattern in which one "regime" is succeeded by another. Law clerks as "secretaries" characterizes the period 1882–1918. The years 1919–1941 find the clerks acting principally as "research assistants," while between 1942 and 1969 they become "junior justices," and then "sorcerers' apprentices" after 1970.[81] According to Ward and Weiden's chronology, it was during the third period that the number of clerks doubled from one to two per Justice, and during the latest period that the third and fourth clerks for each Justice were added, each time by congressional statute at the request of the Court. Indeed, Chief Justice

William H. Rehnquist (right) was photographed in the Supreme Court courtyard when he clerked for Robert H. Jackson. He is seated next to Harry Parker (messenger, left) and C. George Niebank, Jr. (co-clerk, center).

Fred M. Vinson's addition of a third clerk in 1946 prompted appeals judge Learned Hand to dub him "Vinson Incorporated."[82]

As depicted in both books, changes at the Court have driven changes in the clerkship institution. For instance, Chief Justice Hughes's introduction of the "dead list" encouraged Justices to put their clerks to work examining petitions for certiorari and making recommendations concerning so-called "cert-worthy" applications. The practice had been for the Justices individually to review the relatively small number of new petitions that arrived each week, with the Chief Justice presenting and summarizing them at conference for review. However, once it became the default rule that review was denied if a case was on the dead list, Justices had to be more familiar with individual petitions if they were to be aware of those cases that merited resurrection or resuscitation. Then, as the number of petitions for certiorari greatly expanded during the Chief Justiceships of Harlan F. Stone and Vinson, the length of the dead list grew.[83] Second, the explosion in petitions for review—especially in the 1960s—not only meant that clerks spent much of their time on matters of certiorari but prompted creation of the "cert pool," whereby the labors of clerks from different Chambers were combined and then shared. After Justice Thurgood Marshall's retirement in 1991, only Justice Stevens remained outside the cert pool.[84] Third, it was also in the years after 1942 that it became common for clerks routinely to prepare their Justices for oral argument through the preparation of Bench memos that were themselves analyses of the briefs on the merits that had been filed by the parties in each case. Fourth, even so seemingly mundane a matter as change in a Chief's opinion-assignment practices effectively involved the clerks more deeply in the business of drafting opinions for their Justices, not merely doing research for an opinion that the Justice would draft. Hughes's custom had apparently been one of not assigning an opinion to someone

who had an unfinished opinion still on his desk. According to Justice Douglas's recollection, Chief Justice Warren introduced a policy of opinion equalization, whereby each Justice was expected to write approximately the same number of opinions. Similarly if a Justice had been given a complex case the last time, he might be assigned a simpler one the next time. Equalization meant, however, that "Justices who were accustomed to writing very few opinions each term under Chief Justices Taft and Hughes, and in the early years of Vinson's tenure, were expected to greatly increase their output, and turned to their clerks for help."[85] Clerks for Justices who moved at a quick pace were little affected by the change, but clerks for more methodical Justices "like Frankfurter and Reed found themselves writing virtually all their justices' opinions."[86] It was also after 1940 that the "clerk network"[87] developed. With the clerks and Justices all now working in the same building, the Justices found that their clerks could be useful resources of information, as well as informal "ambassadors,"[88] concerning developments in other Chambers and what other Justices might be thinking. For example, Ward and Weiden reprint a lengthy memo written by a clerk to Justice Powell concerning possible "common ground" with Justice Brennan in what became the landmark affirmative-action decision of 1978: *Regents v. Bakke*,[89] in which Brennan and Powell occupied strategically important positions, central both to the outcome of the case and to the impact of the decision in higher-education circles for over three decades.[90]

Generally, then, the cumulative effect of each of these changes has been, not to minimize the role of the clerks, but rather to integrate them more fully and more directly into the work of the Court. Most probably, neither Justice Gray nor General Garland had any inkling of what would become of the institution they helped to spawn a little more than a century ago. Moreover, each of the changes in the clerkship institution has also transformed the Court.

The authors of both books also address the central question that former clerk William Rehnquist posed a half century ago: influence.[91] The findings of both studies are remarkably similar: that it is still the Justices, and not the clerks, after all, who vote in deciding cases. In Pepper's view, "The practical effect of the evolution of the clerkship institution is that law clerks do not wield an inordinate amount of influence."[92] For example, the cert pool itself is an important monitoring device on what the clerks do. Because cert memoranda are circulated among the Chambers of participating Justices, a cert memo is potentially examinable by the clerks of eight Chambers and eight Justices. The practical effect is that "intentional deception or sloppy analysis is quickly discovered."[93] For Ward and Weiden, "clerks are neither merely surrogates nor scheming usurpers. Their role falls somewhere in between."[94] As for decisions in the cases themselves, the "arguments of clerks were less important to the justices than the more traditional factors of the justices' jurisprudential philosophy, specific case facts, and precedent." Rather, clerks are "most persuasive in the certiorari process, in fashioning the style and substantive content of opinions, as well as in the more stylistic aspects of opinion writing. Where clerks have less influence is in changing their justices' minds on the outcomes of cases."[95] Yet they acknowledge that "a danger exists that ambition coupled with passion could lead to self-serving partisanship."[96]

Both volumes conclude with questions that ponder the future of the clerkship institution. True to the spirit of their title, Ward and Weiden wonder whether "the clerks may find themselves unable to quell increasing threats to the Court's legitimacy that their institution has fostered."[97] Peppers is confident that the Supreme Court clerkship "will remain a highly contested prize." What is less certain, he believes "is whether the clerkship experience will retain its uniqueness"[98] as workloads increase and as the staffs of Chambers expand, placing greater distance between clerk

and Justice. He fears that the memorableness of the clerkship experience will go the way of "'the Holmes epigram, the Black way with facts, the Frankfurter vocabulary, the Brandeis footnote, the Stone pragmatism.'"[99] Long before any scholar paid much attention to what law clerks did, Justice Louis D. Brandeis—who had a total of nineteen clerks[100] during his twenty-three years on the Supreme Court—remarked that "the reason the public thinks so much of the Justices of the Supreme Court is that they are about the only people in Washington who do their own work."[101] In light of what Peppers and Ward and Weiden report about the clerkship institution, one suspects that today, Brandeis would be aghast. Yet it is difficult to conceive of the contemporary Supreme Court operating without a clerkship institution vastly different from anything he experienced.

As important as Rehnquist's clerkship with Justice Jackson was in advancing his career, he might well still have been appointed to the Supreme Court without it. Yet it seems unlikely that Rehnquist would ever have secured a seat on the Court had the Court not rendered the decision it did in *Miranda v. Arizona*,[102] or something very much like it.

Miranda[103] is both the subject and the title of a dramatic and well-written case study by Arizona attorney and published historical novelist[104] Gary L. Stuart. His book is an insightful look into the origins of a landmark decision and the workings of the judicial process, from the precinct house to the Supreme Court.

At least since 1936, the Supreme Court had overturned state convictions that were based on coerced confessions.[105] By the 1960s, some Justices wondered whether interrogations—even those not involving third-degree tactics—were unavoidably coercive if an accused person was shut up in a room with only police present. Because, according to *Gideon v. Wainwright*,[106] the Constitution required that an accused person be provided with counsel for trial, perhaps counsel should also be present for an interrogation. What a suspect might say to police in the stationhouse might well have a determining effect later on what happened in the courthouse. This, at least, seemed to be the premise of *Escobedo v. Illinois*,[107] where a bare majority of five Justices suppressed a confession after police denied the suspect's request to have his lawyer—who was waiting outside the interrogation room—present for the questioning. The decision, however, left police unclear as to their precise constitutional obligations.

On June 13, 1966, the Supreme Court clarified its intentions. By a 5–4 vote, *Miranda v. Arizona* called for sweeping changes in police practices in federal law enforcement and in every state of the Union. It remains probably the most significant criminal-law decision ever rendered by the Supreme Court in terms of its impact on the political system.

Because interrogations without the presence of counsel were inherently coercive, reasoned Chief Justice Warren, confessions elicited under such conditions amounted to compelled self-incrimination in violation of the Fifth Amendment. This was true even if, as in Ernesto Miranda's own interrogation, the confession seemed entirely voluntary, at least by traditional legal standards.[108] Henceforth, confessions would be admissible only if police had fully advised the suspect prior to any questioning of certain particulars that nearly instantly became known as the *Miranda* warnings: (1) the right not to answer any questions, (2) the warning that anything the suspect said might be used against him or her as evidence, (3) notification of one's right to have an attorney present if she chose to answer questions, and (4) the offer of a court-appointed attorney if the suspect was unable to retain one.

Warren's opinion for the Court took a drubbing not only in stinging dissents filed by Justices Harlan and Byron White, but in press commentary as well, some of which was plainly incendiary. As suggested earlier in this essay, the decision, along with other Warren Court rulings, also soon became caught up in the presidential election of 1968, which featured a race among three principal candidates:

Vice President Hubert Humphrey, the Democratic nominee; former Vice President Richard Nixon, the Republican nominee; and former Alabama Governor George Wallace, the nominee of the newly formed American Independent party. Both Nixon and Wallace built their campaigns in part around attacks on the Court. With *Miranda* now removed more than forty years into the past, some Americans might be surprised at the intensity of the political rhetoric that surrounded a single Court decision on criminal justice. In words that he repeated many times, Nixon maintained that "[s]ome of our courts have gone too far in weakening the peace forces as against the criminal forces." Mentioning *Miranda* specifically, he claimed that some decisions accounted in part for "the 88 percent increase" in crime in the Kennedy and Johnson administrations. Then, just days before the election, Nixon talked at length about his criteria for judicial appointments. Among the qualifications he would consider would be "experience or great knowledge in the field of criminal justice . . . [T]he abused in our society deserve as much protection as the accused [and] any justice I would name would carry to the bench a deep and biding concern for these forgotten rights."[109] A Nixon Court would presumably abandon the judicial activism that had been the hallmark of the Warren Court. "[N]ominees to the high court . . . would be strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social forces and political viewpoints on the American people."[110] By November 1968, concern over crime, civil unrest associated with the Vietnam war, and other factors cost Democrats enough votes in enough states to reject the heir of Lyndon Johnson's presidency and to hand the White House to Nixon. While Rehnquist lacked the national stature and visibility that would have made him a credible successor to Chief Justice Warren in 1969, as a candidate for an Associate Justiceship a short time later, the "brilliant ideological conservative"[111] seemed made to order for the new President.

While Stuart's account largely steers clear of the politics *Miranda* set in motion, it provides the reader with a glimpse into the lives of the accused persons and their victims in *Miranda* and its companion cases, plus a look as well at some of the more notable aspects of the litigation. For example, Stuart depicts how particular counsel came to be initially associated with Ernesto Miranda's case. Stuart credits Robert J. Cocoran, Arizona counsel to the American Civil Liberties Union, with having initially "found" the *Miranda* case, recognizing it as a "rare opportunity" to "advance the cause of justice for all—the guilty as well as the innocent."[112] Corcoran's first thought about a suitable attorney to guide Miranda's appeal from the Arizona Supreme Court was "the then up-and-coming Rex E. Lee"[113] of Phoenix firm Jennings, Strouss, Salmon & Trask. Later Solicitor General in the Reagan administration, Lee had clerked for Justice Byron White. Because that clerkship was still under "a kind of Supreme Court embargo,"[114] which barred Lee from appearing before the Court during a two-year period following the clerkship, however, Corcoran turned to constitutional scholar—and former clerk to Justice Hugo L. Black—John P. Frank of Lewis and Roca.[115] Frank would handle the briefs, with duties at oral argument in the hands of partner John Flynn. In Stuart's view, "Frank was perhaps the perfect man for the job and, ultimately, more than any other individual responsible for the line of reasoning that was to become known as the *Miranda* doctrine."[116]

Frank predicated his opening brief on what he called the "full meaning of the Sixth Amendment," meaning that it made little sense "to establish an elaborate and costly system of appointed counsel, only to see that nothing happens until it is too late to be effective."[117] Yet, ironically, it was during oral argument that the link between the Sixth and Fifth Amendments appeared. During Solicitor General

Thurgood Marshall's presentation, Chief Justice Warren asked "facetiously if Marshall meant to suggest that the Court overrule *Escobedo* [*v. Illinois*]." "'No sir,' Marshall answered promptly. 'I think *Escobedo* can fit into this case under the Fifth Amendment. I don't want to give support to the theory that . . . *Escobedo* requires a lawyer be appointed for an indigent at the police precinct on arrest.'"[118] This "suggestion—made, it should be remembered, by the government's chief oral advocate—that the Fifth Amendment, rather than the Sixth Amendment, applied in this case might not have been appreciated by the audience, for it was an audience focused on the Sixth Amendment's right to counsel at the accusatory stage, not the yet-to-emerge right to remain silent in the police station." But "the idea wasn't lost on Chief Justice Warren,"[119] who, of course, fashioned the opinion in *Miranda*.

Then there was the matter of whether *Miranda* would be applied retroactively, and, if so, how. A week after *Miranda* came down, the Court announced *Johnson v. New Jersey*,[120] which decreed that *Miranda* would apply to new *trials* beginning after June 13, rather than to *interrogations* occurring after that date. Thus, confessions already in hand for trials about to begin were inadmissible and, for prosecutions in which a confession was absolutely essential, calamitous. The effect was unsettling and only fueled the political clamor that was already under way.[121]

There is also the matter of a question left answered by Warren's *Miranda* opinion, a question that went unanswered for some time—indeed, until deep into the Rehnquist years. Unclear from Warren's opinion was whether the bright-line rule[122] of the *Miranda* warnings was predicated on the Constitution or whether it merely embodied judicially crafted rules of evidence, stipulating the conditions under which a confession could be introduced at trial. The issue came to the forefront in 2000, in *Dickerson v. United States*.[123] At issue was the constitutionality of section 3501 of the Omnibus Crime Control and Safe Streets Act that Congress had passed in 1968, two years after *Miranda*. The section attempted to sidestep *Miranda* by allowing the use in federal court of confessions *voluntarily* given, even if they were not preceded by the precise *Miranda* warnings.[124] Between 1968 and 1997, a succession of Attorneys General made no use of Section 3501, but a holding by the Fourth Circuit Court of Appeals in 1999[125] stipulated that because of 3501, an unwarned but nonetheless voluntary confession was admissible. In an opinion for seven members of the Supreme Court, Chief Justice Rehnquist was adamant that such confessions remained

A new book on the *Miranda v. Arizona* case examines the sweeping changes in police practices in federal law enforcement that the decision generated. *Miranda* remains probably the most significant criminal-law decision ever rendered by the Supreme Court in terms of its impact on the political system.

inadmissible. "We hold that *Miranda*, being a *constitutional* decision of this Court, may not be in effect overruled by an act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts."[126] By insisting that the bright-line *Miranda* rule was indeed something more than a prophylactic device to deal with a criminal-justice problem, the Chief Justice—perhaps, under the circumstances, the least expected member of the Court to do so—certainly did not end all questions about application of *Miranda* in varying factual situations, but did put this particular debate "to bed."[127] *Dickerson* is thus consistent with the conclusions of Bradley and Hensley that with respect to any contraction of constitutional rights during the Rehnquist years, any such retro-movements were fewer than many had hoped for or feared.[128]

For Stuart, the right of persons suspected of a crime to remain silent implicates a "fundamental value in American society, one that distinguishes us, for no other government recognizes the right of its citizens to tell government officials 'no' and make them abide by it. Whether we choose silence or choose to confess is not really the point. *Knowing* that we can choose one or the other is the point. In upholding this right, we license our government to protect all of us, innocent and guilty alike."[129] In its depiction of the process through which and the dynamics by which constitutional rights are shaped and solidified, Stuart's study of *Miranda* amounts to an engaging and useful addition to Supreme Court literature.[130]

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

Bradley, Craig M., ed. **The Rehnquist Legacy** (New York: Cambridge University Press, 2006). Pp. xxi, 392. ISBN: 0-52-168366-1, paper.

Hensley, Thomas R. **The Rehnquist Court: Justices, Rulings, and Legacy** (Santa Barbara, CA: ABC-CLIO, 2006). Pp. xviii, 441. ISBN: 1-57607-200-2, cloth.

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Stuart, Gary L. ***Miranda*: The Story of America's Right to Remain Silent** (Tucson: University of Arizona Press, 2004). Pp. xxii, 212. ISBN: 0-8165-2313-4, cloth.

Ward, Artemus, and David L. Weiden. **Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court** (New York: New York University Press, 2006). Pp.viii, 336. ISBN: 0-8147-9404-1, cloth.

ENDNOTES

[1]A revised edition in two volumes became available in 1926. Charles Warren, **The Supreme Court in United States History** (rev. ed. 1926).

[2]Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (1916).

[3]Edward S. Corwin, "The Basic Doctrine of American Constitutional Law, 12 *Michigan Law Review* 247 (1914); Corwin, **The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays** (1914). *See* Richard Loss, ed. **Corwin on the Constitution** (1981), vol. 1, 17–18. Corwin's work followed the path-breaking article by James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 129 (1893).

[4]Warren, v. Warren's poetic reference to words as "the skin of living thought" comes from a sentence in an opinion by Justice Oliver Wendell Holmes, Jr.: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

[5]Warren, v. Alongside Warren's, Myers's **History** was published at the relatively early date of 1912.

[6]For example, see Warren, vol. 1, 806–13.

[7]Notes, "Death of Chief Justice Waite," 22 *American Law Review* 301, 303 (1888).

[8]Samuel J. Konefsky, **Chief Justice Stone and the Supreme Court** (1946); Vincent Blasi, **The Burger**

inadmissible. "We hold that *Miranda*, being a *constitutional* decision of this Court, may not be in effect overruled by an act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts."[126] By insisting that the bright-line *Miranda* rule was indeed something more than a prophylactic device to deal with a criminal-justice problem, the Chief Justice—perhaps, under the circumstances, the least expected member of the Court to do so—certainly did not end all questions about application of *Miranda* in varying factual situations, but did put this particular debate "to bed."[127] *Dickerson* is thus consistent with the conclusions of Bradley and Hensley that with respect to any contraction of constitutional rights during the Rehnquist years, any such retro-movements were fewer than many had hoped for or feared.[128]

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[7]Notes, "Death of Chief Justice Waite," 22 *American Law Review* 301, 303 (1888).

[8]Samuel J. Konefsky, **Chief Justice Stone and the Supreme Court** (1946); Vincent Blasi, **The Burger**

Court: The Counter-Revolution That Wasn't (1983); Bernard Schwartz, **The Burger Court: Counter-revolution or Confirmation?** (1998); Bernard Schwartz, **The Warren Court: A Retrospective** (1996); L.A. Powe, Jr., **The Warren Court in American Politics** (2000).

[9]Tinsley E. Yarbrough, **The Rehnquist Court and the Constitution** (2000).

[10]David L. Hudson, Jr., **The Rehnquist Court: Understanding Its Impact and Legacy** (2007).

[11]Craig M. Bradley, ed., **The Rehnquist Legacy** (2006) (hereafter cited as Bradley).

[12]*Id.*, 2.

[13]*Id.*, 2.

[14]*See Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

[15]Bradley, 3.

[16]*Id.*

[17]Alpheus Thomas Mason, "The Chief Justice of the United States: *Primus Inter Pares*," 17 *Journal of Public Law* 20, 21 (1968).

[18]Felix Frankfurter, "Chief Justices I Have Known," 39 *Virginia Law Review* 883, 901 (1953).

[19]Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (1956), 568.

[20]David Danielski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court," in Walter F. Murphy, C. Herman Pritchett, and Lee Epstein, eds., **Courts, Judges, and Politics: An Introduction to the Judicial Process** (5th ed., 2002), 663.

[21]Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership, *Journal of Supreme Court History* (1991), 63, 64.

[22]Bradley, 3.

[23]*Id.*

[24]*Id.*

[25]*Id.*, 3–4.

[26]*Id.*, 4.

[27]*Id. See* Kim Isaac Eisler, **A Justice For All** (1993), 103, 139–40.

[28]Bradley, 5 (emphasis in the original).

[29]*Id.*

[30]Rehnquist, "The Notion of a Living Constitution," 54 *Texas Law Review* 693, 470 (1976), quoted in Bradley, 5.

[31]*Trimble v. Gordon*, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting).

[32]*Lawrence v. Texas*, 539 U.S. 558 (2003).

[33]*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[34]*Santa Fe Ind. School District v. Doe*, 531 U.S. 290 (2000).

[35]*Grutter v. Bollinger*, 539 U.S. 306 (2003).

[36]Bradley, 5.

[37]Hensley, 7.

[38]Thomas R. Hensley, **The Rehnquist Court** (2006) (hereafter cited as Hensley).

[39]Sadly, Professor Renstrom lost his own battle with cancer in September 2006.

[40]The author of this review essay contributed a volume to the *Supreme Court Handbooks* series: **The Waite Court: Justices, Rulings, and Legacy** (2003).

[41]The most recent entry in the Johnson series is Michael R. Belknap, **The Supreme Court Under Earl Warren** (2005). The most recent entry in the *Holmes Devise* series is William M. Wiecek, **The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953** (2006).

[42]Hensley, xv.

[43]Henry J. Abraham, **Justices, Presidents, and Senators** (1999), 181, 304–5.

[44]Hensley, xv.

[45]*Id.*, 318.

[46]*Id.*

[47]*Id.*, xvii. In statistical studies of the Court, characterizing the "direction" of a vote—that is, whether it is to be considered liberal or conservative—is somewhat arbitrary. A "liberal" vote in a case involving an individual right is usually defined as a vote in favor of the individual and against the government, whereas a vote in favor of the government is tagged as "conservative." When property rights are at issue, the labeling is reversed and reflects a post–New Deal slant. Accordingly, a vote in favor of the property right is considered conservative, while a vote in favor of the government is marked liberal. *See* Harold J. Spaeth, "Justice Sandra Day O'Connor: An Assessment," in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), 84.

[48]*Id.*, xvii. The operative word in this characterization is "major" and is subject to several notable qualifications. For example, *Crawford v. Washington*, 541 U.S. 36 (2004), overturned *Ohio v. Roberts*, 448 U.S. 56 (1980), which had allowed the use of certain hearsay testimony over Confrontation Clause objections. *See* Hensley, 320. Similarly, in the realm of the death penalty *Atkins v. Virginia*, 536 U.S. 304 (2002), overturned *Penry v. Lynaugh*, 492 U.S. 302 (1989), just as *Roper v. Simmons*, 543 U.S. 551 (2005) overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989). See Hensley, 320.

[49]For example, with respect to the limitations placed on government by the establishment clause, *Agostini v. Felton*, 521 U.S. 203 (1997), represented a significant departure from *Aguilar v. Felton*, 573 U.S. 402 (1985).

[50]Of the forty-three Presidents to date, four—William Henry Harrison, Zachary Taylor, Andrew Johnson, and Jimmy Carter—made no appointments to the Supreme Court. Even James Garfield, who was President for only a few months before he was assassinated, was able to make one: Stanley Matthews in 1881. Garfield's nomination of Matthews succeeded, whereas President Rutherford Hayes's nomination of Matthews had been pigeonholed by the Senate.

[51]Jefferson hoped that William Johnson, his first appointee to the Supreme Court, would assert his independence of the "domineering Chief Justice" (Marshall) Jefferson's hopes went mainly unfulfilled. Benjamin F. Wright, "Foreword," in Donald G. Morgan, **Justice William Johnson: The First Dissenter** (1954), v.

[52]President Clinton's appointment of Ruth Bader Ginsburg to the Court in 1993, to fill the vacancy created by the retirement of Justice Byron R. White, was the first Supreme Court appointment by a Democratic President since President Lyndon Johnson's appointment of Thurgood Marshall in 1967.

[53]Hensley, 321.

[54]*Id.*

[55]Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases** (14th ed., 2005), 17.

[56]Bernard Schwartz, **Decision: How the Supreme Court Decides Cases** (1996), 48.

[57]William H. Rehnquist, "Who Writes Decisions of the Supreme Court?" *U.S. News & World Report*, Dec. 13, 1957; Rehnquist, "Another View: Clerks Might 'Influence' Some Actions." *U.S. News & World Report*, Feb. 21, 1958. *See also* William D. Rogers, "Do Law Clerks Wield Power in Supreme Court Cases?," *U.S. News & World Report*, Feb. 21, 1958. Rogers had clerked for Justice Stanley Reed.

[58]Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (1979); Edward Lazarus, **Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court** (1998).

[59]On **The Brethren**, see D. Grier Stephenson, Book Review, 46 *Brooklyn Law Review* 373 (1980).

[60]Dennis J. Hutchinson and David J. Garrow, eds., **The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington** (2002).

[61]John Bilyeu Oakley and Robert S. Thompson, **Law Clerks and the Judicial Process** (1980); Doris Marie Provines, **Case Selection in the United States Supreme Court** (1980); H.W. Perry, **Deciding to Decide: Agenda Setting in the United States Supreme Court** (1990); Bradley J. Best, **Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court, 1935–1995** (2003).

[62]Artemus Ward and David L. Weiden, **Sorcerers' Apprentices** (2006) (hereafter cited as Ward and Weiden).

[63]Todd C. Peppers, **Courtiers of the Marble Palace** (2006) (hereafter cited as Peppers).

[64]The titles of both books have respectable pedigrees. Ward and Weiden look to a 1779 poem by Johann Wolfgang von Goethe for theirs (Ward and Weiden, 249), while Peppers draws his from Baldassare Castiglione's **The Book of the Courtier**, written five centuries ago (Peppers, 211). The term "Sorcerer's Apprentice?" also appears as a heading for the section on Supreme Court law clerks in Herman Schwartz, **Decision** (1996), 48.

[65]Peppers, 219–35.

[66]Ward and Weiden, 47.

[67]*Id.*, 267, 264.

[68]Peppers, 204.

[69]Through 2002, some 1,736 individuals clerked at the Supreme Court, with only 152 of them serving for longer than a single Term, although in the earlier years of the clerkship institution, some 12 clerks served for nine years or more. Ward and Weiden, 31.

[70]*Id.*, 19.

[71]Peppers, 43.

[72]Ward and Weiden, 29.

[73]Peppers, 42.

[74]*Id.* General Garland later authored a volume of memoirs that includes his own observations on the Supreme Court. Augustus H. Garland, **Experience in the Supreme Court of the United States** (1898).

[75]*See, e.g.*, Paul R. Baier, "The Law Clerks: Profile of an Institution," 26 *Vanderbilt Law Review* 1132 (1973).

[76]*Compare* the data in Felix Frankfurter, and James M. Landis, The **Business of the Supreme Court** (1928), 86, with Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, **The Supreme Court Compendium: Data, Decisions, Developments** (2d ed. 1996), 71, and "2006 Year-End Report on the Federal Judiciary," 39 *The Third Branch* 1, 4 (Jan. 2007).

[77]Ward and Weiden, 26.

[78]*Id.*, 29–30.

[79]*Id.*, 26.

[80]*Id.*, 18 (emphasis in the original).

[81]Ward and Weiden, 23.

[82]*Id.*, 37.

[83]*Id.*

[84]*Id.*, 45.

[85]*Id.*, 42.

[86]*Id.*, 43.

[87]*Id.*

[88]*Id.*

[89]438 U.S. 265 (1978).

[90]Ward and Weiden, 43–45.

[91]Because he organizes his book around a "principal agent" model, Peppers prefers the word "shirking" to "influence." Peppers, 10, 12.

[92]*Id.*, 211.

[93]*Id.*, 210.

[94]Ward and Weiden, 237–38.

[95]*Id.*, 241.

[96]*Id.*, 246.

[97]*Id.*, 250.

[98]Peppers, 212.

[99]*Id.*, 212, quoting John P. Frank, "Fred Vinson and the Chief Justiceship," 21 *University of Chicago Law Review* 224 (1954).

[106]Brandeis's clerks included such future notables as Dean Acheson, Paul A. Freund, Henry J. Friendly, Willard Hurst, and David Riesman. Peppers, 220.

[101]Quoted in Charles E. Wyzanski, Jr., **Whereas—A Judge's Premises: Essays on Judgment Ethics and the Law** (1965), 61.

[102]384 U.S. 436 (1966).

[103]Gary L. Stuart, *Miranda* (2004) (hereafter cited as Stuart). There were actually four cases joined together in *Miranda v. Arizona* that were decided with a single opinion. Besides *Miranda*, they include *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*. See 384 U.S. 436 (1966). The opinion was released on June 13, 1966. It followed oral arguments delivered by ten lawyers that lasted more than seven hours, spread over three days, all of which resulted in a transcript of about 280 pages. Even though the four cases are today all commonly referred to as *Miranda*, it was the Stewart case that actually bore the lowest docket number. Stuart believes that *Miranda* became the name by which the decision was known because it "had the most compelling facts and arguably the strongest brief and the most persuasive oral argument." Stuart, 53.

[104]Stuart's novel is **The Gallup 14** (2000).

[105]*Brown v. Mississippi*, 297 U.S. 178 (1936).

[106]372 U.S. 335 (1963).

[107]378 U.S. 478 (1964).

[108]Stuart, 6–7.

[109]Quotations in this paragraph are drawn from Donald Grier Stephenson, Jr., **Campaigns and the Court: The United States Supreme Court in Presidential Elections** (1999), 181.

[110]*Id.*

[111]Henry J. Abraham, **Justices and Presidents** (3d ed., 1992), 22).

[112]Stuart, 42.

[113]*Id.*, 44.

[114]*Id.*

[115]Stuart notes that he took a course in constitutional law with Frank in 1966. *Id.*, xxi.

[116]*Id.*, 45–46.

[117]*Id.*, 46–47.

[118]*Id.*, 72.

[119]*Id.*, 72.

[120]384 U.S. 719 (1966).

[121]The Court apparently learned a lesson from this retroactivity blunder. When *United States v. Wade* required, 5 to 4, the presence of counsel at identification police lineups, the Court made clear that the ruling would apply only to *identifications* made after that date. 388 U.S. 218 (1967).

[122]A "bright-line rule" is a legal standard composed of elements that are supposed to produce a consistent pattern of application in later cases. Thus, with confessions, the *Miranda* rule replaced the old voluntariness test.

[123]530 U.S. 427 (2000).

[124]*See* Recent Statute, "Title II of the Omnibus Crime Control and Safe Streets Act of 1968," 82 *Harvard Law Review* 1392 (1969).

[125]*United States v. Dickerson*, 166F. 3d 667 (4th Cir. 1999).

[126]530 U.S. at 331 (emphasis added).

[127]Stuart, 167. In *Dickerson*, Chief Justice Rehnquist spoke for the Court. Justice Scalia, joined by Justice Thomas, dissented.

[128]Bradley's volume includes an analysis of *Dickerson* by Yale Kamisar: "*Dickerson v. United States*: The Case That Disappointed *Miranda*'s Critics—and Then Its Supporters." Bradley, 106. Kamisar focuses specifically on *United States v. Patene*, in which the Court reversed a holding by the Court of Appeals for the Tenth Circuit that held inadmissible the fruit of an admitted failure to comply with *Miranda* itself, in a situation where the incriminating statement was unwarned but voluntary. 542 U.S. 630 (2004). In *Patane*, there was no opinion of the Court. Justice Thomas, joined by the Chief Justice and Justice Scalia, spoke for the plurality, while Justice Kennedy, joined by Justice O'Connor, concurred in the judgment. Justice Souter, joined by Justices Ginsburg and Stevens, dissented. Justice Breyer also dissented. As Kamisar writes, "The fact that Justice Scalia joined Justice Thomas's plurality opinion is not surprising. The fact that the Chief Justice did is. In this post-*Dickerson* confession case, the two dissenters in *Dickerson* and the author of the majority opinion in *Dickerson* make strange bedfellows." Bradley, 125.

[129]Stuart, 173 (emphasis in the original.).

[130]Ernesto Miranda's own story ended tragically. Stuart reports that he was released from prison the last time, after a series of incarcerations, in mid-December, 1975. Little more than a month later, he was stabbed to death in a barroom fight in Phoenix. Stuart, 95.

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Corrections: On page 5 of volume 31, number 2, the length of time Justice Byron White served on the Court was misstated. He served thirty-one years, from 1962 to 1993. In Bennet Boskey's article on Supreme Court declinations in volume 31 number 3, Judge John Scholfield's name was spelled incorrectly. Correspondingly, the photo on page 258 is not Judge Scholfield, but General John McCallister Schofield.

Illustrations

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