THE SUPREME COURT HISTORICAL SOCIETY

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HENRY BILLINGS BROWN

*By Trevor Broad**

On October 24, 2005 Rosa Parks, the "Mother of the Modern-Day Civil Rights Movement" who famously refused to give her seat to a white passenger on a bus in 1955, passed away. As her funeral procession made its way to Detroit's Woodlawn Cemetery on November 2, thousands of people lined the streets in tribute to Rosa Parks. The outpouring of support was an unmistakable testament to Rosa Parks's legacy.[1]

Ironically, ten miles east of Woodlawn Cemetery is Elmwood Cemetery where Justice Henry Billings Brown, the author of *Plessy v. Ferguson*, is buried. In a fascinating twist of fates, Rosa Parks, the woman who helped end racial segregation in America, is buried a short distance from Justice Brown, the man who wrote the opinion that is credited with giving constitutional protection to the doctrine of "separate but equal." Adding to the irony is the fact that Rosa Parks was born in 1913, the same year that Justice Brown died. Yet, while Rosa Parks is well remembered, the same cannot be said of Henry Billings Brown, who has descended into relative obscurity.

New York Public Library

The degree to which Justice Brown has been forgotten is surprising given the tremendous attention *Plessy v. Ferguson* has received in light of the Civil Rights Movement. In fact, few realize that Brown was the first Justice of the Supreme Court of the United States from Michigan. For example, the Bentley Historical Library in Ann Arbor, Michigan, a well-known historical archive that is dedicated to preserving the history of Michigan, fails to recognize Brown as an Associate Justice of the Supreme Court of the United States, or as a judge on the United States District Court for the Eastern District of Michigan. The oversight by the Bentley Library illustrates Justice Brown's anonymity. Yet, Justice Brown was widely respected as a jurist by his contemporaries. He was "thought by his associates on the Supreme bench a good judge, fair minded, open to conviction, willing to listen to argument, willing to be convinced if he thought he was wrong, affable, having no jealousy of his associates."[2]

Justice Henry Billings Brown was appointed to the Supreme Court of the United States in 1890. During his fifteen and a half year tenure on the Supreme Court, Justice Brown wrote hundreds of opinions for the Court, mainly in, but not limited to, admiralty and patent law, which were his specialty.

Justice Brown was a pleasant, sociable, and gracious member of the Fuller Court. Those familiar with him noted that he worked both efficiently and diligently on cases before him, and was dedicated to the ideal of doing "justice." He remained humble and was never given to pretension. His colleague, Justice Day, described him as "a capital judge and a genial and loveable companion, free from littleness, rejoicing in the good fortune of his brethren, and at all times upholding the honour and dignity of the Court."

Henry Billings Brown was born March 2, 1836 in South Lee, Massachusetts, a small paper manufacturing town. Henry became acquainted with industrial life at an early age. He recalled, "Among my earliest recollections is that of sitting in a forge, watching the sparks fly from the trip hammer and marveling why water was used to stimulate instead of extinguish fires." Henry's father owned and operated several

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A Letter from the President

I am very pleased to inform you that the Society is embarking on a new research project that will ultimately result in a book, tentatively titled: *Courtwatching: Eyewitness Anecdotes in Supreme Court History.* As the title suggests, the book will feature colorful, amusing, enlightening, and poignant anecdotes in Supreme Court history. Each chapter will focus on one general topic utilizing letters, diary entries, and newspaper accounts by Justices, Court reporters, clerks, advocates, family members and other eyewitnesses to illuminate different aspects of that topic. The eyewitness accounts will then be stitched together into a thematic essay that traces and develops the theme through different eras and different contexts.

The book will be edited by our Director of Publications Clare Cushman and four scholarly consultants: Melvin I. Urofsky, professor emeritus of constitutional studies at Virginia Commonwealth University and author of a forthcoming Brandeis biography; Ross Davies, associate professor of law at George Mason University and editor of *The Green Bag*; Patricia Evans, senior librarian at the Supreme Court; and Lyle Deniston, editor of SCOTUS blog and former Supreme Court reporter for the *Boston Globe* and *Baltimore Sun*.

Do you have a favorite Supreme Court anecdote that you think worthy of inclusion in the book? Alternatively, are you aware of a favorite diary entry, letter or eyewitness account? Perhaps you personally witnessed an interesting episode that you would like to record as a firsthand account and share? Or do you have copies of letters, reminiscences, or newspaper clippings that you think might be of interest? We would love to have them all!

Because the book is not intended to be a comprehensive work and is designed to appeal to a general audience, we will not be able to publish all the anecdotes we collect. Our plan is thus to create an archive on our website where we can post the rich material that we uncover. We hope this will be of service to scholars and Supreme Court buffs.

The table of contents for the book appears below to give you an idea of the various topics we intend to cover. Ideally, we would ask you to send a photocopy of your anecdote to the editor, Clare Cushman, at the Society's office. But we also welcome your ideas, citations to published materials, or simply your knowledge about particular documents that exist. Please email her at chcush@aol.com.

I look forward to reporting to you in future letters on the progress of the book. We are confident the book will be entertaining, but will also make a valuable contribution to the history of the Supreme Court of the United States.

Table of Contents: Tentative

(This book will not cover constitutional history or case law but will illuminate how the Court works as an institution.)

Chapter I. A Slow Start
(the first Court sessions, difficulty getting a quorum, nominees declining to serve, setting up shop)

Chapter II. Justice by Horse and Buggy
(difficulties of circuit riding, salary and workload issues, legacy of circuit system)

Chapter III. Speaking with One Voice
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Chapter IV. Life During Wartime
(Justices' letters from war, disruptions to the docket, Jackson at Nuremburg, etc.)

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(resignations, timing of departures, retirement)

Frank Jones

PROGRAM FOR 2007 LEON SILVERMAN LECTURE SERIES: THE SUPREME COURT IN THE GILDED ERA

The 2007 Leon Silverman Lecture Series will examine a pivotal era in American history by considering several of the most significant Associate Justices of the "Gilded Age." The term "Gilded Age" was coined by Mark Twain and Charles Dudley Warner in their book, *The Gilded Age: A Tale of Today* (1873). Historians use the term roughly to refer to the period from the end of the Civil War to the Presidency of Theodore Roosevelt. It was an era of unprecedented economic, territorial, industrial, and population growth in the United States, marked by heavy industrialization, dramatically increased immigration, the construction of railroads, and the expansion of the American West.

Presentations by five leading Supreme Court scholars will consider the Supreme Court and its response to the conditions created by this era. The first presentation will provide an overview of the period setting the stage for the following four talks that will closely examine the careers and contributions of four key Associate Justices of the period. All programs will start at 6 PM and will be held in the Supreme Court of the United States. Invitations to all Society programs are mailed to active members. Information is also available on the website. For further information, or to make reservations, please telephone the office at (202) 543-0400. The schedule for the program follows.

December 7, 2006–The Supreme Court in the Gilded Era: An Overview
Speaker: Professor James B. O'Hara

Professor O'Hara is retired as a member of the faculty and an administrator at Loyola College, Baltimore. An expert in the literature of the Supreme Court, he serves as Chair of both the Society's Publications Committee, and of the Ad Hoc Library Committee. Professor O'Hara has appeared twice before in the Silverman Lectures and has spoken on the Court throughout the country.

February 27, 2007–Associate Justice Samuel Miller
Speaker: Professor Michael A. Ross

Justice Miller was a major figure of the era and wrote the opinion of the Court in the famous *Slaughterhouse Cases.* He also served on the electoral commission that resolved the Hayes-Tilden election. Justice Miller was the only physician ever to serve as a Justice.

Professor Ross is an Associate Professor of History at Loyola University, New Orleans. He is the author of *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era.*

March 6, 2007–Associate Justice Stephen Field
Speaker: Professor Paul Kens

Field moved to California during the Gold Rush days, and was appointed to the Supreme Court of the United States by President Lincoln. Considered outspoken and controversial, he served longer on the Court than any previous Justice, eclipsing Marshall's record before stepping down.

Professor Kens is associate professor of political science and history at Southwest Texas State University and the author of two books examining the *Lochner* case, one of the landmark cases of the Gilded Era. He has written about Field, and edited the issue of the *Journal of Supreme Court History* that contained Field's memoirs.

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Managing Editor Kathleen Shurtleff
Advisory Editors John Q. Barrett
James B. O'Hara

DISSENTS AND DISSENTERS: THEIR ROLE IN SUPREME COURT HISTORY

The 2006 Silverman Lecture Series

Photo by Steve Petteway

Professor Jonathan Lurie (left) gave the opening lecture in the 2006 series, he was introduced by Justice David Souter.

The 2006 Silverman Lecture series examined the role of Dissents and Dissenters in Supreme Court History. Starting with William Johnson, often referred to as "The First Dissenter," the series examined dissents from the Marshall Court through the early part of the twentieth century.

Writing a dissent affords the author the opportunity to express a personal judgment in a unique way. Many dissents are written by a single author. Unhampered by the need for concession, conciliation or compromise, an individual Justice can argue a point of view in a manner that no other official record of the Court affords.

On March 9, Professor Jonathan Lurie of Rutgers discussed Chief Justice William Howard Taft. Although he personally wrote only two dissents during his service on the Court, Taft presided over a Court that produced many dissenting opinions, largely the work of two individual Justices, Oliver Wendell Holmes and Louis D. Brandeis. Brandeis authored 64 dissenting opinions and Holmes wrote 74. Professor Lurie's talk focused on the tensions between dissenting Justices and a Chief Justice who valued and promoted unanimity.

Professor Lurie is Professor of History at Rutgers University at Newark, and author of several books treating the subject of American military justice. Another of his publications is *The Slaughterhouse Cases: Regulation, Reconstruction and the Fourteenth Amendment.*

On March 23, Professor Linda Przybyszewski spoke on John Marshall Harlan I, author of the dissent in *Plessy v. Ferguson*. In that famous opinion, Harlan called the Constitution "color-blind," and insisted that "separate but equal' was inherently flawed. Author of 123 dissents, Harla is perhaps the most important of the several Justices who were noted for dissent in their own day.

Professor Przybyszewski is an Associate Professor of History at Notre Dame University and the author of the book: *The Republic According to John Marshall Harlan.* She also served as editor of *Some Memories of a Long Life, 1854-1911,* a memoir written by Harlan's wife, Malvina Shanklin Harlan. The manuscript was originally published by the Society as a special volume of the *Journal of Supreme Court History.*

Photo by Steve Petteway

Professor Linda Przbyszewski (right) spoke on John Marshall Harlan. Justice Ruth Ginsburg introduced her lecture.

Photo by Steve Petteway

Justice Antonin Scalia introduced Professor Sandra VanBurkleo's lecture on Justice William Johnson.

On May 2, Professor Sandra Van Burkleo spoke about William Johnson, known as the "first Dissenter". He served on the Court from 1804-1834, under the leadership of Chief Justice John Marshall. Marshall discouraged individual opinions, thinking that they undermined the authority and prestige of the Court. Johnson proved to be a significant impediment to that plan, and is credited with writing the first dissent in the history of the Court, in the case of *Huidekoper's Lessee v. Douglass (1805).* During his thirty-year career on the bench, Johnson wrote 18 dissents, and 36 separate opinions, single-handedly posing a great challenge to Marshall's attempt at a united Court.

Professor Van Burkleo is an Associate Professor of History and Adjunct Professor of Law at Wayne State University. She authored *Belonging to the World: Women's Rights and American Constitutional Culture.* Professor Van Burkleo's association with the Society is of long duration, as she once was a member of the staff of the Documentary History Project.

On May 11, Professor Lucas Morel, Associate Professor of Politics in the Williams School of Commerce at Washington and Lee University, spoke about the *Dred Scott* dissents. Characterized by Chief Justice Charles Evans Hughes as a "self-inflicted wound", the Court's decision in the *Dred Scott* case is considered by many to be the most disastrous in history. Every single Justice wrote an opinion in the case. Chief Justice Taney authored what the record called the opinion of the Court, but each of the other Justices in the majority wrote concurring opinions. Justices Benjamin Curtis and John McLean wrote individual dissents. The plethora of opinions has led some scholars to conclude that there really is no majority opinion for the case.

Photo by Steve Petteway

Professor Lucas Morel (left) spoke on the *Dred Scott* dissents. He was introduced by Chief Justice John G. Roberts, Jr..

Photo by Steve Petteway

Professor Calvin Johnson (left) gave the final lecture on the Income Tax Cases. He was introduced by Justice Samuel Alito and Society Treasurer Sheldon Cohen (right).

Professor Morel is a member of the scholarly advisory committee of the Abraham Lincoln Bicentennial Commission, and is also the author of numerous books, including *Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government.* He has also written numerous editorials and op-ed pieces.

In the concluding program on May 18, Professor Calvin H. Johnson spoke about *Pollock v. Farmers' Loan & Trust Co.* The initial case and its rehearing are commonly referred to as "the Income Tax Cases." The issue involved levying of federal taxes on earned income. In a 5-4 decision, the Court ruled that the tax was an unconstitutional direct tax. Justices Harlan, Jackson, White, and Brown dissented from the majority opinion, arguing that the federal government should not be denied "an inherent attribute of its being—a necessary power of taxation."

Professor Johnson is the Andrews & Kurth Centennial Professor at the University of Texas School of Law. He is the author of *Righteous Anger at the Wicked States: The Meaning of the Founders Constitution.* He has served as the Chair of Tax Committees for both the American Bar Association and the American Association of Law Schools.

As is customary, an upcoming issue of the *Journal of Supreme Court History* will contain the text of these outstanding presentations.

SUPREME COURT HISTORICAL SOCIETY & ROBERT JACKSON CENTER SPONSOR BARNETTE CONFERENCE

By John Q. Barrett

On Friday, April 28, 2006, the Robert H. Jackson Center and the Supreme Court Historical Society co-hosted a program at the Jackson Center in Jamestown, New York, on *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Barnette is the landmark decision in which the Supreme Court during World War II reversed its previous holding and invalidated a compulsory public school flag salute and recitation of the Pledge of Allegiance. The Court held, 6-3, that these West Virginia requirements violated schoolchildren's First Amendment rights, which exist, according to Justice Robert H. Jackson's ringing, often-quoted opinion for the Court, to strengthen "individual freedom of mind in preference to officially disciplined uniformity...".

The Barnette program featured scholarly, lawyerly and human perspectives on the great case. Shawn Francis Peters, author of the award-winning book *Judging Jehovah's Witnesses* (University of Kansas Press 2000; paperback 2002), introduced the program by describing the run of civil liberties cases involving Jehovah's Witnesses during the first decades of the 20th century.

The centerpiece of the program, following Mr. Peters's remarks, was a notable roundtable discussion featuring participants in the *Barnette* litigation more than 60 years ago. These honored guests included the "Barnette" sisters themselves: Gathie Barnett Edmonds and Marie Barnett Snodgrass (whose family name was misspelled by the Court). Mrs. Edmonds and Mrs. Snodgrass are Jehovah's Witnesses. As young students, they were expelled from their public school because they adhered to their belief that the Bible (e.g., Exodus 20:4-5) forbade them to bow down to graven images such as the American flag. They recalled their court case and discussed their childhood experiences in moving terms.

The Barnett sisters were joined in discussion by Washington, D.C. attorney Bennett Boskey, who from 1941-1943 was chief law clerk to Chief Justice Harlan Fiske Stone. In June 1940, when Stone was an Associate Justice, he had dissented powerfully but alone from the Court's decision in *Minersville School District v. Gobitis*, 310 U.S. 586, upholding Pennsylvania's flag salute requirement. Three years later, the *Barnette* Court, with Chief Justice Stone in the majority assigning Jackson to write the Court's opinion, explicitly overruled *Gobitis*.

The Barnette roundtable discussion was moderated by Professor John Q. Barrett of St. John's University School of Law and the Jackson Center, who also delivered closing remarks.

Courtesy of Robert H. Jackson Center

Participants in the Barnette Conference are shown (left to right): Greg Peterson, Gathie Barnett Edmonds, E. Barrett Prettyman, Jr., John Q. Barrett, Marie Barnett Snodgrass, Shawn Francis Peters, and Bennett Boskey.

FROM *GOBITIS* TO *BARNETTE*: A PRIMER

*By Dan Seligman**

The principal of Slip Hill Grade School near Charleston, West Virginina, stopped the two young Barnette sisters at the doorstep of the school one day in the spring of 1942. Was it true, he asked, that they would not salute the flag and say the Pledge of Alleigance? Yes, Marie, 9, and her sister Gathie, 11, said. "We told him it was because we believed that pledging allegiance to a flag was an act of worship, and we could not worship anyone or anything but our God Jehovah," Gathie recalled years later.

If that was the case, the principal said, he had no choice. West Virginia's Board of Education had said saluting the flag and saying the pledge were requirements of attendance. Marie and Gathie Barnette would have to go home and could not come back unless they complied with the Board of Education's requirements.

Courtesy of Robert H. Jackson Center

Recreating a childhood pose, the Barnett sisters, (left) Marie Barnett Snodgrass and Gathie Barnett Edmonds, were sent home from school for their refusal to pledge allegiance to the flag of the United States.

The Barnette sisters went home. Out of their refusal to follow the requirements, a great Supreme Court case was born, one that would make the "Barnette"[1] name synonymous with the notion that the Constitution of the United States protects religious beliefs from coercion by the state or local officials.[2]

It was, at best, an awkward time to engage in civil disobedience and refuse a school board order—or say no to a school principal on grounds that there was a higher law, something more important than patriotism. Only months earlier, the Japanese had bombed the U.S. Naval base at Pearl Harbor, Hawaii, and the United States was at war.

Slip Hill Grade School—with 20 or 25 students—was so poor it had only a picture of a flag. In front of that picture, all students were required at the designated time to stand with their right hands over their hearts, and recite the familiar words:

"I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation indivisible; with liberty and justice for all."[3]

According to West Virginia's Board of Education, refusal to salute the flag "shall be regarded as an act of insubordination; and shall be dealt with accordingly."

The Barnette sisters and their parents were members of Jehovah's Witnesses, an evangelical Christian denomination formed in the 1800s in Pennsylvania. According to their beliefs, they could not salute the flag because the Bible—the 20th chapter of Exodus—stated: "Thou shalt not make unto thee any graven image . . . .Thou shalt not bow down thyself to them nor serve them for I the Lord thy God am a jealous God. . . ." Saluting and pledging to the flag were equivalent to honoring a "graven image" for Jehovah's Witnesses and violated God's laws.

To the Barnette sisters, it was God's kingdom and its laws, not a secular government, to which they pledged allegiance. They respected the flag and stood silently while their classmates recited the pledge, but place their hands over their hearts and say the words? No, they could not do that.

"A time of hysteria" – that's how a cousin of the Barnettes, Dave McClure, described the general mood in those days. McClure was 11 when he was expelled from his school near Charleston, West Virginia in 1942. Nonetheless, he walked a mile to school every day for two weeks in a row to attend class, only to be turned away each time.

Would he salute the flag? His teacher asked each morning. "No," he replied, and back home he walked.

Ironically, West Virginia law held the parents of the Jehovah's Witness children liable to prosecution for having encouraged truancy, a misdemeanor subject to a $50 fine and 30 days in jail. It did not matter that the kids wanted to be in school—and sought to go every day. West Virginia law—and the laws of other states as well—exposed the parents of the "truant" child to criminal charges.[4]

It was not an idle threat. A prosecutor obtained a warrant against Dave McClure's mother as a result of his coerced absence from school[5]. The Barnette sisters' father had to appear in local court, too, on truancy charges. Eventually, the matter was dropped.

Five hundred miles away, at the Jehovah's Witness headquarters in Brooklyn, New York, a young Texas-born lawyer named Hayden Covington learned of the Barnettes' case.

Covington and sympathetic lawyers around the country had argued cases in state and federal courts, even before the U. S. Supreme Court, seeking to overturn restrictions that prevented the Witnesses from handing out leaflets on a street corner or going door-to-door to preach.

Five years before the *Barnette* case, in 1937, the Witnesses challenged a mandatory flag salute requirement in Minersville, Pennsylvania, where school officials expelled Witnesses Lillian Gobitis, 12, and her younger brother, William, 10, because they refused both to recite the pledge and to salute the flag.[6]

At first, the Witnesses met with success. A federal district

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court judge ruled in their favor: he held that Pennsylvania's mandatory flag salute requirement was unconstitutional and ordered the school district to allow the Gobitis children to return.[7]

A federal appeals court upheld the decision, noting in a footnote that in Germany, Adolf Hitler said he considered the Jehovah's Witnesses to be "quacks" and had dissolved their society and confiscated their literature.[8] The implication was clear: such persecution went on in Nazi Germany, but the United States was different.

The Minersville school superintendent was unimpressed. He called the decision a "hodge-podge of perverted quotations" from judges who believe that "little children have the right and the ability to formulate religious beliefs and conscientious objections."[9] The school district appealed to the U. S. Supreme Court, where at last it received support.

By an 8-1 vote, the Supreme Court in 1940 reversed the lower courts and upheld the school expulsions. The Justices in *Minersville School District v. Gobitis* said the states could require all students, no matter what their religious beliefs, to salute the flag and recite the pledge.[10] The flag, they said, was an essential symbol of national unity and transcended all internal differences. In the Supreme Court's view, the need of school officials to inculcate patriotism in its students trumped the religious beliefs of the Gobitis family.

Private religious beliefs, according to the Supreme Court, had to give way to obedience to general law—particularly if that law was not targeted at a religious minority but applied to everyone. "The ultimate foundation of a free society is the binding tie of cohesive sentiment," Justice Frankfurter wrote for the majority.[11] Only one justice—Harlan Fiske Stone—dissented.

The consequences of the Supreme Court's decision were soon recorded on the streets and in schools around the country, where the mood was often ugly and the Witnesses found themselves victims of harassment and attack. In numerous small towns across the nation, Witness members were beaten if they did not publicly salute the flag. The most bizarre incident occurred in West Virginia, where a group of door-to-door Witness preachers were forced to drink castor oil and then sent on their way, all under the watchful eyes of the local sheriff.

And yet at the Supreme Court there were signs of change. In June 1942, three members of the Court said they erred in the *Gobitis* ruling. Justices rarely admit mistakes—at least in public—but Justices Hugo Black, William O. Douglas and Frank Murphy did just that in the case of *Jones v. City of Opelika.* "[W]e now believe [*Gobitis*] . . . was wrongly decided," they wrote. "Certainly our democratic form of government . . . has a high responsibility to accommodate itself to the religious view of minorities however unpopular and unorthodox those views may be."[12]

Hayden Covington at the Witness headquarters in Brooklyn watched those developments with interest. He now had four votes to reverse *Gobitis*: the original dissenter

Library of Congress

Hayden Covington, a lawyer for Jehovah Witnesses, carefully watched decisions from the Supreme Court hoping a change in the membership of the Court would produce rulings more favorable to his cause.

(Justice Stone, since elevated to Chief Justice by President Roosevelt); and three justices who signaled their change of heart in *Opelika.*

But Covington doubted how Robert H. Jackson, the newest justice, would vote.[13] Appointed to the Supreme Court in July 1941, only a year earlier, Jackson had sided with the majority in *Opelika*, a case that upheld the constitutionality of a municipal ordinance taxing the proceeds from the sale of literature by door-to-door preachers, like the Jehovah's Witnesses.

Covington began looking for another case and a new set of facts that would allow the Witnesses to bring the flag salute issue back before the Supreme Court. He found that case in West Virginia, where the Barnette sisters and their cousins, including Dave McClure, had been expelled. The lawsuit, *Barnette v. West Virginia Board of Education*, was filed in federal district court there.

On October 6, 1942, a three-judge district court panel ruled in favor of the Witnesses. The district court declared West Virginia's mandatory flag salute to be unconstitutional and ordered the school board to allow the Barnette children and the other plaintiffs to return to school without saluting the flag or saying the pledge, notwithstanding the Supreme Court's ruling in *Gobitis.*[14]

The judges noted that three members of the Supreme Court had expressed reservations about *Gobitis*, and they used the opportunity to revisit the issue, to frame the matter as they saw it. "There is not a religious persecution in history that was not justified in the eyes of those engaging in it on the ground that it was reasonable and right and that the persons whose practices were suppressed were guilty of stubborn folly hurtful to the general welfare," the court said.[15] The framers of the Constitution were familiar with persecution of this character and the religious freedoms guaranteed by the First Amendment and Fourteenth Amendment were adopted precisely to prevent those types of abuses, the judges wrote.

West Virginia's Board of Education promptly appealed to the Supreme Court, asking it to decide once again whether the state could expel children for refusing to salute the flag.

If there was ever a time when the Supreme Court could wrap itself in the cloak of patriotism and demand loyalty, this was it: American soldiers were dying on battlefields in Europe and in the Pacific.

The Supreme Court issued its opinion on June 14, 1943—Flag Day—and this time, there was no doubt about what Robert H. Jackson thought. To this day, the decision, *West Virginia v. Barnette,* remains one of his most-quoted opinions, a compelling defense of the right to exercise religious beliefs that do not conform to the vagaries of local public opinion. By a 6-3 vote, the Court reversed its decision only three years earlier in *Gobitis* and held that mandatory flag salute was unconstitutional.[16]

Justice Jackson wrote the majority opinion:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[17]

The purpose of the Bill of Rights, Jackson wrote, was to withdraw certain subjects, like religion, and "place them beyond the reach of majorities and officials."[18]

Nor did Jackson find convincing the argument, promoted in *Gobitis*, that mandatory flag salute would instill school discipline and promote civic virtues. Those efforts, Jackson wrote, were self-defeating, doomed like the attempts by the Romans who sought to stamp out Christianity as a "disturber of pagan unity" or the contemporary efforts of "our present totalitarian enemies.[19]

Jackson warned:

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[20]

* * *

Lillian Gobitis Klose now lives near Atlanta. Her family suffered during the flag salute controversy, she recalled. An anonymous phone call in the middle of the night warned her father that a mob would show up at the family grocery store the next morning. Her father went to the police chief, who parked his car in front of the store to discourage troublemakers. Nothing happened, but some residents urged a boycott to punish the family for its religious views. Business dropped off for months.

Years later, Lillian married a Jehovah's Witness from Germany who had been put in a concentration camp for handing out literature on street corners. He had seen and experienced Nazi Germany's treatment of the Witnesses, persecutions that the appeals court in *Gobitis* could only imagine. . . .

The Barnett sisters still live in the Charleston area, and they, too, said they would fight for the principle again. "Absolutely," was the short, unequivocal response. Gathie Barnett Edmonds put it this way: "We took a stand, and it set a precedent for other children for years to come."

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[1] The family spelled its name "Barnett." In the court filings, the name was misspelled. For purposes of consistency, I have spelled the name as it appears in the federal court records.

[2] The First Amendment of the Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Amendment was adopted as part of the Bill of Rights in 1791. By the time the Barnette case came before the U.S. Supreme Court, it was well-settled law that the scope of the First Amendment also protected citizens against actions by state officials. The Court reached that result by incorporating the First Amendment protections into the Fourteenth Amendment, adopted in 1868 (no state shall "deprive any person of life, liberty or property, without the process of law"). Left unanswered was whether expelling children from public schools was permissible under the Fourteenth Amendment.

[3] The words "under God" were added by Congress in 1954.

[4] West Virginia Board of Education Resolution, January 9, 1942.

[5] In McClure's case, it was a truant officer who caused his expulsion. The officer made the rounds of schools in his territory and asked if there were any students who refused to salute the flag. McClure's teacher identified him. When McClure—who described himself as a good student with a perfect attendance record—refused to salute, he was expelled.

[6] The federal court filings misspelled their name, too. It was Gobitas, not Gobitis. I have used the court spelling for consistency.

[7] *Gobitis v. Minersville School District*, 21 F. Supp 581 (E.D. Pa. 1937) and 24 F. Supp. 271 (E. D. Pa. 1938).

[8] *Minersville School District v. Gobitis*, 108 F. 2d 683, n. 3 at 683 (3rd Cir. 1939). The court's opinion was issued on November 10, 1939, two months after World War II began in Europe.

[9] Quoted in Leonard Stevens, "*Salute! The Case of The Bible v. The Flag*," page 72, (Coward, McCann and Geoghegan 1973).

[10] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

[11] *Ibid*, 596.

[12] *Jones v. City of Opelika*. 316 U.S. 584, 623-624 (1942).

[13] Shortly before his Court appointment, Jackson published a book, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*, (New York: Alfred A. Knopf, 1941). It addressed a range of topics, from civil liberties to Roosevelt's ill-fated plan to expand the number of justices on the Supreme Court. The Supreme Court, Jackson wrote on page 284, has been "particularly vigilant in stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of responsible government rests." In a brief footnote, Jackson listed with apparent approval several opinions where the Court had acted vigilantly, but he noted "without comment the contrary 1940 decision in *Minersville School District v. Gobitis*, where a majority of the justices upheld school expulsions for refusing to salute the flag. Nothing more was said.

[14] *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W.Va. 1942).

[15] *Ibid*, 253.

[16] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The newest justice, Wiley Rutledge, joined the majority, leaving Justice Frankfurter, who had written the *Gobitis* opinion, to dissent with only two other justices.

[17] *Ibid*, 642.

[18] *Ibid*, 638.

[19] *Ibid*, 641.

[20] *Ibid*, 641.

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Editor's Note: This article originally appeared in a booklet created to mark the Barnette conference. In the interest of space, a small portion of the material does not appear in this printing

Henry Billings Brown—continued from page 1
lumber mills in South Lee, which further exposed Henry to industrialization. He had "a natural fondness of machinery and was never so happy as when allowed to 'assist' at the sawing of logs and shingles and the grinding of grain in [his] father's mills." Henry appreciated a strong work ethic and was often described as diligent, dedicated, and efficient in completing his work.

Henry had loving and caring parents, who adored their son Henry. His mother was "a woman of great strength of character and pronounced religious convictions… She was strict in the performance of her religious duties, insistent upon her sons' attendance upon church, and was, in short, a typical Puritan mother." Billings Brown, Henry's father, "though not an educated [sic], was a most intelligent man, and a great reader of history and biography, with occasional incursions into the domain of poetry and romance." Henry's interests were more in line with his father's interests than with his mother's, as he became an avid reader of both history and science and was less interested in religious subjects.

Henry grew up in an affluent, but not rich, family. His parents insisted that he receive a proper education, in part because Henry's father had already determined that Henry would become a lawyer. "[W]hen my father said to me one day, 'My boy, I want you to become a lawyer,' I felt that my fate was settled, and had no more idea of questioning it than I should have had in impeaching a decree of Divine Providence." Henry readily accepted his father's choice, because according to him, "[It] was not a bad idea…as it settled the doubts which boys usually have regarding their future… [and it] had an important effect in directing my studies."

Henry attended several of the best preparatory schools in New England. Yet, before he began his "proper" education, Henry's mother instilled in him a desire to read. When he was two years old his mother wrote, 'Henry knows all the letters in the alphabet, large and small… books are his source of amusement.' In fact, his desire to read became so vociferous, that by the age of five his mother believed that an eye infection, which subsequently limited Henry's eyesight and plagued him for the rest of his life, was the result of his incipient desire to read. In her diary she wrote, 'We find it necessary to divert his mind from his books on account of his eyes failing him. I have thoughtlessly indulged him in reading evenings the winter past, but seldom as long as he wished, yet I now see my error and lament it exceedingly.'


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Brown's formal education commenced in Stockbridge, Massachusetts. The town was originally founded as an Indian Mission, with this building serving as its headquarters for many years.

In 1845, the Brown family moved to Stockbridge, Massachusetts, so that Henry could begin his formal education. His parents enrolled him in the Stockbridge Academy, where he began to study Latin. Henry recalled, "Upon our removal to Stockbridge in 1845, I was entered as a scholar at the Academy and began the study of Latin, which I have always thought and still think, should be the foundation of the intellectual equipment of every educated man." Once in school, Henry learned his strengths and weaknesses. He wrote, "I soon discovered that my strength as well as my inclination lay in the direction of languages rather than of mathematics."

Henry entered Yale University in 1852 at the youthful age of sixteen, two years younger than most of his peers. Years later, he would write that being younger than his peers made it difficult for him to adjust to life in college. "Two years is a short time in the life of a man, but as between two boys in their teens of equal natural ability, the younger is handicapped by his age." At Yale, Henry was paralyzed to a certain degree by his adolescent immaturity, leading him to write, "My desire at first was merely to keep in college, and in truth I hardly did that the first term." Henry "was very fond of society, especially that of young ladies. He learned to dance and attended dancing parties. He learned to swim and to play billiards. Perhaps there was no college or society recreation in which he was not interested." He "grew to be ambitious as a scholar, but he does not appear to have loved study for its own sake."

Adding to his difficulties in adjusting to life in college was the death of his mother in 1853. The grief Henry felt as a result of his mother's death only exacerbated his juvenile behavior. He recalled, "I became reckless and behaved so foolishly as to ruin my college reputation for the next two years." However, in his third year of study, Henry regained his sense of composure and dedicated himself to his studies. He graduated from Yale in 1856. He explained, "I had some prejudices to overcome, but I finally succeeded in graduating not with a high, but with a highly respectable, standing."

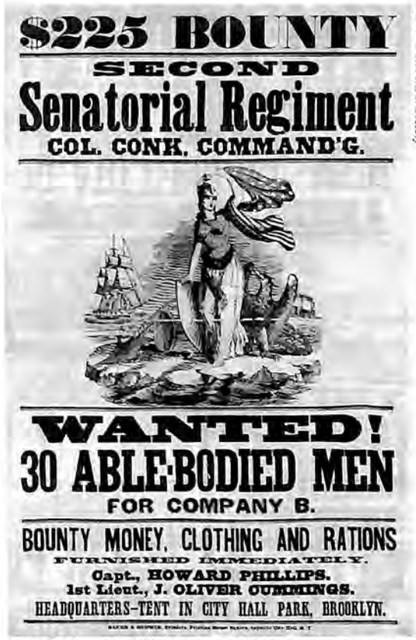
After graduation, Henry's father paid for Henry to travel through Europe for a year. It was a remarkable experience for Henry, which he remembered fondly. In his *Memoir* he states:

"After graduation, my father, who was most kind and indulgent, albeit somewhat hot tempered, offered me a year in Europe. It is needless to say that I eagerly seized upon this opportunity, then comparatively rare, of seeing something of the older world. The result justified my expectations, and I have always regarded that year (from November, 1856, to November, 1857) as the most valuable of my life from an educational point of view. Indeed a year of actual observation is a most befitting supplement to four years of study. Taken at just this time, it has a strong tendency to correct any false impressions, born of national pride or patriotism, to expand our political and religious views and to teach the lessons so hard to learn at home, that while we have accomplished much in the direction of a higher civilization, we have still much to learn.

When he returned home, Henry began studying law in the Squire's office in Ellington. Yet, Henry did not enjoy the work and did not enjoy living in Ellington. Moreover, a religious revival was underway in Ellington, and Henry, unlike his mother, was not deeply religious. In his *Memoir* he explains, "[T]here was a general revival in progress, in which I took no active part, I fear my conduct did not elicit the approval of the ecclesiastical authorities, and that I was looked upon rather as a warning then [sic] an example. But my conscience was 'void of offence,' and I still see nothing to regret or apologise [sic] for." Consequently, he went back to Yale and began his studies at the law school. However, after just nine months at Yale, Henry moved to Cambridge and began attending Harvard Law School, where he stayed for the next six months. Henry enjoyed law school, as it was free from many of the compulsory duties he had experienced during his undergraduate education, but in the end, Henry did not earn a law degree from either school. He had grown tired of the rigors of academic life, and was ready for a new phase in his life. Brown had never been fond of philosophical thought, and was eager after his trip to Europe to gain new experiences outside of New England.

After leaving Harvard, Henry was determined to find his own niche in the world, and he eventually settled on Detroit, where he moved to in 1859. His reasons for settling in Detroit were twofold. His mother's uncle lived in Detroit, and through social connections in Pennsylvania, Henry received two letters of introduction to use in Detroit. Soon after arriving in Detroit, Henry joined the law firm of Walker & Russell, where he completed his legal studies. In July 1860, Brown was admitted to the Michigan Bar and became a practicing attorney. Brown spared no time in making new connections and acquainting himself with the local legal practice in Detroit, which at the time was mainly concerned with shipping and admiralty law. Brown, still an avid reader, familiarized himself with the Michigan Reports by reading all twelve volumes thoroughly.

Brown received his first professional break in Spring 1861 after the election of Abraham Lincoln. Through a family friend, Brown was appointed as deputy United States Marshal. As the deputy U.S. Marshal, Brown came into contact with numerous admiralty lawyers, and this in turn fostered a passion in Brown for the practice of admiralty law. Brown writes, "[The appointment] was out of the line of professional advancement, but I had no hesitation in accepting it, as it not only gave me an immediate income, but also brought me into connection with vessel men of all classes who naturally gravitate toward the Marshal's office whenever any question arises as to 'tying up' a vessel to secure a claim."



New York Historical Society

Recruitment during the Civil War took many forms, as evidenced by the poster above. Brown avoided military service by paying a substitute to take his place in the draft.

Shortly thereafter, Brown was appointed Assistant United States Attorney for the Eastern District of Michigan. He was extremely active in the office, trying cases, interrogating witnesses, preparing indictments, and attending the sessions of the grand jury. As Brown later recalled, "This was really the beginning of my professional activity, and by the expiration of the District Attorney's official term I had built up a practice, principally in the admiralty branch, which justified my taking an office to myself." Through his hard work and dedication as an Assistant United States Attorney and a deputy U.S. Marshal, Brown was able to open a private practice, which specialized in admiralty law. On December 31, 1861 Brown wrote in his diary, "Indeed, I have already had quite a number of admiralty cases (for which I have a particular partiality), brought to me through my connection with the marshal's office… My professional business is much greater than it was a year ago, and long may it live and grow." Yet, Brown never enjoyed the competitive nature of private practice, and the constant need to secure business: "I have done but little because I could get but little to do, and it is not my nature to drum business as most Western lawyers do."

On April 12, 1861 the Civil War began. Brown, a staunch Republican, had supported Lincoln in the election of 1860, and was deeply opposed to secession. Yet, even before the war began, Brown foresaw that conflict was on the horizon. He always had an acute sense about social tensions in society. In his last diary entry in 1860, for example, Brown wrote, "The

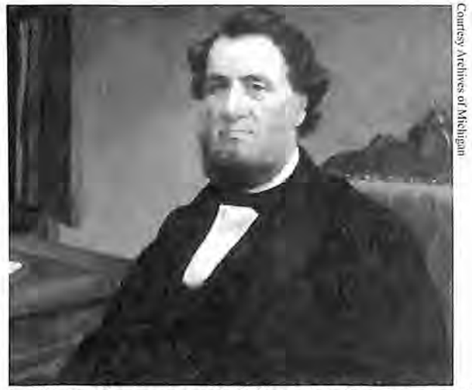
Continued on page 12

situation of the country is dreadful and civil war appears almost inevitable. Anything but disunion; God help us." A year later, after the fall of Fort Sumter, he proclaimed:

"The country, my greatest source of anxiety at present, is in a dreadful state. We have entered upon a war to which I can see no possible end, during the present administration. As I see its inevitable consequences in the loss of life property, in the vast issues of paper money and consequently high prices, and depreciation of the currency, and in the breaking up of the whole social system, it absolutely makes me shudder. What its end will be no man can tell, but all can safely prophesy that it will work immense injury to both sections."

Brown seriously considered joining the Union army, but in the end he avoided serving by paying eight hundred and fifty dollars to a substitute to take his place in the draft, a common practice for wealthy men during the war. Brown writes, "Twice I thought very seriously of participating in the terrible Civil War which has raged the entire year, but circumstances which I now regard as fortunate prevented my entering the service." Brown was able to afford the substitute through his marriage in 1864 to Caroline Pitts, the daughter of a prominent Detroit business man, whose wealth ironically came from the lumber industry, the same trade Henry's father had been involved in back in South Lee. Caroline Pitts, Henry's wife, was, "fine looking, well educated, intellectual, and sympathetic with all her husband's ambitions." Their marriage was "a very happy one … [and] After his marriage his society was largely with her friends and relations, but their acquaintances extended to the most cultured and wealthy people of the city." While Henry loved children, he and his wife never had any of their own, probably because Mrs. Brown "suffered much from ill health." In 1868, Caroline's father died and left a large portion of his wealth to his daughter Caroline, making her and Henry financially secure. They no longer had to depend on the inconsistent income of Henry's private practice, and even more importantly, the inheritance allowed Henry the financial freedom to accept his first judicial appointment.

In 1868, Republican Michigan Governor Henry Crapo appointed Brown to a temporary position as a state judge in the Wayne County Circuit Court in Detroit. However, his time on the bench was short-lived. The increased voter turnout out because of the presidential election in 1868 did not help Brown, who ran as a Republican for re-election in Wayne County, which was predominately Democratic. Brown's close friend Charles Kent wrote that "Judge Brown was defeated by a candidate far inferior, simply because the Democrats were in a majority in this county." Yet, Brown's time on the county circuit court bench was crucial, as it opened Brown's mind to the possibility of a judicial career. In his *Memoir*, Brown states: "I was decisively beaten at the November election, though I ran considerably ahead of my ticket. But short as my experience was, it gave me a taste for judicial life which has much to do in fixing my permanent career." After his defeat in the election, Brown returned to private practice at the well-known admiralty firm of Newberry & Pond, which later became Newberry, Pond & Brown. He practiced at the firm



Courtesy Archives of Michigan

Governor Henry Crapo appointed Brown to a temporary position as a state judge, opening Brown's mind to the idea of a judicial career.

for seven years, all the while remaining active in Republican Party politics. He even tried, albeit unsuccessfully, to win the Republican nomination for Congress in 1871. Despite his political disappointments, Brown's return to private practice at Newberry & Pond "was a most important step in his professional progress, and soon gave him business of more importance than he had before had."

While in private practice, Brown often viewed the practice of law with pessimism. For example, on May 30, 1862, Brown argued his first case in the Michigan Supreme Court, and lost. In response, he wrote, "Verily there is little certainty in the law." In another journal entry in 1863 he wrote, "How sad it is to think that [a lawyer's] prosperity generally grows fat upon the miseries of the rest of the world." In an entry on July 21, 1869 he scribbled, "Won disgracefully a little case in the justice's court. The justice of the peace's partiality so marked I was ashamed of him and myself."

As time progressed, Brown became increasingly uncomfortable in private practice: "I felt my health was giving way under the uncongenial strifes of the Bar, and the constant fear lest by some mistake of my own the interests of my clients might be sacrificed." Brown was a competent lawyer, but private practice left much to be desired for him. It was only after his appointment to the Federal District Court that many of his desires and ambitions were satisfied.

[1] Over the course of two days, thousands of people came to pay their final respects to Rosa Park, who lay in state in the United States Capitol Rotunda, making her the first woman and only the second African-American to receive the honor of being laid in honor in the U.S. Capitol Rotunda.

[2] The quotations in this article, unless otherwise noted, are taken from Charles A. Kent, *Memoir of Henry Billings Brown: Late Justice of the Supreme Court of the United States*, (New York: Duffield & Company, 1915) and from the personal papers of Henry Billings Brown located in the Burton Historical Collection at the Detroit Public Library.

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The second half of this article will appear in the next issue of the Quarterly

PRESIDENT JACKSON'S FAMOUS RETORT TO CHIEF JUSTICE MARSHALL: DID HE REALLY SAY IT?

*Jon O. Newman**

As every student of the Supreme Court knows, after Chief Justice John Marshall decided *Worcester v. Georgia,*[1] President Andrew Jackson retored, "Well: John Marshall has made his decision: *now let him enforce it!*[2] But did Jackson really say that? The question is worth a brief inquiry.

Although Marshall's opinion was rendered in 1832, the earliest known report of Jackson's alleged retort did not appear in print until 1864. The famous response is quoted by Horace Greeley in volume I of *The American Conflict.*[3] Greeley appended the following footnote: "I am indebted for this fact to the late Governor George N. Briggs of Massachusetts, who was in Washington as a member of Congress when the decision was rendered."[4]

There is no indication as to how then-Congressman Briggs acquired his information. Greeley makes no claim that Briggs heard Jackson say the famous words. They remain, at best, double hearsay, with all of the infirmities of such evidence. Greeley's account is not triple hearsay because the words attributed to Jackson are not offered for their truth, only for the fact that they were said.

1829

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A further basis for doubt is the 32-year gap between Jackson's purported words and Greeley's report of them. *The Oxford Dictionary of American Legal Quotations* asserts that Greeley's book is the first occasion when Jackson's words were attributed to him in print.[5] Charles Warren also reports that before Greeley, "No previous historian appears to have quoted the alleged remark."[6] Further basis for doubt arise from the fact that Briggs died in 1861, three years before Greeley quoted the account of what Briggs says he heard Jackson say, and from the absence of any mention of the famous quote in the only known biography of Briggs.[7]

Distinguished constitutional scholars have regularly expressed doubt about the authenticity of the Jackson remarks. R. Kent Newmyer flatly states that Jackson "Never said it."[8] Edwin A. Miles expresses doubt about the words.[9] Dale Van Every will concede only that Jackson was "reported" to have so spoken.[10] Fred Rodell makes this comment: "Marshall made the ruling that brought forth President Andrew Jackson's perhaps apocryphal but essentially accurate snort."[11] David Loth calls the attribution a "legend."[12] The great judicial historian Charles Warren concludes: "It is a matter of extreme doubt, however, whether Jackson ever uttered these words."[13] Edwin S. Corwin will concede only that Jackson "is reported to have said" the words.[14] Finally, Joseph C. Burke sums up the position of the skeptics: "While most [historians] admit that they cannot prove what Jackson said, none seems to doubt that he thought it and acted on it."[15]

This seems to be the view of the overwhelming majority of authorities, although a few—especially early in the twentieth century—give credence to the authenticity of the quote.[16]

The alleged quotation has appeared in the opinions of federal courts on six occasions, four times with skepticism as to authenticity. Most recently, Justice Breyer, lamenting in dissent the Supreme Court's decision in *Bush v. Gore,*[17] said that although "[w]e run no risk of returning to the days when a President [responding to this Court's efforts to protect the Cherokee Indians] *might have said* [the famous quote]. . . we do risk a self-inflicted wound. . . ."[18] The Seventh Circuit referred to the quote as "the remark allegedly made

Jackson/Marshall—continued from page 13

by President Jackson,"[19] a district judge in the District of Columbia wrote that "President Jackson is fabled" to have uttered the quote[20] and a bankruptcy judge in Illinois called it "President Jackson's legendary edict to John Marshall.[21] The District of Columbia Circuit and a district court in Michigan have asserted uncritically that the remark was made.[22]

A few state courts have quoted the remark, expressing doubt as to authenticity,[23] and a few others have reported that Jackson said it.[24]

In the absence of better evidence than Horace Greeley's double hearsay, first reported 32 years after Jackson's alleged remark, I think the quotation should be considered apocryphal.

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[1] 31 U.S. (6 Pet.) 515 (1832) (Banks and Brothers, 3d ed. 1884).

[2] The punctuation and italics reflect the way the statement first appeared in print, as quoted by Horace Greeley in *The American Conflict*, see note 3, *infra*.

[3] *See* 1 Horace Greeley, *The American Conflict* 106 (1864).

[4] *Id.* At 106 n. 27.

[5] *See* Fred R. Shapiro, "The Oxford Dictionary of American Legal Quotations" 392 n.* (1993). This dictionary asserts that "[t]he actual words were probably never spoken by [Jackson]." *Id.*

[6] 1 Charles Warren, "The Supreme Court in United States History 1789-1835, at 759 n. 1 (2d ed. 1926).

[7] *See* William C. Richards, *Great in Goodness: a Memoir of George N. Briggs, Governor of the Commonwealth of Massachusetts, from 1844 to 185* (1866). Richards states in the preface to his "Memoir" that it is based on the "copious notes" supplied to him. *See id.* at iv.

[8] *John Marshall and the Heroic Age of the Supreme Court* 474 (2001).

[9] After John Marshall's Decision: *Worcester v. Georgia*, and the Nullification Crisis, 39 J.S. Hist. 519, 528-29 (1973). Miles also cites two contemporaneous newspaper reports indicating, without direct attribution, that Jackson expressed an intention not to aid in carrying the Court's judgment into effect. See *id.* at 529 n.23.

[10] *Disinherited: The Lost Birthright of the American Indian*, 147 (1966).

[11] *Nine Men—a Political History of the Supreme Court from 1790-1955* 78 (1955).

[12] *Chief Justice John Marshall and the Growth of the Republic* 365 (1949) (referring

[13] *Supra* note 6, at 759.

[14] *John Marshall and the Constitution, a Chronicle of the Supreme Cou* 194 (1919).

[15] "The Cherokee Cases: A Study in Law, Politics and Morality," 21 Stanford L. Review, 524 (Feb. 1969).

[16] See Homer Carey Hockett, *Political and Social Growth of the United States (1492-1852)* 502 (1937); Marquis James, *The Life of Andrew Jackson: Portrait of a President* 603 (1937).

[17] 531 U.S. 98 (2000).

[18] *Id.* at 158 (Breyer, J., dissenting) (emphasis added).

[19] See *Coleman v. Bureau of Indian Affairs*, 715 F. 2d 1156, 1158 & n. 8 (7th Cir. 1983).

[20] See *Cobell v. Norton*, 283 F. Supp. 2d 66, 73 (D.D.C. 2003).

[21] See *In re Abernathy*, 150 B.R. 688, 696 (Bankr. N.D. Ill. 1993).

[22] See *FT.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F. 2d 1300, 1318 n. 97 (D. C. Cir. 1980) ("President Andrew Jackson epigrammatically caught the distinction between jurisdiction to enforce and jurisdiction to adjudicate when he said [the famous quote]."); *United States v. Michigan*, 471 F. Supp. 192, 210 (W. D. Mich. 1979) (Jackson commented [the famous quote]").

[23] See *Ex Parte James*, 713 So. 2d 869 (Ala. 1997) ("reportedly said"); *Matos v. United States*, 631 A. 2d 28 (D.C. 1993) ("perhaps apocryphal remark")' *Illinois Education Ass'n v. State*, 28 Ill. Ct. CL. 379 (1973) ("reported to have said"); *Latting v. Cordell*, 197 Okla. 369 1172 P. 2d 397 (1946) (according to Horace Greeley, ... the President said").

[24] See *Suprex Drugs Corp. v. State Board of Pharmacy*, 372 Mich. 22, 125 N.W. 2d 13 (1963) (President Jackson "commented"); *Butcher v. Price*, 397 Pa. 158, 152-3 A. 2d 869 (1959) ("the famous statement of President Jakeson"); *State ex rel. Hawkins v. Board of Control*, 93 So. 2d 354 (Fla. 1957) (Jackson "issued his famous pronouncement.").

**Jon O. Newman is a Judge on Court of Appeals for the Second Circuit where he has served since 1979. Prior to joining that Court, he served on the federal U. S. District Court for Connecticut. Judge Newman has also been published in the Journal of Supreme Court History.*

Photo caption for picture on page 13

The picture shown on page 13, is an artist's depicition of Chief Justice John Marshall administering the oath of office to incoming President Andrew Jackson. This painting appears on the East Portico of the U.S. Capitol Building.

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 at Opperman House, 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.

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Bill Yedinak, Waupun

WYOMING
Karen Roles, Powell
William J. Thomson, Cheyenne

INTERNATIONAL

CANADA

James M. Rosen, Trepassey, Newfoundland

2007 Sliverman Lecture Series Calendar—continued from page 3

April 26, 2007–Associate Justice Stanley Matthews
Speaker: Professor Jonathan Lurie

Matthews practiced law, was a judge and Senator, and served as counsel for the Electoral Commission that resolved the Hayes-Tilden election. Senate confirmation of his nomination was the closest of any Justice in history: 24-23, with many Senators not voting.

Professor Lurie teaches American legal history at Rutgers University at Newark, New Jersey. He is an expert in American military justice and has written extensively on the subject.

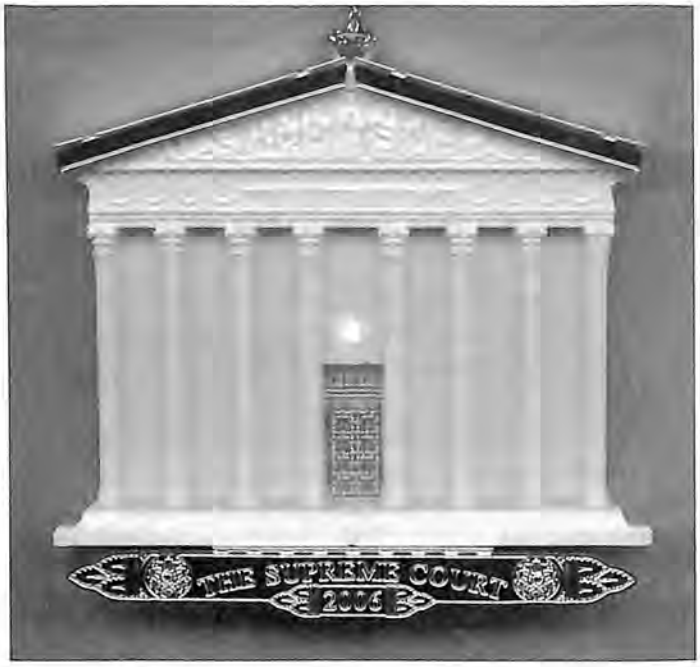
May 7, 2007–Associate Justice David Brewer
Speaker: Professor William Wiecek

Brewer was born to missionary parents while they were living and working in Turkey. He was a judge for forty years of his life, beginning on the State level in Kansas, then later moving to the federal circuit, prior to his appointment to the Supreme Court of the United States. For six years, Brewer served on the Supreme Court with his maternal uncle Stephen Field.

Professor Wiecek is the Congdon Professor of Law and Professor of History at Syracuse University. He has written numerous publications, the most recent of which, *The Birth of the Modern Constitution: The United States Supreme Court, 1941-1953,* is Volume 12 in the Oliver Wendell Holmes Devise History of the Supreme Court of the United States.

LC-USZC4-436

This illustration titled *The Overworked Court,* appeared in an issue of *Puck.* It depicts the heavy increase in the workload of the Court that occurred during the Gilded Era, the result of proliferating business and expansion.



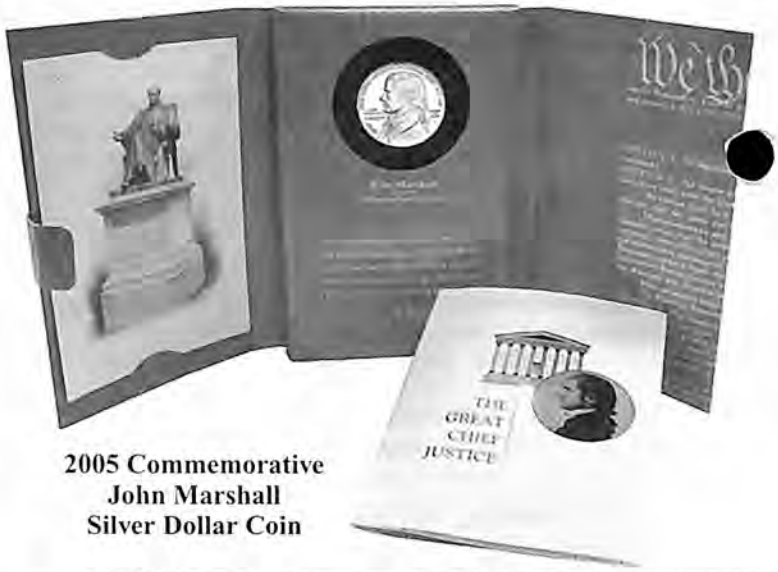
2006 Supreme Court Ornament

The 2006 Supreme Court Marble "Building" Ornament represents the façade of the Supreme Court main entrance.

This ornament is made of cast resin, which includes particles of pulverized marble that was removed from the West Plaza for replacement. Great care was taken to include the eight (of the sixteen) visible columns, and the details of the figures in the frieze above the "Equal Justice Under Law" pediment.

This ornament is beautifully trimmed in 24kt gold plate, so that the doors and chandelier shimmer. It is boxed for gift giving or storage for many years of enjoyment.

Item # 04051 Price $25.95
Members Price $20.76



2005 Commemorative John Marshall Silver Dollar Coin

In 2005, the United States honored Chief Justice John Marshall with a commemorative coin in celebration of the 250th anniversary of his birth. The Chief Justice John Marshall Silver Dollar not only pays tribute to the Supreme Court of the United States, but also recognizes the entire judicial branch of government. This is the first time a United States coin (regular issue or commemorative) has featured a Supreme Court Justice or the Supreme Court as an institution.

Designed by United States Mint sculptor/engraver John Mercanti, the obverse of the Chief Justice John Marshall Silver Dollar features a rendition of a portrait of John Marshall originally executed by French painter Charles-Balthazar-Julien Fevret de Saint-Memin in March of 1808. The reverse, by United States Mint sculptor/engraver Donna Weaver features a view of the Old Supreme Court Chamber, located inside the Capitol building, on the side that houses the United States Senate.

The Chief Justice John Marshall Silver Dollar is available in both proof and uncirculated condition. Each coin is placed in a protective capsule and is accompanied by its own official Certificate of Authenticity signed by the Director of the United States Mint. The proof coin is mounted in a handsome satin-lined velvet presentation case. The high quality uncirculated coin is packaged in a premium gift box with tray and sleeve.

Proof	**Item # 051423**	**$39.00**	**Members $35.00**
Uncirculated	**Item # 051430**	**$35.00**	**Members $33.00**

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