THE SUPREME COURT
HISTORICAL SOCIETY

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JUSTICE BRANDEIS AS LEGAL SEER

*By Justice Stephen G. Breyer**

**Justice Breyer delivered this address on February 16, 2004 at the Brandeis School of Law of the University of Louisville, at which time he was presented with the school's highest honor, the Brandeis Medal. The Medal is given annually to an individual whose life reflects Justice Brandeis's committment to the ideals of individual liberty, concern for the disadvantaged, and public service. The lecture was previously published in 42 Brandeis Law Journal 711–720. It is abridged here with permission.*

It is an honor to be asked to give this lecture, associated with Justice Louis Brandeis. To set the scene, let me remind you of several basic biographical facts of Brandeis's life.

Louis Brandeis was born here in Louisville in 1856. A few years earlier, his family had left Prague, fearing a conservative reaction to the failed democratic revolution there. The family prospered as merchants and was able to give Louis a good education—both here in Louisville and in Germany, where he attended high school. Although Louis's family was Jewish, they did not observe Jewish customs or religious practices. Louis maintained that secular life, although he felt the influence of his uncle Lewis Dembitz, a practicing lawyer and orthodox Jew; indeed, he took Dembitz's last name as his middle name.

Brandeis was a brilliant law student, lawyer, and judge. I should like to read an excerpt (quoted by Tom McCraw) from a letter about him written by a fellow student at Harvard Law School. Brandeis, it says:

> Graduated last year from Law School and is now taking a third year here—was the leader of his class and one of the most brilliant legal minds they have ever had here—and is but little over twenty-one withal. Hails from Louisville—is not a College graduate, but has spent many years in Europe, . . . Tall, well-made, dark, beardless, and with the brightest eyes I ever saw. Is supposed to know everything and to have it always in mind. The Profs. listen to his opinions with the greatest deference, and it is generally correct. There are traditions of his omniscience floating through the school. One I heard yesterday—A man last year lost his notebook of Agency lectures. He hunted long and found nothing. His friend said—Go and ask Brandeis—he knows everything—perhaps he will know where your book is—He went and asked. Said Brandeis – "Yes- go into the Auditor's room, and look on the west side of the room, and on the sill of the second window, and you will find your book" – And it was so.[1]

Collection of the Supreme Court of the United States

Following a four-month confirmation battle, Louis Dembitz Brandeis's nomination to the Supreme Court was confirmed June 1, 1916, by a Senate vote of 47 to 22

This letter suggests that Brandeis was omniscient, indeed, a seer, a matter to which I shall return.

Brandeis's professional accomplishments lived up to his law school reputation. For thirty years, first with his partner Samuel Warren, and later with other associates, he practiced law in Boston, where he turned his raw intelligence, powerful legal imagination, unusual capacity for hard work, and love of advocacy into a highly successful career. That is to say,

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A Letter from the President

The Society performs its mission primarily through the work of committees: the Executive Committee, which meets quarterly and is responsible for the governance of the organization between annual meetings; ten standing committees that submit reports and recommendations at each meeting of the Executive Committee; and various special committees, such as the ad hoc committee that successfully helped bring about the passage of the John Marshall Commemorative Coin Bill this year. All of the committees are of vital importance to the well-being of the Society but the core substantive activities are planned and implemented primarily by three of them— the Acquisitions Committee, the Program Committee, and the Publications Committee.

In the last issue of the *Quarterly*, I discussed the work of the Acquisitions Committee. In this issue I will summarize the programs of the Society that are planned and supervised by the Program Committee. The next issue of the *Quarterly* will feature the Publications Committee. Hopefully these letters will give newer members a better understanding of what the Society does— a question I am sometimes asked— and will serve as refreshers for longtime members.

(a) Organization of the Program Committee

For the past several years, this committee has been ably chaired by Philip Allen Lacovara. He was preceded by Vice President E. Barrett Prettyman, Jr., who continues to serve on the committee. The other members of the Program Committee are Herman Belz, James C. Duff, Roy Englert, Charles Galvin, Robb M. Jones, Maureen E. Mahoney, James B. O'Hara and Seth P. Waxman. Jennifer M. Lowe is the staffer having primary liaison with this committee and the day-to-day responsibility of implementing its decisions; and Executive Director David Pride, Assistant Director Kathy Shurtleff, and other members of the staff, also provide assistance. The committee typically meets four times a year, usually by conference telephone call.

I would divide the responsibilities of the Program Committee into three areas: lectures; other educational programming; and special events. There is considerable overlapping among the three, of course, just as there is an interrelationship between the activities of the Program Committee and the Publications Committee.

(b) Lectures

Since 1993, the Society has sponsored a lecture series each year. This was formally named the Leon Silverman Lecture Series to honor our distinguished Chairman of the board for his outstanding leadership during his 11 years as President of the Society. There are usually five or six lectures in each series; they are held in the courtroom of the Supreme Court and last about one hour each, including an introduction of the speaker by one of the Justices who acts as host for the evening, with a reception afterwards; and are well attended. The text of each lecture is subsequently published in the *Journal of Supreme Court History*, thereby preserving and further disseminating the fruits of the speakers' efforts.

Through experience it has been concluded that the most effective way of creating an interesting lecture series is by the use of a thematic approach. The theme for the Leon Silverman Series this past year was *Advocacy before the Supreme Court*. The lecture series for 2005, which will be presented between February and May 2005, will have the theme of *Mr. Jefferson and the Supreme Court*, and will focus on President Thomas Jefferson, the Supreme Court, John Marshall and the Constitution. As in the past, an outstanding group of scholars and historians have agreed to make presentations. In addition to the lectures being given in Washington, the Program Committee is exploring the possibility of reprising one or more at a suitable venue in the State of Virginia. This would provide another opportunity for the Society to expand its geographic wings, so to speak.

One of the highlights of the year is the Annual Lecture that is delivered in the Supreme Court courtroom on the afternoon of the day on which the Annual Meeting and Dinner take place— usually the first Monday in June. Almost all of the present members of the Supreme Court have delivered annual lectures in the past and other distinguished speakers have included U.S. Court of Appeals judges and prominent authors and historians. This past June, Judge John Roberts, of the Court of Appeals for the District of Columbia Circuit, spoke on the subject of oral advocacy. I am happy to advise you that Judge J. Harvie Wilkinson III of the Court of Appeals for the Fourth Circuit, will deliver the Annual Lecture this coming June. There is no charge for attending the Annual Lecture but reservations are required.

We participate with the U.S. Capitol Historical Society and the White House Historical Association, on a rotating basis each year, in presenting the National Heritage Lecture. The lecture returns to the Supreme Court Historical Society in 2005. The topic will be announced in coming months.

From time to time, special lectures of one kind or another are presented either in Washington or in other parts of the country, as further pointed out below.

(c) Other Educational Programs

One of the most successful activities of the Society is the conduct of the Summer Institute for high school teachers. A total of 60 teachers come to Washington in two separate sessions in June of each year for an intensive indoctrination about the Constitution and the role of the Supreme Court. The participants then share this knowledge with other teachers and students throughout the nation. Thus far a total of 545 high school teachers have participated in the Washington sessions. The Summer Institute is so popular that the Society is exploring ways of increasing the number of participants.

In addition, the first New York City Supreme Court initiative was held this past November in New York at the offices of Fried, Frank, Harris, Shriver & Jacobson LLP. The Society received a generous grant from the Carnegie Corporation of New York to implement this program, which hopefully will serve as a model for future out-of-town seminars. This is an expensive endeavor but worthy of the full support of the Society in my judgment. It is hoped that other law firms and foundations will be willing to fund the cost of programs in their home states.

These programs are made possible by a very happy partnership between the Society and Street Law, and the Society is grateful for its support and valuable assistance. You will read more about the 2004 Summer Institute sessions administered by Street Law on page 16 of this issue, where you will learn in more depth about its approach to teaching about the constitution and the Supreme Court.

For many years the Society has provided financial, administrative and moral support for *"The Documentary History of the Supreme Court of the United States, 1789-1800,"* a highly important project. Volume VII was published this past year, and the manuscript for the eighth and final volume is scheduled to be completed by December 31, 2006. This project has been monitored by the Program Committee. I will have more to say about this landmark project in a later letter.

(d) Special Events

There have been a variety of special events over the years, including for example: (i)a lecture that was given by Justice Anthony Kennedy to a large audience of Society members and their guests in San Francisco in September 2003; (ii)a lecture on Justice Brennan delivered by Professor James O'Hara in New Jersey in October 2003; and (iii)I will participate in January of 2005 in a program at a meeting in Orlando, Florida of the American Intellectual Property Law Association, with which the Society has established a close relationship that hopefully will be a model for similar joint activities with other such groups.

Of particular interest to me have been the recreations of oral arguments before the Court in famous cases of the past. For example, several years ago the early case of *Chisholm v. Georgia* was reenacted, (or more accurately, re-imagined) with Chief Justice Marshall being represented by Justice Antonin Scalia (in fact, he represented the entire Marshall Court that evening). When the case was originally argued in 1793, Attorney General Edmund Randolph appeared as private counsel for Chisholm. Contending that the Supreme Court lacked jurisdiction of the case, the State of Georgia declined to appear (unwisely in retrospect), and no member of the Supreme Court bar accepted the invitation of the Justices to speak in its behalf. In the recent recreation, Solicitor General Seth Waxman, a member of the Society's Executive Committee, appeared and argued for Chisholm. Former Attorney General Griffin Bell then accepted the invitation of the Court to appear for the State of Georgia and he presented a spirited argument but the outcome was the same, of course. As you know, this decision precipitated the passage of the Eleventh Amendment a few years later.

In another reenactment, Philip Lacovara and Teresa Wynn Roseborough, currently an Executive Committee member, presented the arguments in *Gibbons v. Ogden*, with Justice Scalia once again graciously presiding. The courtroom was filled to capacity on each of these occasions. I am hopeful that other such reenactments can be scheduled to take place hereafter.

There are other programs that because of space limitations I have not attempted to describe. I hope the foregoing demonstrates that the Program Committee is doing a splendid job for the Society, and I want to express my appreciation to all of its members and to the staffers who provide assistance to the committee.

Frank Jones

THE SCHEDULE FOR THE 2005 LEON SILVERMAN LECTURE SERIES APPEARS ON PAGE 11 OF THIS MAGAZINE AND ON THE SOCIETY'S WEBSITE

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Managing Editor Kathleen Shurtleff
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FESTIVITIES HELD MARKING THE 29TH ANNUAL MEETING

The Honorable John Roberts presented the lecture speaking on the topic of *The Reemergence of a Supreme Court Bar.*

The first Monday of June 2004, marked the 29th Annual Meeting of the Society. Traditions set up in the early years of the Society have been followed in the intervening years, and the opening event of the day was the Annual Lecture given by the Honorable John Roberts of the U.S. Court of Appeals for the D.C. Circuit. His topic was "The Reemergence of a Supreme Court Bar." Speaking to a capacity audience, Judge Roberts gave an engaging and interesting talk. Well qualified not only as a federal judge but also as a recent and frequent advocate before the Supreme Court, he spoke with first-hand knowledge and expertise. As is customary, the text of his remarks will appear in a forthcoming issue of the *Journal of Supreme Court History.*

Many members availed themselves of the opportunity to tour the Supreme Court Building at the conclusion of the Lecture. As in past years, tour leaders from the Office of the Curator of the Court provided an opportunity for members to view areas of the Building not accessible to the average visitor to the Court.

The Annual business meetings of the General Membership and the Board of Trustees were held in the Supreme Court Chamber in the evening. President Frank Jones and Chairman of the Board Leon Silverman presided over the meetings and provided short reports on the status of the Society. Notable achievements for the fiscal year included the completion of the 2004 Leon Silverman Lecture series, and co-sponsorship of the National Heritage Lecture, directed this year by the White House Historical Association. New publications include the special book produced to commemorate the 50th anniversary of the decision in *Brown v. the Board of Education*, titled *Brown, White and Black: The Landmark School Desegregation Case in Retrospect.* Other publications produced include regular issues of the *Quarterly* magazine, and three issues of the *Journal of Supreme Court History.* Educational training sponsored by the Society included special program for history teachers and selected students of Chavez High School in Washington, DC. In addition to these programs were the traditional two sessions of the Summer Institute in which 60 high school teachers received intensive training focusing on teaching about the Supreme Court and constitutional issues. This on-going program has garnered much praise and support. (See story on page 16 of this magazine.)

Acquisitions of note obtained during the year included memorabilia and photographs from the families of Justice Tom C. Clark and Chief Justice Charles Evans Hughes. Purchases included significant autograph letters by Chief Justice Marshall and Justice Noah Swayne, and antique photographs and engravings.

Among the most important purposes of the Annual business meetings is the election of officers and members of the Board of Trustees. Nominations to office were made by Virginia Warren Daly acting in her capacity as Secretary of the Society and Chair of the Nominating Committee. The first elections concerned individuals nominated to serve on the Board of Trustees. The following individuals were nominated to serve an additional three-year term as members of the Board of Trustees: **George R. Adams; Vincent Battaglia, Sr.; Barbara Black; Vincent C. Burke, Jr.; Patricia Dwinnell Butler; Andrew Coats; James Goldman; John D. Gordan III; Philip A. Lacovara; Ralph I. Lancaster, Jr.; Leon Polsky; Cathleen Douglas Stone; Seth P. Waxman; Agnes N. Williams;** and **W. Foster Wollen.**

In addition, the following individuals were elected to an initial three-year term of service as members of the Board of Trustees: **J. Bruce Alverson; Nancy Brennan; Edmund N. Carpenter; Benjamin Heineman; A. E. Dick Howard; Randall Kennedy; Lucas Morel; Charles Morgan; Carter Phillips; Teresa Wynn Roseborough** and **Larry Thompson.** In recognition of long and loyal service, three individuals were nominated to serve as **Trustees Emeritus**. The three so nominated were: **Mrs. Vera Brown, Mrs. Ruth Insel,** and **F. Elwood Davis.** All candidates were elected by unanimous vote.

At the Annual Meeting, President Jones displayed a copy Volume VII of the *Documentary History of the Supreme Court: 1789-1800,* the penultimate volume in the series. Virginia Warren Daly, Secretary, and Leon Silverman, Chairman of the Board, are also shown.

Teresa Wynn Roseborough is pictured with Mark Wasserman and Greg Smith. Ms. Roseborough was elected to serve as member of the Board of Trustees and the Executive Committee.

Immediately following the Annual Meeting of the General Membership of the Society, Chairman Leon Silverman convened the Annual Meeting of the Board of Trustees. Mr. Silverman remarked that the caliber of the incoming Trustees was a mark of the achievements of the Society. Our Trustees and Officers are truly among the great legal scholars and practitioners of our time. Their participation in the Society brings great honor and credit to the organization, and their expertise is reflected in the quality of our publications and programs.

Elections were held at this meeting. Nominated to serve one-year appointments as At-Large Members of the Executive Committee of the Board of Trustees were the following individuals: **Frank Gundlach; Ralph I. Lancaster, Jr.; Jerome Libin; Mrs. Thurgood Marshall; Maureen Mahoney; Joseph Moderow; John Nannes; Leon Polsky; Teresa Wynn Roseborough** and **Seth P. Waxman.** All were elected by unanimous vote.

Following the elections, Mr. Silverman called upon Justice Clarence Thomas to assist in presenting awards to a number of members who deserved special recognition. All of them have contributed generously of their time and substance to the work of the Society during the past year.

The first awards presented were the literary prizes awarded for outstanding articles published in the **Journal of Supreme Court History.** The Hughes-Gossett Literary prize, carrying a cash award of $1500, was presented to Judge **John Ferren** for his article on the life of Wiley Rutledge. This article was developed from a book-length biography of Justice Rutledge published after the Annual Meeting was held. The student literary prize was awarded to **Daniel Hamilton** for his article, "A New Right of Property: Civil War Confiscation in the Reconstruction of the Supreme Court." Mr. Hamilton was unable to attend the ceremony but his achievement was recognized.

Justice Thomas presented the Hughes-Gossett Literary prize to Judge John M. Ferren for an article derived from Ferren's new biography of Justice Wiley Rutledge.

Justice Thomas presented an award recognizing her generous support of the Society and particularly the Acquisitions Program, to Patricia Dwinnell Butler.

Following the elections, Mr. Silverman called upon Justice Clarence Thomas to assist in presenting awards to a number of members who deserved special recognition. by promoting membership in the Society within their home states. Mr. Gundlach worked tirelessly during the year to encourage the network of state chairs. While some were recognized at the dinner held in April (reported in the last issue of the *Quarterly),* those recognized at the Annual Meeting were: **J. Bruce Alverson of Nevada; William L. Edlund of California North** (for the FY 03 campaign); **James Falk, Jr. of Washington, DC; Robert Gwinn, Texas-Dallas; Wayne Mark, Nebraska; James Schaller, Washington, DC; R. Bruce Shaw, South Carolina** (for the FY 03 campaign); and **James Wyrsch, Missouri-West.**

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29th Annual Meeting—continued from page 5

Wayne J. Mark received an award in recognition of his outstanding service as membership state chair for Nebraska.

The next item of business was the presentation of awards for donors to the Society. For this portion of the meeting, **Jerome Libin**, Chair of the Development Committee, joined Justice Thomas at the podium. Those present to receive recognition for significant contributions to the Society during the year were recognized for personal donations, or as representatives of firms or foundations: **Fred Bentley, Sr.,** for contributions of historically significant items, as well as funds to purchase items for that collection; **Patricia Butler**, for contributions to the Acquisitions fund and other programs; **Dorothy Goldman**, for her frequent and generous donations to almost every program; **James Goldman**, for his support of many Society programs and causes; **Frank G. Jones,** of the **Fulbright Jaworski** law firm; **Robert Juceam** of the **Fried Frank Harris Shriver and Jacobson** law firm; **Gregory Michael** for his personal generosity; **Jay Sekulow** of the **American Center for Law and Justice; Foster Wollen** of the **Bechtel Foundation**; **Donald Wright** for his personal assistance; and **William Yarbrough** for his personal contribution.

The last, but an extremely important item of business, was recognition for outstanding service on the Ad Hoc Coin Committee. The members of this Committee have performed valiantly in obtaining the necessary number of sponsors in Congress to insure the passage of a bill to mint a John Marshall commemorative coin. Committee Chair **Ralph I. Lancaster, Jr.** assisted Justice Thomas in making awards. Those present to be recognized for their service were: **James Morris; Scott McGeary; Ed Mullins; Lively Wilson, and Foster Wollen.**

R. Bruce Shaw was also recognized for his work as state membership chair for South Carolina.

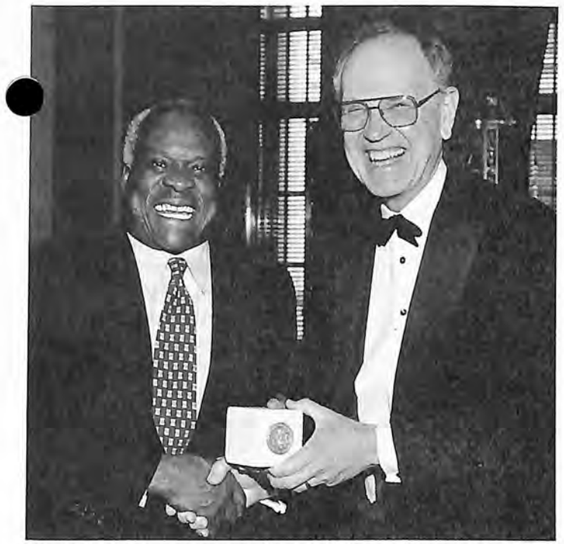
J. Bruce Alverson received an award for his service as state chair for Nevada. Mr. Alverson was also elected a member of the Board of Trustees on June 5.

At the conclusion of the awards ceremony portion, the meeting of the Board of Trustees was adjourned until 2005. Those holding reservations for the reception and dinner then adjourned to the East and West Conference Rooms where they enjoyed the opportunity to meet and greet other members of the Society and invited guests. During the reception, string quartets from the U. S. Air Force Band under the direction of Assistant Director Master Sergeant Paul Swantek provided beautiful chamber music.

Dinner was served in the Great Hall. Flags from each of the fifty states, as well as a large flag of the United States suspended near the front entrance, decorated the room. These flags were provided through the courtesy of the Military District of Washington. Mr. Jones welcomed those present to the dinner, recognizing the Justices who were present. After his brief remarks, the Chief Justice proposed a toast to the President of the United States .

After-dinner entertainment was introduced by Annual Meeting Chair **Charles Cooper**. This consisted of a brief concert performed by the U.S. Army Chorus. The chorus was created in 1956 as a choral counterpart of the U.S. Army Band, "Pershing's Own," and the group has serenaded national and international heads of state at many events. It has performed in many historic buildings and prominent concert halls across America. Under the direction of Musical Director Captain Jim Keene, the concert included patriotic music, American folk tunes and Broadway show tunes, and solo performances as well as ensemble numbers.

At the conclusion of the concert, Mr. Cooper thanked the members of the chorus and the musicians of the string quartets for their contributions to the evening. The meeting was adjourned until 2005. The Thirtieth Annual Meeting will be held on Monday, June 6, 2005. The Honorable J. Harvie Wilkinson III of the Fourth Circuit will present the Annual Lecture at 2 PM. The reception and dinner will start at 7 PM and 8 PM, respectively. Invitations will be mailed to members approximately six weeks prior to the date of the event.



Frank G. Jones was recognized for his service as state chair for the Houston area of Texas.

Society Trustee Joseph Moderow (left) and his wife, Karen, enjoyed conversation at the reception with William Ide and his daughter Jennifer.

Fred Bentley, Sr. received an award from Justice Thomas in recognition of his generous support of the Acquisitions Program.

At the conclusion of the business meetings, Justice Thomas greeted President Frank C. Jones and his wife, Annie.

RECEPTION MARKS PUBLICATION OF BIOGRAPHY OF WILEY RUTLEDGE

Justice John Paul Stevens, himself a Rutledge clerk, hosted a party honoring the publication of a new biography of Rutledge written by Judge John M. Ferren (right).

A reception on September 13, 2004 celebrated the publication of *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge.* The Society sponsored the event in conjunction with the University of North Carolina Press to celebrate this book written by Judge John M. Ferren.

Justice John Paul Stevens hosted the event held in the East Conference Room at the Supreme Court. Justice Stevens clerked for Rutledge after graduation from law school at Northwestern University in 1947. In his remarks, the Justice reflected upon this important aspect of his life and how it had impacted upon his career. He also observed that Judge Ferren's biography was an example of what judicial biography should be.

Following the Justice's remarks, Judge Ferren addressed the guests, expressing thanks to Justice Stevens and to many who had assisted him in his work. Invited guests included many who had contributed to the production of the volume, as well as representatives of the Society and the University of North Carolina Press.

In the following pages of this issue of the *Quarterly,* is a book review. It concludes that this outstanding work makes a real contribution to the field of judicial biography and provides a detailed account of a man whose contributions to the Court were cut short by an untimely death at the age of fifty-seven, after he served only six years on the Court. Best known for his dissents, Rutledge raised a powerful voice in defense of liberal causes. In an excerpt from his dissent in the *Yamashita* war crimes case, Rutledge eloquently defended the rule of law:

It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents.

See page 20 for information about ordering a copy of the book signed by Judge Ferren.

Justice Stevens greets Judge William Benson Bryant who served on the US District Court for the District of Columbia. Mrs. Thurgood Marshall looks on while Judge Bryant's son, William B. Bryant Jr., is in the background of the photo.

THE SALT OF THE EARTH

**By James By O'Hara*

In the 1920's, when Felix Frankfurter was still a young law professor, he regularly lamented that there were very few adequate biographical studies of Supreme Court Justices. Aside from a few nineteenth century works of the life and letters category—more hagiographical than analytical—only a handful of judicial "lives" had been written. Frankfurter believed that the work of the Court could never be fully understood without satisfactory study of the economic, political and psychological forces which shaped the philosophies of individual Justices. Fortuately, over time, systematic, well-written works have appeared, and now about a third of all the Justices who have served during the Court's long history are represented by competent biographies.

Collection of the Supreme Court of the United States

Wiley Blount Rutledge, the subject of a new biography, was appointed to the Court by FDR in 1943. Rutledge had first come to his attention in 1937 when as Dean of the University of Iowa College of Law he became an outspoken advocate of the President's "Court-packing" plan.

John Ferren, a senior Federal appellate Judge, has now joined the list of able authors who have contributed to the genre. *Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge*, published by the University of North Carolina Press, fills a real gap. Most of the Roosevelt era Justices have been subjects of analytical biographies, but Rutledge had been neglected. Scholars have long noted the need for a detailed look at the life of Justice Rutledge, whose influence and contributions were far greater than his short service of less than six years would imply. Judge Ferren's book wonderfully meets the need.

Wiley Blount Rutledge was appointed to the Court in 1943; he died in 1949, only 57 years old. Yet he made an impressive mark during this brief tenure. World War II was still raging in 1943, and his length of service included the peacetime economic boom which followed the cessation of hostilties.

It was also a time when philosophical and tempermental differences among the Justices had reached almost molten heat. Personal feuds and petty dislikes had fractured even a pretense of affable and cordial communication. Justices Black and Jackson treated each other with icy formality. Frankfurter and Douglas despised each other and barely spoke. Many of the Justices looked with scorn on Murphy's supposed intellectual shortcomings and his sanctimony and air of righteousness made matters worse.

Wiley Rutledge walked in this maelstrom, held his head up high and somehow managed to get along with everybody. He treated his colleagues with respect, and gained theirs in return. He had the intellectual credentials to vie with former professors Frankfurter and Douglas, the philosophical depth (gained in large part from his reading of Ezra Pound) to challenge Black and Jackson, and the human warmth to reach out to Murphy in a way that created an abiding fraternal affection.

Rutledge's path to Washington was unusual, even unique. He was born in Kentucky in the coal and agricultural region on the Ohio River south of Louisville. His father was a Southern Baptist preacher; his mother, a typical small town minister's wife who died of tuberculosis at the age of 33 when the future Justice was only 9. But Rutledge was given no small measure of love by his maternal grandmother and a spinster aunt. He got good grades at local schools, then later matriculated at Marysville College, a small Presbyterian prep school and college where he played football and excelled at oratory and debate. Marysville not only provided intellectual formation; while there he was smitten by his Greek teacher, Annabel Person—only a few years his senior—whom he subsequently married.

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Salt of the Earth—continued from page 9

Illness plagued Rutledge as a young man. He fell ill with the tuberculosis which had killed his mother, and spent a time of recuperation in New Mexico. By this time, he had married and for a while taught school to provide a steady income. As his health improved, he decided to become a lawyer, and entered law school at the University of Colorado. After graduation, he and Annabel settled down in Boulder and he began his academic career as a law professor at his alma mater.

University life appealed to him. Subsequently, he left Colorado to teach law at Washington University in Saint Louis where, after only a few years, he became dean in 1931. Four years later, the Rutledges moved again when he assumed the deanship at the University of Iowa, a somewhat larger school.

Thus far in his life, there was little to suggest a career path leading to the pinnacle of American law. Two factors changed that. The first was the celebrated "court-packing" proposal made by Roosevelt after his 1936 landslide re-election. This legislation would have enlarged the Court up to a possible fifteen Justices—a ploy denounced not only by Roosevelt foes, but by many of his usual supporters. Rutledge, almost alone among law school deans, favored the measure, and this attracted the attention of Roosevelt's inner circle. A second factor was the active and persistent support of Irving Brant, a well-known journalist and author (now mostly remembered for his definitive, six-volume life of James Madison). Based in St. Louis with the old *Star Times*, Brant was a New Deal enthusiast whose opinions were sought and heeded by Roosevelt's closest advisors. As vacancies to the Supreme Court occurred in the late 30's, Brant began a stream of suggestions, some private, some in print, that Wiley Rutledge would be an excellent addition to the high court.

As a result, Dean Rutledge was seriously considered for

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During his service as President, Franklin Delano Roosevelt appointed eight Associate Justices and raised Harlan F. Stone to the center chair. Rutledge was his eighth appointment of an Associate Justice.

the vacancies of 1939, 1940 and 1941. As a mark of presidential approval he was named in 1941 to the Appeals Court for the District of Columbia, which at that early date had not yet merited the esteem and respect now enjoyed by its similarly named successor.

No doubt many of Rutledge's admirers, and perhaps he himself, thought that his appointment to the Supreme Court would now never materialize. Roosevelt had by this time raised sitting Justice Harlan F. Stone to the center chair as Chief, and had appointed seven Associate Justices. The President was to have one more opportunity when Justice James F. Byrnes resigned in 1943 to accept a major role in the wartime White House. Rutledge was named to replace him. After an improbable journey from high school teacher with tuberculosis, he was now a colleague of the legendary idols, Stone, Black, Frankfurter and Douglas.

In a reception honoring the appearance of the book, Justice John Paul Stevens, himself a former Rutledge clerk, highlighted the special difficulty faced in the writing of judicial biography. The biographer must weave together the facts and details of a life, yet be mindful that a simple retelling of family anecdotes will not do. The relevance of a judge's life comes from his service on the bench, from the cases, from the opinions. Truth to be told, the actual *life* of most of the Justices is rather prosaic. The John Marshalls and Oliver Wendell Holmeses are the exception, not the rule. A balance between life and an appropriate discussion of cases is no easy task. Judge Ferren, perhaps because of his judicial background, appreciates this difficulty, and handles it with ease (prompting Justice Stevens to quip that perhaps lives of Justices should only be written by judges).

The present volume at once captures the interest of the

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In this cartoon concerning the proposed Court-packing plan, FDR tells the Referee that he wants six substitutes, noting that he does not want to take the current six team members off the field, but wants to add six more.

general reader while still providing substance for the sophisticated student of the Court. Wiley Rutledge was never flamboyant; he was not self-absorbed. He emerges from these pages as a warm, gentle human being, a loving husband and attentive father, self-effacing for someone in public life. But there was an underlying passion, for the law, for justice. He was an unrepentant New Dealer, was in awe of FDR, a resolute liberal. As a writer, he was slow and deliberate, eschewing the emotional extremes of a Murphy and the slap-dash superficiality found in so much of Douglas. He did not permit himself the luxury of sloganeering, and in a few cases wrote with uncanny prescience about then unpopular causes. Rutledge was a man of significance, whose brief tenure made him a forgotten figure of the Roosevelt/Truman era. Judge Ferren's book will change that.

The research behind this book is extensive, and the brief essay on sources is very useful. A fine set of photographs is strategically placed within the text. Everyone who loves the Court and its history is in Judge Ferren's debt.

**Professor James B. O'Hara is a retired college administrator, professor of law and member of the Maryland Bar. He is a Trustee of the Society and is the Chair of the Library Committee. Dr. O'Hara has authored several Trivia Quizzes and feature pieces in previous issues of the* Quarterly.

2005 LEON SILVERMAN LECTURE SERIES SCHEDULE

The dates and speakers for the 2005 Leon Silverman Lecture Series have been finalized. The overall theme for the series will be ***"President Jefferson, Chief Justice Marshall, the Supreme Court and the Constitution."*** The schedule for individual lecture topics and speakers appears below. All lectures will take place in the Supreme Court Chamber, Washington, D.C.

February 23, 2005 Professor Henry Abraham
Jefferson's Appointments to the Supreme Court

March 23, 2005 Professor Stephen Bragaw
Jefferson and the Indian Tribes: Native American Sovereignty and the Court

April 4, 2005 Professor Barbara Perry
Jefferson's Legacy to the Court: Freedom of Religion

April 20, 2005 Professor R. Kent Newmyer
Jefferson and the Rise of Supreme Court Power

May 4, 2005 Professor Melvin Urofsky
President Jefferson and Chief Justice Marshall

Further information can be found on the Society's website, and questions should be directed to the office of the Society, at (202) 543-0400.

TWO SOCIETY TRUSTEES RECEIVE HONORS

Two members of the Society's Board of Trustees have received honors this year. Both are from Texas and both have been active in the work of the Society. Harry M. Reasoner of Houston, and Charles O. Galvin of Dallas, were honored for their outstanding professionalism and commitment to the legal profession. Mr. Reasoner is a member of the Ad Hoc Coin Bill Committee, and in that capacity provided important assistance in securing passage of the bill. Mr. Galvin, a long-time member of the Society, has served in a variety of positions of leadership and has rendered valuable insight and assistance to its work.

Mr. Reasoner of the Houston office of Vinson & Elkins was awarded the 2004 American Inns of Court Professionalism Award for the Fifth Circuit. Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former President of the American Inns of Court, presented the award to Mr. Reasoner on May 13th at the 2004 Fifth Circuit Judicial Conference in Austin, Texas.

The Circuit Professionalism Award is presented to honor a senior practicing judge or lawyer whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession. Candidates are nominated through circuit-wide open nominations and selected by a panel of representatives from both the circuit and the American Inns of Court Foundation.

Harry M. Reasoner graduated from Rice University in 1960 and from the University of Texas Law School in 1962. He then completed post-graduate work at the University of London as a Rotary Foundation Fellow, studying international law and comparative law of competition and monopoly. He clerked for Judge Charles E. Clark on the U. S. Court of Appeals for the Second Circuit in 1963. He joined Vinson & Elkins in 1963 where he served as Managing Partner from 1992 to 2001. His principal area of practice is general litigation, including antitrust and securities litigation.

Mr. Reasoner is a Trustee of the Supreme Court Historical Society, and is a Fellow of the American College of Trial Lawyers, International Academy of Trial Lawyers, International Society of Barristers, and the American Bar Foundation. His professional memberships are numerous, and he has completed many special assignments, including service on the Supreme Court of Texas Advisory Committee and as a member of its Task Force.

Mr. Reasoner is a Life Trustee and Past President of the University of Texas Law School Foundation and served on boards for other universities, including Baylor College and Rice University. He has received distinguished alumnus awards from The University of Texas and its Law School, as well as the Anti-Defamation League's Lifelong Achievement Award.

Charles O. Galvin, a Trustee of the Supreme Court Historical Society and a member of the Society's Program Committee, was one of five lawyers recently honored by the Texas Bar Foundation for over fifty years of service. The award is made to those who adhere to the highest principles and traditions of the legal profession and provide service to the public.

He is the former Dean of SMU Dedman School of Law and is a Distinguished Professor of Law, Emeritus, of SMU and Centennial Professor of Law, Emeritus, of Vanderbilt University. He is presently of counsel to Haynes and Boone, LL.P. of Dallas.

Brandeis as Legal Seer—continued from page 1

Library of Congress

The ice truck in the photo above shows 1937 prices for ice. The regulation of the ice industry was the subject of one of Brandeis's most famous dissents, *New State Ice v. Liebmann.*

Brandeis did well financially, but he did not ignore the public interest dimension of the profession. Indeed, he argued many of his cases without charge, winning most of them, and earning in the process a reputation as "the people's lawyer."

Brandeis became particularly interested in government regulation, which he saw as a weapon to help the ordinary citizen, worker, or consumer. Let me give you some examples of his work on regulation: Marshalling facts, including the "fact" that the railroads were operating inefficiently, he convinced the Interstate Commerce Commission that it should deny significant increases in railroad rates. Filling his famous "Brandeis brief" with "facts" about the effects of working long hours on women's health, he convinced the Supreme Court to uphold as constitutional an Oregon law limiting the number of hours that women could work.[2] (And that was not an easy legal task three years after the Supreme Court had struck down a similar law limiting bakers' hours in *Lochner v. New York*.[3]). Brandeis worked for stronger antitrust laws, for more extensive regulation of big business, and, in particular for a new regulatory agency, the Federal Trade Commission, which, after Woodrow Wilson's election, he helped to establish.

In 1916 President Wilson appointed Brandeis, then 60, to the United States Supreme Court. After contentious hearings, the Senate confirmed Brandeis. He served on the Court for 23 years. His work has had an impact that has lasted for generations.

The question I want to discuss this evening is: Why? Why has Brandeis's reputation as a great lawyer and judge endured for all these years? Is it because, as his classmate's letter suggests, he was a seer, someone who knew everything? Is it because, as Louis Jaffe once told me, he was the greatest liberal of his day? Is it because of his unflagging support for average working people? Court historian Maeva Marcus writes that Brandeis's opinions reflected his experiences with the problems of industrial democracy, including mediating a garment workers' strike.[4] Another scholar, Tom McCraw, argues that the central themes of his Court career accorded well with the "chief interests of his earlier life: a preoccupation with actual social conditions, an insistence on individual right and autonomy, and . . . a powerful commitment to judicial restraints."[5]

He adds that Brandeis's opinions, embodying these themes, made him "an American hero . . . a properly revered symbol of individualism, integrity, self-reliance, and willingness to fight hard for cherished values."[6]

I do not quarrel with these assessments, but, in my view, they do not fully explain the lasting impact of Brandeis's work. Brandeis, after all, could not foretell the future (his law school classmates' belief to the contrary notwithstanding). He was a man of his time. And his opinions reflect the social and economic problems of those times. Why, then, does his work still resonate in a world that faces different economic and social problems? Why do we continue to find accurate Tom McCraw's description of Brandeis as embodying "impartiality, wisdom, and judicial depth?"[7]

With this question in mind, I recently re-read one of Brandeis's most famous opinions, his dissent in the *New State Ice Co. v. Liebmann*[8] case. My reactions may be of interest to you because they come from a judge who very much admires the opinion, yet who has lived nearly a century later than Brandeis in a world with different economic and social problems. Given the differences in perspective, perhaps they will help us locate where in the opinion its enduring value lies.

The Supreme Court decided *New State Ice Co.* in 193[illegible] Oklahoma had enacted a statute regulating firms that sold ice in the State. Any such firm was required to obtain the State's permission to enter the business, pay a licensing fee, charge regulated rates, and follow Commission-set accounting procedures. The Liebmanns, who wanted to enter the ice business, challenged the statute's constitutionality. They pointed to Supreme Court precedent holding that a state could regulate an industry only if that industry was "impressed with a public interest," a matter determined by history or by a special public need for the industry's goods or services. The Liebmanns argued that providing ice was no longer a special "public interest" industry. They argued that providing ice did not differ significantly from providing meat, vegetables, or other ordinary commodities; that new, electric refrigeration permitted ice to be made by almost anyone; and that state regulation primarily served to shield existing ice providers from competition by new entrants. Ultimately a majority of the Court agreed. The Court found that "the practical tendency" of the law was to "shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public." The Court struck the statute down as unconstitutional.

Brandeis disagreed with the majority. His 31-pa[illegible] dissenting opinion contains 57 footnotes, almost every on[illegible] of which is crammed full of facts. I cannot reproduce the opinion here. But I can give you the flavor of it. Brandeis quotes from Lord Hales' *Treatise on the Ports of the Sea*, from the *Ice and Refrigeration Blue Book for 1927,* from the magazine *Refrigerating World*, and from an old Supreme Court opinion that describes the regulation of chimney sweepers. His text and footnotes explain the nature of public utility regulation. They demonstrate that ice manufacturing had become an important industry by the early 1930's (52,202,160 tons were produced in 1927) with widespread industrial, agricultural, and domestic uses. They make clear that, without ice, perishable commodities, such as food, could not be sold at great distances, particularly in states with warm summers such as Oklahoma (where according to Brandeis, the average "mean normal temperature" from "May to September is 76.4 degrees".)

The text and footnotes show that electric refrigerators, while part of a growing market, had not yet achieved dominance and many families could not afford them. They discuss plant-based economies of scale, using cost figures to suggest that many localities could only support one plant of efficient size. They describe consumer complaints about poor service, and how the state commission sought to provide better service and lower prices. They refer to economists who argued that the economic problem in the 1930's was not high prices, but so-called "destructive competition," and others who believed "that one of the major contributing causes" of the current depression "has been unbridled competition."

One must ask, however, what conclusion the reader is meant to draw from the display of facts and technical arguments. And here we may find differences in the reactions of Brandeis' contemporary readers and those of today. Did Brandeis intend to show that regulation, by restricting competition, would help rescue America from the Depression? A later report from Paul Freund, Justice Brandeis's law clerk, that Brandeis kept a file labled "Depression Cures," offers some support for this view. That possibility was not considered peculiar at the time; in fact, it found expression in President Roosevelt's effort to enact the National Industrial Recovery Act, a law that would have created industry cartels, where industry leaders, worker representatives, and government members together would have determined prices, product supply, and working conditions in many major industries.

But if the desirability of some such system is what Brandeis sought to prove in his dissent, he failed in the long term. Few industrial economists today believe that competition-restricting devices could have overcome the Depression. Brandeis himself expressed doubts about New Deal measures like the National Industrial Recovery Act, writing to his daughter in 1934 that such cures "seem[ed] to be going from bad to worse." And Brandeis ultimately joined a unanimous Court that struck down the NRA as a form of "delegation run riot."

Then, was Brandeis trying to show that "destructive competition" was a serious problem demanding a legislative solution? If so, his view no longer reflects the consensus of modern regulatory economists, who think that "destructive competition" was generally an empty pejorative phrase used by established firms in regulated industries like trucking, maritime shipping, or airlines to stop the competition that new entrants might provide. That is just what the *New State Ice* majority said, namely that the Oklahoma statute would hurt, not help, consumers, by restricting competition.

Was Brandeis trying to show that the ice business was a natural monopoly that the State must regulate to protect the public? If so, economists today might find his reasoning inadequate. The facts that he relied upon—that only one firm supplied ice in most localities, that prices were uniform, that the value of ice was low compared to shipping costs—might or might not show a natural monopoly depending upon the ability of new competitors to enter a market should that single firm seek to raise its prices.

Was Brandeis trying to help small business? It seems not: The Liebmanns' ice company would have been the very kind of small business, seeking to enter an industry dominated by existing firms, that Brandeis would ordinarily have supported, given his opposition to big business and trusts.

Was Brandeis trying to prove that regulation of industry was itself a good idea, helping to protect the public from the harms that "big business" might cause? If so, he has not entirely succeeded over time. The terms of the economic debate have shifted as the American public has become less sanguine about the ability of government regulation to solve our major economic problems. We have seen regulatory agencies "captured" by those whom they are supposed to regulate. We have found instances where government

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ITS THE "INITIAL" EXPENSE THAT WORRIES HIM.

President Roosevelt's "alphabet agencies" and legislation were designed to help pull the country out of the depression. However, many were skeptical. This cartoon shows the "tax payer" contemplating the expense involved in implementing programs such as the Public Works Administration (PWA).

Continued on page 14

Brandeis as Legal Seer—continued from page 13

regulation has proved counter-productive. As a consequence, we no longer argue among ourselves in absolute terms—i.e., no regulation or full-blown "command control" regulation. Rather, we debate more nuanced questions of where, when, and what kind of regulation is appropriate. Brandeis may have seen regulation as an answer; today we see it as a source of questions.

Was Brandeis trying to show that *states* must have greater regulatory powers in order to help small business, workers, and consumers? If so, the facts of *New State Ice* offer only a modicum of support for that proposition. And the need to augment state powers for that purpose proved less important with the advent of the New Deal. Under Roosevelt, the federal government, not the states, proved the instrument of policy change. The federal government's regulatory powers continued to expand for decades, as late as the 1970's and under Republican as well as Democratic Presidents. Where Brandeis envisioned the *states* as saving the day, it ended up being *Congress* that enacted far-reaching regulatory statutes and then established federal agencies to administer them.

If history fails to validate at least some of Brandeis's economic views, however, that fact does not diminish the life and force that his dissenting opinion retains to this day. According to Westlaw, the *New State Ice* decision has been cited 1,679 times, in recent Supreme Court opinions, in untold numbers of law review articles, and elsewhere. Why? I suspect it is because his fact-based discussion helps to support two important general statements, and it embodies an important constitutional attitude.

The first statement concerns the relation between the Supreme Court and the states. Brandeis's opinion says that:

"[I]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[9]

The second statement concerns the relation of the Supreme Court and legislatures. Brandeis, while acknowledging that the Constitution required the Court to strike down arbitrary legislation, added these words:

"But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[10]

These two statements do not favor or disfavor any particular set of economic or social beliefs. Rather, they describe a structural relationship, a proper structural relationship, between the courts and the Constitution. This relationship means that legislatures, both federal and state, must have broad power to determine the legal connections among labor, management, capital, and consumers. And courts, when they review legislative decisions about economic and social matters (where basic individual liberties are not threatened) must respect a legislature's judgments.

Seen as an effort to demonstrate the validity of these propositions, Brandeis's lengthy factual descriptions and technical arguments suddenly spring to life. We see them, not as dated claims from the 1930's about what *is* the case,

Collection of the Supreme Court of the United States

Justice Stephen G. Breyer has combined elements of an academic career with those of the judicial throughout his service. He is noted as a consensus builder, as well as for his energy and wit.

but as hypothetical claims about what then plausibly *might be so*—just as Brandeis said they were. (It *might* be true, for example, that freight costs were so high that local ice plants were immune from competition—even if we cannot be certain.) The change, from the actual to the possible, makes a difference. The opinion's detailed discussion of ice manufacturing, temperature changes, destructive competition, and class public utility regulation then serve to demonstrate the following lasting truths:

- first, a truth *about the world*, namely the likely relevance of factual matters to the solution of an economic problem;
- second, a truth *about the judiciary*, namely the comparative inability of judges to find remedies for substantive economic problems;
- third, a truth *about legislatures*, namely their comparative advantage when it comes to investigating the facts, understanding their relevance, and finding solutions;
- and fourth, a truth *about the Constitution*, namely its democratic preference for solutions legislated by those whom the people elect.

By using facts to show what plausibly *might* be so, Brandeis demonstrated the truth of these propositions. This, in my view, is the key to the opinion's greatness and enduring *constitutional* value.

To repeat what I see as the connection that the *New State Ice* dissent finds between ice-making machinery and human liberty: I see that connection as embodying what Judge Learned Hand described as the "spirit of liberty," that "spirit that is not too sure of itself." That is a message that, I believe, Brandeis thought courts, like other institutions in a democracy, might take into account.

Indeed, Brandeis understood the Constitution's basic objective as the creation of a certain kind of democratic system of government—a system that protects fundamental human liberty while assuring each citizen the right to participate in well-functioning democratic decision-making institutions. That system foresees, and depends upon, citizens deciding for themselves how to live together in their communities. The job of the Court is to keep legislatures on the constitutional rails, deferring to the legislators' judgments whenever fundamental individual liberties are not seriously threatened.

This view of the Constitution has been at issue in recent cases in our Court. In *United States v. Lopez*[11], decided in 1995, the Court struck down a federal statute called the Gun-Free School Zones Act, which made it a federal crime for anyone knowingly to possess a firearm near a school. The majority found that the statute exceeded Congress' authority to legislate under its Commerce Clause power, because possessing a gun in a local school zone was not economic activity that substantially affected interstate commerce. In the view of the minority, the Constitution required us to judge the matter not directly, but at one remove. "Courts," we said, "must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."[12] The question was not whether there actually *was* a substantial connection between gun-related school violence and interstate commerce, but whether Congress *could rationally have found* such a connection. An appendix, full of reports and studies, tried to show that Congress could have found that gun-related violence near schools is a commercial, not just a human, problem.

More recently, the Court found that Congress had exceeded its enforcement power under the Fourteenth Amendment to enact Title I of the Americans with Disabilities Act.[13] Title I prohibited States from discriminating against the disabled in employment, and it required States to make some accommodations for disabled employees. The Court held that the legislative record was inadequate, because it did not show that Congress had identified a pattern of irrational state discrimination in employment against the disabled or designed an appropriate way to enforce an anti-discrimination requirement. Again, the dissent, citing the mass of facts that Congress had assembled with the help of a special task force on the need for remedial legislation, argued that Congress might reasonably have found a need for its legislation, and that strict judicial review of the "evidence" before Congress was not appropriate. In both cases, the underlying issue concerned the basic Brandeis question—the structural question of the proper relation between the Court and Congress. I cannot prove that Brandeis was right; nor can I even prove that he would have found himself in dissent. But I can say that his view of the proper Constitutional relation has influenced my own views, three-quarters of a century later.

My reading of the *New State Ice* dissent suggests that Brandeis, perhaps, was not a seer in respect to details. Whether Brandeis was right or wrong about ice-making and natural monopoly is a contingent matter, not determined by our Constitution. But whether Brandeis was right about political democracy is a non-contingent matter permanently inscribed in our Constitution. And here *New State Ice* suggests that Brandeis was a seer. He was right in urging deference to legislative judgments, when economic regulation and ordinary social legislation is at issue. And he was right that we must continue to use facts and consequences to distinguish permissible or better, from impermissible or worse, interpretations of the Constitution and of law.

Brandeis's dissent shows the need for, and provides, a standard that permits courts to separate the contingent from the permanent. Brandeis remains a seer, not because he could find a lost book in class nor because of his use of factual detail, but because of his prescient sense of the role of judges interpreting a Constitution, that, while protecting human liberty, even more importantly, creates a democracy.

[1] Thomas K. McCraw, *Prophets of Regulation* 82-83 (1984).
[2] *Muller v. Oregon*, 208 U.S. 412 (1908).
[3] 198 U.S. 45 (1905).
[4] Maeva Marcus, *Louis D. Brandeis and the Laboratories of Democracy*, in *Federalism and the Judicial Mind: Essays on American Constitutional Law and Politics* 76 (Harry N. Scheieber ed., 1992).
[5] McCraw, *supra* note 1, at 135.
[6] *Id.* at 141-2.
[7] *Id.* at 135.
[8] 285 U.S. 262 (1932), (Brandeis, J. Dissenting).
[9] *Id.* at 311.
[10] *Id.*
[11] 514 US. 549 (1995).
[12] Id. at 616-617 (Breyer, J. Dissenting).
[13] *Bd. Of Trustees Of the Univ. of Ala. V. Garret*, 531 U.S. 356 (2001).

**Justice Stephen G. Breyer was appointed to the Supreme Court in 1994 by President Clinton after a distinguished academic and public service career. His previous judicial experience included service on the U. S. Court of Appeals for the First Circuit and the U.S. Sentencing Commission.*

2004 SUMMER INSTITUTE SESSIONS IN REVIEW

*By Allison Hawkins**

Justice O'Connor spoke with Janet Emond, a social studies teacher in Downer's Grove, Illinois, during a reception for participants of the Supreme Court Summer Institute for Teachers. Justice O'Connor has been involved with this program since its inception in 1996.

The successful alliance of the Supreme Court Historical Society and Street Law, Inc. has produced yet another exemplary learning experience for teachers. The 10th annual Supreme Court Summer Institute for Teachers (SCSI) took place June 17-22 and June 24-29, 2004. It brought 60 of the country's most qualified secondary teachers of law, civics, and government to Washington, DC for six days of immersion in the U.S. Supreme Court.

SCSI began in 1995 with the goal of providing teachers with a professional development experience unlike any other. The Institute provided teachers with insight into the Court by directly linking them with legal experts, political commentators, media personalities, political figures, and experienced educators. SCSI participant Wendy Ewbank found the caliber of the presenters to be unmatched. "I was completely impressed by the quality of presenters the Institute included – the lawyers, journalists, issue advocates, and the law professors who played key roles in the very cases we were studying."

The first-hand knowledge of the guest presenters, combined with the instructional expertise of Lee Arbetman, Director of U.S. Programs at Street Law, Inc. and Diana Hess, Professor of Education at the University of Wisconsin-Madison and an expert in the field of democracy education, provided the teachers with a seemingly infinite pool of knowledge about the Court.

A favorite activity among Institute attendees was a moot court simulation of *Elk Grove Unified School District v. Newdow et al*, which became known to many as the Pledge Case. Moot courts are becoming a more common activity in many social studies classrooms and have proven to be an effective tool for educating students about legal principles and the judicial system. In this exercise teachers were split into groups representing the school district, Michael Newdow, and the Supreme Court. Experts from each side helped each group develop their arguments and play their assigned roles. The presiding "Court" was coached by Barbara Perry, a professor of political science at Sweet Briar College and an authority on the U.S. Supreme Court. A teacher from week one found the activity to be "highly engaging and stimulating. It will definitely enhance the moot courts I do in the classroom."

The culminating events of the Institute were hearing the announcement of Supreme Court decisions and attending a reception with a Justice at the Court. Justice Kennedy mingled and inspired teachers from week one. A surprise guest of honor, Cecilia Marshall, wife of the late Justice Thurgood Marshall, introduced him. Week two participants had the pleasure of meeting Justice O'Connor. One teacher summed up the evening by saying, "This was a special experience. Teachers rarely get to participate in such events. Justice O'Connor and her husband were extremely friendly and gracious."

Teachers had many positive things to say about their experiences at SCSI. Paul Landau, a lawyer-turned-teacher from North Hollywood High School in California summed up his time in Washington and echoed the thoughts of his fellow participants when he said, "Without reservation, the 2004 Supreme Court Summer Institute for Teachers … was the most informative, intimate (only 30 teachers), classy, and fun seminar I have ever attended. "

SCSI provided teachers with multiple perspectives of the nation's highest Court. Teachers left the Institute with a greater understanding of key cases to share with their students, a variety of interactive strategies to teach students about the Court, and knowledge of how to incorporate resource people into their lessons on the Supreme Court. They also learned

Cecilia Marshall, wife of the late Thurgood Marshall and a board member of the Supreme Court Historical Society, visited with Lee Arbetman (center), Director of U.S. Programs at Street Law, Inc. and Dave Boucher, an Institute participant from Prineville, Oregon. Mrs. Marshall surprised Institute participants by attending a reception at the Court.

Justice Kennedy shared words of inspiration with participants from week one of the Supreme Court Summer Institute for Teachers. Pictured with him are Sam Cavanaugh of Indianapolis, Indiana, and Wendy Ewbank of Seattle, Washington.

how to prepare and present professional development activities about the Court for other teachers. In their home states, teachers are encouraged to complete a workshop on the Supreme Court. Participants in the 2003 program provided workshops attended by more than 700 teachers. After returning home, many Institute participants are interviewed about their experiences by their local newspapers. Below are comments published in several local papers.

"One of the highlights … was a reception for the teachers hosted by Justice Sandra Day O'Connor. She really rolled out the red carpet for us," said Cecil Catolos of New Orleans, who added that the reception was held in a hall in the Supreme Court usually reserved for dignitaries. "She was more into making us feel welcome, and she gave a brief speech about how she values education and teachers."

(From the August 15, 2004 edition of the *East New Orleans Picayune*).

"I just hope my excitement and enthusiasm for [the Supreme Court] can kind of work on [my students] to just get them interested in what goes on in Washington," said history teacher Janell Sowers of Tualatin, Oregon, who hopes that her experience will help focus her classes on modern, relevant issues as well as the usual historical ones.

(From the August 19, 2004 edition of the *Lake Oswego Review*).

Cecilia Marshall poses with Institute participant Connie Geffinger of Las Vegas, Nevada.

**Allison Hawkins is a staff member at Street Law. Her primary responsibilities include planning and implementing marketing strategy for the organization and coordinating publication sales. In addition, she helped facilitate many of the arrangements for the participants in the 2004 sessions of the Summer Institute.*

2005 SUPREME COURT SUMMER INSTITUTE

June 16-21 and June 23-28, 2005

Applications for participation in the upcoming sessions of the Summer Institute are now being accepted. The Society funds this important program implemented by Street Law Inc. Prospective participants should visit their website www.streetlaw.org to apply. Thirty applicants will be selected for each session of the institute (a total of 60). Applications must be postmarked no later than March 11, 2005, and notification will be mailed no later than March 28, 2005.

Successful applicants must be either secondary social studies, civics or government teachers, or work in a supervisory capacity with secondary school teachers and must be willing to train other teachers. Preference is given to teachers with Law Related Education experience and teacher training experience. Efforts are made to ensure that the participants represent the full range of teachers in the United States.

Complete information can be obtained by accessing the Street Law website. That site can be accessed through the Society's website, www.supremecourthistory.org. While on the site, be sure to review the Landmark Cases section of the website developed to provide teachers with a full range of resources and activities to support the teaching of landmark Supreme Court cases. General teaching strategies range from case study to moot court activities and political cartoon analysis. This section covers 15 important cases dating from 1803 through 1989.

SOCIETY RECEIVES COLLECTION OF PHOTOS OF JUSTICE TOM C. CLARK

Mimi Clark Gronlund, daughter of Justice Tom C. Clark, recently donated a collection of photographs to the Society. The pictures had been part of her late mother's estate. The images are 8 x 10 black and white glossy photos, and date primarily from the 1960s. Most of the photographs show Justice Clark with other members of the Court during his term of service. The collection includes images that were taken by news service photographers and recorded events such as the presentation of books to the Court by the Ambassador of India, and the Justices' participation in ABA meetings. One photograph shows members of the Court at the White House, one was taken on the occasion of the funeral of Justice Wiley Rutledge, and another at the inauguration of President John F. Kennedy.

The photographs are a rich addition to the collection of images owned by the Society and will doubtless grace the pages of many future publications.

Justice Clark was the subject of a public safety billboard. This photograph appeared in two Arizona newspapers in May 1962.

Below: Justice Clark, Chief Justice Warren and Justice Reed were photographed on April 6, 1957 on the occasion of the installation of a plaque honoring Justice Reed. The photo was taken in Marysville, Kentucky, the birthplace of Justice Reed.

WANTED

In the interest of preserving the valuable history of the highest court, The Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisitions Committee at the Society's headquarters, 224 East Capitol Street, N.E., Washington, D.C. 20003 or call (202) 543-0400. Donations to the Acquisitions fund would be welcome. You may also reach the Society through its website at www.supremecourthistory.org.

New Memberships July 1, 2004 through September 30, 2004

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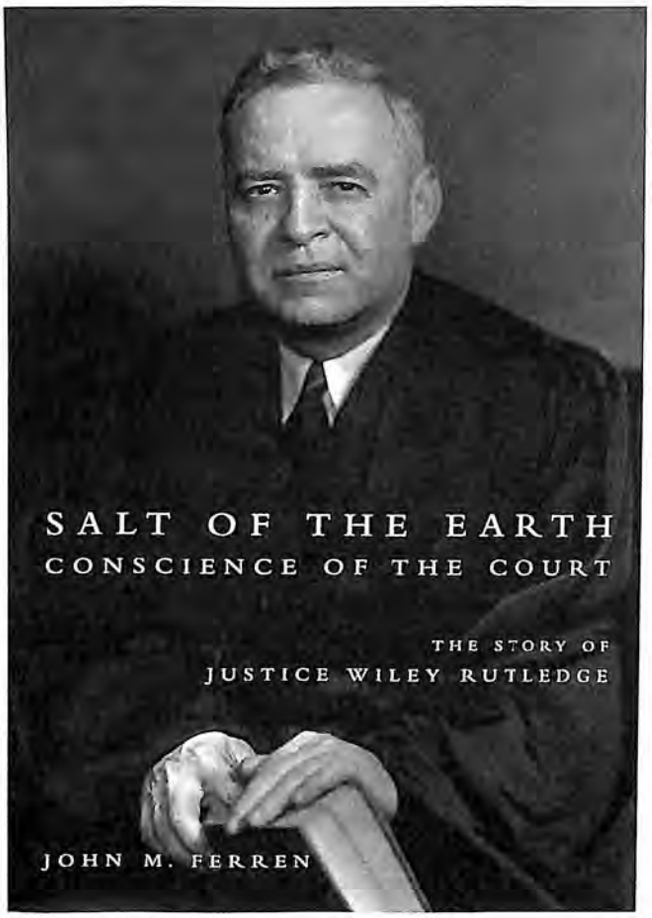

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