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GENERAL STATEMENT

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

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

The Society maintains an ongoing educational outreach program designed to expand Americans' understanding of the Supreme Court, the Constitution, and the judicial branch. The Society cosponsors Street Law Inc.'s summer institute, which trains secondary school teachers to educate their students about the Court and the Constitution. It also sponsors an annual lecture series at the Supreme Court as well as occasional public lectures around the country. The Society maintains its own educational website and cosponsors Landmarkcases.org, a website that provides curriculum support to teachers about important Supreme Court cases.

In terms of publications, the Society distributes a *Quarterly* newsletter to its members containing short historical pieces on the Court and articles describing the Society's programs and activities. It also publishes the **Journal of Supreme Court History**, a scholarly collection of articles and book reviews, which appears in March, July, and November. The Society awards cash prizes to students and established scholars to promote scholarship.

From 1977 to 2006 the Society cosponsored the eight-volume **Documentary History of the Supreme Court of the United States 1789–1800** with a matching grant from the National Historical Publications and Records Commission. The project reconstructed an accurate record of the development of the federal judiciary in the formative decade between 1789 and 1800 because records from this period are often fragmentary, incomplete, or missing.

The Society maintains a publications program that has developed several general interest books: **The Supreme Court Justices: Illustrated Biographies 1789–2012** (2012), short illustrated biographies of the 112 Justices; **Courtwatchers: Eyewitness Accounts in Supreme Court History** (2011), a narrative history of the Court told through first-hand accounts; **Supreme Court Decisions and Women's Rights: Milestones to Equality** (2010), a guide to gender law cases; **We the Students: Supreme Court Cases for and About High School Students** (2000), a high school textbook written by Jamin B. Raskin; and **Black White and Brown: The Landmark School Desegregation Case in Retrospect** (2004), a collection of essays to mark the 50th anniversary of the *Brown* case.

The Society is also conducting an active acquisitions program, which has substantially contributed to the completion of the Court's permanent collection of busts and portraits, as well as period furnishings, private papers, and other artifacts and memorabilia relating to the Court's history. These materials are incorporated into exhibitions prepared by the Court Curator's Office for the benefit of the Court's one million annual visitors.

The Society has approximately 5,000 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

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JOURNAL OF

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2018 VOL. 43 NO. 3

INTRODUCTION

Melvin I. Urofsky 207

ARTICLES

What Say the Reeds at Runnymede? Magna Carta in
Supreme Court History
Derek A. Webb 210

Bank of the United States v. Deveaux and the Birth of
Constitutional Rights for Corporations
Adam Winkler 237

Clerking for “God’s Grandfather”: Chauncey Belknap’s Year
with Justice Oliver Wendell Holmes, Jr.
Todd C. Peppers, Ira Brad Matetsky, Elizabeth R. Williams, and Jessica Winn 257

The Sit-In Cases: Explaining the Great Aberration of the Warren Court
Christopher W. Schmidt 294

Sitting by Designation: Retired Justice Tom C. Clark’s
Federal Court Service
Craig Alan Smith 321

The Judicial Bookshelf
Donald Grier Stephenson, Jr. 348

REVIEW ESSAY

Paul Finkelman, **Supreme Injustice: Slavery in the Nation’s Highest
Court** (Cambridge, Mass., Harvard University Press, 2018)
Charles F. Hobson 363

CONTRIBUTORS 382

ILLUSTRATIONS 383

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Introduction

Melvin I. Urofsky

As all of you who have been following the news—whether in old-fashioned newspapers (as I do) or on some electronic device—know, many colleges founded before the Civil War, such as Harvard and Georgetown, or even afterwards, such as Washington and Lee, have been reexamining the role of slavery in their early history. It is not that these schools have been unaware that slavery played a part—historians have long known that the value of chattel slaves funded many things other than the plantations south of Mason and Dixon’s line. Rather, it is the demand from students that universities openly face up to these facts and, if possible, do something to atone for it, that is driving schools to take a look into the darker recesses of their past.

This is the context in which Paul Finkelman’s new book, **Supreme Injustice**, arrives. Now the president of Gratz College in Philadelphia, Paul has long been one of the leading historians of slavery, especially the role it has played in the American court system. In his new book, he examines the role of the three most important Justices that sat on

the high court in the years before the Civil War—Chief Justice John Marshall, Justice Joseph Story, and Chief Justice Roger Taney. What is the newest, and perhaps most startling part of this book, is the extent to which Marshall, the Great Chief Justice, owned and sold slaves.

Because of the importance of these findings, as well as Finkelman’s argument that the three men could have changed the Court’s slavery jurisprudence, you will find two reviews of his work in this issue. First, Grier Stephenson looks at the entire book and the treatment of all three Justices in his “Judicial Bookshelf.” Because Finkelman’s findings about John Marshall are so new and surprising, we invited Charles Hobson, the editor of the John Marshall Papers, to look in particular at the chapter dealing with Marshall. We have also invited Dr. Finkelman to respond in the next issue if he chooses to do so.

In most histories of American jurisprudence, including mine, the place we usually start is at Runnymede with King John signing the Magna Carta. The reason is simple—

Magna Carta started what will be called the “British Constitution,” which in fact is not a single document, but a series of laws passed during the ensuing centuries. When the U.S. Supreme Court first began hearing cases, there were many references to English law—after all, that was basically the only law those early Justices knew. Over the decades, as we built up our own body of law, one might have expected that there would be fewer references to the British Constitution and especially to Magna Carta.

Derek A. Webb, former Supreme Court Fellow and associate in the Supreme Court and Appellate and Commercial Litigation and Disputes practice groups at the law firm Sidley Austin, however, suggests that Magna Carta has played a far larger role in Supreme Court cases than previously expected, and that role has continued right down to the present. There has always been some debate over exactly what the barons at Runnymede meant by “due process of law,” a debate that has been going on in American courts for decades. On the 800th anniversary of the Great Charter in 2015, Justices Antonin Scalia and Stephen Breyer took opposite sides in a case, with both of them citing Magna Carta as justification. Mr. Webb lists the cases and I think you will agree that we did not expect that many.

I have mentioned a number of times that the field of constitution history is not a large one, and I have always been happy to be part of a discipline where most of us know each other. The article by Adam Winkler is another example of what my son has called “dealing with the usual suspects.”

During several periods in American history there has been criticism of the courts, and especially of the high court, for its treatment of corporations, and especially of ascribing rights to them normally associated with natural persons. Adam, a professor of law at UCLA, spurred on by recent criticism of the court, began to look into the charges, and discovered that the courts have treated

corporations as entities entitled to rights since the founding of the republic.

Shortly after he gave a talk on his book **We the Corporations: How American Businesses Won Their Civil Rights** (2018) in Washington, I had lunch with him, and asked if he had any material that would qualify as an article for the *Journal*. It turned out that not only did he, but he had been trying to send it to me at an old e-mail address. I gave him the right one, and the result is the article that sums up much of his argument.

Todd Peppers, Fowler Professor of Public Affairs at Roanoke College and Visiting Professor at Washington and Lee, is no stranger to this journal, and we have been proud to have published some of his earlier work on law clerks. In fact, it would be fair to say that Todd has been one of the prime movers in historians using memoirs and other materials by clerks to learn more not only about the individual Justices for whom they clerked, but also about the workings of the Court itself. I can personally affirm that materials from Justice Brandeis’s clerks played no small part in my biography of him.

As you can tell from the title, “Clerking for ‘God’s Grandfather,’” we are dealing with one of the three greatest—and certainly one of the most colorful—Justices to ever sit on the high court: Oliver Wendell Holmes, Jr. Chauncy Belknap kept a journal of his year serving as what Holmes called his “secretary,” and how Pepper and his associates found, transcribed and annotated the diary is a story told in the article.

The sit-in cases decided during the early 1960s have always been a source of puzzlement in many ways. Why did the Warren Court, considered the most liberal in our history, have so much trouble with them? Why did Hugo Black, who in most civil rights cases stood with African-Americans seeking justice and equality, vote against the protesters?

Christopher Schmidt, professor of law at Chicago-Kent College of Law, offers an

explanation for what he calls an “aberration” in the Warren Court’s jurisprudence. While everyone may not agree with him, it will serve as a starting point for future discussion of these cases.

Justice Tom Clark had an unusual career. Named to the high court in 1949 by President Truman, he served until 1967, when he resigned so as to avoid a conflict of interest: Lyndon B. Johnson had named Clark’s son Ramsey as Attorney General. But Tom Clark still had another decade to live, and in those ten years he served on many lower federal courts and also worked for his pet cause, improving the administration of justice.

While a number of scholars have looked at his post-Court career, Craig Alan Smith, a

professor in the Department of History, Politics and Society at California University of Pennsylvania, argues that they really have not given him the credit he is due, both for his work on judicial administration, as well as for the influence of his decisions on the lower courts. No other Justice in modern times, it should be noted, had as full a career after stepping down from the bench.

Finally, we have Grier Stephenson’s “Judicial Bookshelf,” which aside from the review of the Finkelman book, looks at three other volumes that will be of interest to those looking into the Court’s history.

As always, a great variety of topics to entertain and to enlighten you. Enjoy!

What Say the Reeds at Runnymede? Magna Carta in Supreme Court History

DEREK A. WEBB

At Runnymede, at Runnymede,
What say the reeds at Runnymede?
The lissom reeds that give and take,
That bend so far, but never break,
They keep the sleepy Thames awake
With tales of John at Runnymede.¹

Introduction: An 800th Anniversary to Remember

On June 15, 2015, lawyers on both sides of the Atlantic Ocean commemorated the 800th anniversary of the moment when King John affixed his seal to Magna Carta in Runnymede. In Runnymede that day, Queen Elizabeth, Prince William, and Prime Minister David Cameron appeared before a throng of thousands of British and American lawyers and politicians to commemorate the occasion. The keepers of the four remaining “exemplifications” of the 1215 Magna Carta, The Deans of Lincoln Cathedral and

Salisbury Cathedral and the archivists of the British Library, the keepers of the four remaining “exemplifications” of the 1215 Magna Carta, were all on hand. U.S. Attorney General Loretta Lynch spoke on behalf of the United States. The American Bar Association rededicated its small memorial it had first placed in Runnymede in 1965 for the 750th anniversary celebration. The weekend before the big day, churches throughout the country rang their bells, archers vied against each other in skills competitions, a medieval fair replete with traditional jousting was thrown, and, in a colorful river pageant, a flotilla of boats of all shapes and sizes floated down the Thames River towards Runnymede. And the day before the anniversary itself, a full-scale reenactment of the conflict between King John and the barons was staged in the Runnymede Pleasure Grounds.

And in Washington, D.C., that day, the Supreme Court commemorated Magna Carta in the way it often does best: Justices Antonin

Scalia and Stephen Breyer argued about its implications for a case in dueling citations to the Great Charter. In *Kerry v. Din*, the two Justices disagreed about whether a decision by the State Department not to grant a visa to the husband of a U.S. citizen deprived that U.S. citizen of “due process.” And both looked back to Magna Carta to help them understand the contours of what the Fifth Amendment’s Due Process Clause required in that situation. It was a fitting tribute to Magna Carta that year, as the Justices cited Magna Carta more often in October Term 2014 than in any other single previous term in Supreme Court history.² A joke that percolated around the Court that year summed it up nicely: “Write Smarta’—Cite the Carta!”

The contrast between the commemorations in Runnymede and Washington, D.C., that day illustrates a unique quality of Magna Carta. Magna Carta is impossibly old. The Supreme Court first opened its doors and met for business on February 2, 1790, in the Royal Exchange building in New York City. Five hundred seventy-five years before that, King John met with the barons in Runnymede. The time between those two meetings, more than twice the length of time in which the United States itself has existed, reminds us of the sheer, staggering, nearly prehistoric antiquity of Magna Carta, and the relative youth of our own constitutional system.

And yet, across nearly a millennium of history, we continue to look back to Magna Carta as the earliest and most totemic symbol of constitutionalism and the rule of law in world history. Despite its antiquity, Magna Carta has managed to reach out from the vast deep of the past to exert a modest but ongoing influence on the deliberations of the Court. Indeed, Magna Carta has served as something of a leitmotif throughout Supreme Court history. Whenever a Justice has reached for a foundational legal text to undergird a claim about the fundamental liberties of individuals and the appropriate limits of government, Magna Carta has been available. As early as

1819, Justice William Johnson observed the easy availability and applicability of Magna Carta for judicial decisions when he wrote, “As to the words from *Magna Charta* . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”³

This article is a survey of the influence Magna Carta has exerted upon the Supreme Court throughout this history, and it proceeds in four parts. First, stepping back for a moment from the work of the Court to the Court’s work site, I look at the depictions of King John and Magna Carta throughout the Court’s building itself. Though frequently overlooked by visitors to the Court, there are in fact two such depictions that tell a powerful story about the connection between Magna Carta and the American institution of judicial review. Second, I take an empirical, bird’s-eye view of how and when the Supreme Court has turned to Magna Carta by graphically organizing the Court’s 160 citations throughout its history though the conclusion of October Term 2017, according to time periods demarcated by the tenure of the seventeen Chief Justices, and by legal issues, observing the broad array of legal claims for which Magna Carta has been cited. Based upon this quantitative analysis, I argue that there have actually been two Magna Carta’s in Supreme Court history—one that prevailed in the nineteenth century, which provided due process protections for mostly economic liberties of various kinds, and a second that was taken up and dusted off in the mid-twentieth century, which provided protection mostly in the context of criminal procedure and fundamental rights jurisprudence. Third, I look behind the numbers to the opinions themselves and suggest a striking parallel between the use of Magna Carta by the

Supreme Court in the nineteenth, twentieth, and twenty-first centuries and the use of the “ancient constitution” by seventeenth and eighteenth century Whig lawyers, politicians, and statesmen in England and America. In particular, although Magna Carta has been used and repurposed to meet different jurisprudential needs at different times, a common theme throughout has been its usefulness in opposing arbitrary power and government by decree via a return to an older, “ancient” tradition of formal legal procedure. I conclude in the fourth section by suggesting that the same power-constraining dynamism of Magna Carta has made it not only a useful resource for Justices eager to check government power, but also for Justices writing dissenting opinions eager to check their very own colleagues in some of the most egregious opinions in Supreme Court history.

1. King John in the Marble Palace

Within the Courtroom itself, hewn into the Spanish marble frieze above and to the right of the Justices, and hovering over the proceedings of the Court since the building opened in 1935, is an image of King John, looking slightly deflated (Figure 1). And at the front of the building, in one of the eight panels on the seventeen-foot bronze doors at the entrance of the Court, is a second depiction of King John, placing his seal on Magna Carta. This panel is itself just the first of four panels on the right door arranged vertically. The Magna Carta panel is the first panel on the bottom, depicting the 1215 contract between the King and his barons (Figure 2). Directly above that is a panel depicting the Statute of Westminster of 1275, an early act of the British Parliament, which put into binding statutory form many of the provisions of Magna Carta (Figure 3). Above that is an image of Sir Edward Coke squaring off with King James I in 1608 (Figure 4). As a commentator on Magna Carta in his *Institutes*, Coke stressed

the ways in which Magna Carta was not just another statute but rather a “super statute,” a higher or fundamental law that trumped the ordinary acts of King and Parliament. As he put it on the floor of Parliament on May 17, 1628, “Magna Carta is such a fellow, he would have no sovereign.” Magna Carta would have no sovereign, he explained, because any act by King or Parliament that contradicted it would be legally void, or as he put it in the colorful legal language of the time, “holden for none.” And in the fourth and final panel of the bronze



Figure 1. King John as depicted inside the Courtroom wearing chain mail and a warrior's helmet.

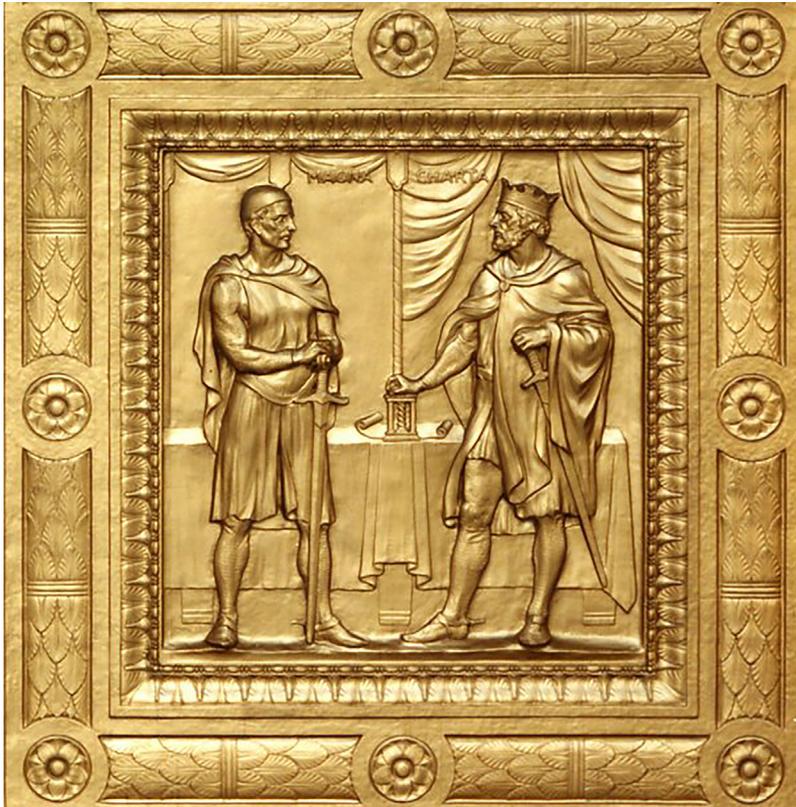


Figure 2. King John of England is coerced by the Barons to place his seal upon the Magna Carta in 1215.

door, John Marshall and Joseph Story face each other in what the architect said was a discussion of *Marbury v. Madison*, the foundational 1803 case establishing for the Supreme Court its power of judicial review (Figure 5).

Viewed bottom to top, the sequence of panels beginning with Magna Carta and concluding with *Marbury v. Madison* tells a coherent and plausible story connecting the events in Runnymede with the work of the Supreme Court. John Donnelly, the designer of the doors, summarized that story in his own words in a September 27, 1932 memo to Cass Gilbert. “The four panels on the right, also beginning at the bottom present crucial events in the development of the ‘Supremacy of Law’ in our own system—that supremacy of law of which the Supreme Court and its rulings on the constitutionality of statutes are the embodiment, and which make the Supreme Court the most important tribunal in the world.”⁴ From

contract to statute to super-statute to judicial review, the four panels graphically illustrate the English legal historian Trevelyan’s observation that “the first great step on the constitutional road was Magna Carta.”⁵ In that key first moment the nucleus of the very idea of constitutionalism, of reigning in rulers themselves within the rule of law, makes its appearance on the world stage.

2. A Tale of Two Magna Cartas: A Bird's Eye View of Magna Carta in Supreme Court History

In 1965, while commemorating the 750th anniversary of Magna Carta, Phillip Kurland observed that “the importance of Magna Carta to American constitutionalism is . . . to be discovered in judicial opinions rather than legislative acts or political tracts. Moreover, since the Supreme Court in time became



Figure 3. Edward I watches as his chancellor publishes the Statute of Westminster in 1275.



Figure 4. Sir Edward Coke bars King James I from the "King's Court," making the court, by law, independent of the executive branch of government.



Figure 5. Chief Justice John Marshall and Associate Justice Joseph Story discussing the 1803 *Marbury v. Madison* opinion in front of the U.S. Capitol. (Justice Story did not join the Court until 1811, eight years after this historic decision was handed down.)

dominant in the formulation of constitutional doctrine, one must look to that Court's judgments to discover the transmission to the United States of the protection of the [provisions] of Magna Carta."⁶ Fifty-plus years hence, that remains all the more true, as the Court has, if anything, looked with even greater frequency and attentiveness to the historic events at Runnymede in the intervening time. To get a fuller picture, therefore, of the significance of Magna Carta in Supreme Court history, one must look behind the image of King John on the Court's bronze doorway and beneath his image on the north wall frieze, and at the activities of the Justices on the bench, in conference, and in their chambers, as they have from time to time considered the implications of Magna Carta for American law in the eighteenth, nineteenth, twentieth, and twenty-first centuries.

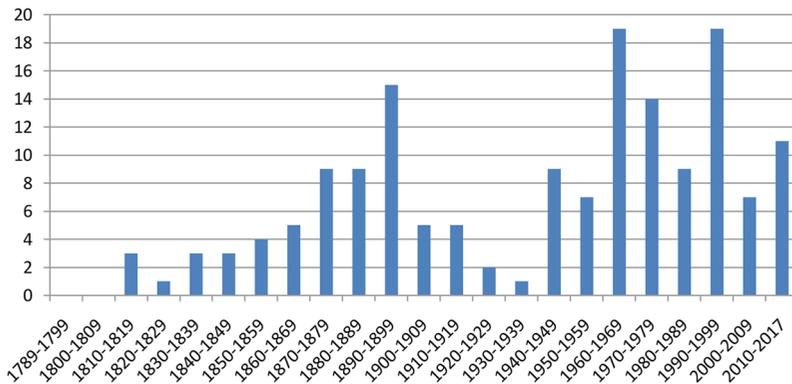
From 1789 to 2017, the Supreme Court cited Magna Carta (or "Magna Charta" or "Great Charter") in 160 distinct cases. In thirty-three other cases, they cited it as well, but only when either quoting the lawyers at the bar, as when early court reporters included transcripts of oral argument along with the opinion itself, or when making a purely symbolic reference to an entirely different law, such as the Sherman Act, which they would frequently refer to as "the Magna Carta of free enterprise." Of the principal 160 cases, reference to Magna Carta was made in a full fifty-seven dissenting opinions.⁷ And nearly a third of all 160 cases and nearly half of all the citations in dissents, were made by just four Justices who clearly found in Magna Carta a fertile constitutional resource for both their opinions and perhaps especially for their

dissents. Topping the list was Hugo L. Black (fifteen total citations, eight in dissent), followed by John M. Harlan (eleven citations, six in dissent), John Paul Stevens (ten citations, five in dissent), and William O. Douglas (eight citations, four in dissent). And while the citations to Magna Carta are fairly spread out historically, with the earliest judicial citation in an 1814 Joseph Story dissent from John Marshall's majority opinion in *Brown v. U.S.*,⁸ and the most recent in a 2018 dissent by Justice Breyer in *Jennings v. Rodriguez*,⁹ there appear to be some historic trends worth noting. Below are two charts depicting the historic frequency of the Supreme Court's citations to Magna Carta by decade and by era of Chief Justice.

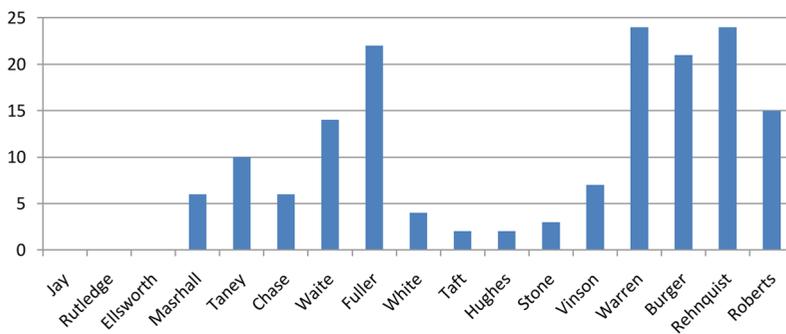
The first thing to notice is that the Court has turned to Magna Carta more frequently as

time has gone by. When Bernard Bailyn analyzed the Supreme Court's citation of **The Federalist**, he observed that "the greater the distance in time from the writing of the papers, the more the justices have found it useful to draw on the authority of this two-century old commentary."¹⁰ A somewhat similar trend seems to have been true of this eight-century old document. No Justice ever referred to Magna Carta in the Court's first twenty-four years, including John Marshall himself. And since 1960, the Court cited it as many times over the past fifty-seven years as it did during its first 164 years combined. Put otherwise, the Court cited Magna Carta more times during the four Chief Justiceships of Warren, Burger, Rehnquist, and Roberts as it did from the beginning of John Jay's tenure as Chief Justice in 1789 to the conclusion of

Citations to Magna Carta by Decade



Citations to Magna Carta during Era of Chief Justice



Fred Vinson's Chief Justiceship in 1953, spanning a total of thirteen Chief Justices. Clearly the Court has looked with greater favor and fondness, or at least with greater frequency, upon the reeds at Runnymede as it has moved into the post-World War II era.

One might be inclined to hypothesize that this was a consequence of the rise of originalism, of judicial efforts to ground constitutional interpretation self-consciously in the original understanding of the Constitution that became particularly popular in the late 1980s and became associated with a more conservative approach to law and judicial role. But even a cursory glance at the list of the leading citers to Magna Carta reveals that it was not so much the well-known originalists on the Court like Justices Antonin Scalia and Clarence Thomas who were primarily responsible for this increase in interest, but rather a number of Justices from across the interpretive and ideological spectrum. The nine leading citers to Magna Carta since Earl Warren became Chief Justice in 1953 have been Stevens (ten), Black (ten), Douglas (seven), Scalia (seven), Thomas (seven), Souter (six), Kennedy (five), Powell (four) and Warren (four). Their citations together made up nearly seventy-five percent of all the citations to Magna Carta during this period. And as should be evident, no single set of interpretive or political commitments could be ascribed to this rather diverse list of jurists. Despite their considerable differences in how they approach the law, they all nonetheless found in Magna Carta something worthy of attention.

Second, within that overall history, there appear to have been three distinct periods in which the Court notably spiked either upwards or downwards in its citation of Magna Carta. The first such period occurred from the late 1870s through the end of the 1890s, when the Court shifted from citing Magna Carta two-to-three times per decade to eight-to-ten times or more per decade. One perhaps obvious explanation for the increase

during this period is that the Fourteenth Amendment, prohibiting the states from denying life, liberty, or property to any person without due process of law, had just been ratified in 1868. This prohibition was ultimately anchored in and derived from chapter thirty-nine of Magna Carta, according to which "no free man shall be taken or imprisoned or disseised [*sic*] or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." And as lawyers began to appreciate the potential power of this Amendment, it accordingly became a fruitful subject of lawsuits and hence of corresponding judicial attention in the late nineteenth century. And as lawyers and judges alike wrestled with the language and meaning of the Due Process Clause, they frequently turned back with greater attentiveness to its historic antecedent in Magna Carta.

Another potential explanation for the spike in attention to Magna Carta in the late nineteenth century is that it corresponded with the rise of the post-Civil War industrial economy and a broader shift in the jurisprudential gestalt at the Court from the Civil War until the early twentieth century in which the Court took on an increasingly bolder role in policing the relationship between government on the one hand and business and property holders on the other.¹¹ As states attempted to impose more extensive regulations on slaughterhouses, railroads, grain facilities, and other industries, lawyers for those companies, and eventually several Justices on the Court itself, turned for legal shelter from these regulations to the multitude of property protections Magna Carta gave to the barons against the King and his constables.¹² From 1872 to 1899, the Court cited Magna Carta thirty-two times. And in fifteen of those cases, the Court was specifically confronting challenges to the constitutionality of state economic regulations made in the name of the Contracts Clause and the Due

Process Clause of the Constitution. They did not necessarily strike down all those regulations, but in all those cases, either the majority or the dissenters turned to Magna Carta as an historic source of illumination for the limits imposed by the Constitution upon government in the regulation of business and private property.

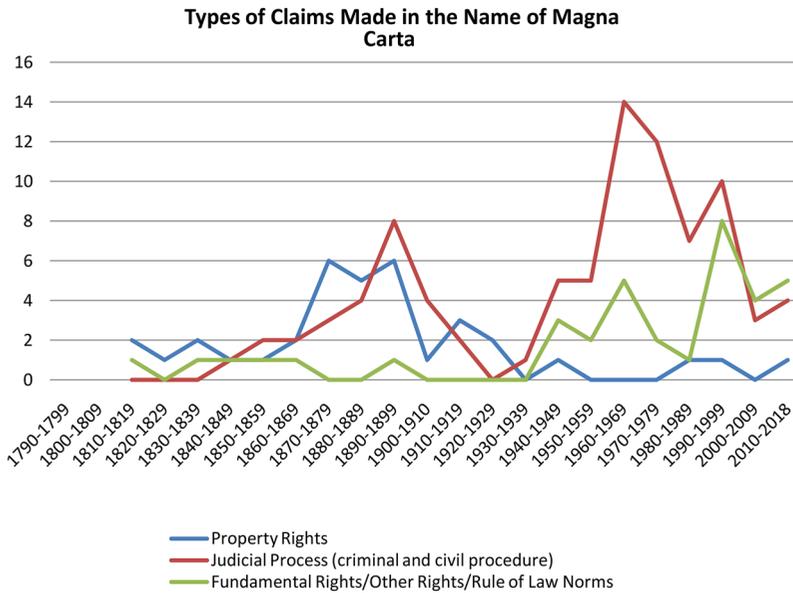
The second period that stands out in the charts runs from the 1920s through the early 1940s, in which the Court went considerably downwards from its all-time high in the 1890s to its all-time low in the 1930s. Indeed, for twelve years from 1926 to 1938, the Court somewhat incredibly did not cite Magna Carta a single time. This decline interestingly corresponds with another, broader trend that prevailed at the Court at this time, in which the post-*Lochner* Court self-consciously pulled back from policing the relationship between government and business, renounced what came to be known as substantive economic due process, and settled into what scholars have since called the New Deal settlement. With perhaps fewer attorneys expecting much pay-off for their clients from citation to the Great Charter in this altered judicial climate, in which, as the Court summarized its new approach to business regulations in its 1938 decision in *Carolene Products*, “the existence of facts supporting the legislative judgment is to be presumed,”¹³ the Court shifted its focus away from wrestling with the property rights implications of the eight-hundred-year-old document.

However, beginning in the late 1940s, reaching a high-water mark in the 1960s, and carrying through to at least the 1990s, a third period of renewed judicial fascination with Magna Carta seemed to emerge. The Court in *Carolene Products* had indeed said that everyday regulations of commerce and industry would be henceforward subjected to merely rational basis judicial scrutiny. But it also hinted, in its famous Footnote Four, that, going forward, a “more exacting judicial

scrutiny” might be appropriate when “legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”¹⁴ This statement, as is well known, foreshadowed the explosion of non-economic, fundamental rights protection by the Supreme Court in the second half of the twentieth century. And correlated with this overall trend, the Supreme Court turned to Magna Carta in the 1960s with renewed interest for what it had to say about those “specific prohibitions” of the Bill of Rights that dealt specifically with criminal procedure and what it had to say about the nature of “fundamental rights” under the Fourteenth Amendment. Under the alchemy of the new set of judicial priorities in the second half of the twentieth century, Magna Carta was itself somewhat transformed from a bulwark of property protections against a rapacious King to a charter of basic liberties for those in the maw of the criminal justice system and as a font of wisdom for those eager to obtain insight into those fundamental rights that were “inherent in the very concept of ordered liberty.”

The chart below illustrates this overall trend in how Magna Carta has been used by the Court.

The reeds at Runnymede, as this chart illustrates, have said different things at different times to the Justices of the Supreme Court, depending upon the felt jurisprudential needs of the day.¹⁵ In a way, tracking Magna Carta from its earliest citation by the Supreme Court to its most recent thus helps us to see just a bit more clearly the broad narrative arc of jurisprudential developments at the Supreme Court throughout its history. In the nineteenth century, lawyers like Daniel Webster and jurists like Justice Stephen Field often invoked Magna Carta as a check upon state interference with the property rights of citizens and corporations. It was used to undergird claims regarding inheritance rights,



debtors' rights, and the legal rights of corporations. And it was used to illuminate constitutional claims against state interference with property via the Contracts Clause, the Fifth Amendment prohibition on taking property for public use without just compensation, and the Fifth and Fourteenth Amendment prohibition on depriving citizens of property without due process. After its seeming period of obsolescence in the early twentieth century in the wake of the New Deal, Magna Carta's connection with property claims almost entirely faded away, and came back to life in a new form in the 1960s. In the hands of new lawyers and jurists like Justices Black, Frankfurter, and Douglas, Magna Carta came to symbolize a check upon state prosecutorial misconduct before, during, and after criminal and civil trials. It pointed to the importance of the writ of habeas corpus, the right to speedy grand and petit juries, and the prohibition against excessive fines and cruel and unusual punishment. And it also represented an authoritative go-to source for those interested in abstract rule of law norms and putting limits on state interference in other areas of fundamental personal importance. The reeds

at Runnymede, in other words, have gently swayed this way and that, bending but never quite breaking, depending upon the prevailing winds of the time at the Court.

3. The U.S. Constitution and the Ancient Constitution: Magna Carta, Arbitrary Government, and the Rule of Law

Scholars have observed that, throughout history, Magna Carta has often had something of a phoenix-like quality.¹⁶ Alive in one era, it fades away into a period of obsolescence and then, in a new moment of need, is reborn as something entirely different. After numerous reissues of Magna Carta throughout the thirteenth and fourteenth centuries, it fell into a period of relative neglect during the Tudor period of the sixteenth century.¹⁷ Writing in the mid-1590s, Shakespeare himself chose not to even mention Magna Carta a single time during his play about the life of King John. But in the Stuart period of the seventeenth century, with King and Parliament quarreling on the brink of civil war, Magna Carta and its lessons of restraint



In 2014 the Library of Congress commemorated the 800th anniversary of Magna Carta with an exhibition: *Magna Carta: Muse and Mentor*. Above, Law Librarian David Mao (center) hosted a conversation with Chief Justice John G. Roberts, Jr., and The Rt. Hon. The Lord Judge (former lord chief justice of England and Wales) on the document's legal legacy, in conjunction with the exhibit.

upon the King were rediscovered anew.¹⁸ Benjamin Rudyerd, a member of Parliament at the time, nicely summarized the sentiments of many: “For my own part, I shall be very glad to see that good, old decrepit Law of Magna Charta which hath been so long kept in and lain bed-rid as it were; I shall be glad I say to see it walk abroad again, with new Vigour and Lustre . . . For questionless, it will be a general heartening to all.”¹⁹

As the previous section indicated, the “good, old decrepit Law of Magna Carta” has risen and fallen and risen again not only in England but in the United States as well. This phenomenon, though often observed in its native English context, has never quite before been observed in the United States. This tells us something about important trends and developments in U.S. Supreme Court jurisprudence. But it also tells us something about Magna Carta itself as a source for legal argument. Magna Carta, of course, is not technically part of the law of the land in the

United States. It is not among the organic laws of the United States to be found in the first volume of the United States Code. And, as Chief Justice Roberts reminded an audience at the Library of Congress in 2014, if a lawyer before the Supreme Court is relying heavily upon Magna Carta, he is probably losing his argument, as the Justices typically like their authorities a bit more current and a bit more genuinely legal.²⁰ And yet, Magna Carta is not a completely and hopelessly antiquated document either. Citing Magna Carta in the United States is not the same as citing Hammurabi’s Code or the Laws of Solon, the handiwork of two other iconic lawgivers carved into the Supreme Court’s Spanish marble frieze across from King John. What then explains Magna Carta’s enduring, albeit shifting, vitality in the work of the United States Supreme Court?

In his classic article, “The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth

and Eighteenth Centuries,” John Phillip Reid identified a tendency among English and American lawyers in the seventeenth and eighteenth centuries to invoke the immemorial lessons of the “ancient constitution” on behalf of their view that law was, in a phrase, the antithesis of the arbitrary exercise of power.²¹ Used almost exclusively as a check or restraint upon power, and hardly ever as a defense of governmental power, the ancient constitution “was a standard of reference for seventeenth century antiprereogativists and for eighteenth century constitutionalists opposed to arbitrary power.”²² And above all, the chief hobgoblin of ancient constitutionalists was not necessarily the cruel or harsh exercise of power, but rather the *arbitrary* exercise of power, in which the sovereign’s command, dictate, or say-so, uncircumscribed by any formal rules or external standards, had the force of law. “In eighteenth-century parlance, arbitrary was the difference between liberty and slavery, right and power, constitutional and unconstitutional.”²³ And law stood as a bulwark against mere arbitrary dictate. “For most of history English law was not command, but the opposite of command. Law, at least constitutional law, blunted the force of command.”²⁴ As Jared Elliot put it in 1785, “Arbitrary, Despotick Government, is, When this Sovereign Power is directed by the Passions, Ignorance, & Lust of them that Rule. And a Legal Government, is, When this Arbitrary & Sovereign Power puts it self under Restraints, and lays it self under Limitations.”²⁵ And to restore government to “legal government,” lawyers and politicians in the seventeenth and eighteenth centuries would commonly look to the ancient past and invoke the norms of the ancient constitution, whose immemorial restraints upon the King had been essential to English liberty.

In much the same way, Justices of the United States Supreme Court have turned again and again to Magna Carta as an aid in understanding the limits of government and the necessity of restraint upon arbitrary

power. Though used to buttress many different kinds of legal claims, as we have already seen, Magna Carta has signified above all the importance of substituting law for mere choice and procedure for mere fiat in protecting the freedom of the individual against the power of government. Although not a Supreme Court Justice himself, Daniel Webster may have captured this fundamental dimension of Magna Carta best when he stood before the Court in March 1818 and argued *Dartmouth College v. Woodward*. Citing Magna Carta, Webster highlighted its “law of the land” provision and observed, quoting Blackstone, that “law is a rule; not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal.”²⁶ Going on to gloss Magna Carta further, he added in his own voice, “By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society.”²⁷ For an act of the legislature to be truly lawful, he said, and not just a mere enactment or decree, it had to have this quality of generality. As he put it, “Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.”²⁸

Numerous Justices in the nineteenth century echoed Webster and pointed out the ways in which Magna Carta highlights the fundamental dividing line between lawful government and the arbitrary command of the sovereign. In 1878, Justice Stephen Field said that Magna Carta indicated that, even in wartime, in wartime, government still needed to proceed according to law and not mere fiat. “Our system of civil polity is not such a rickety and ill-jointed structure, that when one part is disturbed the whole is thrown into confusion and jostled to its foundation.”²⁹ Field added that the words

due process of law . . . as is known to every one, were originally used to express what was meant by the terms “the law of the land” in Magna Charta, and had become synonymous with them. They were intended, as said by this court, “to secure the individual from the arbitrary exercise of the powers of government . . .” They were designed to prevent the government from depriving any individual of his rights except by due course of legal proceedings, according to those rules and principles established in our systems of jurisprudence for the protection and enforcement of the rights of all persons.³⁰

And, in his 1884 dissent in *Hurtado v. California*, Justice John Marshall Harlan favorably quoted Justice Story’s gloss on Magna Carta and its guarantee of some kind of trial, observing that “When our more immediate ancestors . . . removed to America, they brought this privilege with them as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.”³¹ Against what he called “new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience,”³² stood the right to a proper jury trial anchored in Magna Carta and the common law. Honoring that right, he conceded, was less efficient than some alternatives. But “however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*,) yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters . . .”³³

Throughout the twentieth century, Justices continued to emphasize Magna Carta’s

special, almost talismanic, relevance for the choice between the “rule of law” and the “rule of men” in much the same way as had Justices in the nineteenth. Writing in 1940 for a unanimous court in *Chambers v. Florida*, the first case argued by Thurgood Marshall, in which approximately thirty African-Americans were summarily arrested without warrant and detained and questioned repeatedly on the fourth floor of a jail for an entire week until their confessions were wrung from them, Justice Black cited Magna Carta as an ancient source for the legal requirement that criminal process must be conducted according to general laws and public proceedings applicable and accessible to all.³⁴

From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the “law of the land” evolved the fundamental idea that no man’s life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power.³⁵

Black added that the rule that government must proceed according to law, and not arbitrary decree, was especially helpful to the vulnerable. “[T]hey who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.”³⁶ In his 1965 dissenting opinion in *Republic Steel v. Maddox*, Black echoed these views, noting that

At least since Magna Carta people have desired to have a system of courts with set rules of procedure of their own and with certain institutional assurances of fair and unbiased resolution of controversies. It was in Magna Carta . . . that there

originally was expressed in the English-speaking world a deep desire of people to be able to settle differences according to standard, well-known procedures in courts presided over by independent judges with jurors taken from the public.³⁷

Although he disagreed sharply with Black on many points over his career, Justice Felix Frankfurter perceived a similar connection between the freedom of the individual and legal process symbolized in Magna Carta when he observed just five years later in *Malinsky v. New York*, “The safeguards of ‘due process of law’ and ‘the equal protection of the laws’ summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure.”³⁸

And, in perhaps one of the most famous articulations of the theory of “substantive due process,” John M. Harlan argued for an even deeper connection between Magna

Carta and the opposition to arbitrary rule in his 1961 dissent in *Poe v. Ullman*. “The guaranties of due process, though having their roots in Magna Carta’s ‘per legem terrae’ and considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation.’”³⁹ Thus the liberty protected under the Due Process Clause, at least in the United States, “is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”⁴⁰

Whether in the context of substantive economic due process, criminal due process, or substantive due process, from the nineteenth to the twenty-first centuries, Magna Carta has again and again “walked abroad” under different guises but almost always in the end as a source for constraining arbitrary

410—OPINION

6

DUNCAN v. LOUISIANA.

The history of trial by jury in criminal cases has been frequently told.¹⁵ It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.¹⁶ Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

In his 1968 opinion for the Court in *Duncan v. Louisiana*, in which the right to trial by jury in criminal cases was finally incorporated against the state governments, Justice Byron R. White referenced the Magna Carta.

government power within the limits of some kind of formal legal process. And just as the “ancient constitution” operated in seventeenth- and eighteenth-century England almost exclusively as a check upon state power, made more authoritative by its seemingly timeless, immemorial antiquity, so also has Magna Carta served as a check upon government power in the United States in part by virtue of its historic vintage. As Reid described the uses of the ancient constitution,

the most potent forensic attribute of ancient constitutionalism was its timelessness. . . . The constitutional values were values familiar to us, true enough, “rights,” “popular,” “freedom,” and the like. But the operative words were eighteenth-century, ancient-constitution words, “restore,” “original purity,” and “preserve.” They were not the words of the nineteenth-century constitution of command: “reform,” “change,” or “decree.”⁴¹

Likewise, a familiar and common feature of judicial citation to Magna Carta throughout Supreme Court history has been to establish the dignity and meaning of an individual right by locating it first in the text of the Constitution and then tracing its lineage all the way back to the time of the Great Charter. There is perhaps no clearer example of this mode of analysis than in Justice Byron R. White’s 1968 opinion for the Court in *Duncan v. Louisiana*, in which the right to trial by jury in criminal cases was finally incorporated against the state governments.

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centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. . . . Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.⁴²

Once again, the theme of “arbitrary rule” and its antithesis in Magna Carta is expressed, but that anti-arbitrary norm is anchored not just in freestanding philosophical inquiry, but in history and the “impressive credentials” that the jury trial enjoys dating all the way back to the early Middle Ages.

Whether it was the jury trial, habeas corpus, the right to a local and speedy trial, the Due Process Clause, the prohibition on taking property without just compensation, or the prohibition on excessive fines and cruel and unusual punishment, Supreme Court Justices, like the ancient constitutionalists before them, have frequently looked back to the ancient history of these rights, even prior to their adoption in the Constitution, to establish their vintage and pedigree. This was done at least in part to establish the meaning of those phrases as they were originally understood at the time of the creation of the Constitution.

Justice Henry B. Brown summarized this methodology in 1895 in *Mattox v. U.S.* when he wrote, “We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such

as his ancestors had inherited and defended since the days of Magna Charta.”⁴³ What the British citizen possessed under Magna Carta was, at least in many cases, what an American citizen possessed under a similar provision in the U.S. Constitution.

And the language of “possession” and “inheritance” was common. Joseph Story put it nicely when, speaking of the jury trial, he said, “when our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power.”⁴⁴ Far from being a merely antiquarian inquiry, therefore, what was at stake in going back this far into the mists of time was nothing less than determining the legal “birthright” and “inheritance” of American citizens to non-arbitrary government under the Constitution.

And the historic inquiry was an ongoing, dynamic one, in which new cases and controversies sparked new discoveries regarding that inheritance. Justice Stanley Matthews perhaps captured this pliable, adaptive, ever-novel quality of Magna Carta best in his opinion for the Court in *Hurtado v. California*.

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language: “It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required, and as their character would safely bear; for almost five

centuries it was appealed to as the decisive authority on behalf of the people, though commonly so far only as the necessities of each case demanded.”⁴⁵

The most common use of Magna Carta by Justices on the Supreme Court has been, in the style of the ancient constitutionalists before them, to check the exercise of arbitrary power with historic claims to various forms of “timeless” legal procedure that Americans possessed under the Constitution and ultimately as a matter of inheritance from the common law and the Great Charter. Describing the forensic techniques of the ancient constitutionalists in England, John Marshall Harlan, quoting the late nineteenth-century scholar of the jury John Profatt, managed to capture not only the dynamic of these seventeenth- and eighteenth-century lawyers, but nineteenth-, twentieth-, and twenty-first-century Supreme Court Justices as well when he wrote,

During long centuries, when popular rights were overborne by prerogative or despotism, those who claimed and were denied the right to such a trial founded their demand on the guaranty of the Great Charter, and solemnly protested against its violation when the privilege was denied them; and whenever an invasion or violation of individual rights was threatened, the security afforded by this guaranty was relied on as an effectual safeguard either to repel the attack or nullify its effect.⁴⁶

Whenever the mere choice or prerogative of the sovereign, unlimited by law, threatened “popular rights,” the Great Charter was available to ancient constitutionalists and Supreme Court Justices alike as a ballast against arbitrary government. Though Magna Carta took on many different shapes and sizes in late medieval and early modern England

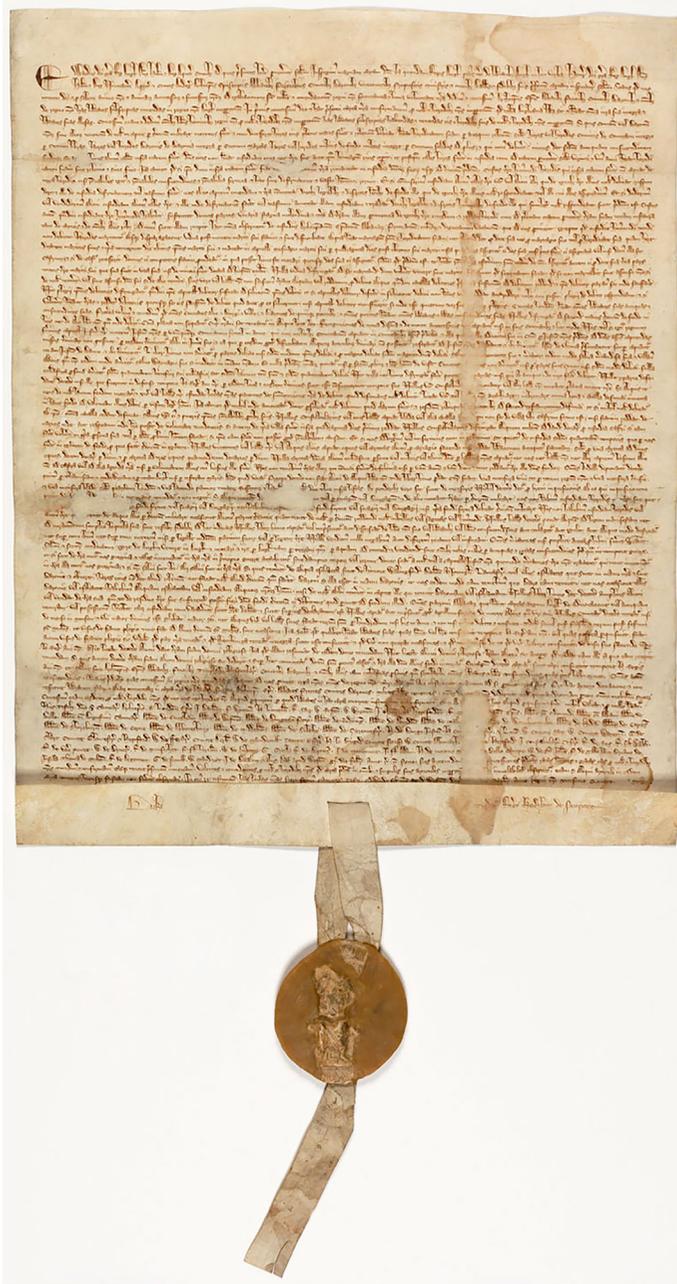
and America, and in the pages of the *U.S. Reports* from the nineteenth through the twenty-first centuries, this underlying theme of restraint upon the willfulness of the sovereign appears to have been a central connecting link across the centuries.

4. Magna Carta: The Zelig of Great Dissents

Magna Carta has thus frequently been used as a check upon arbitrary power by helping to illustrate the ancient meaning of the rule of law and the original meaning of various liberty-enhancing, power-constraining provisions in the Constitution itself. But Magna Carta has not only been used to check state power. It has also frequently been used in various dissenting opinions as a counterweight to some of the Supreme Court's more notorious decisions. Charles Evans Hughes once observed that "a dissent in a court of last resort is an appeal to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."⁴⁷ It is therefore interesting to observe that, in a handful of the more particularly egregious cases throughout Supreme Court history, those that have blessed significant contractions of personal liberty or dubious expansions of government power and landed on many scholars' lists of the "anti-canonical" cases⁴⁸ that have long troubled observers of the Court, the Justices who have written in dissent from their brethren have often turned to Magna Carta. Almost as if the errors of the Court were so fundamental that correcting them required a fundamental reorientation back to constitutional first principles, these dissenting Justices have looked back to the Great Charter perhaps in the hope that, by citing these ancient principles, future jurists, if not their current colleagues, might be awakened from their slumbers to the deep damage done by the Court.

First on nearly every scholar's list of the most egregious decisions in Supreme Court history is Chief Justice Taney's opinion in *Dred Scott v. Sandford*, in which Taney held that the prohibition of slavery into the territories deprived slaveholders of their Fifth Amendment right to due process. In his justly-celebrated dissent from that opinion, Justice Benjamin R. Curtis found in Magna Carta an obvious parry to Taney's claim about the meaning of due process. If the prohibition of slavery in the territories violated the due process of slaveholders, why hadn't anyone pointed that out in 1787, when the Confederation Congress first did this in the Northwest Ordinance? "Due process of law," Curtis pointed out, descended directly from Magna Carta and was incorporated into every state's constitution at the time of the Northwest Ordinance. And yet no one in 1787, not even a slaveholder, had raised this objection at the time. "I think I may at least say, if the Congress did then violate Magna Charta by the ordinance, no one discovered that violation."⁴⁹ Taney's interpretation of what "due process" meant under the Fifth Amendment, in other words, conflicted with what every member of the founding generation understood it to have meant, as they inherited it from Magna Carta, and placed it into their federal and state constitutions in the 1770s and 1780s.

Also often ranking high on lists of the Supreme Court's infamous decisions was the 1873 decision in the *Slaughterhouse Cases*. This ruling effectively eviscerated the Privileges or Immunities Clause of the Fourteenth Amendment, holding that it did not protect a robust collection of fundamental rights "which belong, of right, to the citizens of all free governments"⁵⁰ but rather only a small and relatively insignificant collection of rights of national citizenship, such as the right to travel to the seat of government. Here too, the dissenters found in Magna Carta a helpful counter. For Justice Joseph P. Bradley, Magna Carta stood for the proposition that



This copy of Magna Carta, 1297, is on display in the David M. Rubenstein Gallery at the National Archives.

citizens of any and all states, whether in one of the individual states of the Union, or as citizens of the federal government, were endowed with certain fundamental rights. Fundamental rights were not just limitations upon local or state governments. They attached wherever government, of whatever

size or description, attempted to regulate the conduct of its citizens. As Bradley put it, “In this free country, the people of which inherited certain traditional rights and privileges from their ancestors, citizenship means something.... And these privileges and immunities attach as well to citizenship

of the United States as to citizenship of the States.”⁵¹ To assert otherwise, he said, as the Court had done, was “to evince a very narrow and insufficient understanding of constitutional history” of which Magna Carta and the “traditionary rights” of Englishmen “wrested from English sovereigns” at various points played a central role regarding the rights and meaning of citizenship.

The rights of non-citizens were the subject of spirited disagreement twenty years later in the 1893 *Chinese Exclusion Case (Fong Yue Ting v. U.S.)*, where again Magna Carta played a role. In that case, the Court held that Chinese laborers who had already resided for a year with the consent of the United States could be subject to arrest and deportation if they did not have a certificate and could not produce “at least one credible white witness” on their behalf. Justice Stephen Field, writing in dissent, objected:

I utterly dissent from, and reject, the doctrine expressed in the opinion of the majority, that “congress,” under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination . . .

According to this theory, congress might have ordered executive officers to take the Chinese laborers to the ocean, and put them into a boat, and set them adrift, or to take them to the borders of Mexico, and turn them loose there, and in both cases without any means of support. . . . I utterly repudiate all such notions, and reply that brutality, inhumanity, and cruelty cannot be made elements in any procedure for the enforcement of the laws of the United States.⁵²

The Court’s majority based its ruling upon the “accepted maxim of international law” that every sovereign nation had an unlimited power to control its borders.⁵³ Writing in dissent, Justice Field questioned whether that power was quite so unlimited, especially as applied to individuals already admitted into the country. And he cited Magna Carta for the proposition that even in the treatment of foreigners, the wielding of sovereign power had at least some outermost limits. Specifically, “deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities.”⁵⁴ Congress had considerable powers in this area to be sure, but Magna Carta, and English practice under it, suggested that even here some external standards and some amount of process existed to constrain executive discretion.

As *Dred Scott*, the *Slaughterhouse Cases*, and *Fong Yue Ting* illustrate, Magna Carta has thus seemed to exert a certain gravitational force upon the Justices on the Court who have been on the outs with their colleagues in cases involving constitutional first principles. Again and again, when the Court has blessed the contraction of basic liberties of citizens in the most historically troubling cases, especially involving some of the most politically vulnerable members of the national community, dissenting Justices have found it helpful to look back not only to the text and history of the Constitution, but to that even more ancient document that first “fenced round and interposed barriers on every side against the approaches of arbitrary power.”

Conclusion: Something Old, Something New

When people visit the original parchment versions of Magna Carta today, whether the four remaining “exemplifications” of the

1215 Magna Carta in England, or the copy from 1297 owned by David Rubenstein on permanent loan in the National Archives in Washington, D.C., they peer through a state-of-the-art, bullet-proof glass casing, into a box whose temperature and humidity are controlled remotely by a curator via laptop or an app on a phone, and under twenty-four-hour armed guard. And they see a document that is at once ancient and extremely fragile, and yet somehow still evergreen and remarkably pliable. When they look, they might see the faded, tiny writing in abbreviated, medieval Latin, in which John, “by God’s grace king of England, lord of Ireland, duke of Normandy and Aquitaine,” promised to remove all fish-weirs from the Thames, pledged that there would be a standard width of dyed cloth, and guaranteed that he would not force his knights to pay him money if they would perform castle-guard instead. Or, they may see, at least in seed form, the broad outlines and even specific features of individual liberties and due process so integral to modern constitutionalism today.

Supreme Court Justices have similarly peered into Magna Carta from time to time and found things both old and new. As the two architectural nods to King John and Magna Carta throughout the Supreme Court building suggest, there is a connection, remote, to be sure, but still nonetheless real, between what happened in Runnymede in the summer of 1215 and what happens today in the courtroom and the conference room. And as we have seen, Justices have often turned to Magna Carta out of the felt urgencies of the day, pressing, twisting, and turning it into the service of new jurisprudential needs.

But, beyond the felt necessities of each case, there does appear to be something ever-old and enduring about Magna Carta as well. Across the many different types of claims for which Supreme Court Justices have marshaled Magna Carta, there is the persistent, “ancient,” and “timeless” preference that Magna Carta symbolizes for law over

command and process over arbitrary choice. Whether in the context of property protection, criminal procedure, or substantive due process, Magna Carta, at its seemingly irreducible core, has enduringly indicated that the mere *ipse dixit* of the sovereign is never quite enough to justify the deprivation of life, liberty, or property. And that central, core meaning of Magna Carta has been relevant not only when the Justices have attempted to speak law to power, but when dissenting Justices have attempted to speak out directly against their erring colleagues. Attempting to correct what they believed to be novel errors, like Taney’s theory of due process in *Dred Scott*, or Miller’s theory of the privileges and immunities of citizens in the *Slaughterhouse Cases*, they looked back to the old provisions of Magna Carta for a helpful corrective.

That Magna Carta should somehow unite the old and the new, the ancient and the novel, should not be entirely surprising, as appeals to the “ancient constitution” in the seventeenth and eighteenth century similarly stitched together the past and present. As Reid put it:

The ancient constitution was a model, true enough, but it was also a means of constitutional renaissance, resuscitation, and redemption, made all the more relevant because it was not a constitution that had existed only in the distant past, but one that existed, now, in the present.⁵⁵

Magna Carta, in precisely the same way, has served periodically as a “means of constitutional renaissance” in the United States, enabling Justices to critique government practices, and even themselves, in the name of a document that, despite its antiquity, still somehow exists even now, in the present.

Author’s Note: In working on this project, I have incurred about as many debts as the barons owed to King John. This article was conceived during the 800th anniversary of Magna Carta when I had the great privilege

to serve as a Supreme Court Fellow in the Office of the Counselor to the Chief Justice. Accordingly, I would like to first thank Chief Justice John G. Roberts, Jr., Jeffrey Minear, the Counselor to the Chief Justice, and Mr. Minear's staff at the time, Melissa Aubin, Shelly Snook, Cara Gale, and Margarita Kofalt, for their enthusiastic encouragement of this project. Catherine Fitts and Matt Hofstedt of the Supreme Court's Curator's Office provided key archival research support. My fellow Supreme Court Fellows, Matthew Axtell, Isra Bhatti, and Zachary Kauffman, each provided invaluable insight and much good humor throughout. The 2014-2015 Supreme Court interns in the Counselor's Office, Kamala Buchanan, Joseph Gallardo, Athie Livas, Maureen Mentrek, Jess Davis, and Zak Lutz, did all the real work and were among my first readers. They also encouraged me to enter a lottery to be among 1,215 lucky individuals to see all four exemplifications of Magna Carta brought together for the first time in 800 years at the British Library, to this date still the only lottery I have ever won. Phillip Buckler, the Dean of Lincoln Cathedral, provided gracious hospitality to me during my visit to Lincoln Cathedral. Judge Diarmuid O'Scannlain and Wanda Rubianes provided me with an extraordinary opportunity to present this work before a meeting of the Judicial Conference Committee on International Judicial Relations at the State Department. Nicholas Cole, Paul Kerry, Pedro Fortes, and Paul Yowell hosted me twice at Oxford University to give talks on the subject at Pembroke College and Oriel College. Professor A. E. Dick Howard provided inspiration, memorable conversations about Magna Carta in Salisbury Cathedral and Oxford, and introduction to a dark ale known as "Bad King John," black, bitter, and intense, just like its namesake. And Clare Cushman and her staff at the *Journal of Supreme Court History* helped bring this all together and considerably improved the final product.

1) PROPERTY PROTECTIONS

- Prohibition against taking property without due process
 - *Davidson v. New Orleans* (1877) (Miller opinion)
 - *Marx v. Hanthorn* (1893) (Shiras opinion)
 - *King v. Mullins* (1898) (Harlan opinion)
 - *French v. Barber Asphalt Pav. Co.* (1901) (Shiras opinion)
 - *Ochoa v. Hernandez y Morales* (1913) (Pitney opinion)
 - *Wilson v. New* (1917) (Day dissent)
 - *Appleby v. New York* (1926) (Taft opinion)
 - *O'Bannon v. Town Court Nursing Center* (1980) (Blackmun concurrence)
- Prohibition against taking property without just compensation
 - *Northern Transportation v. Chicago* (1878) (Strong opinion)
 - *Sinking Fund Cases* (1878) (Strong dissent)
 - *Spring Valley Water Works v. Schottler* (1884) (Field dissent)
 - *City of Chicago v. Taylor* (1888) (Harlan opinion)
 - *NRLB v. Stowe Spinning* (1949) (Murphy opinion)
 - *Horne v. Department of Agriculture* (2015) (Roberts opinion)
- Inviolability of contract
 - *Sinking Fund Cases* (1878) (Strong dissent)
- Right of state to regulate economy
 - *Munn v. Illinois* (1876) (Waite opinion)
 - *Holden v. Hardy* (1898) (Brown opinion)
 - *Adams v. Tanner* (1917) (Brandeis dissent)
- Property protection of resident aliens/merchants at outbreak of war

- *Brown v. US* (1814) (Story dissent)
- *Johnson v. Eisentrager* (1950) (Jackson opinion)
- Legal rights of corporations
 - *Dartmouth College v. Woodward* (1819) (Webster oral argument)
 - *Charles River Bridge v. Warren Bridge* (1837) (Baldwin concurrence)
 - *Perin v. Carey* (1860) (Wayne opinion)
 - *Atchison v. Matthews* (1899) (Harlan dissent)
- Inheritance rights
 - *Wilkinson v. Leland* (1829) (Story opinion)
 - *Bates v. Brown* (1868) (Swayne opinion)
- Rights of debtors
 - *Bank of Columbia v. Okely* (1819) (Johnson opinion)
 - *Livingston's Lessee v. Moore* (1833) (Johnson opinion)
 - *Den ex dem. Murray v. Hoboken Land & Imp. Co.* (1855) (Curtis opinion)
 - *Rees v. City of Watertown* (1873) (Hunt opinion)
 - *Merriwether v. Garrett* (1880) (Field concurrence)
 - *U.S. v. Ryder* (1884) (Bradley opinion)
- Water rights
 - *Martin v. Waddell* (1842) (Taney opinion)
 - *Idaho v. Coeur d' Alene Tribe of Idaho* (1997) (Kennedy opinion)
- *Carafas v. LaValle* (1968) (Fortas opinion)
- *Peyton v. Rowe* (1968) (Warren opinion)
- *Schneckloth v. Bustamonte* (1973) (Powell concurrence)
- *Murray v. Carrier* (1986) (Stevens concurrence)
- *Hamdi v. Rumsfeld* (2004) (Souter concurrence and Scalia dissent)
- *Boumediene v. Bush* (2008) (Kennedy opinion)
- Prohibition against arbitrary pre-trial detention
 - *Jennings v. Rodriguez* (2018) (Breyer dissent)
- Prohibition against forced confessions while in custody
 - *Chambers v. Florida* (1940) (Black opinion)
- Prohibition on general warrants
 - *Minnesota v. Carter* (1998) (Scalia concurrence)
- Prohibition on warrantless arrests
 - *Payton v. New York* (1980) (Stevens opinion)
- Every injury requires a remedy
 - *Stoneridge v. Scientific Atlantic* (2008) (Stevens dissent)
- Admiralty jurisdiction
 - *Jackson v. Magnolia* (1857) (Campbell dissent)

2) CRIMINAL AND CIVIL PROCEDURE

Before trial

- Privilege of the writ of habeas corpus
 - *Ex Parte Yerger* (1868) (Chase opinion)
 - *Parker v. Ellis* (1960) (Warren dissent)
 - *Smith v. Bennett* (1961) (Clark opinion)
 - *Fay v. Noia* (1963) (Brennan opinion)

During trial

- Justice not to be bought or sold—and not to work to the disadvantage of the poor
 - *Griffin v. Illinois* (1956) (Black opinion)
 - *Smith v. Bennett* (1961) (Clark opinion)
 - *Williams-Yulee v. Florida Bar* (2015) (Roberts opinion)

- Sheriff cannot perform role of judge/justice of peace
 - *South v. Maryland* (1855) (Grier opinion)
- Judges must be learned in law
 - *North v. Russell* (1976) (Stewart dissent)
- Right to have case tried locally
 - *National Equipment Rental v. Szukhent* (1964) (Black dissent)
- Right to adjudication by Article III court in case involving private rights
 - *Wellness International Network v. Sharif* (2015) (Thomas dissent)
- Right not be excluded from jury service on account of race
 - *Strauder v. West Virginia* (1879) (Strong opinion)
 - *Swain v. Alabama* (1965) (Goldberg dissent)
- Right to speedy trial
 - *Polizzi v. Cowles* (1953) (Black dissent)
 - *Klopper v. North Carolina* (1967) (Warren opinion)
 - *Moody v. Daggett* (1976) (Stevens dissent)
 - *U.S. v. Lovasco* (1977) (Stevens dissent)
 - *Betterman v. Montana* (2016) (Ginsburg opinion)
- Right to Grand jury
 - *Hurtado v. California* (1884) (Matthews opinion, Harlan dissent)
 - *Ex Parte Bain, Jr.* (1887) (Miller opinion)
 - *Territory of Hawaii v. Osaki Mankichi* (1903) (Harlan dissent)
 - *In re Oliver* (1948) (Frankfurter dissent)
 - *U.S. v. Dionisio* (1973) (Douglas dissent)
- *Albright v. Oliver* (1994) (Rehnquist opinion, Stevens dissent)
- Right to Criminal jury
 - *Callan v. Wilson* (1888) (Harlan opinion)
 - *Palliser v. U.S.* (1890) (Gray opinion)
 - *Hallinger v. U.S.* (1892) (Shiras opinion)
 - *Sparf v. U.S.* (1895) (Gray dissent)
 - *Glasser v. U.S.* (1942) (Murphy opinion)
 - *Kennedy v. Mendoza-Martinez* (1963) (Goldberg opinion)
 - *Duncan v. Louisiana* (1968) (White opinion and Black dissent)
 - *Neder v. U.S.* (1999) (Scalia dissent)
 - *U.S. v. Booker* (2005) (Stevens opinion)
- Right to Criminal jury trial in death penalty case
 - *Spaziano v. Florida* (1984) (Stevens concurrence)
 - *Walton v. Arizona* (1990) (Stevens dissent)
- Criminal jury should be composed of twelve members
 - *Thompson v. Utah* (1898) (Harlan opinion)
 - *Maxwell v. Dow* (1900) (Harlan dissent)
 - *Williams v. Florida* (1970) (White opinion) (Magna Carta did not, in fact, require trial by jury of twelve members)
- Conviction requires unanimous verdict of petit jury
 - *Territory of Hawaii v. Osaki Mankichi* (1903) (Harlan dissent)
- Right to Civil jury
 - *Bank of Columbia v. Okely* (1819) (Johnson opinion)

- *Waring v. Clarke* (1847) (Woodbury dissent)
- *Beckwith v. Bean* (1878) (Field dissent)
- *King v. Mullins* (1898) (Harlan opinion)
- *Capital Traction v. Hof* (1899) (Gray opinion)
- *United Gas Public Service v. Texas* (1938) (Black concurrence)
- *Pernell v. Southall Realty* (1974) (Marshall opinion)
- Criminal jury required even in petty offenses
 - *Schick v. U.S.* (1904) (Harlan dissent)
- Jury should be a representative cross-section of people
 - *Glasser v. U.S.* (1942) (Murphy opinion)
- Criminal jury right for state juvenile defendants
 - *McKevier v. Pennsylvania* (1971) (Douglas dissent)
- Right to be heard in one's defense during trial
 - *Hovey v. Elliott* (1897) (White opinion)
- Right against self-incrimination
 - *Twining v. New Jersey* (1908) (Moody opinion—right should not be incorporated)
 - *Adamson v. California* (1947) (Black dissent—right should be incorporated)
 - *Cohen v. Hurley* (1961) (Black dissent—right should apply to lawyers)
- Power of courts to punish for contempt
 - *In re Terry* (1888) (Harlan opinion)
 - *Eilenbecker v. Plymouth County* (1890) (Miller opinion)
 - *In re Debs* (1895) (Brewer opinion)
 - *Greene v. U.S.* (1958) (Frankfurter concurrence)
- After trial**
 - Prohibition against double jeopardy
 - *Ex Parte Lange* (1873) (Miller opinion)
 - *Bartkus v. Illinois* (1959) (Frankfurter opinion)
 - Prohibition against cruel and unusual punishment
 - *Trop v. Dulles* (1958) (Warren opinion—evolving standards of decency—prohibits depriving one of citizenship as a crime)
 - *Furman v. Georgia* (1972) (Douglas concurrence, Marshall concurrence)
 - *Camona v. Ward* (1979) (Marshall dissent)
 - *Rummell v. Estelle* (1980) (Powell dissent)
 - *Solem v. Helm* (1983) (Powell opinion)
 - *Spaziano v. Florida* (1984) (Stevens concurrence)
 - *McLeskey v. Kemp* (1987) (Brennan dissent)
 - Prohibition against excessive fines
 - *Weems v. U.S.* (1910) (McKenna opinion)
 - *Standard Oil Co. of Indiana v. Missouri* (1912) (Lamar opinion)
 - *Browning-Ferris v. Kelco* (1989) (Blackmun opinion, O'Connor concurrence)
 - *Pacific Mutual Life v. Haslip* (1991) (Scalia concurrence)
 - *Harmelin v. Michigan* (1991) (Scalia opinion)
 - *TXO Production v. Alliance Resource* (1993) (O'Connor dissent)
 - *BMW of North America v. Gore* (1996) (Breyer concurrence)
 - *U.S. v. Bajakajian* (1998) (Thomas opinion)
 - *State Farm v. Campbell* (2003) (Kennedy opinion)
 - *Southern Union Co. v. U.S.* (2012) (Breyer dissent)

3) GENERAL STATEMENTS OF FUNDAMENTAL RIGHTS AND RULE OF LAW

- Executive/King and states under rule of law
 - *U.S. v. Arredondo* (1832) (Baldwin opinion)
 - *Luther v. Borden* (1849) (Woodbury dissent)
 - *Gordon v. U.S.* (1864) (Taney)
 - *U.S. v. Lee* (1882) (Gray dissent)
 - *Robertson v. Baldwin* (1897) (Harlan dissent)
 - *Appleby v. New York* (1926) (Taft opinion)
 - *U.S. v. Line Material* (1948) (Douglas concurrence)
 - *Clinton v. Jones* (1997) (Stevens opinion)
 - *Hamdi v. Rumsfeld* (2004) (Souter concurrence)
 - *Boumediene v. Bush* (2008) (Kennedy opinion)
 - *Department of Transportation v. Association of American Railroads* (2015) (Thomas concurrence)

 - Meaning of Due Process Clause in 5th and 14th Amendment
 - *Den ex dem. Murray v. Hoboken Land & Imp. Co.* (1855) (Curtis opinion)
 - *Davidson v. New Orleans* (1877) (Miller opinion)
 - *Hurtado v. California* (1884) (Matthews opinion, Harlan dissent)
 - *Holden v. Hardy* (1898) (Brown opinion)
 - *French v. Barber Asphalt Pav. Co.* (1901) (Shiras opinion)
 - *Truax v. Corrigan* (1921) (Taft opinion)
 - *Malinsky v. New York* (1945) (Frankfurter concurrence)
 - *Louisiana v. Resweber* (1947) (Frankfurter concurrence)
 - *Adamson v. California* (1947) (Black dissent)

 - *Konigsberg v. California* (1961) (Black dissent)
 - *Poe v. Ulman* (1961) (Harlan dissent)
 - *Republic Steel Corp. v. Maddox* (1965) (Black dissent)
 - *Application of Gault* (1967) (Black concurrence)
 - *Stovall v. Denno* (1967) (Black dissent)
 - *Duncan v. Louisiana* (1968) (White opinion and Black concurrence)
 - *In re Winship* (1970) (Black dissent)
 - *McGautha v. California* (1971) (Douglas dissent)
 - *Ingraham v. Wright* (1977) (Powell opinion)
 - *Daniels v. Williams* (1986) (Rehnquist opinion)
 - *Pacific Mutual Life v. Haslip* (1991) (Scalia concurrence)
 - *Collins v. City of Harker Heights* (1992) (Stevens opinion)
 - *Planned Parenthood v. Casey* (1992) (O'Connor, Kennedy, Souter plurality)
 - *Washington v. Glucksberg* (1997) (Souter concurrence)
 - *County of Sacramento v. Lewis* (1998) (Souter opinion)
 - *Eastern Enterprise v. Apfel* (1998) (Breyer dissent)
 - *Kerry v. Din* (2015) (Scalia opinion and Breyer dissent)
 - *Obergefell v. Hodges* (2015) (Thomas dissent)
-
- Meaning of Privileges or Immunities Clause of 14th Amendment
 - *Slaughter-House Cases* (1872) (Bradley dissent, Swayne dissent)
 - *Saenz v. Roe* (1999) (Thomas dissent)
 - *McDonald v. Chicago* (2010) Thomas concurrence)
-
- Prohibiting the extension of slavery consistent with due process
 - *Dred Scott v. Sandford* (1856) (Curtis dissent)

- Right against deportation
 - *Fong Yue Ting v. U.S.* (1893) (Chinese Exclusion Case) (Field dissent)
- Right of travel
 - *Kent v. Dulles* (1958) (Douglas opinion)
 - *Bell v. Maryland* (1964) (Goldberg opinion)
- Right of speech and press
 - *Bridges v. California* (1941) (Black opinion and Frankfurter dissent)
 - *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Mass* (1966) (Douglas concurrence)
 - *U.S. v. 12,000 Foot Reels* (1973) (Douglas dissent)
- Right to petition government
 - *Adderley v. Florida* (1966) (Douglas dissent)
 - *Borough of Duryea v. Guarnieri* (2011) (Kennedy opinion)
- Freedom of church from state interference
 - *Pawlet v. Clark* (1815) (Story opinion)
 - *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) (Roberts opinion)

ENDNOTES

¹ RUDYARD KIPLING, *What Say the Reeds at Runnymede?* in RUDYARD KIPLING'S VERSE INCLUSIVE EDITION 1885-1918 7 (1925), at p. 750–51.

² The six cases in which the Justices cited Magna Carta during October Term 2014 were: *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225 (2015); *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015); *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Kerry v. Din*, 135 S. Ct. 2128 (2015); *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³ *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819).

⁴ John Donnelly to Cass Gilbert, September 27, 1932, Cass Gilbert Papers, New York Historical Society.

⁵ G. M. TREVELYAN, *HISTORY OF ENGLAND* (3d ed. 1953), Vol. 1, at p. 227.

⁶ PHILIP B. KURLAND, *Magna Carta & Constitutionalism in the United States: "The Noble Lie,"* in *THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY* (Samuel E. Thorne ed., 1965) at p. 58.

⁷ Of the principal 160 cases in which the Court cited Magna Carta, eighty-seven citations were in the opinion for the Court, fifty-seven were in dissents, and twenty-four were in concurrences. In five cases, the Justices cited Magna Carta in both the opinion and a dissent (*Hurtado v. California* (1884), *Bridges v. California* (1941), *Duncan v. Louisiana* (1968), *Albright v. Olver* (1994), and *Kerry v. Din* (2015)). In three cases Magna Carta was cited in two separate dissents (*Slaughterhouse Cases* (1872), *Union Pacific Railroad v. United States* (1878), and *Hamdi v. Rumsfeld*, (2004)). In one case it appeared in both the opinion and a concurrence *Browning-Ferris v. Kelco* (1989). And in one case it appeared in two separate concurrences *Furman v. Georgia* (1972).

⁸ 12 U.S. 110, 142-44 (1814).

⁹ 138 S. Ct. 830, 861 (2018).

¹⁰ BERNARD BAILYN, *A Note on The Federalist and the Supreme Court*, in *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* (2003), p. 126.

¹¹ See generally ROBERT G. McCLOSKEY, *Constitutional Evolution in the Gilded Age: 1865-1900* in *THE AMERICAN SUPREME COURT* (1960).

¹² *Id.*

¹³ *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

¹⁴ *Id.* at n. 4.

¹⁵ The aggregated categories of "property rights," "criminal and civil procedure rights," and "fundamental rights" are, of course, quite broad. One searches in vain through the text of Magna Carta for such generic provisions. To provide a somewhat more detailed picture, therefore, of how Magna Carta and its many specific provisions have been used in Supreme Court opinions over time, and what legal claims it has come to stand for, the chart in the appendix breaks down these three categories into their more particular legal claims, with the names and dates of nearly all the Supreme Court cases in which Magna Carta has been cited and the Justices who cited it. Magna Carta, as this list attests, has been invoked to support or at least address an extraordinary range of legal issues within the three broad categories of property, criminal procedure, and fundamental rights.

¹⁶ See, e.g., Kurland, *Magna Carta and Constitutionalism*, at p. 49.

¹⁷ A. E. Dick Howard, *TEXT AND COMMENTARY, MAGNA CARTA*, (1998), pp. 23-25.

¹⁸ *Id.* at p. 25-27.

¹⁹ Quoted in *id.*, at p. 26.

²⁰ Jess Bravin, *Chief Justice Roberts Wishes Magna Carta an Early Happy 800th Birthday*, WALL ST. J., Nov. 5, 2014, <http://blogs.wsj.com/law/2014/11/05/justice-roberts-wishes-magna-carta-an-early-happy-800th-birthday/>.

²¹ JOHN PHILIP REID, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW (Ellis Sandoz ed., 1993).

²² *Id.* at p. 238.

²³ *Id.* at p. 236-37.

²⁴ *Id.* at p. 218.

²⁵ Quoted in *id.*, at p. 236.

²⁶ *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 580-81 (1819).

²⁷ *Id.* at 581.

²⁸ *Id.*

²⁹ *Beckwith v. Bean*, 98 U.S. 266, 294 (1878).

³⁰ *Id.* at 294-95.

³¹ *Hurtado v. People of State of California*, 110 U.S. 516, 549 (1884) (Harlan, J., dissenting).

³² *Id.* at 545.

³³ *Id.*

³⁴ *Chambers v. Florida*, 309 U.S. 227, at n. 10.

³⁵ *Id.* at 236-37.

³⁶ *Id.* at 238.

³⁷ *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 669 (1965).

³⁸ *Malinsky v. New York*, 324 U.S. 401, 413-14 (1945).

³⁹ *Poe v. Ullman*, 367 U.S. 497, 540 (1961).

⁴⁰ *Id.* at 543.

⁴¹ Reid, *The Jurisprudence of Liberty*, pp. 279, 295.

⁴² *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

⁴³ *Mattox v. U.S.*, 156 U.S. 237, 243 (1895).

⁴⁴ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, VOL. 3:§ 1773 (1833).

⁴⁵ *Hurtado v. California*, 110 U.S. 516, 530 (1884).

⁴⁶ *Maxwell v. Dow*, 176 U.S. 581, 611 (1900).

⁴⁷ Quoted in address by Justice William O. Douglas, A.B.A. Annual Meeting, Sept. 8, 1948, and printed in J. AM. JUD. SOC'Y. at 106 (1948-49).

⁴⁸ See generally, Jamal Greene, *The Anticanon*, 125 HARVARD LAW REVIEW 379 (2011).

⁴⁹ *Dred Scott v. Sandford* 60 U.S. 393, 626-27 (1856) (Curtis, J., dissenting).

⁵⁰ This language comes from Bushrod Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (1823).

⁵¹ *Slaughter-House Cases*, 83 U.S. 36, 114-15 (1872) (Bradley, J., dissenting).

⁵² *Fong Yue Ting v. U.S.* 149 U.S. 698, 755-56 (1893) (Field, J., dissenting).

⁵³ *Id.* at 705.

⁵⁴ *Id.* at 757.

⁵⁵ Reid, *The Jurisprudence of Liberty*, at 279.

***Bank of the United States* v. *Deveaux* and the Birth of Constitutional Rights for Corporations**

ADAM WINKLER

Introduction

Recent decisions by the Supreme Court of the United States in *Citizens United v. Federal Election Commission*, holding that corporations have a First Amendment right to spend money to influence elections, and *Burwell v. Hobby Lobby Stores, Inc.*, permitting corporations to assert religious liberty rights under a federal law, have brought the issue of rights for corporations into the public consciousness. The rise of corporate constitutional rights is usually traced to an 1886 case, *Santa Clara County v. Southern Pacific Railroad*, which is often cited for establishing that corporations are “persons” under the Constitution. While the story of the Southern Pacific’s case is highly entertaining—involving an illustrious lawyer who deceived the Justices and a misleading headnote that claimed the Court had decided

issues it had not—*Santa Clara County* was hardly the first Supreme Court case to address the constitutional rights of corporations. That honor belongs to another case decided almost eighty years earlier, *Bank of the United States v. Deveaux*, and corporate personhood played little role.¹

Although still cited from time to time for other issues, *Bank of the United States v. Deveaux* is one of the neglected landmarks of American constitutional law. The explicit question addressed in the case was whether business corporations had constitutional protections—namely, the right to sue in federal court on grounds of diversity under Article III. While there is little evidence the Framers ever intended the Constitution to apply to business entities, Chief Justice John Marshall’s opinion for the Court broadly construed the text to cover corporations. Marshall did *not* say that corporations were

people; in fact, his reasoning rejected the core tenets of corporate personhood. Instead, Marshall based his decision on a very different conception of the corporation—as an association of people—that would prove far more influential than corporate personhood in justifying the expansion of individual rights to corporations over the next two centuries.

The Bank of the United States

The corporation behind the first corporate rights case was the Bank of the United States, arguably the first great corporation in the new nation. The brainchild of Alexander Hamilton, George Washington's Secretary of the Treasury, the Bank of the United States was chartered by the first Congress in 1791 and carried the country's name. Yet it was what Americans today would think of as a private business. It was a for-profit corporation with publicly traded stock, managed by executives who were accountable to stockholders. The federal government had seats on the board and a considerable number of shares, but otherwise the investors were private individuals. At a time when the handful of existing American corporations were local concerns—operating, say, a toll bridge across the Charles River—the Bank was a national enterprise, with headquarters in Philadelphia and branches stretching from Boston to New Orleans.²

The mission of the Bank of the United States was to secure America's credit and stabilize the nascent nation's precarious economy. There were already a number of state-created banks but their notes were unreliable. A federal bank, backed by Congress, would have the resources to guarantee its notes and offer a more secure place to hold the federal government's deposits. Hamilton had been inspired by the success of an earlier bank, the Bank of North America, founded during the Revolutionary

War. When Washington's army was short on rations and pay, with soldiers on the verge of mutiny and American currency nearly worthless, the Bank of North America was established to print more dependable notes and insure liquidity. The plan worked to the benefit of both the nation and investors, who received annual dividends of thirteen-to-fourteen percent. The Bank of North America was transformed into a private state bank in 1786, and today, after more than two centuries of mergers and reorganizations, remains a tiny part of Wells Fargo.³

Despite the success of the Bank of the North America, Hamilton faced significant hurdles in setting up his bank. One of them was the text of the Constitution. Did Congress have the power to create a corporation under the Constitution? In the vigorous debate over Hamilton's proposal for a bank in 1791, James Madison argued that Congress did not have that authority. During the Constitutional Convention, Madison had proposed to give Congress the authority to charter corporations but his proposal was rejected. Fortunately for Hamilton, the men who populated Congress at the time did not believe the only appropriate way to interpret the Constitution was by reference to the original understanding of the Framers. With strong advocacy by northern commercial interests, Hamilton's bill was passed. Washington signed the Bank bill into law, over the objections of his Secretary of State, Thomas Jefferson. And while the political divide between Hamilton and Jefferson over the Bank is well known for helping to spur the creation of the two-party system, it would also lead eventually to the first Supreme Court case on the constitutional rights of corporations.

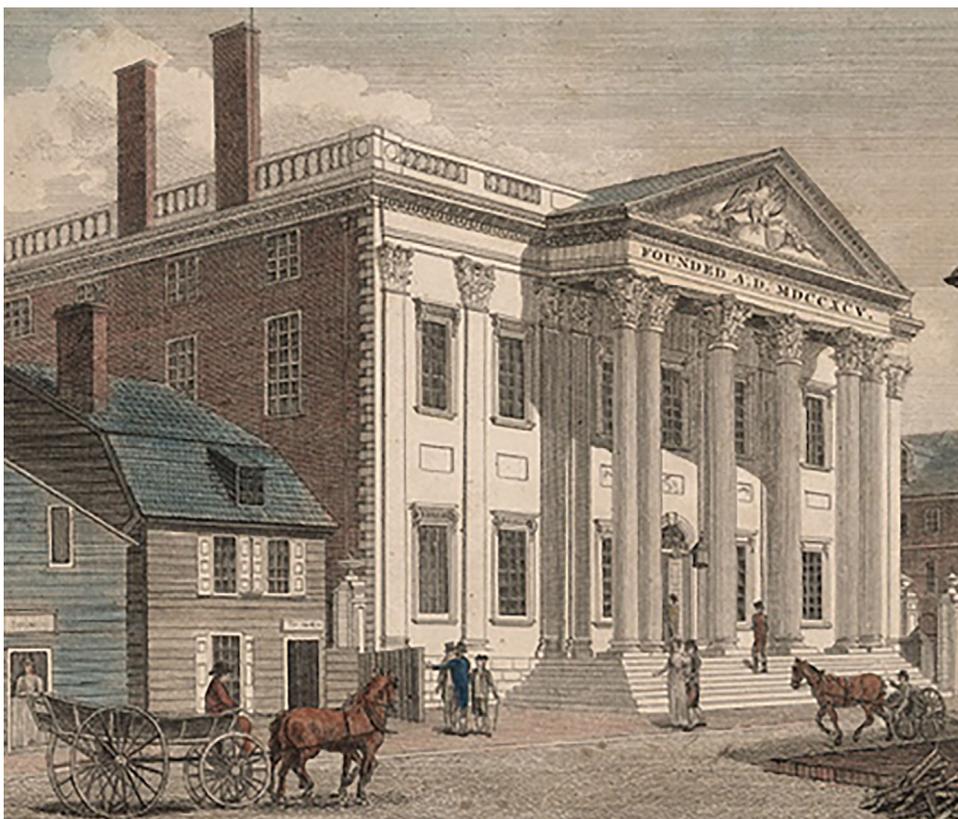
In the early years, the Bank was quite conservative. It showed more interest in public service than in maximizing profit. Hamilton in his original proposal had advised, "Public utility is more truly the object of public banks than private profit." The Bank adhered to this wisdom, forsaking

opportunities to make money for stockholders in order to maintain the stability of the nation's finances. "Arguments in favor of a Safe & Prudent Administration are paramount to all considerations of pecuniary interest," the board of directors instructed branch managers. In that spirit, the Bank in the 1790s and early 1800s was cautious in extending loans and maintained a large cash reserve. The Bank was nonetheless profitable, earning stockholders an impressive eight-to-ten percent return annually.⁴

Yet the Bank stoked passions. To Jefferson, the Bank was not just a financial institution; it was a threat to his vision of a decentralized, agrarian society built upon a foundation of independent, yeoman farmers. The Bank represented the concentration of

power in the hands of an unaccountable corporation based in the North, one that used its effective control over lending to pursue a nationalist agenda. Moreover, the Bank's policies favored loans to commercial interests, like manufacturing and infrastructure, which threatened to pull still more people from the farm. Increasingly, the borrowers on the receiving end of the Bank's loans were corporations.⁵

To Jeffersonians, the Bank also invaded upon states' rights. Jefferson and his party, the Democratic-Republicans, thought states should have broad authority to regulate business within their borders to promote the public interest. Yet the Bank, the nation's largest and most powerful corporation, was seemingly immune to state regulation



As Secretary of the Treasury, Alexander Hamilton championed the establishment of the Bank of the United States to stabilize and improve the nation's credit. In the 1790s and early 1800s the Bank was cautious in extending loans and maintained a large cash reserve. The First Bank building (pictured) was completed in 1797 in Philadelphia.

because of the Constitution's supremacy clause. The Bank was created by Congress, and under Article VI of the Constitution, "the Laws of the United States . . . shall be the supreme law of the land." That meant that state lawmakers, who were used to complete control over the few corporations that might be in their states, had no say over the operations of the Bank.

The Bank was nevertheless a success. The Bank helped "to place American finance on a sound footing," and within five years of the Bank's creation the United States had the highest credit rating in the world. Nevertheless, the Bank became "the target of every possible derogatory charge, of every species of vituperation." After Jefferson won the presidency in the bitterly disputed election of 1800, he promptly ordered the sale of all of the government's shares of the company's stock. Yet even Jefferson, the archenemy of the Bank, found he could not live without it; when he left the presidency deeply in debt, he went to the Bank for a personal loan.⁶

Jefferson, however, was still in office in 1805 when his allies in Georgia made a daring move against the Bank. Shortly after the Bank opened a new branch in Savannah, Georgia lawmakers, frustrated that they could not prohibit the federal institution outright, instead imposed a tax on the Bank's locally held capital and notes. If the Bank wanted to do business in Georgia, it would have to pay dearly for the privilege. And if the tax were not enough to persuade the Bank to close up and go home, Georgia could always impose additional taxes.⁷

The usually conservative Bank responded with uncharacteristic brashness. Headquarters in Philadelphia instructed the Savannah branch officials to ignore the law and refuse to pay the tax. A century and a half before African-American protestors sat in at lunch counters to force the nation to confront civil rights, the Bank of the United States similarly chose to engage in an act of civil disobedience to defend its rights. Although the Bank

executives did not risk personal harm as did civil rights protestors, they hoped their refusal to follow the law would "bring the question before the Supreme Court of the United States."⁸

A Georgia tax collector named Peter Deveaux, angry at the Bank's noncompliance, determined to enforce the law himself. Deveaux had a bold streak of his own, which had served him well before. As a soldier in the Revolutionary War, Deveaux once happened upon a group of American soldiers vengefully preparing to hang two ragged-looking spies captured after an American defeat. Deveaux risked his own life to intervene—and saved the lives of the two men, who turned out to be two American soldiers, one of whom, John Milledge, went on to become a U.S. Senator, governor of Georgia, and founder of the University of Georgia. In April 1807, amidst the controversy over the Bank, Deveaux once again stuck his neck out for what he thought was right. With "force and arms," the tax collector barged into the Savannah branch of the Bank and carted off two boxes of silver coins for the state of Georgia.⁹

The Bank wanted to challenge the constitutionality of the Georgia tax. Students of constitutional history will quickly recognize that to be the same question at issue in *McCulloch v. Maryland*, a landmark Supreme Court case from 1819 that held that states could not impose special taxes on federal corporations. In *McCulloch*, the second Bank of the United States challenged a tax imposed by Maryland, which had copied the tactic from Georgia's tax on the first Bank of the United States a decade earlier.¹⁰

For the first Bank of the United States, it made little sense to file a lawsuit in Georgia state court to contest the popular Georgia tax and the actions of a Georgia tax collector. State judges were widely perceived at the time to have a tendency to favor local interests, which did not bode well for a controversial out-of-state corporation. The Bank filed suit in federal court instead. It was

not so much that the Bank was opposed to biased judges; it just wanted ones more likely to lean in the Bank's favor. The federal courts were largely occupied by judges appointed by Washington and Adams, who supported the Bank, and the Supreme Court was led by Chief Justice John Marshall, whose leadership would become known for nationalist rulings that enhanced federal power and minimized states' rights.

The text of the Constitution did not appear to be on the corporation's side. The Bank's suit in federal court was based on Article III, section 2, of the Constitution, which authorizes federal courts to hear suits "between Citizens of different States." The Founders had the same worry as the Bank about biased state court judges. If both parties to a lawsuit were from the same state, neither would be disadvantaged by a judge's parochial allegiances and there was little need for a federal forum. If, however, the parties were from different states, the federal courts should be available to protect the "foreigner" from unfair treatment. Article III, together with the Judiciary Act of 1789, which provided explicit statutory authority for federal courts to hear these types of diversity cases, effectively creates a constitutional right to sue in federal court. But that right was guaranteed to "citizens," not corporations. The question of who counts as a "citizen" under this provision would be one of great significance in American history; in the notorious case of *Dred Scott v. Sandford*, the Court would declare that blacks were not citizens under this provision and "had no rights which the white man was bound to respect." A half-century earlier, the Bank of the United States would fare much better.¹¹

As best we can tell, the Framers never considered whether corporations should have the right to sue in federal court when they were drafting the Constitution. At the time of the Revolution, corporations were few and far between. For over half a century, England's Bubble Act had been in effect, prohibiting

any unincorporated entity from having transferable shares. The law was coupled with an uncompromising refusal by successive English monarchs to grant charters to any business that had stock, which is why the industrial revolution in England was led primarily by businesses organized as partnerships, not by corporations as in the United States.¹²

The Founding generation, liberated from English control, enthusiastically embraced the corporate form. While there were only a handful of business corporations in America at the Founding, by 1800 more than 300 had been chartered. Americans formed corporations to produce silk, cotton, iron, and maps; to construct aqueducts, dig mines, and run waterworks; and to operate ferries, banks, and insurance companies. Most of all, corporations were created to build the scores of turnpikes, bridges, and canals that began to stitch together the independent colonies into one nation with a single, national economy. John Adams was led to ask, "Are there not more legal corporations,—literary, . . . mercantile, manufacturing, marine insurance, fire, bridge, canal, turnpike, &c. &c. &c.,—than are to be found in any known country of the whole world?"¹³

Hamilton's faith in corporations was such that he was willing to rest the weight of the unsteady American financial system on the shoulders of one. Yet the Bank now faced a serious legal problem. It could not win in state court, yet how could it claim a right to sue in federal court in the absence of any evidence that the Framers meant to protect corporations? Moreover, Article III said that "Citizens" could sue in federal court, and citizens are generally thought to be natural people who, by law, owe their allegiance to a particular nation. If that was what the Constitution meant by the "Citizens" in Article III, then corporations like the Bank of the United States would not have any right to sue in federal court. And absent this fundamental right, the Bank would find itself,

quite literally, regulated to death by Jeffersonians eager to shut it down.

Corporations and Their Rights

The idea that a corporation could have legal rights similar to those of ordinary people might seem absurd. Corporations are fictional entities, created by people primarily for economic reasons. Nevertheless, the very reason the corporation was invented was to enable the establishment of a durable, legal entity that could exercise at least some legal rights. To understand why requires turning from the early United States to ancient Rome—and to the celebrated English scholar who was among the first to detail the legal rights of corporations.

The earliest version of the corporation was created in Rome three centuries before the birth of Christ. Called a *societas publicorantium*, this prototype was Rome's answer to a pressing problem: how could a group of people hold property together and make contracts for their common enterprise over time without disruption? The Romans already had business partnerships, called *societas*, but they could be unreliable. The *societas*'s property, like that of a partnership today, was owned by the partners in the partners' own names; there was no legal separation between the partnership and the partners. Moreover, Roman law required partnerships to be dissolved in any number of circumstances, such as when any one partner became insolvent or died. (Today, by contrast, partners can contractually agree to maintain the business in the event of one partner's departure.) In a time when life spans were short, the Roman partnership was useful as a way of aggregating capital but also created an unwelcome yet constant state of chaos for the businesspeople who employed it.¹⁴

The *societas publicorantium* offered much greater stability. It was authorized to own

property and form contracts in its own name and did not have to be dissolved if a member died or went bankrupt. Because of these special privileges, the *societas publicorantium* had to be authorized by a decree of the Senate or the emperor. Individuals could form partnerships on their own, but only the sovereign had the authority to create a corporation. From the very beginning, it was recognized that corporations needed to be strictly controlled and limited.

Nonetheless, the corporation became quite successful in Rome. *Societas publicorantium* were created for shipbuilding, mining, public works projects, temple construction, and tax collection. Even some of these earliest corporations had a global impact. A 1997 study of ice core samples from Greenland found "unequivocal evidence of early large-scale atmospheric pollution" caused by Roman silver- and lead-mining corporations operating in southern Spain between 366 BC and AD 36.¹⁵

In the centuries to follow, the corporate form became popular for other sorts of organizations that also had the need to own property or form contracts in their own names, regardless of the shifting identity of their members. Beginning in the fourth century, the Catholic Church claimed to be a corporation so that it could receive gifts of land and hold that property in the Church's own name for perpetuity. Oxford University, which was founded sometime in the eleventh century, was a corporation, as were many English guilds and even the City of London.¹⁶

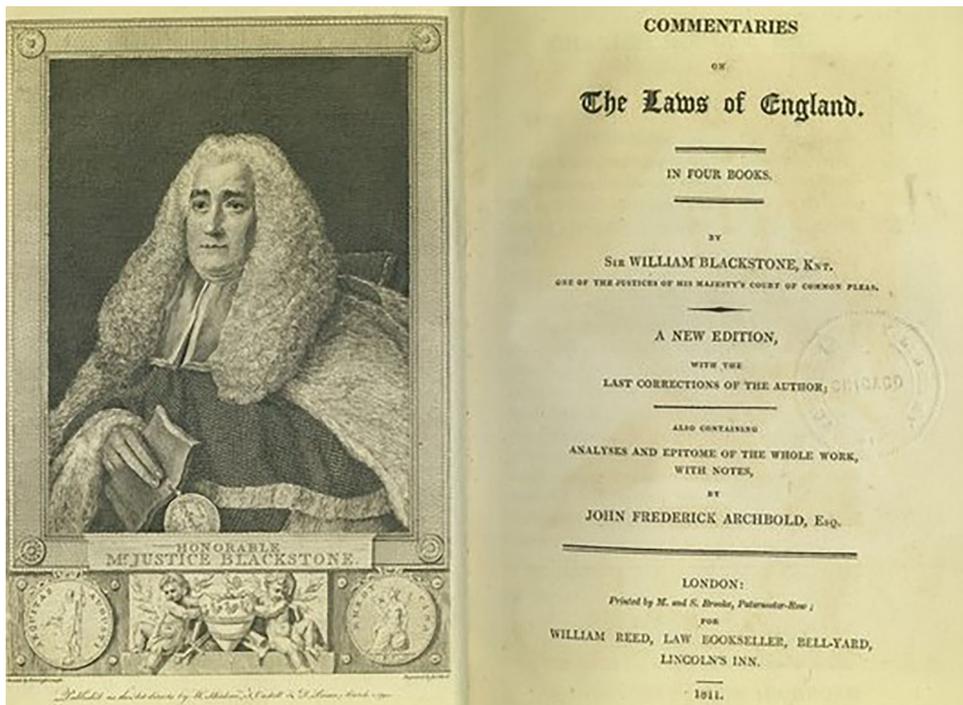
In 1758, William Blackstone sought to bring some order to English law in his famous **Commentaries on the Law of England**, and among his topics was the corporation. Blackstone's first love was not the law but architecture, and while still a teenager, he wrote a much-praised treatise on "the art of building." As a lawyer, however, his practice was notable mostly for its lack of distinction. A priggish, ill-tempered man, Blackstone could not keep clients. He may have just been

a poor lawyer; when he was appointed to the bench later in life, his rulings were reportedly overturned on appeal more than those of any other judge in London. Yet, as a scholar and chronicler of English law, Blackstone was without peer. His scholarly effort to detail, organize, and explain English law would lead his **Commentaries** to be hailed as the “most influential law book in Anglo-American history.”¹⁷

In the **Commentaries**, Blackstone explained how corporations were formed and what legal rights and duties corporations had. He began by describing the corporation as an “artificial person.” By this, Blackstone meant two things. First, the corporation was an independent legal entity in the eyes of the law, separate and distinct from the people who formed it. Second, as an independent legal entity, it had certain legally enforceable rights similar to those of a natural person. An individual’s “personal rights die with the

person,” Blackstone wrote. So “it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons.” Called “bodies corporate, or corporations,” these artificial persons “may maintain a perpetual succession, and enjoy a kind of legal immortality.” There were, Blackstone noted, “a great variety” of corporations used for such things as “the advancement of religion, of learning, and of commerce.”¹⁸

Blackstone analogized the corporation to a person because the individual human being was the paradigmatic legal actor in the minds of lawyers. Only people, not objects like tables or shrubs, had standing to claim the law’s protections; only people had rights. Indeed, this remains a common frame of mind today. When proponents of animal rights go to court seeking legal protections for chimpanzees, for example, they claim the animals



In his *Commentaries on the Laws of England* (1776), law professor William Blackstone outlined the rights and duties of corporations. He reasoned that corporations had to be in the service of the public and were therefore both public and private enterprises at the same time.

“legal persons.” They do not mean that chimpanzees are exactly the same as human beings, or that they have all the same rights as people, including the right to free speech, freedom of religion, or the right to bear arms. They mean only that chimpanzees should have standing as independent beings entitled to claim at least some rights under the law.¹⁹

Because the corporation was its own independent, identifiable legal “person,” it had to have a name. “When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all legal acts,” explained Blackstone. The name of the corporation was not just a nicety. The name was “the very being of its constitution” and was essential to enable the entity to “perform its corporate functions.” English courts took the corporation’s name very seriously, voiding contracts for failing to state a corporation’s formal name precisely. The name was so important for corporations for the same reason it was important for individuals: it was the signifier of the unique identity of that person. Acts taken in the corporate name were, in the eyes of the law, acts of the corporation—not acts of the members.

Today, corporations are typically thought of as private enterprises, created by private citizens to pursue profit for themselves. In Blackstone’s day, however, corporations straddled the divide between public and private. They had unambiguously private aspects, in that they were financed and managed by private parties. Yet they were also inherently public. They could only be formed by charter granted by the government, and the government would not grant one unless the corporation had a public purpose. “The king’s consent is absolutely necessary to the erection of any corporation,” Blackstone noted. To be a separate, legally recognized entity required special governmental approval, and it would not be forthcoming if a corporation’s mission were not “for the advantage of the public.” Corporations had

to serve the commonweal, whether it was by building a road, maintaining a bridge, or providing insurance. Individual investors took home profits, but the ultimate mission of the corporations had to be in the service of the public. Corporations, in other words, were both public and private enterprises at the same time.²⁰

Corporations were also strictly regulated in Blackstone’s day. Today businesses are controlled through labor laws, consumer protection laws, environmental laws, workplace safety laws, and the like, but corporations in the 1700s were regulated primarily through their charters. The charter was both the corporation’s birth certificate and its rule book. It was the visible manifestation of the king’s consent—and a tool for the king to control his creations. Charters were often detailed documents that set forth the corporation’s mission, powers, and duties. They might dictate how much the corporation could charge for goods or services, how much capital it could raise, and how corporate decisions were to be made. A corporation had a measure of autonomy, to be sure; Blackstone recognized that one of the fundamental attributes of the corporation was the power “to make by-laws or private statutes for the better government of the corporation.” Nevertheless, a corporation could only lawfully act in ways permitted by the government-issued charter. Anything else was beyond the power of the corporation—what the law would later term *ultra vires*—and unenforceable. Blackstone also identified another limit on the corporation’s bylaws: they were “binding” on the corporation “unless contrary to the laws of the land, and then they are void.”²¹

Under English law, corporations nonetheless always possessed certain rights. “After a corporation is so formed and named,” Blackstone wrote, the law gives it “many powers, rights, capacities, and incapacities.” These rights are “necessarily and inseparably incident to every corporation.”

As a separate legal entity, the corporation typically enjoyed the right to “purchase lands, and hold them”—in other words, the right of property. This was why the corporate form had been developed in ancient Rome, so that groups of people could own property together without the hassles and inefficiencies of partnerships. Without property rights, corporations could not function.²²

Another inherent right of corporations was the right to form contracts. They had the legal power to make agreements with others—employees, suppliers, lenders—that would “bind the corporation.” Consistent with the legal requirements of his day, Blackstone noted that corporations could only form binding contracts with the use of a “common seal.” The seal, like the corporation’s name, served to differentiate the entity from the people who comprised it. “For though the particular members may express their private consent to any acts, by words, or signing their names, yet this does not bind the corporation,” he wrote. The corporation as a distinct legal person “acts and speaks only by its common seal.”²³

Blackstone also recognized that corporations had a third right: the right to “sue or be sued . . . by its corporate name.” Although Americans today may not always think of the right to sue and be sued as a fundamental right, it may in fact be the most vital because it is preservative of all the others. If someone takes your property or restricts your religious freedom, the right to sue enables you to defend your rights and obtain a lawful remedy. Without access to the courts, rights would be just words on paper with little practical significance. Of course, a corporation cannot appear in court like an ordinary person. It must, Blackstone recognized, “always appear by attorney,” a representative of the corporation. The people who formed or ran the corporation could not appear in their own names. They were wholly different legal persons and lawsuits had to be by or against the corporation itself.²⁴

These were the three core rights of any corporation: the right to own property, the right to make contracts, and the right of access to the courts. Each of these rights, Blackstone explained, was exercised by the corporation in its own name. The members of the corporation did not own the corporation’s property, the corporation did. The members of the corporation were not personally bound by the corporation’s contracts, the corporation was. The members of the corporation could not sue or be sued for legal controversies involving the corporation, only the corporation could. Corporations were their own independent entities under the law, separate and distinct from their members and with certain rights deserving of protection. That is, they were legal persons.

Although corporations had some legal rights, they did not have the exact same rights as individuals. Blackstone highlighted the differences between real people and corporations. “A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.” With no physical body, the corporation could not “be committed to prison” or “be beaten.” Nor could the corporation swear an oath. Blackstone also wrote that corporations had special duties that individuals did not have. For example, corporations could be “visited” by authorities, who were allowed to “inquire into, and correct all irregularities that arise” should the corporations “deviate from the end of their institution.” Because of the unique features and characteristics of the corporation, the rights and duties of this artificial person were distinct from the rights and duties of ordinary individuals. But both had some rights.²⁵

Blackstone’s understanding of the corporation is old but hardly outdated. Open any law book on corporations and one of the first things discussed is likely to be the strict separation between the corporate entity and its members. As George Field wrote on the

opening pages of *A Treatise on the Law of Private Corporations*, published in 1877, a corporation is a “legal person” whose acts “are considered those of the body, and not those of the members composing it.” More than a century later, Harvard Law School dean Robert Charles Clark wrote of his own corporate law treatise, “One of the law’s most economically significant contributions to business life . . . has been the creation of fictional but legally recognized entities or ‘persons’ that are treated as having some of the attributes of natural persons.” And because the “law conceives corporations to be legal persons with certain powers and purposes,” the rights and obligations of corporations do not transfer to their members, and vice versa. According to the Supreme Court, the “basic purpose” of incorporation is “to create a legal entity distinct from those natural individuals who created the corporation, who own it, or whom it employs.” This idea—that a corporation is in the eyes of the law its own, separate legal person—remains a central principle of corporate law. It would not, however, be as successful in shaping American constitutional law.²⁶

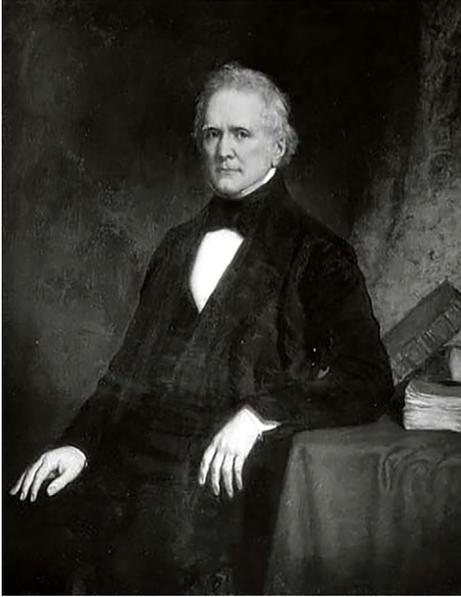
Horace Binney’s Strategy

Blackstone’s *Commentaries* would be among the sources that Horace Binney, the young lawyer for the Bank of the United States, would use to argue for constitutional rights for corporations. Although the Framers had not set out to protect corporations, Binney was blessed with a creative mind. A precocious child from Philadelphia who grew up surrounded by power—President Washington’s residence was across the street and Hamilton lived next door—he went to Harvard College at the age of fourteen. To make friends and build camaraderie, he founded the “Hasty Pudding Club,” which remains in existence today as the oldest collegiate social club in America. As a

budding young lawyer, Binney’s innovative arguments quickly earned him the respect of the Pennsylvania bar, and he was still only in his twenties when he was hired in 1808 to represent the nation’s preeminent corporation in the fight for its life.²⁷

Binney and the Bank filed suit in the federal court in Georgia to recover the money taken by Peter Deveaux. Binney was hopeful the Bank would receive a more fair hearing than in the state courts, but perhaps only on appeal. Two of the judges who first heard the Bank’s case in the lower federal court in Georgia were William Johnson, a sitting Supreme Court Justice who hailed from South Carolina who was riding circuit, and William Stephens, the local federal judge. Both had been appointed to the bench by Jefferson after his election to the presidency in 1800, and both shared the Sage of Monticello’s populist opposition to corporations like the Bank. If the philosophical leanings of the presiding judges were not enough of an obstacle, Binney also faced the daunting task of persuading them to give corporations the right of “Citizens” to sue in federal court.²⁸

Binney could possibly have argued that corporations were citizens because they enjoyed many of the characteristic features of citizenship. A corporation, like a citizen, could have a nationality, a country to which it belonged. Today, for example, it is commonplace to ascribe a nationality to a corporation—to call General Motors an American company and Renault a French one—and the same was true in Binney’s era. In an 1814 case, Supreme Court Justice Joseph Story explained that “where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation.” Nor would it have been completely outrageous for Binney to argue that a corporation was a citizen of a particular state—the type of citizenship at issue in diversity cases under the Judiciary Act and Article III. Then and now, a corporation is



In 1805 Philadelphia lawyer Horace Binney (above) filed suit in federal court in Georgia on behalf of his client, the Bank of the United States. They sought to recover money taken from the Bank by Peter Deveaux, a Georgia tax collector, in response to the Savannah branch's refusal to pay taxes imposed on locally held capital. Binney argued that corporations and their members were not the separate and distinct entities corporate law demanded.

incorporated in one state and must follow that state's laws on issues of corporate governance, such as the fiduciary duties of officers and the voting rights of stockholders. As in Binney's day, Americans today might speak of a Delaware corporation or a New York corporation.²⁹

Even if corporations could arguably be seen as citizens for some legal purposes, Binney likely understood how difficult it would be for him to win with such an argument. As a student of rhetoric and persuasion, he would know that even the most compelling logic falters if it defies common sense. Saying that corporations were "Citizens" under the Constitution was precisely such an argument. Citizenship was a status reserved for actual human beings. Binney nonetheless came up with a clever, even fateful, solution. If he could not persuade the courts that a corporation was a

citizen, perhaps he could persuade them that his case was not really about a corporation.

Binney focused the court's attention on the people behind the corporation. The Bank itself might not be a citizen under the Constitution, but what Binney called the Bank's "members" were. The people who formed, ran, and financed the corporation were ordinary Americans entitled to all the rights provided in the Constitution. They undeniably were citizens, and Article III was written to protect their rights. This was not a case about the rights of a corporation. This was a case about the rights of the corporation's members.

"A corporation is composed of natural persons," Binney argued. Although the Bank was the formal party to the lawsuit, the "real parties" were the Bank's members. If they were citizens of states other than Georgia, where Deveaux was a citizen, then they should have access to federal court to protect them "against fraudulent laws and local prejudices." The purpose of the constitutional right to access federal court for diverse citizens was to reduce the possibility of local bias, and that same concern was present in the Bank's case. The members of the locally reviled Bank were not likely to find an impartial judge in Georgia state court.³⁰

Binney's solution was to make the corporation invisible, to make it transparent, and, in effect, to hide its corporate-ness. He did not deny that a corporation was involved, yet he sought to make the corporate form irrelevant. He sought to collapse the distinction between the corporation and its members, suggesting the courts see right through the corporation and focus instead on the people who comprise it.

Corporate lawyers today have a name for this way of thinking about corporations. They call it "piercing the corporate veil." The ordinary rule, ever since the days of Blackstone, is that there is a strict separation between the corporation and the people behind it. Today, for example, if someone

slips and falls at Starbucks, courts do not impose liability on the individuals who own stock in the company; the corporation is the legally responsible entity. The injured person would have to sue Starbucks rather than Starbucks's stockholders. In a small number of highly unusual cases, however, the courts will pierce the corporate veil, ignoring the separate legal status of the corporation and imposing liability on the stockholders personally. Piercing the corporate veil in business law cases is very rare, and courts typically only do it when someone uses the corporate form to perpetuate a fraud or commit wrongdoing.³¹

Binney wanted the courts to pierce the corporate veil, even though there was no fraud or wrongdoing by the Bank. He argued that corporations and their members were not the separate and distinct entities corporate law demanded. Instead, Binney portrayed corporations as associations of individuals, and firms should be able to assert the same rights as the people who come together within them. This frame for understanding the corporation would be repeated often throughout American history in cases dealing with the constitutional rights of corporations.

Binney's influence, however, was not immediate. Justice Johnson and Judge Stephens ruled against him and the Bank. Johnson authored the court's opinion. First, he rejected the idea that a corporation could be a citizen under Article III of the Constitution. "A corporation cannot with propriety be denominated a citizen of any state, so that the right to sue in this court under the Constitution can only be extended to corporate bodies by a liberality of construction, which we do not feel ourselves at liberty to exercise." Then Johnson rebuffed Binney's creative argument about piercing the corporate veil. "As a suit in right of a corporation can never be maintained by the individuals who compose it, either in their individual capacity or by their individual names, how is the citizenship of the

individuals of the corporate body ever to be brought into question by the pleadings?"³²

From Johnson's perspective, the law was clear. It was the Bank's money that was taken, not the money of the Bank's members. The Bank's stockholders were not parties to the case. If any of them had tried to sue Peter Deveaux in their own names, Johnson would have dismissed the case. Similarly, if Deveaux had sued the Bank's stockholders for some wrongdoing committed by the Bank, the corporation's members would have urged dismissal on the very same ground—that there was a strict separation between the rights of the corporation and the rights of those who form, own, or manage it. Johnson recognized, in other words, the same long-standing principle of law that Blackstone had explained in his **Commentaries**: corporations were their own independent legal persons, separate and apart from their members.

For Johnson, however, corporate personhood did not mean that corporations had the same constitutional rights as individuals. Corporations only had those rights appropriate for such a unique, specialized type of legal entity. So while corporations might have a right to own property or form contracts as appropriate for a business, they still had *fewer* rights than natural people: individuals had the right to sue in federal court on diversity grounds but corporations did not.

Corporate Rights in the Supreme Court

When the case made it to the Supreme Court for argument in February of 1809, the Justices were holding court in a pub. After the Court first moved to Washington, the Justices were given a committee room in the Capitol Building in which to hear cases. Beginning in 1808, however, renovations were undertaken on the building and the Justices were forced to move into a drafty, frigid library on the second floor. They

decided to hear their cases instead across the street in the cozier confines of Long's Tavern. Although one envisions the Justices hearing cases while tipsy on Madeira, this location also was appropriate in its own way: by some accounts, Long's Tavern was located on the same plot of land where the majestic neoclassical Cass Gilbert–designed Supreme Court Building sits today.³³

Binney told the Justices they should pierce the corporate veil. To decide this case, they ought to look right through the corporate form and allow the Bank to sue in federal court because the Bank's *members* were "Citizens." "A corporation is a mere collection of men," Binney insisted. The "spirit of the constitution," he insisted, required the "residence and inhabitancy [of] the particular members" to control. The Framers guaranteed the right to sue in federal court to protect people from the biases of local judges, and denying the corporation's members such access "would be a result clearly contrary to the intention and spirit of the constitution."³⁴

Another lawyer who appeared before the Supreme Court at the same time as Binney was John Quincy Adams. At forty-four, the son of the second President of the United States had already been a U.S. Senator and a professor at Harvard, and he was about to be named minister to Prussia. Just months after the Bank case, Adams would be nominated and confirmed to the nation's highest court himself. He declined, thinking the Supreme Court position somewhat of an insult; after all, he was by then busy negotiating the fate of the world with the tsar. Yet back in February, Adams was still practicing law, which was what brought one of the most legendary figures in American history to Long's Tavern at the same time as Binney. Adams's case, *Hope Insurance v. Boardman*, would be his last appearance in the Supreme Court for thirty-two years, until he returned in 1841 as the former president to argue in the famous *Amistad* case for the rights of African slaves.³⁵

In the *Hope Insurance* case, Adams was focused on the rights of corporations. Although historians have written off *Hope Insurance* as "of little consequence," the case presented the same issue as *Bank of the United States v. Deveaux* and the two cases were argued at the same time. Adams, who was representing two Boston men suing the Hope Insurance Company, a Rhode Island insurance corporation, was seeking, however, to vindicate the other side of the corporation's right to sue: the right to *be* sued. Recall that Blackstone described the corporation as typically having the right to sue and to be sued. The corporation's legal standing could be used by the corporation when it sued someone, as in the Bank's case, or by others when they sued the corporation. The latter was the type of case Adams had. His clients wanted to sue in federal court because they thought the judiciary of Rhode Island, where Hope Insurance was located, would be biased in favor of the company. Although Binney and Adams were coming at the problem from different angles, they ended in the same place: corporations, both argued, should have the right to sue and be sued in federal court.³⁶

Rounding out the all-star cast of lawyers was Jared Ingersoll, a former member of the Constitutional Convention of 1787 who was appearing on behalf of Hope Insurance, and Philip Barton Key, who represented Peter Deveaux, the Georgia tax collector. Key, the uncle of "The Star-Spangled Banner" lyricist Francis Scott Key, was perhaps in some ways the most extraordinary of the remarkable figures who gathered in Long's Tavern. Key had fought in the Revolutionary War on the side of the British, but he became the rare Loyalist welcomed back into the upper echelons of American society after Independence. He was elected to Congress, served for a short time as a federal judge, and then returned to private practice, where he represented powerful clients. In 1805, for instance, four years before the Bank case, Key successfully defended Supreme Court Justice

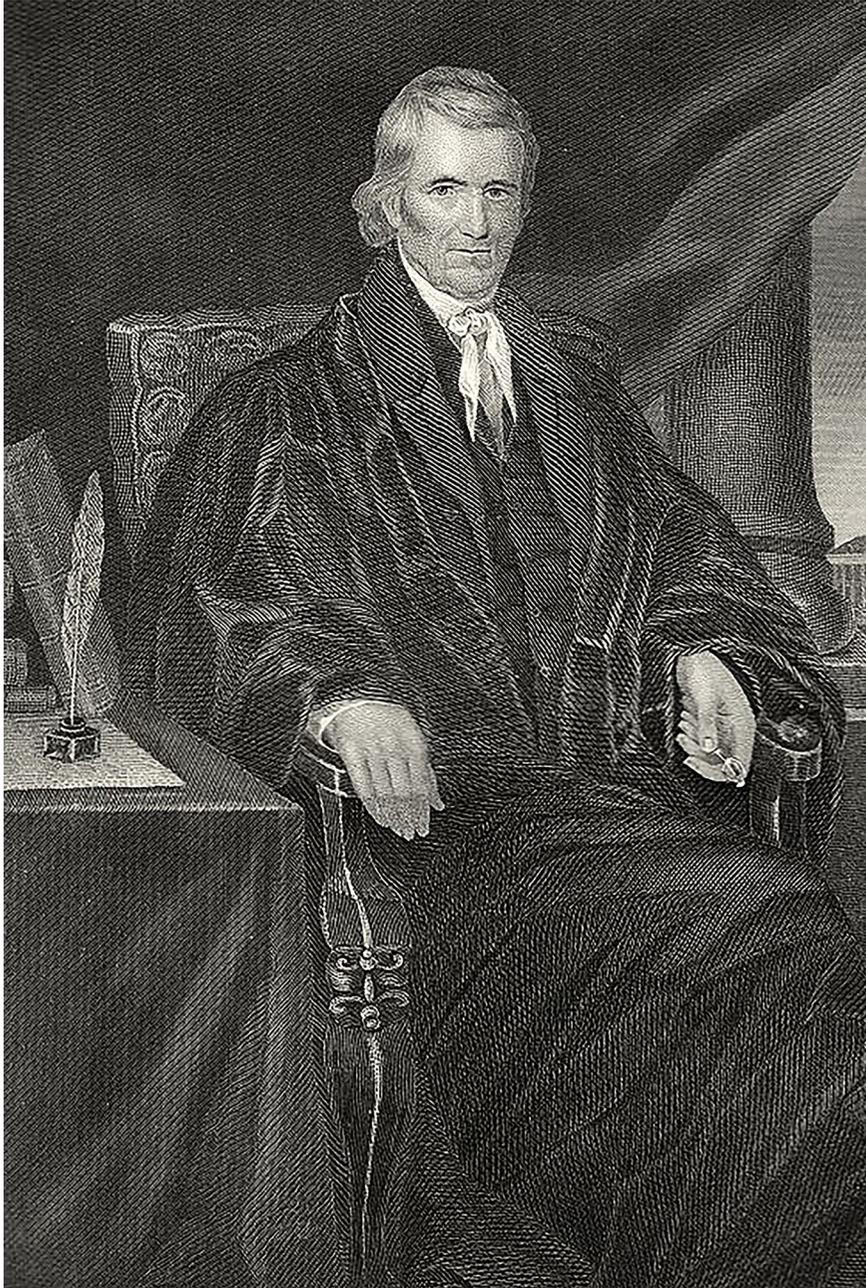
Samuel Chase in his impeachment trial, establishing a precedent—still adhered to today—that federal judges could not be impeached for political reasons. So when Key appeared before the Justices in the corporate rights case, he could count on the personal gratitude of one Justice and the warm appreciation of all the others.³⁷

Key's argument for limiting corporate rights was centered on corporate personhood. "But it is said that you may raise the veil which the corporate name interposes, and see who stand behind it," said Key, in response to Binney's argument. The Bank's lawsuit, however, "is brought in the corporate name." The members "expressly averred themselves to be a body corporate, and to sue in that capacity." The Bank itself, "not the individual stockholders," was the plaintiff. Using an argument that populists would make often in the 200-plus years of corporate rights cases, Key insisted that the corporation and its members must be deemed separate and distinct under the law. "No corporation . . . can derive aid from the personal character of its members; nor does it incur any disability form [their] disabilities," Key told the Justices. The purpose of the corporation was to be an independent legal actor, separate and apart from the people who create it. The court, Key argued, was without the "power to examine the character of the individuals to ascertain whether the corporation has a right to sue in a certain court." The question was whether *corporations* were "Citizens" under the Judiciary Act and Article III, not whether their members were.³⁸

When Adams rose to address the Justices, he was forced to admit Key's point that under the law a corporation was traditionally deemed a person with its own separate legal identity. A corporation's "powers, its duties and capacities are different from those of the individuals of whom it is composed," Adams recognized. "It can neither derive benefit from the privileges, nor suffer injury by the capacities, of any of those individuals."

Nonetheless, he argued, the court should still ignore the corporate form. The Justices, he advised, should rule that corporations were citizens under Article III because that would serve the basic purposes of diversity jurisdiction—perhaps even more so in the case of a corporation than in one involving an individual. "If there was a probability that an individual citizen of a state could influence the state courts in his favor, how much stronger is the probability that [the courts] could be influenced in favor of a powerful moneyed institution which might be composed of the most influential characters in the state?" In determining whether corporations had constitutional rights, Adams argued, the Justices should not be "limited by the letter of the constitution" but should instead promote the broad purposes of the text.³⁹ *Bank of the United States v. Deveaux* and its companion case, *Hope Insurance*, thus presented the Supreme Court with two different ways of thinking about the constitutional rights of corporations. Like Justice Johnson, Key argued that corporations were people— independent entities with legal rights and obligations separate and apart from the people who make them up. Because of that legal separation, the rights and duties of the members did not transfer to the corporation, or vice versa. The question facing the court was whether corporations, as such, were citizens guaranteed the right to sue in federal court. Horace Binney and John Quincy Adams argued conversely that corporations were associations—collectivities that enjoyed the same rights and obligations as their members. According to this perspective, the courts should pierce the corporate veil and ask whether the corporation's members were citizens guaranteed the right to sue in federal court.⁴⁰

These two contrasting ways of thinking about corporations were first introduced to American constitutional law in the *Bank of the United States* and *Hope Insurance* cases. Ever since, the history of corporate rights has



John Marshall held in *Bank of the United States v. Deveaux* (1809) that a corporation was an association of people whose rights are derived from its members, but he did not define who exactly counted as members of a corporation.

largely been a struggle between the disparate poles of personhood and piercing. Today's critics of *Citizens United* often blame corporate personhood for the Supreme Court's expansive protection of corporate rights. Yet historically, the logic of personhood has

usually been employed by those seeking to narrow or limit the rights of corporations. By contrast, expansive constitutional rights for corporations have frequently been a product of the logic of piercing. When the Supreme Court has ignored the corporate form and

looked to the rights of the individuals who made up the corporation, the rulings naturally tended to give corporations nearly all the same rights as individuals. Expansive constitutional rights for corporations were built into Horace Binney's argument.

After the hearing, Adams confided in his diary that his presentation to the Justices had not gone well. "The ground which I was obliged to take appeared to the court untenable, and I shortened my argument, from the manifest inefficacy of all that I said to produce conviction upon the minds of any of the Judges." He need not have been so worried. For, despite Jefferson's appointment of Justices like Johnson to the Supreme Court, Hamiltonian Justices like Marshall and Chase, who favored corporate rights, remained in control.⁴¹

Like Alexander Hamilton, Marshall favored the growth of corporate enterprise and supported the Bank of the United States in particular. In his opinion for the court in *Bank of the United States v. Deveaux*, Marshall enthusiastically embraced the theory espoused by Horace Binney and John Quincy Adams about how to think about corporations under the Constitution. (Despite Adams's supposedly poor performance, the future President won his case too. Although there was no separate opinion in *Hope Insurance*, the Supreme Court reporter directed readers to see the opinion in *Bank of the United States*, which decided the same issue, "the right of a corporation to litigate in the courts of the United States.")⁴²

Marshall's opinion admitted that the question involved in the case was "one of much . . . difficulty." First he examined the Bank's charter of incorporation to see if Congress, in creating the Bank, had explicitly conferred upon it the right to sue and be sued in federal court. Although the charter did explicitly grant the Bank "a capacity to make contracts and acquire property, and enables it 'to sue and be sued'"—the three core rights identified by Blackstone—Marshall said that

was insufficient. Congress could have meant only to grant the Bank the right to sue and be sued in *state* court. To extend to corporations the right of access to *federal* court, however, would have required Congress to say so explicitly.⁴³

The question, then, turned not on the meaning of the Bank's charter but on the meaning of the Constitution. Although Marshall recognized that the law often deemed a corporation to be a legal person—"for the general purposes and objects of a law," the corporation was often "included within terms of description appropriated to real persons"—a corporation was "certainly not a citizen." That title was reserved for human beings, and there was no evidence from the founding period that the citizens referred to in Article III included corporations. Yet, that still did not answer the question conclusively, Marshall explained, because constitutions were to be read expansively. "A Constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles." The purpose of diversity jurisdiction under Article III was to protect people against potentially parochial and biased state courts. The court was obliged to read Article III to fulfill that promise, which in Marshall's view meant extending the right to sue and be sued in federal court to corporations—regardless of the fact that corporations were not citizens.⁴⁴

While Marshall embraced John Quincy Adams's argument about the purposes of Article III, he also pierced the corporate veil as Horace Binney had suggested. Corporations might not be citizens, but their members were. Marshall described the corporation as an "invisible, intangible thing," employing a phrase he would use again in another corporate rights case, *Dartmouth College v. Woodward*, decided a decade later. What Marshall meant was that corporations were too ethereal to be the basis for constitutional

rights and that, instead, the court should focus on the corporation's members. "Substantially and essentially, the parties in such a case" are the "members of the corporation." The corporation was just a stand-in for a group of "individuals who, in transacting their joint concerns, may use a legal name." Because the people who associated together within the corporation were the real parties to the case, Marshall held, *their* citizenship should control. The court, he said, was obliged to "look beyond the corporate name and notice the character of the individual."⁴⁵

An astute legal craftsman, Marshall knew that his reasoning ran counter to the traditional way the law had treated corporations—as independent legal entities with rights and obligations separate and distinct from those of their members. His opinion surveyed a series of English cases dealing with the ability of corporations to sue and be sued more generally, admitting sheepishly that they provided "more strong" support for treating a corporation as its own legal person rather than "to consider the character of the individuals who compose it." Nevertheless, Marshall insisted, "this technical definition of a corporation" should be set aside in this case to protect the rights of the corporation's members.⁴⁶

Although Marshall based a corporation's ability to sue in federal court on the citizenship of its members, the esteemed jurist never identified who exactly counted as a member of a corporation. Was it the stockholders? The employees? The directors? *Bank of the United States v. Deveaux* offered no answer, even though the logic of piercing the veil made this question vitally important. In 1806, three years prior to the *Bank of the United States* case, the Supreme Court had held in a case involving diversity jurisdiction that the parties must be completely diverse, with all of the plaintiffs from different states from all of the defendants. Even today, the requirement of complete diversity remains the law of the land. Yet because Marshall did

not specify who counted as a member of the corporation, he never bothered to ask whether, in fact, all of the Bank's members were from different states from Peter Deveaux. Given the Bank's relatively large class of stockholders, it was likely that at least one hailed from Deveaux's home state of Georgia, which meant there would not be complete diversity. In Marshall's rush to extend corporations the right to sue in federal court, he skipped right over this issue and declared that the Bank had the right to sue the tax collector in federal court. He declared the rights of the members paramount, but the actual membership remained abstract and undefined.

The Bank would not survive long enough to enjoy very much its newfound constitutional freedoms. When Chief Justice Marshall handed down the Court's ruling in March 1809, the Bank of the United States faced the threat of imminent closure. While modern corporations typically enjoy perpetual life, Congress had only chartered the Bank for twenty years as a compromise to attract the votes necessary to pass Hamilton's controversial proposal. That meant the Bank would need to obtain a new charter from Congress in 1811 if it were to carry on. Hamiltonian backers of the Bank had already begun lobbying Congress, over still bitter opposition, to renew the charter when *Bank of the United States v. Deveaux* was argued before the Supreme Court in 1809. That explains why an important question in the *Bank of the United States* case was left unanswered by Marshall's opinion, which said nothing about the constitutionality of the Georgia tax itself. Marshall was likely trying to protect the Bank; a Supreme Court ruling prohibiting states from taxing the Bank would only inflame those opposed to reissuing the Bank's charter. *McCulloch* remained to be decided only because Marshall had ducked that same question a decade earlier in the first corporate rights case.⁴⁷

Marshall's effort was in vain. In Congress, the vote on renewal of the Bank's

corporate charter lost by a single vote. The Bank of the United States was shut down. Although it died an early death, the Bank's impact on the Constitution and corporate rights would be felt for ages to come. The Bank had fought and won the first Supreme Court case affording corporations rights under the Constitution, and many corporations to come would build on that foundation in seeking additional protections. Frequently, those cases would present the court with the same choice between two different ways of conceptualizing the corporation—as a person or as an association. Is a corporation, as Blackstone said, a legal person with rights of its own? Or is a corporation, as Binney and Marshall said in *Bank of the United States*, best understood to be an association of people whose rights are derived from the members? More often than not, piercing the veil and allowing a corporation to claim the rights of its members would be the framework adopted by the Court in corporate rights cases and used to justify the extension of an ever-larger sphere of individual rights to business corporations.

Editor's Note: This essay is a revised excerpt of Adam Winkler's **We the Corporations: How American Businesses Won Their Civil Rights** (2018).

ENDNOTES

¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 134 S. Ct. 2751 (2014); *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886); *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809).

² On the Bank of the United States, see Edward S. Kaplan, **The Bank of the United States and the American Economy** (1999); James O. Wettoreau, "New Light on the First Bank of the United States," 61 *Pennsylvania Magazine of History and Biography* 263 (1937); John H. Wood, **A History of Central Banking in Great Britain and the United States** (2005); James Stuart Olson, "Bank of the United States," in **Encyclopedia of the Industrial Revolution in America** (2002), at p. 21.

³ On the Bank of North America, see Kaplan, **The Bank of the United States**, at p. ix; Simeon E. Baldwin, "American Business Corporations Before 1789," 8 *American Historical Review* 449, 458–459 (1903); Lawrence Lewis, **A History of the Bank of North America** (1882); Todd Wallack, "Which Bank Is the Oldest? Accounts Vary," *Boston Globe*, December 20, 2011, available at <http://www.bostonglobe.com/business/2011/12/20/oldest-bank-america-accounts-vary/>. WAcvIlmpfFhyKsx8bhgAJ/story.html.

⁴ See Wettoreau, "New Light on the First Bank," 272, 284.

⁵ See Jerry W. Markham, **A Financial History of the United States: From Christopher Columbus to the Robber Barons** (2001), Vol. 1, at p.126-127 and at p. 281.

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⁷ See W. Calvin Smith, "Banks, Law, and Politics: The Origins, Outcome and Significance of the Deveaux Case," *Proceedings of the South Carolina Historical Association* (Spring 1991), 9, 11; Wettoreau, "New Light on the First Bank," at p. 276–277.

⁸ See Smith, "Banks, Law, and Politics," at 11.

⁹ On Peter Deveaux, see Georgia Historical Society, "Deveaux, Peter, 1752–1826," available at <http://georgiahistory.pastperfectonline.com/webobject/3BFA3BA2-7CAE-41A5-B570-608121172364>; George White, **Historical Collections of Georgia** (1855), at p. 219. For a detailed history of the Deveaux litigation, see Smith, "Banks, Law, and Politics," at 9.

¹⁰ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹² See Stuart Banner, **Anglo-American Securities Regulation: Cultural and Political Roots, 1690–1860** (2002), at pp. 75–80; Ron Harris, "The Bubble Act: Its Passage and Its Effects on Business Organization," 54 *Journal of Economic History* 610 (1994); see Pauline Maier, "The Revolutionary Origins of the American Business Corporation," 50 *William and Mary Quarterly* 51 (1993).

¹³ 2 James Stancliffe Davis, **Essays in the Earlier History of American Corporations** (1917), Appendix B, p. 332; John Adams, Letters to John Taylor, of Caroline, Virginia, in Reply to His Strictures on Some Parts of the Defence of the American Constitutions, in **The Works of John Adams, Second President of the United States**, ed. Charles Francis Adams (1856), at p. 510.

¹⁴ On Roman *societas* and *societas publicorum*, see Ulrike Malmendier, "Law and Finance 'at the Origin,'" 47 *Journal of Economic Literature* 1076 (2009); Ulrike

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¹⁵ See Kevin J. R. Rosman et al., "Lead from Carthaginian and Roman Spanish Mines Isotopically Identified in Greenland Ice Dated from 600 B.C. to 300 A.D.," 31 *Environmental Science and Technology* 3413 (1997).

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¹⁷ On Blackstone, see Lewis C. Warden, **The Life of Blackstone** (1938), at pp. 14–16, 35–37; David A. Lockmiller, **Sir William Blackstone** (1938), p. 10. On his influence, see Albert W. Alschuler, "Rediscovering Blackstone," 145 *University of Pennsylvania Law Review* 1 (1996); Ian Williams, "Book Review: Blackstone and His Commentaries: Biography, Law, History," 71 *Cambridge Law Journal* 223 (2012); Wilfred Prest, "Blackstone as Architect: Constructing the Commentaries," 15 *Yale Journal of Law & the Humanities* 103 (2003).

¹⁸ See William Blackstone, **Commentaries on the Laws of England**, ed. Robert Malcolm Kerr (1876), Vol. 1, at pp. 467–486 ("Of Corporations").

¹⁹ On the human individual as the "paradigmatic legal actor," see Meir Dan-Cohen, **Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society** (1986), at p. 13.

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²¹ *Ibid.*, at p. 475. On *ultra vires*, see Stephen Griffin, "The Rise and Fall of the *Ultra Vires* Rule in Corporate Law," 2 *Mountbatten Journal of Legal Studies* 1 (1998).

²² See Blackstone, **Commentaries on the Laws of England**, Vol. 1, at p. 475.

²³ See *ibid.*

²⁴ See *ibid.*, at p. 476.

²⁵ See *ibid.*, at pp. 476–477, 479–482.

²⁶ See George W. Field, **A Treatise on the Law of Private Corporations** (1877), at p. 1–2; Robert C. Clark, **Corporate Law** (1986), at p. 15; *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001).

²⁷ On Binney, see William Strong, **An Eulogium on the Life and Character of Horace Binney** (1876), at p. 5–21; Robert R. Bell, **The Philadelphia Lawyer: A History, 1735–1945** (1992), at pp. 145–155; **John Hays Gardiner, Harvard** (1914), at p. 161.

²⁸ See Smith, "Banks, Law, and Politics," at p. 12–13.

²⁹ On corporate nationality, see Linda A. Mabry, "Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality," 87 *Georgetown Law Journal* 563, 581 (1999). For Story's case, see *Society for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756 (C.C.D. New Hampshire 1814).

³⁰ See *Bank of the United States v. Deveaux*, 9 U.S. 61, 64, 67 (1809) (reprinting the argument of Horace Binney).

³¹ On veil piercing in corporate law, see Maurice Wormser, "Piercing the Veil of Corporate Entity," 12 *Columbia Law Review* 496, 500, 501 (1912); Peter B. Oh, "Veil Piercing," 89 *Texas Law Review* 81, 83 (2010–2011); Lorraine Talbot, **Critical Company Law** (2015), at p. 24. For a comprehensive study of piercing-the-veil cases in corporate law, see Robert B. Thompson, "Piercing the Corporate Veil: An Empirical Study," 76 *Cornell Law Review* 1036 (1991).

³² See *Bank of the United States v. Deveaux*, 2 Fed. Cas. 692, 692–693 (Cir. Ct. GA 1808).

³³ See Anon., "The Supreme Court—Its Homes Past and Present," 27 *American Bar Association Journal* 283 (1941); William C. Allen, **History of the United States Capitol: A Chronicle of Design, Construction, and Politics** (2001), at p. 89, 107. There is some disagreement about whether Long's Tavern was located where the current Supreme Court sits or across the street to the south, where the Library of Congress sits. According to Allen, Long's Tavern was renovated and renamed the "Brick Capitol." According to Kenneth Jost, **The Supreme Court A–Z** (2013), at p. 212, the Supreme Court Building is located where the Brick Capitol used to be. Yet Jost also says that Long's Tavern is where the Library of Congress is currently located. Suffice it to say the exact location of the pub remains uncertain.

³⁴ See *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809).

³⁵ See *Hope Insurance Company v. Boardman*, 9 U.S. 57 (1809). On Adams, see Harlow G. Unger, **John Quincy Adams: A Life** (2012); Fred Kaplan, **John Quincy Adams: American Visionary** (2014). See also William G. Ross, "John Quincy Adams," in **Great American Lawyers: An Encyclopedia**, ed. John R. Vile (2001),

Vol. 1, at p. 9; Charles Warren, **The Supreme Court in United States History, 1821–1855** (1922), Vol. 2, at p. 347, and Vol. 1, at p. 390. Adams is also credited with winning a later 1810 case, *Fletcher v. Peck*, 10 U.S. 87 (1810), but that case was in fact argued prior to the *Hope Insurance* case.

³⁶ See Allen Sharp, “Presidents as Supreme Court Advocates: Before and After the White House,” 28 *Journal of Supreme Court History* 116, 118 (2003).

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³⁸ See *Bank of the United States v. Deveaux*, 9 U.S. 61, 71-77 (1809).

³⁹ See *ibid.*

⁴⁰ For a discussion of competing theories of the corporation, see Eric W. Orts, **Business Persons: A Legal Theory of the Firm** (2013), at pp. 9–51. Some scholars argue that corporate rights discussions should avoid metaphysical abstractions like personhood or

associationalism. See, e.g., Richard Schragger and Micah Schwartzman, “Some Realism about Corporate Rights,” in Micah Schwartzman et al., **The Rise of Corporate Religious Liberty** (2016), at p. 345.

⁴¹ See John Quincy Adams, **Memoirs of John Quincy Adams**, ed. Charles Francis Adams (1874), Vol. 1, at p. 546.

⁴² See *Hope Insurance Company v. Boardman*, 9 U.S. 57 (1809).

⁴³ See *Bank of the United States v. Deveaux*, 9 U.S. 61, 85 (1809).

⁴⁴ See *ibid.*, at pp. 86-88.

⁴⁵ See *ibid.*, at p. 88-89; Margaret M. Blair and Elizabeth Pollman, “The Derivative Nature of Corporate Constitutional Rights,” 56 *William & Mary Law Review* 1673, 1680 (2015).

⁴⁶ See *Bank of the United States v. Deveaux*, 9 U.S. 61, 89-90 (1809).

⁴⁷ See Smith, “Banks, Law, and Politics,” 13; *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Clerking for “God’s Grandfather”: Chauncey Belknap’s Year with Justice Oliver Wendell Holmes, Jr.

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Introduction

In the last twenty years, historians have discovered the Supreme Court law clerk. Although the first clerks were hired by the Justices in the 1880s, for much of their existence the clerks toiled in relative anonymity. Law clerks emerged from the shadows, however, when Court scholars began to appreciate the value of studying them, not only because clerks were eye-witnesses to the internal workings of the Supreme Court, but also because the clerks had substantive job duties and arguably wielded influence over the decision-making process.

Most of what we know about law clerks comes from the clerks themselves, usually in the form of law review articles memorializing their Justices and their clerkships or in interviews with reporters and legal scholars.

In a few instances, however, law clerks have contemporaneously memorialized their experiences in diaries. These materials provide a rare window into the insular world of the Court. While the recollections contained in the diaries are often infused with youthful hero worship for their employer—in contradistinction to Justice Oliver Wendell Holmes, Jr.’s claim that no man is a hero to his valet—they offer a real-time, unfiltered peek at the personalities who populated the bench and the issues with which the Court was grappling. Just such a snapshot in time is provided by the diary of Chauncey Belknap, a remarkable Harvard Law School graduate who clerked for Justice Holmes during October Term 1915. Through Belknap’s near-daily records of his clerkship, as well as his encounters with the glittering social set of pre-war Washington, we are permitted a

singular and fascinating glimpse into the colorful experience of working for one of the Court's most famous jurists.

A copy of the diary was obtained from Belknap's long-time law firm, Patterson, Belknap, Webb & Tyler. While portions of the diary have appeared in other books and articles, the diary has never been reproduced in its entirety.¹ This is due, in part, to the fact that the diary is written in a combination of cursive that varies in its readability and Pitman shorthand. Over a two-year period, two of the co-authors (Williams and Winn) carefully transcribed the diary. Once the transcription was complete, a Pitman shorthand expert was retained to translate the shorthand into English. Finally, all four authors had to agree upon words that were challenging to discern because of Belknap's handwriting. If agreement could not be reached, then the word was listed as "unintelligible" in the final text.

As they transcribed the text, Williams and Winn researched and annotated Belknap's references to people, places, and events. The text was subsequently edited to make formatting and style more consistent. For purposes of publication, an abridged version of the diary is presented here. The selected entries and portions of entries reflect the tone of the diary as a whole and highlight the significant events and conversations Belknap recorded. Brief identifications of persons mentioned and explanations of unfamiliar terms, as well as citations, are provided in the endnotes.

Before one turns to the diary, some background on its author is necessary. Belknap was born on January 26, 1891, in Roselle Park, New Jersey, to Chauncey and Emma McClave Belknap. The early years of his life were filled with hardship and loss. His father was a sales executive with the Thomson Houston Electric Company. When Belknap was two years old, his father died of yellow fever during a business trip to South America. Belknap's mother died two years later of appendicitis. Thus, Belknap was effectively orphaned by the age of four.

Relatives raised Belknap and his young sister, Fredericka.² The young children went to live on the Upper West Side of Manhattan with maternal aunt Mary McClave, who was a school teacher. Living quarters were tight, and Belknap slept on the living-room couch. Many weekends were spent farther downtown with his paternal aunts, Cornelia and Elizabeth Belknap, or with his uncle, Frederick H. Shipman. Belknap was close to his uncle, who was the treasurer of the New York Life Insurance Company.

Belknap attended public schools in New York City, graduating from the High School of Commerce. While Belknap was at the High School, a teacher recognized his academic potential. This teacher spoke to Shipman and encouraged him to help Belknap attend Princeton University. It was Shipman's resourcefulness and belief in his nephew that made Belknap's future education possible. Shipman tutored Belknap for a year and subsequently paid his college tuition. To attend Princeton, Belknap was required to pass a test proving that he had Latin skills equivalent to a year of study. He passed this test after studying for one month.³

Belknap attended Princeton while Woodrow Wilson was the university's president. Belknap met Wilson while at Princeton and later recalled that he had "great admiration" for the future United States President. Belknap studied History, Politics, and Economics, and wrote his senior thesis on the British army officer Charles George Gordon, nicknamed Gordon of Khartoum.⁴ Belknap was also the managing editor of the *Daily Princetonian* newspaper and a member of the debate team.

Belknap graduated *cum laude* on June 11, 1912, delivering the valedictory address before his 255 classmates.⁵ After a summer trip to Europe, he arrived late to Harvard Law School.⁶ His intellect more than made up for the missed days, and, at the end of the first year, Belknap's grades earned him a spot on the *Harvard Law Review*.⁷ While at

Harvard Law School, Belknap learned at the knee of some of the institution's most illustrious professors, including Samuel Williston, Ezra Ripley Thayer, Joseph H. Beale, and Austin W. Scott. During his third year of law school, Belknap also had the chance to socialize with a new law professor named Felix Frankfurter—whom Belknap later described as a “fascinating companion.”⁸ On three occasions, Belknap and Frankfurter dined with local Boston attorney Louis D. Brandeis and his wife, Alice.

During his third year of law school, Belknap was called into Dean Ezra Thayer's office and offered a clerkship with Justice Holmes. Belknap later recalled: “He said ‘I had a similar job with Justice Horace Gray . . . and it was the most interesting year of my entire life . . . I think you will find Holmes to be even a more interesting figure than I did Gray.’”⁹ Belknap added that his only reservation

concerned clerking for a Justice as elderly as the seventy-four-year-old Holmes. “I wondered whether he would survive the entire year, and that I might not find myself in the course of the year stranded and looking for a job when law offices were not employing young lawyers.”¹⁰ Belknap, however, decided “to take the chance” on Holmes, who would live for another twenty years. Years later, Belknap's daughter Barbara learned from her history teacher that Holmes always selected the “brightest” student for a clerkship. Barbara went home and asked her father about her teacher's statement, to which Belknap teasingly replied, “Not always the brightest, but the best.”

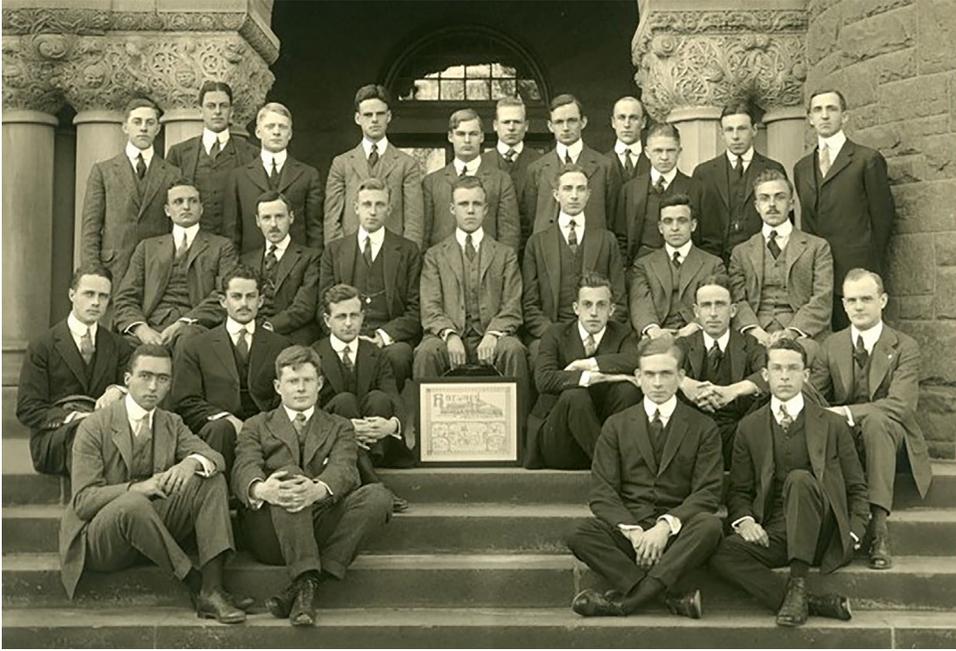
In the fall of 1915, Belknap arrived in the nation's capital. The recently widowed President Woodrow Wilson occupied the White House. In December 1915, Wilson would marry Edith Bolling Galt, a native of Wytheville, Virginia, and the widow of a jewelry store owner. News of her engagement to President Wilson created a small scandal among the Washington social circles in which Belknap moved in 1915, as wild rumors circulated that President Wilson had been unfaithful to his late wife, or worse, had planned her death.

It was also a Washington preoccupied with the drumbeat of war. To the south, the Mexican Revolution continued to rage. Several of Belknap's diary entries discuss the revolution, including the massacre of American citizens by Pancho Villa's troops in January 1916 and the subsequent dispatch of American troops to the border. And although America had not yet entered the First World War, the violence in Europe filled the newspaper and captured the attention of many in the nation's capital, including Belknap.

During his clerkship with Holmes, Belknap lived in a brick, three-story row house located at 1727 Nineteenth Street NW, in Washington, DC. In the spring of 1912, Commissioner of Indian Affairs Robert G. Valentine invited two of his friends, young lawyer Felix Frankfurter and Assistant Attorney General Winfred T. Denison, to live with



Orphaned at the age of four, Chauncey Belknap was raised by relatives in New York City. It was an uncle, Frederick H. Shipman, who allowed him to attend Princeton University by tutoring him and paying his tuition. Belknap delivered the valedictory address to classmates in 1912 and would later serve on the Princeton board of trustees for twenty years.



Belknap's good grades earned him a spot on the *Harvard Law Review*; he is pictured above in the second row from the front at left with the other twenty-seven editors of the law review in 1914-1915. Dean Ezra Thayer approached him in his third year to offer him a clerkship with Justice Holmes.

him in the large home. A year later, Loring Christie, an attorney at the Department of Justice, and Lord Eustace Percy, a diplomat at the British Embassy, joined them.

Historian Brad Snyder writes that the Dupont Circle home soon became a "political salon" and a gathering spot for supporters of the Bull Moose Party.

[The residents] threw dinner parties, discussed political events of the day, and wooed young women and high government officials with equal fervor. Ambassadors, general, artists, lawyers, Supreme Court justices, cabinet members, and even a future US president dined there. "How or why I can't recapture," Frankfurter recalled, "but almost everybody who was interesting in Washington sooner or later passed through that house."¹¹

Soon its young tenants started calling the house "the House of Truth" in recognition of the philosophical debates between themselves

and frequent guest Justice Oliver Wendell Holmes, Jr.

Over the next few years, the original tenants moved out and were replaced by a new group of bright young men. Several of the temporary tenants were supplied by Justice Holmes, whose legal secretaries lived at the House of Truth. They included George Harrison, who clerked for Holmes during October Term 1913, Harvey Bundy (October Term 1914), and Chauncey Belknap. It was Felix Frankfurter, now teaching at Harvard, who secured lodging for Belknap at the House of Truth. "I never can repay the debt of gratitude I owe to Felix [Frankfurter] for this introduction [to the House]," Belknap later remarked. "It meant that I was immediately introduced to the liveliest and most interesting group of people of my own age and a little older in the city."¹²

Belknap shared the residence with Montgomery Boynton Angell ("MBA" in the diary), Louis G. Bissell, Franklin Ellis, and Edward Henry Hart. Angell was a

graduate of Princeton University (where he roomed with Belknap) and Harvard Law School. Now Angell was working for the Interstate Commerce Commission. He would serve with distinction in World War I before entering private practice with the law firm that eventually became Davis, Polk & Wardell.¹³ The two men would become life-long friends and served as godfathers to one another's children.

Both Bissell and Hart were Columbia Law School graduates and attorneys, with the former working at the Interstate Commerce Commission. Hart would subsequently marry Frances Newbold Noyes, whose name appears throughout the diary. By all accounts, Noyes was already an accomplished young woman when she met Belknap. The daughter of the publisher of *The Washington Star*, Noyes came from wealth and privilege. And her educational background matched that of the men of the House of Truth, as she had studied at both the Sorbonne and Columbia University. Belknap would later describe Noyes as the "principal ornament" at Justice Holmes's afternoon teas.¹⁴ She later worked for the Naval Intelligence Bureau as well as the Y.M.C.A. as an overseas canteen worker during World War I, and she would go on to a successful publishing career before her premature death in 1943.¹⁵ Edward Hart himself would serve as general counsel to the Federal Reserve Bank of New York.

Described by Harvey Bundy as a "jolly man around town" but a "rather queer addition to the venerable salon," Ellis rounded out the group of tenants. Snyder explains that "Ellis's main interests consisted of playing bridge and golf, not law and politics."¹⁶

In some ways, the Supreme Court that Chauncey Belknap experienced would be difficult to recognize today. The Court did not have its own "home" and the Justices did not have their own Chambers. It would be another twenty years before the present Supreme Court building was built. During October Term 1915, the Justices heard cases in the Old

Senate Chamber and worked at offices in their own homes. Given the decentralization of the Court's members, Belknap had few opportunities to interact professionally with the other Justices and their clerks.

When Holmes was appointed to the Supreme Court, he adopted the practice of his predecessor—Horace Gray—and hired law clerks, although Holmes referred to his assistants as "legal secretaries." Holmes' first law clerk was Charles Kennedy Poe, who held the position while simultaneously completing his legal studies at Columbian University's Department of Law—now George Washington University Law School.¹⁷ All subsequent Holmes clerks would be Harvard Law School graduates selected by the law school faculty; they served for one year.

At a minimum, the Holmes clerks were expected to do basic legal research, review petitions for certiorari and prepare reports, and occasionally provide feedback on drafted legal opinions. The Justice also required his clerks to perform basic non-legal clerical duties, such as balancing Holmes's bank account. These duties were hardly onerous. The more memorable part of the clerkship was the time spent with Holmes. He engaged the clerks in philosophical debates, took them to his favorite spots in Washington, including the Old Soldiers' Home, the Augustus Saint-Gaudens sculpture at the Rock Creek Cemetery grave of Clover Adams, and the Washington zoo, and shared his "tall talk" about the Civil War. And the clerks often found themselves "masters of leisure," playing golf, attending Washington soirées, and reading literature, often recommended to them by Holmes.

During his clerkship with Holmes, Belknap himself read an astonishing range of books and plays. They included **Hamlet**, **Romeo and Juliet**, and **King Lear** (Shakespeare), **Don Quixote** (Miguel de Cervantes), **Beyond Good and Evil** (Friedrich Nietzsche), **Law and Public Opinion in England** (A.V. Dicey), **The World Crisis and Its Meaning** (Felix Alder), **Physics and Politics**

(Walter Bagehot), **Marius the Epicurean** (Walter Pate), **Social Control** (Edward Alsworth Ross), **The Three Musketeers** (Alexandre Dumas), **Pure Sociology** (Lester Ward), **La Sorcière** (Victorien Sardou), **The Foundations of Belief** (Arthur Balfour), **An Introduction to the History of the Science of Politics** (Frederick Pollock), **The Greek Commonwealth** (Alfred Eckhard Zimmern), **Human Nature in Politics** (Graham Wallas), **History of the French Revolution** (François Mignet), **Hernani** (Victor Hugo), **The Picture of Dorian Gray** and **Lady Windemere's Fan** (Oscar Wilde), and **Evan Harrington** (George Meredith). And, of course, **The Common Law** by Oliver Wendell Holmes, Jr. Given the sheer number of pages consumed by Belknap, one wonders when he had the time to read legal briefs.

The most dominant figure in the diary entries is Justice Holmes, who hardly needs introduction. The basic details of the Holmes story are well-established. He was the son of the famous Dr. Oliver Wendell Holmes, Sr.; was a thrice-wounded officer of the Twentieth Massachusetts Volunteer Infantry; the author of **The Common Law**; and a justice on first the Massachusetts Supreme Judicial Court and then the Supreme Court of the United States. However, there is a new dimension to the Holmes who appears in the diary. While most accounts by his law clerks feature an aging Holmes on the decline, Belknap presents us with a picture of a vigorous Holmes in his mid-seventies. This is a Holmes who has yet to be canonized by legal scholars and the press but who is at the height of his intellectual powers and still engaged in the whirl of Washington society.

Another wrinkle is the appearance of Fanny Holmes in the diary. Fanny herself has proved to be an elusive figure for Holmes scholars, often dismissively described as an odd recluse. Belknap's diary entries offer a different picture. "She was a most extraordinarily entertaining creature," he later explained. "She simply captured everyone by

her wit, her understanding and penetration of human beings and their motives."¹⁸ Fanny called Belknap "Mr. Secretary," and during his clerkship she recruited the young man to help her in her "plot" to plan a surprise birthday party for the Justice. And Belknap also had a front row seat on the practical jokes that she played on her husband. To Belknap, Fanny was a "rare human being" who possessed "deeper insights into human beings than Holmes himself."¹⁹

Belknap had the weekly opportunity to observe Fanny during her "at home teas," a ritual of Washington high society. Every Monday afternoon, Fanny would open her home to visitors, as was expected of wives of Supreme Court Justices. Belknap discusses these teas in his diary, as well as the fact that the Holmeses preferred to entertain young people rather than stuffy politicians and their wives. Belknap would later recall:

Young people in Washington were just devoted to Justice Holmes. He jokingly said to me when I started to work to bear in mind that part of my duty was to make sure that the liveliest girls in Washington attended his and Mrs. Holmes' parties. This was easy to do, because they were all just thrilled at the idea of being there with him, listening to him talk; they would sit on the floor sometimes, at his feet. Mrs. Holmes would pay very slight attention to the Congressmen's wives who would turn up at the open house occasions. She would sometimes whisper to me to "give that 'pouter pigeon' over there this little glass of Cherry Bounce and see if it will bounce her out."²⁰

The picture that emerges is that of a witty woman who gave her husband no quarter and who frequently interacted with the legal secretaries, a startling contrast to the gray, semi-invalid who briefly appears in many Holmes biographies.

Throughout the diary, Belknap records Justice Holmes's spontaneous observations about his fellow "scorpions in a bottle." For most of October Term 1915, the Court was short-handed because of the long illness of Justice Joseph R. Lamar, who would die in January 1916, and the contentious confirmation process of his successor, Louis Brandeis. Accordingly, for most of the Term Justice Holmes sat with Chief Justice Edward Douglass White and Associate Justices William Rufus Day, Charles Evans Hughes (who would resign in June 1916), Joseph McKenna, James C. McReynolds, Mahlon Pitney, and Willis Van Devanter. Justice Brandeis would join the White Court in June 1916, after Belknap's clerkship had ended.

Not only was Belknap privy to Justice Holmes's uncensored views of "the boys," but he had a few opportunities to make his own observations. He attended several sessions of Court when the Justices orally presented their decisions, and his November 29, 1915 diary entry includes humorous reflections on the Justices' unique mannerisms.

Belknap also discusses many of the cases before the Court during the October 1915 Term. The issues involved in these cases included "alien labor" and immigration²¹, a minimum wage case,²² freedom of contract,²³ the regulation of interstate commerce,²⁴ labeling requirements under the Pure Food and Drug Act,²⁵ and eminent domain.²⁶

Finally, the diary contains examples of Belknap's extracurricular activities. Debating with famous visitors to the House of Truth. Outings with Montgomery Angell. Flirtatious encounters with the vivacious Frances Noyes. Long hikes through nearby forests. White House receptions. Golf outings at the Chevy Chase country club. Observing debates from the House gallery. Evenings at the theater. Attending the annual State of the Union Address. Dancing the night away at glittering charity balls. And teaching himself French.

As noted above, only an abridged version of the diary is presented here. We have

selected entries and portions of entries that reflect the tone of the diary as a whole and highlight the significant events and conversations Belknap recorded. These entries are annotated to provide additional information about the individuals and events referenced by Belknap.

Thursday, October 7 [1915]

The N.Y. sleeper pulled into Washington in a heartless downpour. After breakfasting in the station on poor eggs and strange news—that the President is to remarry—trolley to 1727 Nineteenth Street, between R & S streets, Frankfurter's famous House of Truth. It's a narrow, red brick three story affair, a bit dingy outside and in. I soon discovered the passage into our dining-living room, a connected studio of generous proportions, with skylight and broad windows. It saves the house. MBA and I share the second-floor front.

Lunched with MBA, whom I had not seen since we parted in Cambridge last June. He's enthusiastically interested in his work with Commissioner Daniels of the I.C.C., formerly our Professor of Economics at Princeton. Part of the afternoon we heard an argument before the I.C.C.—wretched.

At dinner, made the acquaintance of all our housemates: Lou Bissel, Princeton '04, and a Columbia Law School man is now with the I.C.C....Ed Hart, Yale and classmate of Bissel's at Law School, was formerly at the Commission—he is now fallen from grace to be at the South Eastern Railroad; Franklin Ellis, Harvard, is a jolly man about town, with a good heart and sweet disposition. We will have a good year together.

Friday, October 8

Presented myself at the house of Justice Holmes, 1720 I Street, on the minute of

eleven, and was ushered up to his study on the second floor back, by the Negro messenger [Arthur Thomas]. The Justice was writing at his desk and greeted me cordially. He is a good specimen for 74, with deep sparkling eyes under bushy brows, hair thick and not yet white, flowing white moustache. He stands a trifle over 6 feet, I should say, erect and a clean-cut figure; in his purple velvet jacket with a long cigar, he looks more like a cavalry captain than the popular conception of a jurist.

Soon I was introduced to the well-stocked library which lines the walls of the study and my room, which is immediately adjoining. It reveals versatile tastes, from the Year Books to Walter Lippmann, from [William] James to Rabelais. Over the mantle is what the Justice describes as “the family mausoleum, where I keep all my father’s books in their various editions and my grandfather’s—both of them wrote books.” He inquired whether I was interested in literature and gave me the run of the library in my free time. I chuckled when he complimented my handwriting. Dean Thayer²⁷ is the only other person who has been equally generous, and these two have the worst hands ever man attempted to decipher. The Justice tells the story on himself of Chief Justice Field,²⁸ of Mass., who exclaimed in despair, “Holmes, you are indictable as a fraud at common law, because your handwriting looks legible but isn’t.”

After setting the judicial house in order a little, we went out for a walk and the Justice outlined his theory of economics. I can’t do him justice—who could?—but here is the gist: “I find it helpful to try to think in terms of things and not words. In economics we should think of the disposition of a stream of products, not of ‘ownership,’ etc. Someone told me in horror-stricken tones that 50,000 people own 95% of the wealth of the country. I don’t care. I would if they consumed 95% of the stream of products, but that is a physical impossibility. The amount of that stream

which the rich consume in excess of the poor is so small, that if scattered among all the poor it would be imperceptible. The rich enjoy the products of the vineyards of Champagne, fine silks, and choice foods. But these cannot go round among all; and if you object to the enjoyment of such luxuries, the way to prevent it is to forbid their production. Grow grain in the fields of Champagne. It will only make the world a little duller. If a man is owner of property it merely means that he, rather than anyone else, determines how much of its product shall be put back into this property, and how much shall be deflected into other channels, for the satisfaction of other social needs which the owner foresees.

His judgment of how his property can best serve the needs of society is stimulated by self-interest, for the most profitable channel is the one that society demands most. The socialist regime differs from the regime of private property only in substituting the judgment of the government official for the private individual, in making this decision. My first doubts of the regime of private property were experienced when I read of Andrew Carnegie’s endowment of a Public Library. By deflecting his property to a non-productive enterprise of this sort, he was failing to fulfill his public function.”

I met Mrs. Holmes, a peculiar looking woman of the Justice’s age, with a reputation for extraordinary brilliancy. She was warm with her welcome and hoped I would enjoy Washington.

Saturday, October 9

Wigmore²⁹ has written the Justice for a list of his best cases in the Supreme Court and I have been engaged all day culling them out. The Justice binds his opinions in separate volumes for each year and includes at the back of each volume the sheets of his circulated opinions on which his brother justices have written their comments

“damnatory or otherwise,” as he says. These should make the volumes of considerable historical interest when they find their way into the Harvard Library, whither I presume they are bound. How some of the Justices strip themselves naked: Hughes agrees, “reverently”; while [Mahlon] Pitney comments on a reference to “judicial thought from Kant & Jhering”³⁰—“I agree but dislike the

reference to medieval law and speculative philosophy. It savors of pedantry.”

I am invited to dine with my chief and his wife tomorrow at the Willard—“the Tavern,” he calls it.³¹ Today this question came up for decision—should the Justice’s lady leave her card on the President’s fiancée, Mrs. Galt. After some discussion they came into my room and called up the Chief Justice for



When Belknap met Holmes (pictured here in 1914, a year before Belknap’s clerkship) for the first time, in the Justice’s home study, the clerk thought that with “his purple velvet jacket with a long cigar, he looks more like a cavalry captain than the popular conception of a jurist.” Holmes was seventy-four and would not retire until he was ninety.

advice. And the Chief having no objection, the great step was resolved upon.

Sunday, October 10

Bright fall day. Had 36 holes of atrocious golf at Chevy Chase [Club] on Franklin Ellis' card, playing with MBA against Thaddeus Thompson [sic] and Shoemaker, both U.S. Navy.³² In the evening, dined with the Holmeses, who were both as delicious as the dinner. Mrs. H claims one of the regicides among her ancestors and related an experience on their first visit to England. An acquaintance invited them to her country house and offered as a special inducement to show the hiding place of the sainted martyr king; adding, "Oh, if I could lay my hands on the descendants of one of those murderers, I would strangle them." So they cautiously avoided the house.

The Justice had some amusing tales about his "governor" [Oliver Wendell Holmes, Sr.] and apologized profusely because the water flowed like Champagne owing to Washington Sunday Laws.³³

Monday, October 11

Little work to do, as the Court did not convene till noon today. I went down to the Capitol, presented the Justice's card to the Marshal who informed me that I have the privilege of the bar and showed me into the Supreme Court chamber. Promptly at twelve the gavel rapped, the audience rose, the deputy marshal announced, "The Honorable, the Supreme Court of the U.S.," and they filed into their seats. Lamar's chair was vacant, as he has not recovered from an attack of paralysis.

The court is an imposing array of men, except for Day and McKenna who are insignificant looking, the former being almost emaciated in appearance. Holmes' famous witticism hits this off: when Day's son [William, Jr.], as large in stature as his father

is small, was presented for admission to the Bar of the Court, he remarked, "Oh, a regular block off the old chip!" The New York Alien Labor Law Case consumed the entire day and was argued by counsel whom the Justice aptly characterized as "chaotic-minded."

Tuesday, October 12

A pile of records and briefs on my desk signified work had begun. It is my duty to submit a report of the facts and arguments to the Justice who then avoids the necessity of wading through a chaotic mass of words to get at the essence of the dispute.

This morning he was showing me a book of letters written from his parents while he was at the front on the Civil War. On one page was pasted a slip of paper with the faint penciled scrawl, "I am Oliver Wendell Holmes of the 20th Mass., son of Oliver Wendell Holmes of Boston, Mass." This had been written as he lay wounded within the enemy's lines at Antietam, but later the Confederate line was pushed back and he was not captured.

Bissell, Hart, MBA, and I dined and spent the evening with Frances Noyes at Silver Spring, Maryland, just outside the district. She is an old friend of the other men and of Mrs. Harrison,³⁴ who motored me out. Mr. Noyes is owner of the *Washington Star* and President of the A.P.,³⁵ and his *filia* is keen, vivacious, cultivated—attractive without beauty—a tiring bundle of nerves; at 25, the author of *Mark*, a novel of English high society that I have not read and probably shall not.

Wednesday, October 13

Busy most of the day over records and briefs—none of great interest. Yesterday, says the Justice, Baron Reading, the Lord Chief Justice of England, who is Chairman of the commission to negotiate the British war loan, sat with the [C]ourt, in a special chair

beside the Chief Justice. Only Herschell and Coleridge have been similarly honored.³⁶

My position in the Holmes household has its humorous aspects. Today, Mrs. H declared, “If he doesn’t treat you right, remember I am always right down stairs!” But he is wonderful and talks over his decisions as if I were on an equal plane of learning and power. His assumptions are a trifle embarrassing occasionally.

Thursday, October 14

Busy all day on cases which showed how some lawyers waste their clients’ money.

Last night, the British Ambassador entertained at dinner for Lord Reading, inviting the Supreme Court.³⁷ His solution of the question of precedence between [Chief Justice] White and Reading was happy. Being a man’s dinner, he asked White to be hostess and placed Reading on his right. The Justice thinks the Lord Chief talked well and had the appearance of marked intellectual distinction about the mouth, “but McKenna thought he was a little light on his ‘h’s.”

Lou, MBA, & I saw [George Bernard] Shaw’s *Androcles and the Lion* at the Belasco tonight.³⁸ Shavian humor with a touch of irreverence. As we walked up Connecticut Avenue, about 11:30, we passed the President walking alone in the direction of the White House, with two secret service men 20 feet behind. In an Inverness overcoat,³⁹ top hat, and cane, he does not resemble the Woodrow of Princeton days.

Saturday, October 16

Finished my work early and talked with the Justice. He is fond of propounding the theory that the ideas in most books are in the course of 25 years so worked-over, developed, and absorbed that the book is to all intents dead. He means it is living only in its progeny. That is what makes it hard to appreciate the

cause of the greatness of old books. He had been reading Plato’s *Banquet* and thinks the dominant factor in its greatness is that here Plato, first of all men, points out the interest of a life of ideas rather than of action.⁴⁰

We were also talking of ideals of government. He referred to a book by James J. Hill, whom he regards as one of the greatest of Americans.⁴¹ Hill deplores the day which he sees coming, when our resources will be fully developed or exhausted, the nation weakens, etc. “But,” says the Justice, “I was about that time re-reading some Greek and thought of the little republic which produced those men. Suppose we do fall from Jim Hill to Aeschylus!”

Frank Ellis dropped in about dinner time and took me down to the Metropolitan Club for the meal.

Evening re-reading *Hamlet*.

Monday, October 18

Busy all day accumulating material for an opinion the Justice is writing in *Gegiow v.*



Justice Holmes preferred the company of young people, so his wife Fanny (pictured in her youth) “tried to freeze the old folks out” when she hosted her Monday tea receptions.

Uhl.⁴² He is denying the right of immigration officials to exclude immigrants solely because of a glut in the labor market at the place of their immediate destination, Portland, Oregon. I left him at night with the results of my day's work: nothing on all fours, but also nothing he can't get around.

Tuesday, October 19

The Justice had just finished his opinion when I reached his house. "See what you think of this," he said and insisted that I sit down while he stood at his desk reading. It was characteristically vigorous and free from the junk which clutters so many opinions. I told him I had not realized how strong the side could be made, and he seemed pleased. Worked on a new batch of cases all day and walked home as far as the British Embassy with the Justice. I spoke of my astonishment at the speed with which he finished his opinion. He laughed: "Yes, my brothers sometimes chaff me a little about it—but it's largely a question of putting your mind to it. With most cases, it's the impact without your bit there that counts, just prolonged pressure."

Dinner at University Club with David Lawrence, Princeton 1910, and now Associated Press correspondent.⁴³ He has just returned from a visit to [General Venustiano] Carranza at Vera Cruz and poured out a vivid story of his journalistic achievements. The worst part of the newspaper reporter's life would be that his standards of success, the getting of a scoop, generally necessitates conduct bordering on the dishonorable.

Thursday, October 21

The Justice has most of the work in his hands and was unusually chatty even for him. "My boy, is this the 21st of October? Fifty-four years ago this afternoon I was wounded

in the Battle of Balls Bluff,⁴⁴ twice. I thought they'd done for me"—and then I had the whole story.

Saturday, October 23

The Justice was aroused this morning by a statement of Felix Adler's in his new book on *The World Crisis*,⁴⁵ that ethical development is the end of man. To him, it [life] is the end more than a means to the end; it is simply living, functioning to the full extent [of your] power. It has a flavor of Goethe.⁴⁶

Monday, October 25

The Justice must have been annoyed at the conference on Saturday. He doesn't like Pitney, and today he didn't hesitate to say so. "He is essentially a small-minded man, not to be compared with the President's [other] appointees, Hughes, Van Devanter and Lamar.⁴⁷ Hughes is to my mind a very great man. But Pitney has the contentious, small spirit that gets in the way. He bothers counsel far too much on the bench and is too belligerent. I think he will have to be spoken to. And yet he is an exceedingly conscientious man, who studies his cases carefully."

The Justice was working on his decision in *Zeckendorf v. Steinfeld*⁴⁸ and was anxious to use a quotation he remembered in the Year Books: "*Ne glosez point le Statut; nous le savoms meuz de vous, gar nous les feimes*" originally called to his attention by "Fred Pollock."⁴⁹ As he left, he asked me to try to discover it. I hurried down to the Capitol, heard the few opinions handed down, and then made for the Supreme Court library on the floor below. As I was about to give it up, this needle in a haystack, I happened upon a reference which on verification in the Library of Congress proved to be what he was looking for. I was waiting with it when he came in and his delight was so genuine it was a pleasure to

see. "Come to my arms, my boy, you're an angel." He was still chuckling over it as I went downstairs.

Tonight I started on [Walter] Bagehot, *Physics and Politics*.⁵⁰

Tuesday Oct 26

The Justice is still elated over my little discovery. I hate to think how nearly it escaped me. "Good morning, young hero," was his greeting. I think his impact on the case was doubled by his joy at being able to use the little sentence, over 600 years old. Will someone be setting one of OW's sparkling little gems in the midst of his own jewel, 600 years hence?

Working all day on the resubmitted cases, evening on Bagehot. This book is a good example of the Justice's theory that 25 years marks the life of most books. Some of Bagehot's thinking rings dull to one who has heard Pound lecture.⁵¹

Thursday, October 28

At work all morning on a peculiarly tangled bankruptcy case. The Justice was finishing an opinion in a close interesting case about which his mind was not decided until the end, *United States Fidelity and Guaranty Co. v. Riefler*.⁵² I have done quite a bit of work on the authorities for it, but found little to help.

Friday, October 29

It seems from the papers of the Justice that the Minimum Wage Law is to be knocked out 5 to 4. Day, McKenna, Hughes, and Holmes dissent. The Justice seems to have noted with pleasure Pitney's comment in conference, "Communitistic proposition," and his own vigorous "I take the more pleasure in voting to affirm that I regard the law as the

imbecile product of incompetence." Imagine Pitney's expression!⁵³ The Justice gave me a little volume of his speeches, which is not so widely known as it should be.⁵⁴ Dean Thayer, whose competence as a critic of the experience of speakers could hardly be exceeded, said the Harvard Law Assoc. address, which is last in the book, was the most impressive thing he had ever heard.

Sunday, October 31

Languid Indian summer day, but MBA and I undertook to be vigorous, and started out early for a tramp with lunch stowed away in our pockets. After a trolley to Georgetown, we walked across the Potomac Bridge and turned upstream, following the wooded rocky shore as far as the Chain Bridge. It was a tough scramble in the heat, and we were glad to take the pike for a stretch. After luncheon beside a brook on the road-side, we continued at a good pace through riotous autumn coloring, occasional trim farms, with corn stalks dotting the fields.

We stopped for water at a fresh-painted farmhouse, which seemed to have risen like a mushroom from the decaying ruins of an older stone edifice. The occupant was an open-faced, well-spoken gentleman who, on discovering our Princeton affiliations, declared himself Yale '84. He directed us over paths through his farm and woodland to a bluff or crag which juts out into the Potomac and commands an unsurpassed view both up and down the stream. Here we stretched out on the rocks in the warm sun and listened to the song of the rapids far below us. Blessing the happy chance which guided us to the good man's house, we boarded a trolley for home.

The day's adventures were not yet over. I was interviewing some coon hunters, who displayed proudly a beautiful possum captured the night before. He wrapped his tail around my finger and I supported him for the admiration of the crowd until he suddenly dropped and scurried for refuge beneath the

skirts of a charming passenger. Then there was commotion, then there were shrieks, and a rush to the other end of the car, while Mr. Possum curled himself up under the seat and was easily returned to the bag. Tonight Frances Noyes's married sister invited us out to dinner, but we resisted the temptation and went early to bed.

Monday, November 1

The Justice engaged on a condemnation case—lands for the Ashokan Reservoir to serve New York City.⁵⁵ He left the record in my hands to see if the evidence supported his opinion, which it unquestionably did to spare. But as I read the opinion in his unfinished form, it did not impress me as many of his have. The Court came down with an opinion through Hughes, knocking out the Arizona Alien Labor Law.⁵⁶ This was the case I wrote up for the Review last year—I sustained myself.⁵⁷

This was the day of Mrs. Holmes's first tea—for the youngsters. All the men I know in town were there—with one unmarried lady, Frances Noyes, and her sister Mrs. Blagdon.⁵⁸ But the Justice performed in his very best style, looking younger and handsomer than ever. His genial "My dear boy, how are you?" would put each new arrival at ease, while Mrs. H does her part to perfection.

Finished Bagehot tonight, and started in on some French, which I must learn to read, at least. Today the Justice read some great lines from Verlaine's "Grotesques," translated in the *New Republic*, and I was forced to admit I could have made nothing of them in French.⁵⁹

Sunday, November 7

More fall in the air than heretofore. MBA and I off for a tramp over the country we discovered last week on the Virginia shore. We set out at Jackson, which was our *terminus ad quem*⁶⁰ last week, and after a

chat over the fence with our jolly old friend Dr. Scott, we scampered down the ravine to the riverbank and worked our way along its fringe of underbrush and trees to a tiny Japanese lake, between two cliffs not far back from the Potomac.

Here, in the sunshine far above the water, we took out our sandwiches and then stretched out for a smoke and talk, while the fine gold of spider webs danced over our heads. Through the afternoon we clambered over palisades, pushed through underbrush, and eventually emerged at Great Falls, from whence we took the trolley home. Then it was a jump into the raiment of respectability, and tea with Frances Noyes, at their city home, N. St. and Vermont Ave., a beautiful old-fashioned house. From there we hurried over to supper with the Tuckers and had an evening of good talk.

Monday, November 8

On my arrival, the Justice was deep in his new case, which is nothing of moment—a contract suit by the government. He put me to work on a record and briefs of a case—*Penn R.R. Co. v. Jacoby*,⁶¹ which involves the effect of reports of the I.C.C. as prima facie evidence to a jury. I have tried to make myself letter perfect on it, for he wants to talk about it and it is no simple matter to furnish the material for his cunning intellect.

Mrs. Holmes's tea this afternoon. I went downstairs late, and she didn't begin to pour until six or later. As I handed over a cup she whispered, "I was waiting to see if I couldn't freeze the old folks out." She certainly prefers the "youngsters" and the Justice has far more fun with Frances Noyes than with her older and more sedate sisters. Mrs. Holmes talked of Justice Brown, who was a delightfully entertaining old gentleman.⁶²

I took Frances Noyes home and remained to dinner. Mr. Noyes more animated than usual and full of interesting comment on the administration. They are one of the few



Frances Noyes (above at wheel) socialized frequently with Belknap and attended teas at the Holmes residence. She became a writer of detective fiction and short stories and married Belknap's friend Edward Henry Hart in 1921.

Washington families who are able to forgive the President his social gaucherie—although they are keenly alive to it—and who recognize how large he looms before the country and the world. It is a testimony of their good judgment, for none can miss more the authenticity of the Tafts.

American reports, the Justice compared the writers to cuttlefish; they seek protection for their feeble intellects in the obscurity of an inky cloud of words. They have a fear of sharp thinking.

Tuesday, November 9

With few submitted cases to occupy me this week, I am the master of a magnificent leisure, which I prepare to utilize in studying a book on literary style entitled, *The King's English*,⁶³ no one knows better than I how frequently I massacre it. The Justice was busy with an opinion and postponed my report on *Penn R.R. Co. v. Jacoby*.

During an evening at home, I read French and half of *Romeo and Juliet*.

Thursday, November 11

In speaking of the diffuse, loosely reasoned opinions which fill so many of our

Friday, November 12

Most of my day was free to give to *The King's English*. It discloses so many pitfalls that I shall soon hesitate to take a pen into my hand.

Saturday, November 13

On my arrival this morning, the Justice said, with one of his finest smiles, "Well, my boy, I have a belly full for you. We have to decide on the constitutionality of the Migratory Bird Law,⁶⁴ and the Chief Justice inquired if I knew any young men from Cambridge whom we could put to work on the authorities. I thought of you, and although I won't turn you over to the Furies, we might see what we can do with it." I smiled,

recalling [Harvard Law School Professor Eugene] Wambaugh's contemptuous treatment last year of the arguments to uphold the law. But the Justice is strongly unimpressed by them. "I am convinced that it would be best for the country to sustain it, and when that is true I think we are entitled to go a long way."

I suggested the analogy of the *Insular Cases*.⁶⁵ He replied that those had never given him the least trouble. "You know, that is the one matter about which Roosevelt talked to me when he called me down here before my appointment. He said he wanted to know if I was 'sound' on the insular matter. I told him I presumed I was talking to a gentleman who would understand that I preserved my judicial independence; but I had no hesitation in telling him what I had often said when the matter of the post was furthest from my mind, that I saw no possible objection in the Constitution to the question. Moreover, I don't believe any provision in the Constitution applies *ex proprio vigore*⁶⁶ to the Islands. Brown's talk about fundamental matters I have never been able to comprehend. I always to try find one hint of Congress extending the Constitutional provision to the matter in question.

Roosevelt could never understand the judicial attitude toward a question. Everything was black and white with him. Take the Northern Securities Case,⁶⁷ which came up shortly after he had appointed me, and which he was very anxious for us to decide against the merger. I dissented from the decision in favor of dissociation. [Philander C.] Knox⁶⁸ told me afterward that Roosevelt was so angry he swore he would never ask me to the White House again, but he did, and we talked about it all over long afterward."

Sunday, November 14

A dismal rainy day, fit only for the fireside, blazing logs, a pipe and a book. I provided myself with all and had some happy hours over the concluding pages of *Marius*;⁶⁹

he turns from Epicurus to Christ, but gives his life for his friend before he is baptized.

Felix Frankfurter came down from Cambridge for the weekend. We saw little of him during the day, but had a crowd in for dinner: Norman Hapgood, the editor of *Harper's Weekly*; Thurlow Gordon; Robert Szold; [George] Rublee, the new Federal Trade Commissioner; and half a dozen others.⁷⁰ Hapgood and Felix debated the President's preparedness program with warmth and brilliance, and it seemed to most of us that Hapgood made out a strong case for the administration. After dinner I had a long chat with [William] Stoddard, the Washington correspondent of the *Boston Transcript*.⁷¹ We were all entertained by Dr. Irving, who gave a vivid description of a bicycle trip through the war-swept Balkans, from Constantinople to Sarajevo. He has less admiration for the Servians than George M. Trevelyan,⁷² who talked about them at Cambridge last year; Irving thinks the Bulgars [sic] superior as a people.

Monday, November 15

The Court adjourned today until after Thanksgiving, but a conference kept the Justice at the Capitol all day. I could find no migratory bird material in the home library, and therefore spent the day on some reading of every own—a few chapters in Lester Ward's *Outline of Sociology*.⁷³ When the Justice came in and saw what I was reading, he advised me to start in with Ross's *Social Control*,⁷⁴ "a stranger and more original piece of work."

Tuesday, November 16

The resubmitted cases have arrived and I spend part of the morning on them. Toward noon, the Justice and I went for a walk and he stopped for a few minutes to cut some coupons at the Riggs Bank. We were talking

about the protective tariff. "It has always seemed to me," he said, "that protectionists and free traders start their arguments from different premises. If national rivalries are disregarded and war [unintelligible] as obsolete, the free trade reasoning is irresistible. But if statesman must take into account the probability of war, then the necessity of making a nation of self-supporting is a weighty consideration in favor of protection. The Chief Justice, who is a Louisiana man, told me he was converted to protection by the Civil War, when his mother had to make him a suit of clothes out of the piano cover."

When lunch time came . . . [the Justice] asked me to stay for luncheon and I had great fun watching "the Missus," as he calls her, bait him, keep him amused, and send him back to his work refreshed and invigorated by the hour with her.

Thursday, November 18

I read over a couple of unimportant opinions of the Justice's. This duty has been purely a formality so far, and even if there were doubts in my mind, I should have to get myself into the state of mind of a court overruling a jury before venturing to differ. I had time to follow Ross through some discussions of the natural state, as evolved in the California mining centers before the advent of law.

The Justice gave me a free afternoon, which I spent on French and straightening out several economic conceptions on the effect of luxury. I dined with the Noyeses, and Frances and I gave up a visit to see John Drew⁷⁵ as she was suffering from the arrival of a wisdom tooth gone askew.

Friday, November 19

These are wild bland days like spring. After a little work on an opinion, I read Ross

until about noon the Justice suggested a walk. I referred to Ross' original development of the function of religion as an agent of social control, and this led the Justice from religion into cosmology. "I call myself a bet-abilitarian. I can't know the nature of the universe, but I simply bet that during my lifetime and the short time thereafter with which I am concerned, it will continue to be a succession of causes and effects. As soon as I find an effect without a cause, reasoning becomes impossible. But a spontaneous destruction or modification is perfectly conceivable."

Monday, November 22

The Justice has been reading with interest an article in the *Harvard Law Review* by the head of the minimum wage tribunal in Australia, describing its operation and effect.⁷⁶ This led the Justice to talk about the constitutionality of the minimum wage law which is still undecided although it was argued last December.⁷⁷ Apparently, Day, McKenna, Hughes, Holmes are for it, with Pitney, Van Devanter, Lamar, and McReynolds opposed, and the Chief Justice, who is writing the opinion, in doubt. The Justice said he is afraid it will be knocked out and he read me a dissent he had prepared if such proves to be the case. If this has to come forth as a dissent, it will rank beside his opinion dissenting from *Lochner v. New York*,⁷⁸ as a classic utterance of those who believe that the Court does not stand in the way of all social reform. On the merits of the policy [of minimum wage], the Justice is a skeptic, but, as he expresses in his draft of a dissent, the advantage of trying this sort of a social experiment on a small scale outweighs his fear that its interstitial cost may exceed its value.

We had a long walk together, the Justice philosophizing on one of his favorite themes that man is in the universe and not the universe in him. This he calls "the supreme act of faith" (because it can't be proved), the belief that one is not god, with the universe his dream. "The

French skeptics when they deposed God set up man in his place. They were not skeptical enough. If man exists in the universe, he is a very small part of it and true skepticism should lead to as sincere humility as belief.”

I introduced the subject of beginning practice and suggested that in New York young men had little opportunity to cultivate their abilities as trial lawyers. He said he knew almost nothing about conditions at the bar today and had always backed business initiative. “I began in Boston, which was the nearest and easiest place for me; and I don’t believe the place a man starts or the position he attains has much to do with his happiness in life if he philosophizes well.”

The Justice’s tea was bright as ever. I declined an invitation to dine with Frances Noyes and her sister and spent an interesting evening over *The Common Law*.

Tuesday, November 23

The Chief Justice thinks he has accumulated all the possible material on the migratory bird case, and so I will have no work to do at it after all. But there are a number of cases submitted, and I shall be too busy and too poor to go home for Thanksgiving.

I walked downtown with the Justice and he took me to see the tiny toy shop where [Abraham] Lincoln used to buy toys for Tad.⁷⁹ When the Justice first came to Washington, the old gentleman in the store could remember Lincoln’s coming in of an afternoon and buying something for all the children, saying with a smile, “I don’t know whether they have all been good, but I’ll let their mother decide that.”

Friday, November 26

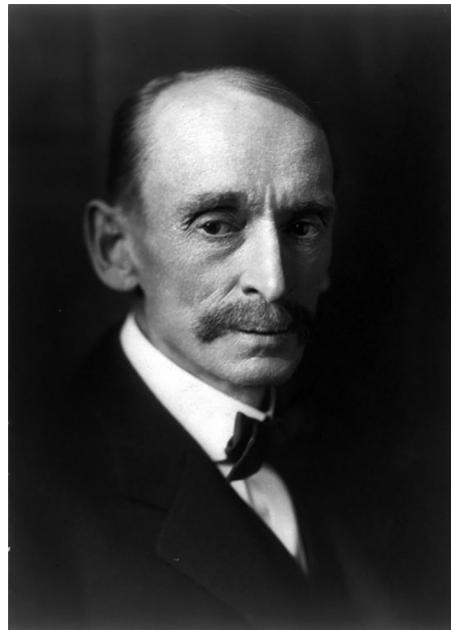
Finishing up the week’s cases at the Justice’s. He has been reading *Hamlet* over

again and is full of it. “In this play,” he said, “and in most of them Shakespeare does not reveal himself as a profound psychologist. But he had a sense of the wonderful mystery of life which he puts into the mouths of his greatest character. What I like about him is his song and tall talk.”

Monday, November 29

The Court resumed after two weeks’ recess. I went down to hear the opinions come down, but there was nothing of moment except the New York Alien Labor Law, on which my note in the review last year proved an accurate prophecy.⁸⁰

The difference in the styles of delivery of the judges is marked. Pitney reads every word, as if fearful lest some drop of evidence should remain hidden. His voice



Justice Holmes worried considerably about Justice William Rufus Day’s declining health. “[Day (above)] is one of the most high-minded men and loyal friends I know,” he told Belknap. Yet Holmes complained that Day’s “opinions set like plaster-of-paris; there is no budging them. That is one of the points in which men differ most.”

is husky and unpleasant. Van Devanter's clear, ringing voice is a welcome contrast, but his oral opinions seem directed at the back benches full of wide-eyed laymen, who see a glimmer when he labors the obvious. Hughes also uses his powerful voice, refers but little to his notes, and might be delivering an earnest campaign speech. Day swallows his words against the impression of embarrassment. Holmes has a refined, cultivated voice, and a clear enunciation; he gives only the essentials, and a few of the little rhetorical ornaments of which he is proud, and is soon finished. McKenna seems older than Holmes, although a few years his junior. He reads off the facts and states the results in a few words. White, the Chief Justice, has the most remarkable manner. With hands unnecessarily moving—flapping adequately expresses their behavior—he goes through a series of cases with scarcely a reference to a note and in a confidential voice and attitude which seems to invite one to step up beneath him and find what is really going on.

The afternoon tea was sprightly as ever. One of the guests, Mrs. Hugh Wallace, a daughter of Chief Justice Fuller, and “an old pal” of the Justice's, so he calls her, brought her niece who was a young stick.⁸¹ Frances Noyes asked us to dinner and we had a fine evening together, at least I did.

Thursday, December 2

The Justice put me to work on a complicated Employers Liability case argued before them yesterday but on which he had failed to make up his mind.⁸² “I want you to give me something definite and concise when I get home, something I can make the basis of an opinion.” After several hours in the Department of Justice Law Library, I could find nothing to upset the judgment below and drew up an opinion along those lines which the Justice accepted.

Monday, December 6

The Justice very busy—three cases allotted to him this week and which he hopes to complete. I took Miss Geer down to the Court to hear the opinions read, but there was little of interest and we were unable to get into either Senate or House, which had their opening sessions today. A suffrage parade, in brilliant purple and yellow costumes, was received on the Capitol steps by a Congressional delegation. They were the bearers of a monster petition for a Constitutional Amendment as the usual resolution proposing it was introduced in Congress today.⁸³

Walter Lippmann, a young Harvard graduate, has now gained a considerable reputation as a writer on politics and social [theory/reform], and is now on the staff of the *New Republic*, joined us at the House of Truth for a while. He is quiet, but not unassuming; his talk is not nearly so brilliant as his books. His ideas on public [theory/reform] are definite and he supports them with thoughtful argument.

Few young people at the Justice's tea, but he was in as high spirits as ever. Evening at home, reading.

Tuesday, December 7

The Justice read me his first opinion; it is an employers' liability case meriting the summary treatment it receives. I started in on the submitted cases, which are numerous and perplexing this week.

As the Justice had generously turned over to me his ticket for the House Gallery when the President delivers his message,⁸⁴ I went down to the Capitol early and captured a seat in the front row, adjoining the diplomatic gallery. For half an hour before the President's entrance, the floor was an animated scene. Old Uncle Joe Cannon was the center of a constantly changing group, congratulating him on his return.⁸⁵ I also recognized [James R.] Mann, the Republican leader,

looking happy over the great reduction of the Democratic majority;⁸⁶ while Champ Clark, with a yellow gardenia in his buttonhole, circulated about greeting old friends.⁸⁷

Soon the Cabinet came in and took seats, on the left of the rostrum, just below where I was sitting. I recognized Garrison, McAdoo, Daniels, Redfield, Houston, and Wilson.⁸⁸ The three front rows of benches were vacated on the Speaker's request for the use of the Senate which had been invited by the House to hear the message on its floor. Out of the hum of voices rose one a little stronger than the rest, calling upon the Speaker. "A message from the Senate" was announced, and a formal acceptance of the invitation of the House was delivered. Shortly thereafter the Senators filed in, led by Lodge and Kern,⁸⁹ I think. [Oscar] Underwood was received with a burst of applause in which his former colleagues on the Democratic side of the House led.⁹⁰

Now the galleries were filled, crowds even sitting on the steps. The entrance of Mrs. Galt, the President's fiancée, had created a stir and many eyes were turned in her direction. In the diplomatic gallery were many representatives of the allied powers, but I saw no Germans. A Committee of the House is announced by the Speaker to escort the President in, and [James Paul] Clarke,⁹¹ President pro tempore of the Senate, who is seated beside the Speaker, designates Senators to accompany the House Committee. They retire and the House is silent for the first time during the morning. In darts a short, quick-moving, middle-aged man, the Doorkeeper of the House; standing in the aisle behind the first row of benches, he announces: "Mr. Speaker, the President of the United States."

Everyone rises, on the floor and in the galleries and amidst loud applause the President enters through a door to the left of the Speaker's Chair. The cheering and hand-clapping increases in volume as the President steps up to the Clerk's desk and shakes hands cordially with the Speaker, who

has pledged his support to the new preparedness program. Presently there is quiet, the members resume their seats, the galleries follow suit, except for the unfortunate late arrivals who strain on tiptoe from the rear. But it is unnecessary, for the President reads in a firm voice with a careful enunciation and inflection that carry each deliberately uttered word to his farthest auditor.

The message is a plea for preparedness against military attacks; preparedness through an increase of armaments, personnel, and the mobilization of industry. There are likewise a few telling sentences of bitter reproach for the hyphenated Americans who are threatening the preparedness of the nation; and these win the loudest applause, in which Republicans join. The reading occupied just an hour, and at one-forty the President retired, followed by the Senators, and the House took an adjournment. I am very grateful to the Justice for the opportunity to observe this impressive bit of ceremony that Wilson's keen political insight has revived.

Tom Miller, the member for Delaware, asked me to lunch with him and his wife, and afterward I hurried back to work.⁹²

We had an interesting discussion about the message with Lippmann, who considers it the "worst of many bad ones." MBA and I were far from agreeing or being convinced by his arguments. A young man named Todd, secretary to Meyer London, the only socialist member of Congress, came in during the evening and talked more soundly than every socialist before.⁹³

Thursday, December 9

The Justice is now on his third case and is hoping to get it up "snug" by the end of the week. The speed with which he turns out his wonderful compact sentences is marvelous to see. Last week he was caught by Pitney in a slip on the Employers' Liability Act; he despises those little cases anyway, but I think

felt especially bad that Pitney should have been the one to detect it.

We spent the evening at the theater, David Warfield in [David] Belasco's new play *Van der Decken*.⁹⁴ Surely Belasco would never have produced it if he hadn't written it himself. It was a disappointing version of the Flying Dutchman legend, well-staged, but with little else to recommend it. After the theatre, we had a good talk by the fireside, and late to bed.

Friday, December 10

The Justice read over to me a vivid opinion. It is nothing but a contract claim against the government, on appeal from the Court of Claims, but he has put into it a bit of what he calls "the eternal granite" and it has a good swing. He was thinking on fire with a vengeance to turn out three such jobs in a week.

Evening reading Pollock's *History of the Science of Politics*, a good review of the college course on Theory of the State.⁹⁵

Monday, December 13

The Justice is puzzled over a case in which the Court is asked to mandamus a Massachusetts circuit judge who refused the [petitioner] access to depositions sealed in a previous suit.⁹⁶ He set me to work on an examination of authorities. *Marbury v. Madison* stands in the way unless this can be worked out as an exercise of appellate jurisdiction, and not an order for the delivery of the papers.⁹⁷ He is determined to give the order and read me a vigorous opinion covering all but the procedural point. I commented on its strength. "Do you think there is anything discourteous or uncivil to the judge below," he said. "He will know he made a mistake," I replied. "Well, I think I'll try it on the boys and see if they swallow it,"

he said with a twinkle. "The boys" is more of a compliment to some of the other brethren than to the Justice.

When he got home I had a collection of material which determined him to alter part of the opinion, "to get around what that skunk Marshall said in *Marbury v. Madison*." As we walked downstairs to join Mrs. Holmes for tea, he told about the minister who preached a sermon trying to interpret away a text opposed in spirit to some of his doctrines. On his way home, he asked a parishioner what he thought of it and some doubt as to the success of the effort was expressed. "Well," said the preacher, "I own I wish the Apostle had never used the words."

I talked with Mrs. H. She told me about Arthur Hill and Roosevelt.⁹⁸ He'd come down, and left his card at the White House, and that way was invited to luncheon. On his return, Mrs. H said, "Well you've been captured. Let me tell you just what happened. You sat at the President's right and he talked to almost all the time. He talked about—oh—Eastern trade routes, referred to a few obscure battles, got on to literature and then you had rather a poor dessert." "Were you behind the wall?" asked Hill.

"You see," said Mrs. H, talking now to me, "Roosevelt needed a group of smart young men in every big city in the country. Hill was his aim and he went out to capture him. When Hill returned to Boston, he told [illegible], 'I have seen a King.' And by supporting Roosevelt he almost cut his practice in two. People avoided him on the street and his wife and children suffered."

Tuesday, December 14

The Justice was happy this morning over having solved to his satisfaction the mandamus case which had raised some doubts yesterday. I think it a powerful piece of work. A large number of certioraris came in to-day and I was hard at work on them. Evening at

home, beginning *Notre Dame de Paris*;⁹⁹ I know enough French now to get the gist of the story without constant reference to the dictionary.

Thursday, December 16

By the end of the morning I was far enough ahead with my work to be sure of finishing up tomorrow. I took the afternoon to visit the Gallery of the House it was a too *bushwa* choice.¹⁰⁰ [Representative Claude] Kitchin of N.C., the Democratic leader, was pressing the bill for extending the emergency war revenue bill to meet a threatened Treasury deficit. The House went into a Committee of the Whole and all the old Republican ammunition was fired off again by the old guns—Uncle Joe Cannon, Longworth, Fordney, Mondell and Mann.¹⁰¹ Cannon, usually mighty, made a five minute speech evincing more physical than intellectual vigor, while the House hung on the old man's words. Longworth's delivery was good, but Mann's logic was the most appealing. Kitchin closed the debate for the majority—a rough ready speaker, inviting but without polish, he stirred his supporters to bursts of enthusiasm and laughter. The Republicans seemed able to meet his crude wit. They sat silent, after fruitless efforts to interrupt, silent and disdainful. There was truth in Mann's criticism that the Democratic leader had done very little to defend his case on its merits.

Evening at home, reading *Notre Dame*.

Sunday, December 19

MBA joined the Storeys for a walk this morning, with old Moorfield Storey, a genial, stiff-fibred abolitionist, as our guide.¹⁰² He had been Sumner's secretary in 1867–69 and took the keenest delight in pointing out the landmarks of the Washington of his day—



Of Chief Justice Edward D. White (pictured), Holmes told Belknap: "He has mellowed in recent years. I sometimes thought him lacking in dignity when he fulminated and roared from the bench, but this has mostly disappeared. Of course, when he is trying to drive a thing home in conference he roars fit to shake the building, but that is simply getting it out of him—the man's manner."

Gideon Welles's house, now occupied by the Ewings, where the severe old secretary sat and so roundly abused his colleagues;¹⁰³ the site of Seward's house, and the beat of the sentry who guarded it after the night of the assassination; the house where he had attended the balls of the day, and where he heard Ewerts pronounce some of his most piquant bon mots.¹⁰⁴

Helen Taft, Frances Noyes, and others to luncheon in the H of T.¹⁰⁵ Afterward to tea at Mrs. Draper, who nearly fills a huge mansion on K St. and Connecticut Avenue,¹⁰⁶ then to the Noyeses'. Ed Hart and I to dinner at Sophie Johnston's,¹⁰⁷ with Helen Taft, who is clever and entertaining but evinces no charm of manner.

Wednesday, December 22

I have omitted to note on Sat. Dec. 18th, the marriage of the President and Mrs. Galt,

which has been the leading topic of conversation in Washington circles since the engagement was announced on the day I arrived here last fall. After dining that evening with Mrs. Woodward, we were walking up 18th St. for a call on Daniels, the Interstate Commerce Commissioner, when we realized suddenly we were in the midst of the crowd of curious onlookers before [Galt's] house, at just about the hour of the ceremony.

An awning leading from the gutter to the door of the little red brick house was the only decent indication of the event on which the nation's eyes were turned, an event which could have far-reaching political consequences. Only the blindest adulation could fail to observe that this marriage, following so close on the death of Mrs. Wilson, has displeased the country. Scandalous stories are freely circulated about the one man whose reputation I once predicted would never be sullied by even the suggestion of misconduct. But he has exposed himself to the innumerable malicious talkers who have crowded in licking their lips at the death of another's reputation.

All to-day, I was engaged in the cases and certioraris, and dined with Frances Noyes, an entertaining evening.

Thursday, December 23

My hopes of getting aboard a New York express at 4 p.m. were soon dispelled. The Justice had got himself into a bothersome Indian land case, one of the things with which Congress wastes the time of the Supreme Court, instead of making a lower federal court the final arbiter. I was running down authorities for him all day and when he finally set forth for a visit to the dentist at 4, he charged me with the duty of starting an entirely original investigation of the matter, on my own hook. I had little to contribute on his return.

Before I left, the Chief Justice's opinion on the minimum wage¹⁰⁸ arrived long overdue. The Justice's face as he read it was a study. Finally he burst, "Oh, I hope I'm not prejudiced but I think this is awful stuff"—and he read most of it aloud, commenting on the clumsy effort to popularize the result by refusing to classify women with minors, paupers [rest of sentence is unintelligible].

As I said goodbye and wished him a Merry Christmas, he picked up his pen and, with a twinkle in his eye and a twist of his moustache, said, "Well my boy, have a fine break, and meanwhile your old Uncle will see whether he can write something solemn and nasty about the Chief's opinion. I'd like to say I take a keener delight in upholding the law because I simply abominate its policy, but the Chief is so solemn about it I mustn't let any levity detract from my words." So he settled down, halfway in as he was and I was off. Mrs. H conferred her Xmas present upon me. It was to have been at the bottom of a stocking over my fireplace tomorrow morning, she said, but my sudden departure upset her plans.

I had to stay for dinner at the House of Truth tonight, some of Frank's crowd, and uninteresting enough, in Heaven's name. I tried to get Frances when I discovered I was doomed to stay, but she was engaged and Sally Beecher was a poor substitute. At 12:30, I boarded the sleeper for N.Y. I recommend a stupid and prolonged dinner as a sovereign remedy for train insomnia.

Saturday, January 1 [1916]

Up late, in time to set out with MBA for a Farm Breakfast given by Charles Henry Butler, the Reporter of the Supreme Court, in honor of South American visitors, at his house on I Street.¹⁰⁹ Butler was a genial host and welcomed the party in his library through a carefully prepared address in Spanish, ponderously humorous. Most of the Justices were there; Redfield, the Secretary of Commerce;

Frances Sayre, the President's son-in-law; and many of the generally famous occupants of the newspaper columns.

I had a long talk with Dr. Bunge, apparently an attorney-general or solicitor-general for Argentina and a professor of law.¹¹⁰ His English was fluent and he had an alert curiosity untempered by any trace of diffidence. "And what is your salary?" was one of his first questions. His opinion of American legal education was greatly lowered when I informed him of the place of the Roman law in our curriculum. "It is the refinement of a refinement—the dessert, the liqueur" I said. "Ah, no, say rather it is the soup, the oysters," he replied. He expects an increase in the law business with South America, parallel to the expansion of the trade which has followed upon the wake of the new currency systems.

In the afternoon, a round of perfunctory calling; evening, dance at Sophie Johnstone's and later at Joe Garrison's—supper with Frances.

Monday, January 3

This morning's papers brought news of Justice Lamar's death. He had not been sitting since last spring and a paralytic stroke made it unlikely he could ever resume his work. The Justice was expecting it, but had not heard of it until I told him. "He is a real loss, a real loss," he said with deep feeling. "He was a dear fellow and a strong judge of decided convictions with which I often disagreed, but which we must all respect."

The Court took an adjournment until Thursday, and Pitney, Van Devanter, and McReynolds accompany the body to Georgia. Among the names suggested for his successor are [Secretary of Interior Franklin K.] Lane, [Secretary of Agriculture David F.] Houston, [John W.] Davis, the solicitor-general, Taft, [Secretary of War Lindley M.] Garrison. The papers name no one already on the bench;¹¹¹ I

suppose politics has generally been the channel to the Court, rather than rising through the judicial ranks. But nearly all of Taft's undoubtedly excellent appointments came from the bench—Pitney, Van Devanter, Lamar, and Lurton.¹¹²

The international situation has become critical with the sinking of the P. & O. liner Persia by an Austrian submarine, following on the heels of Austria's note disavowing previous submarine outrages which had been the subject of protests. The President hurried back from his Virginia honeymoon, and people wear grave faces.

Tuesday, January 4

On a long walk with the Justice, I drew him to talk on the men who have been with him on the bench.

"Chief Justice Fuller was in all the administrative facets of his office a model Chief Justice. He easily adjusted details, without the fuss and friction of our present chief. But while White is a stronger man intellectually, because of his defective style and odd manner of reasoning, he does not receive full justice. I think he is a big man, but not in just the right niche. He lacks the judicial habit of mind and would [unintelligible] of a life of a work in the Senate where he was already prominent when he was appointed. He has mellowed in recent years. I sometimes thought him lacking in dignity when he fulminated and roared from the bench, but this has mostly disappeared; of course, when he is trying to drive a thing home in conference he roars fit to shake the building, but that is simply getting it out of him—the man's manner."

"Take [Joseph] McKenna—I didn't consider him a big man for many years, but now I am coming to recognize his importance. His poor health was an element which conspired to impair the quality of his work, and his jerky style of writing concealed the meat of his

thinking. As a rule, the quality of a man's thinking in his opinions is a fair criterion of his helpfulness in conference. But, of course, they all have their specialties—it is always enlightening to hear Van Devanter on one of those western land cases, for instance or Hughes on—well, anything he has made his own.”

“[Rufus] Peckham¹¹³ was a strong judge, strong rather than subtle or profound. I always said his major premise was ‘God damn it.’ [John Marshall] Harlan,¹¹⁴ who had been a powerful man on the Court was manifestly weakening in his later years—his mind was petrifying. So few men put a spark out of themselves with their work. I think Field was one of those few, and Wells in Massachusetts.¹¹⁵ Horace Gray just missed it.¹¹⁶ He had his finger in everything, and the ability to manage everything in a high degree. I think it was Fuller who once said if it were necessary to establish a unit to suppress a country-wide insurrection, Gray would be the man to put at the head of it.”

So he chatted on delightfully, beyond my memory to set down. It is a full life just to know the men he has known—and to be a part of their performance!

This afternoon I started Graham Wallas's *Human Nature in Politics*, a depressing effort to be both truthful and cheerful as to the future of democratic government, after a psychological analysis of the electorate. Zimmern refers to it in the highest terms,¹¹⁷ and the Justice also commends it. Evening, Elizabeth Harding's dinner, announcing her engagement to Frank Ellis; later masked ball at the Gaffs'. Frances called for me and I had a merry time at supper with her.

Monday, January 10

I called for Katherine and took her and Frances to the Holmeses' tea—not so much fun as usual, because of the invasion of the official set. But the old Chief Justice was a

mountain of radiant benevolence and good humor. To dinner with Sally Beecher, where I met Alcuma, an ambitious young Argentinian, first secretary of the embassy here. He was cultivated, had traveled in England and the Continent, and had been secretary to the president down there. Being modest about his English, he said little until led on. But he showed a knowledge of our politics far exceeding the average university standards; and he expressed an admiration for the restraint and sobriety of the discussions in our legislative bodies—more especially the House of Commons, with which he was more familiar than with our own houses.

After dinner, to the Charity Ball at the Willard with our party, where we careened about the crowded ball rooms until the heat drove many out.

Tuesday, January 11

A new lot of cases in, which kept me busy all day. The Justice was telling me yesterday of his opinion—a clever bit of statutory construction which he finished and had got away to the printer before I arrived Monday—that meant a Sunday morning and afternoon on the job. Today it came back and he gave it to me to read; it was a choice thing, for all its technicality. Hughes returned it marked “In the best style known to the Court.”

Dinner at home, and the evening over Nietzsche's *Beyond Good and Evil*, as revolting a bit of sophistry as I have ever dipped into, but withal sharp and amusing. . . .

Friday, January 14

Monday's opinions at hand—one by Hughes covering the case which in the lower court was the subject of my first *Law Review* note; also a powerful opinion by Hughes under the Pure Food Law,¹¹⁸ forbidding the distribution of quack drugs.

Justice Day very ill and the Justice extremely worried. "I do hope Day pulls through," he said. "I am very fond of him. He is one of the most high-minded men and loyal friends I know. His opinions set like plaster-of-paris; there is no budging them. That is one of the points in which men differ most. Day is like Judge Devens of Massachusetts,¹¹⁹ while White more closely resembles Chief Justice Morton.¹²⁰ They are tenacious, but amenable to persuasion and will often come around in a day or two."

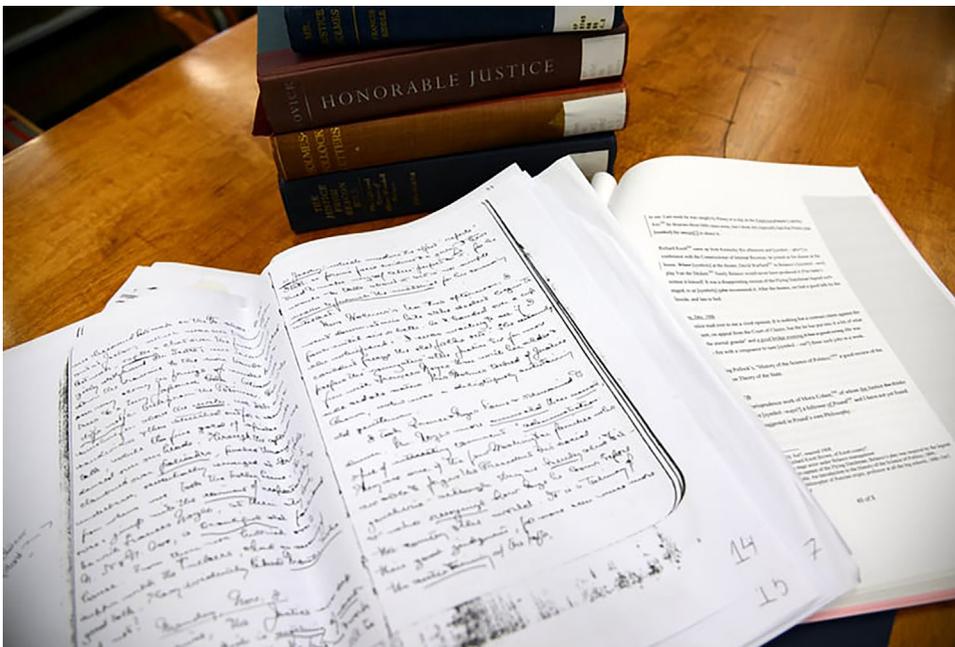
I walked out to the Riggs Bank with the Justice and on our way back we skirted the north side of Lafayette Square. I called his attention to the old Gideon Welles house, which I have always admired. "Yes," he assented, "one of the first in Washington; whenever I pass it with White he says it was the scene of the most atrocious crime in history, for there Slidell hatched the Confederacy.¹²¹ White was a Whig and had a desire to break away. In fact, he told me they would never have got out if they had not been misled into believing they would have active support

from the Northern Democrats. Beckham was a member of a regiment drilling to support them, but of course when the split came it was rigid and all went over to the Union."

Mexico turbulent, massacres at the North, and lots of tall talk in the Senate. But the President keeps his head and stands firm.

Saturday, January 15 to Saturday, January 29

I must spare a negligent and merry two weeks in a few lines. For pomp and ceremony, I have seen nothing quite exceed the Pan American Ball given on the 19th in honor of the President by the South American ambassadors. Its setting in the Pan American building was appropriate and picturesque, the luxuriant foliage, glimmering fountains, and twinkling lights on the patio furnishing a background for resplendent diplomatic uniforms and sparkling *décolleté*. The President and his wife entered to the Star Spangled



Belknap used a combination of cursive and Pitman shorthand to write in his diary. This is the first time the document has been transcribed in its entirety.

Banner, the Secretary of the Treasury led the dancing, and the floor was a gala spectacle. I have spent the usual proportion in more normal gadding about.

Several visits to the House only reinforce the impression that from its particular brand of deliberation the country has little to gain. It is the best confirmation I know of Le Bon's analysis of the mind of a deliberative assembly, in his *Crowd Psychology*.¹²² The reasoning is on a low scale, the eloquence juvenile and clumsy.

In our ample leisure I have been sticking close to the French with gratifying results.

Loring Christie, who is private secretary to Borden, the conservative prime minister of Canada, passed a Sunday in the House of Truth, where he formerly lived. As Felix Frankfurter put it in a matchless phrase, he revealed much by his reticences and something by his talk. He spent some time in England for the chief last year and had unmitigated disgust for most of the liberal leaders, Asquith included.¹²³ The latter he describes as a tired old man, frequently a bit squiffy,¹²⁴ and more of the conciliatory politician than the vigorous leaders our world requires.

Yesterday the President loosed a bomb into the arena by nominating Louis D. Brandeis for the Supreme Court vacancy. His name had been mentioned, so far as I have observed, only by the *New Republic*. He is a Jew, radical on labor and social questions, and in spite of his Kentucky birth, a member of the Boston Bar, which is already represented on the Court by my chief. A storm of protest greets the nomination in this morning's press and the worst type of Senator derides it as an absurdity. I should like to see him confirmed, thus swinging the majority of the Court to the progressive element and giving it the support of a great and cultivated intellect. His personality, as I observed it during dinner at his house in Boston last year, is remote as possible from the agitator for which he is denounced in the capitalist papers.

But he is a situation for the minimum wage [case]. With Lamar dead, the Court is four and four on it. Now the addition of the counsel who argued for the law will surely break the deadlock, for he can participate in the decision.¹²⁵ Will it come out counting Lamar's vote against the law, since the decision was in fact reached as he was on active service? Then would the dead literally rule the living!

Tuesday, February 1

The Court has taken a recess until February 21—most of the others having now accumulated [opinions to write], but my chief's steady application keeps him "up snug." He is perplexed by a knotty corporation reorganization tangle, and is trying to find the angle of cleavage, where as he likes to put it, you must insert the knife . . . [Holmes]: "An opinion should be like an etching—you select the feature on which you wish the attention to be concentrated, you work it out with all refinement and skill, and then you draw in the outlines with a bolder hand."

I am at work on the cases and motions, which raise nothing of interest this week. Frankfurter has sent on a list of the Justice's opinions to be included in an article he is preparing for the March Review, in honor of the Justice's 75th birthday,¹²⁶ and I am struggling for opportunities to verify the list in his absence, as it is a profound secret. Mrs. H is in the conspiracy and promises to get him out.

The President is stumping the Middle West for his preparedness policies, drawing huge crowds with the vociferous enthusiasm which may or may not mean the steady pressure that will bring over Congressmen reluctant to vote the necessary taxes.

Thursday, February 3

Working with the Justice on a close trademark and unfair competition case, Mrs.

H being called in as an expert witness on the purchasing habits of the average prudent hosiery buyer.¹²⁷ It was generous of him to accept a few of my suggestions for modifications on his first draft, but he doesn't feel at all sure of making it go.

We had a good walk up around DuPont Circle at noon, the Justice giving an amusing but strictly confidential account of how the Pipe Line cases were hammered out by the Court.¹²⁸ It seems Day had them to yearn over for more than a month and ultimately returned them to the Chief, who then allotted them to himself. After having them by him some weeks, on the Tuesday before the Court's final adjournment in June, he asked the Justice if he would take them and have them ready for Monday. The Justice agreed, and by Friday had an opinion circulated. On Friday, Hughes came in with suggestions—"Just strike out this sentence and this one, and insert these words, etc." Day followed and gave a new keynote to the opinion by insisting on the insertion of the expression, "The defendants were before the statute common carriers in all but name."

The Justice had taken a broader ground and sustained the power of Congress regardless of previous status of the pipe lines. But his brethren thought it inexpedient, in the present mood of Congress, to communicate the tempting intelligence of how far the Court thought they might go within Constitutional Limits. It is to me one of the most striking instances of the exercise of political functions, political without the insidious connotation of partisan. The Justice became vehement on the subject of the Court and by forcing on them "upward and onward" noisy reform movements of the day. "They are generally a cheap substitute for the real thing."

Friday, February 4

At work with the Justice, cleaning up the submitted cases for distribution. Dinner party

at Noyes's, and at 9:30, I left to attend the President's Reception of the Judiciary at the White House.¹²⁹

The long line of cars, with an occasional superannuated horse cab, circled slowly in to the East Portico. At the cloak room I was lucky to find Mr. and Mrs. Drey, and we agreed to go through the long ordeal together. Ascending to the East Room, we found under the glittering chandeliers a closely packed throng of people, passing three times the length of the East Room and eventually making their exit through the south door, in single file, to approach the receiving line. We took our places and bore with the crush, to be repaid in just over an hour by the consciousness that we were under the vigilant eye of a secret service officer and must be approaching close to the President.

Suddenly, as we passed through a door, a stately gentleman in gold braid inquired the name, turned and announced, "Mr. Belknap, Mr. President"—there was a nod of greeting, a smile from Mrs. Wilson, and so on down the line of exhausted but devoted Cabinet wives who were nearing the end of a wearisome evening. The President looked fresh and vigorous despite the exertion of his stumping tour in the West. His wife is gracious in manner, and pleasant looking though with slight resemblance to her photographs. Mrs. Holmes said, "The ugliest woman ever held out to be pretty!"

We progressed to the state dining room and repasted ourselves with imminent danger to our garments, and then joined the crowd floating from room to room to identify the newspaper headliners—Speaker Champ Clark, a bit squiffy but no more so than usual; Senator Ollie James, with the bulk of an elephant and about the same intelligence;¹³⁰ Secretary Josephus Daniels, beloved by all good naval men, and all the rest of the Cabinet, Senate, and House.¹³¹ The Justices, the guests of honor, retired early. When I drove home with the Dreys, at 11:30, the marine band was still playing in the

vestibule and the crowd still hung about the state apartments.

Wednesday, March 8

To resume after a lazy silence, this is the Justice's seventy-fifth birthday as well as Ash Wednesday. In order to avoid any conflict with the sanctities, Mrs. H had her party last night, with entertainment in two installments. First with dinner of the elders, with a pungent flower of youth imported chiefly by the Justice and less effectively by a Dutch baron and myself.

When we had retired upstairs to smoke, the Justice returned to literature and we heard his version of "My Hunt for the Captain."¹³² A severe neck wound, lacking not half an inch to be mortal, had him out of the battle field [at Antietam]. Two days later, after passing through the surgeon's hands, he was making his way along the outskirts of Hagerstown in pretty groggy fashion when a little boy ran over and inquired if the ladies who had sent him could do anything to help. The captain [Holmes] asked for water and was invited to rest in the old slave house. "I spied around," said he, "and observed a grand piano and one of my father's books and decided it looked like a pretty good thing. The ladies I then thought old but I would now call them young and they would discourse on the universe or play to my choice.

When a box of excellent cigars was produced, belonging to the ladies' brother, who was, I believe, a Confederate officer, I decided it was an adventure worth seeing through. So there I stayed the better part of a week, while the governor [Holmes's father] was prowling about as he relates. Finally, they told me I really must communicate with the family, so I started off and sent the telegram which brought my father to my side. And you know he tells of the rational indifference on the meeting, how he took me by the hand and said merely, 'How are

you, boy?' But he doesn't tell as a preliminary about his greeting after Ball's Bluff, where I showed my young soldier's contempt for his lack of restraint. This was play-acting and we both knew it." A picture-snap-shot—of the old Perkins house in Hagerstown, received this winter from the tenant, stands on the mantel in the study, a treasured possession of the Justice's.

As the cigars shortened, the ladies joined us upstairs and the evening was gay with laughter and talk. I was becoming worried for the success of the secret design of Mrs. H, when Mrs. Gillette rose to leave and by 10:30 the house was empty of its guests. At least, so the Justice thought, as he changed upstairs for his purple velvet smoking jacket and an hour with a book before bed time. But at that minute nearly a dozen of his 'lads and gals' were gathered in the little darkened reception room, where an illuminated owl peered from over the chimney piece. . . . he had just remarked to Mrs. H, "That was a funny birthday party—where were all my young 'uns—the only one there was the Secretary," when from below stairs he was summoned by the chirping of some twenty birdlike whistles. He came slowly downstairs and stood in the darkened doorway, with wonder and delight written on every feature. Then the lights were flashed on and the doors to the dining room were thrown open; and there was the birthday cake to be cut, and the parcels to be circulated, and talk to go round, until at the end of the evening we all settled down on the floor in a cluster at his feet. So the party terminated, a play of gaiety and laughter.

Today I have been busy all day with the submitted cases. Dinner with Frances tonight. Mr. and Mrs. Noyes are recently back from Jamaica where they encountered a young English officer wounded in the Battle of Loos. They had captured three lines of German trenches when he fell and dragged himself back to the reserve lines for two hours. Had they held the trenches taken? — Oh, no — there was nothing to reinforce their decimated

numbers. “But that wasn’t my fault,—that was up to the staff.”

Thursday, March 9

Our cases all day and dinner at the House [of Truth] tonight. Dorothy Kirchwey Brown, on my left, whose father is the new warden of Sing Sing prison gave a frank description of the frightful conditions under which some 1,600 convicts are lodged, many of them very entertaining and interesting high-class crooks.¹³³

Saturday, March 11

The Justice read me a graphic letter from Einstein, our diplomatic representative in Sofia, Bulgaria, which made one inhale the fumes of the Balkan cauldron.¹³⁴ He described how walking to the club one evening he passed two freshly murdered men bleeding in the gutter, and his difficulties in extending to the British representative a right of asylum in the American embassy, which was a hotel room. The Justice’s reply was as piquant as only his own flavor can make the ordinary. “I seem to be a favorite with the Nation,” he laughingly remarked, referring to the Jews. “This fellow Einstein is of their persuasion, and there are Brandeis, Frankfurter, Lippmann, and Warburg, all of them have of that same Jewish flair that I like.”¹³⁵ Someone must collect his letters someday. Truly few can have been destroyed. Here is an answer he dashed off to a valentine—a rosebud with the message beneath a hinged petal:

*On the day of Valentine
A rosebud asked: Will you be mine?
Dear rose go not too near the worm,
For he though aged and infirm
Thy pretty petals would devour Now
glowing pink to sun and shower—
Wait until late in the sky He soars
aloft, Thy Butterfly.*

Thursday, March 16

One of the cases was constantly talking of how [the defendant] had ‘breached’ the contract. I spoke to the Justice of the remarkable popularity of this useless and ugly word is attaining in the American bar—“Yes,” said he, “the American people has the instinct of a turkey buzzard for a rotten phrase.”

Monday, March 20

The Justice at work on a difficult taxation case, on which the Court stands 3 to 4. “The Chief is against me,” he said, “but then he goes on the principle that nothing is taxable. I have always said we get more for our taxes than for anything else, because we get living in civilized society.”

After reaching its opinions the Court took a recess until April 3rd. The Justice doesn’t need it, but McReynolds and Pitney are way behind.¹³⁶ He got home early and we worked over the cases all afternoon, with a visit to the Department of Justice Library. Mrs. H’s tea was invaded by twice her usual number, but it was a gay party and the cherry bounce went its rounds.

Tuesday, March 21

We are at another opinion today—a contractor trying to get reformation of a contract with the government, denied in a monumental effort [in a 20-page opinion] by the Court of Claims. The Justice said of the writer, “He thought to make himself immortal by making himself eternal. It’s a damn sight harder to deal with an ass than with an able man. Either I’m a fool or they are damn fools.” Having thus cleared the air, he gave it to them and, by the end of the day, it was ready for the press.¹³⁷

Friday, March 24

Busy all this morning on some new cases—complicated facts but no problems of

interest. A California attorney called to apply for a writ of error to the State of Maine, which he urged with a combination of Yankee persistency and Western bluntness of feeling that was most offensive. The Justice showed some patience, and even listened to the fellow's resumption of his argument after the refusal of the writ had been signed.

Saturday, March 25

At work on a memo study of the facts in a certiorari petition. At noon out with the Justice to fish in his pond, which is judicial language for cutting BB coupons.¹³⁸ He was tickled over an excellent joke on me. Last month his bank books disappeared and after prolonged search I had a new set made out. As we set forth this morning I reminded him of the books and he said, "Yes, and by the way my boy, if you'll look in your desk drawer where you keep my checks, I think you'll find the long-lost books." I opened it, and there they were, a most natural place for me to have mislaid them. When we were on the street, I very silent and discomfited, he turned to me with a twinkling eye: "Well, young feller, I hope you're feeling pretty keenly about the books—have I stirred quite a bit of pain?" My suspicions began to be aroused until he finally admitted he had found them at the bottom of a pocket he had sworn to be empty, and then he had slyly tucked them in my drawer in the hope that I would find them.

This afternoon read further in *The Common Law* and tonight diverted myself with *Lady Windemere's Fan*.¹³⁹ I had often thought of a plot along the same lines for a story and was interested in Wilde's development of it.

Thursday, March 30

The Justice had a call this morning from W.T. Denison, recently Secretary of

the Interior of the Philippine Islands, and one of "his boys" during Denison's residence in Washington as assistant attorney general. The climate had compelled him to leave the Islands after little more than a year's residence, which was enough, however, to convince him that policy there is not only mistaken but absurd. We declare we are governing the islands until the natives are themselves capable of undertaking it, Denison says, and thereby make it impossible for any intelligent Filipino to support our occupation without confessing his countrymen's incapacity.

I told the Justice I am difficult in retaining the obscure and minute details of which Holdsworth's book is largely comprised. "My dear boy," he said, "It isn't ability to recite on a book that counts. I couldn't recite on any book I have read. But your mind is like a piece of paper which once creased more easily assumes the same folds again. You absorb unconsciously and gain a critical ability you are unaware of."

Somehow George Meredith's name came up.¹⁴⁰ "He was the most brilliant talker I have ever heard. I went down to see him when I was a young man with Leslie Stephen. His reputation was limited to the little group which saw his genius and his name was scarcely known. But I didn't like his disregard of the personalities about him. I don't mean myself because I was an unknown Boston lawyer. And he had a vulgar underbred grimace which was offensive. When I saw him again as an old man he was too deaf to indulge in anything but a monologue."

The Justice talked entertainingly of his interest in legal history, the philosopher's interest in the struggle for life among ideas, like the old German oath as the basis of the contract, now leaving only a dwindling anemic and attenuated remnant in the promissory oath of the witness or the juror.

Monday, April 3

After a recess of two weeks, the Court resumed its sessions today and handed down

a heavy batch of opinions, none of public interest. The Justice has got into difficulties with his opinion taxing the inheritance of foreign property [unintelligible]. Van Devanter is especially recalcitrant, on the 14th Amendment. “God knows what will be evolved out of the bowels of the 14th Amendment. Each judge sees in it the embodiment of his own prejudices,” the Justice said. I spent a good part of the day accumulating authorities on the point from the states.

Dinner with Frances, who helped to cultivate my French accent during the evening.

Wednesday, April 12

The Justice read me his opinion [in a criminal law case], which is clear, artistic and short, full of meat with one bold sentence which covers the case: “This is not a foxhunt.”¹⁴¹ I remarked upon it and he said he owed the idea to John Gray, who said years ago that the theory of the English criminal law was that the law breaker, like the fox, was entitled to so many minutes of law – i.e., shame to escape.¹⁴²

I was called upon for something amusing to go into a letter to [Justice] Day, who has gone back to Boston to convalesce from a wasting illness. He read me the letter which was a gem—or a collection of them. Here is a sample: “Our Court will soon dispatch its business satisfactorily until the Chief acquires that attribute of the Almighty which will enable him by pressing a spring to plunge a bore into the infernal regions.”

Tonight a dinner party with the Holmeses, which Mrs. H and I collaborated upon and got together a merry crowd. Things swung along without flagging till well toward midnight, and as I bade her good night she turned to the Justice and said, “Well, don’t you think my friend and I gave you a good party?” He beamed.

Thursday, April 13

The long delayed special issue of the *Law Review*,¹⁴³ got out in honor of the Justice’s 75th birthday, arrived this morning, with contributions from Sir Frederick Pollock, Eugene [sic] Ehrlich of Vienna, Pound, Wigmore, etc.¹⁴⁴ He was deeply moved at the tribute, more so than by any honor he had ever received, he told me. “When I was a young feller,” he said, “I sometimes thought if an angel should sit at the foot of my bed and say, ‘You’ve done the trick,’ I’d be willing to see the Prince Rupert’s drop of life burst into a thousand fragments.¹⁴⁵ I suppose this is about as near to that as any man comes in a lifetime.”

Conclusion

Belknap’s clerkship ended with the close of October Term 1915. Holmes informed him that it was customary for the legal secretaries to receive a summer vacation, adding that he would call upon Belknap’s services if necessary. The Justice, however, never did. Belknap subsequently secured a position at the New York firm of Burlington, Montgomery & Beecher, hoping to gain experience in their litigation practice. The move to New York, however, did not end his relationship with the House of Truth. Belknap maintained life-long relationships with many of the House’s former tenants. The group called themselves “the minds” and met for dinner parties at one another’s homes.¹⁴⁶ And it was an original House of Truth tenant, Winfred Denison, who convinced Belknap to leave Burlington, Montgomery & Beecher after only a few short months and join him at the New York law firm of Stetson, Jennings & Russell.

Belknap’s tenure with this second firm was short-lived, as the United States entered the war and the former Holmes clerk enlisted in the United States Army. Belknap was assigned to the staff of General of the Army John “Black Jack” Pershing, whose headquarters were

located in France. Belknap would also serve on the front lines with a young lieutenant colonel named George Marshall, who later became Chief of Staff of the Army and Secretary of State. While Belknap's interactions with General Pershing were limited, he worked closely with Marshall. "We were in the same dugout, in the same sub-cellars; we were together constantly."¹⁴⁷ Belknap developed a deep respect for the young officer, whose devotion to duty reminded him of Holmes. The feeling of respect was mutual, and Marshall would later write that Belknap was "an interesting example of the rapidity with which an American can adapt himself to the performance of an intricate and delicate task."¹⁴⁸ At the end of the war, Belknap would hold the rank of major and receive the *Legion d'Honneur* for his work translating between the French and American generals.¹⁴⁹

After the war, Belknap returned to Stetson, Jennings & Russell before joining a new firm created by Denison and former New York Federal Reserve general counsel James Freeman Curtis. The firm would eventually become Patterson, Belknap, Webb & Tyler, where Belknap worked until his retirement in 1982. His clients included the Rockefeller Foundation and the Metropolitan Opera. Outside of his legal practice, Belknap maintained ties with his beloved Princeton and served on its board of trustees for twenty years.

In 1926, Belknap married Dorothy Lamont, the daughter of American Steel Foundries president Robert P. Lamont. Lamont would later serve as Secretary of Commerce in the Hoover Administration. The union between Belknap and Dorothy produced three children and seven grandchildren, including grandson Gilles Carter. He described Belknap as a charismatic and handsome man who possessed a wonderful sense of humor, a lawyer dedicated to his work and the training of younger attorneys, and a loving and devoted grandfather. Moreover, Carter recalled the life-long

intellectual curiosity of a grandfather who devoured history books, kept up with the latest issue of *Scientific American*, loved looking up new words in the dictionary, and was "interested in everything." More than sixty years after he taught himself French, Belknap mastered Italian so he could draw greater pleasure from the operas he attended.¹⁵⁰

His grandson added that his grandfather's interests extended to the more pedestrian joys of life. Belknap enjoyed supervising the planting and harvesting of fruits and vegetables on his farm on Connecticut, and he was "delighted" by small discoveries like Reddi-whip in a can (which he called "the cat's meow") and Beatles records.

Chauncey Belknap died of cancer on January 24, 1984 at the age of ninety-two. His legacy included a series of small but important lessons learned from Justice Holmes, lessons that he constantly shared with his family: make good use of small bits of time, always have something in your pocket to do, and don't wait aimlessly at the train station.¹⁵¹ Belknap also lived up to the advice that Holmes offered all of his clerks—living is an end, not a means to an end, and you must make sure that you take a good "whack" at your brief time and fully function before your little swirl of electrons dissipates back into the mysterious cosmos.

ENDNOTES

¹ The most extensive discussion of the diary appears in an article by Scott Messenger, who focuses solely on Belknap's clerkship experience. I. Scott Messenger, "The Judge as Mentor: Oliver Wendell Holmes, Jr. and His Law Clerks." *Yale Journal of Law & the Humanities*, Volume 11, no. 1 (1999) [pp. 119–152]. The diary is also referenced in Brad Snyder, **House of Truth: A Washington Political Salon and the Foundations of American Liberalism** (Oxford University Press, 2017) and Thomas Healy, **The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech** (Metropolitan Books, 2013).

² Fredericka Belknap would attend Barnard College. From 1929 to 1954 she held the position of director of the personnel bureau at the New Jersey College for Women. “Wayne Woman Gets College Post,” *The Philadelphia Inquirer*, August 16, 1954.

³ Interview with Barbara Belknap.

⁴ Oral History of Chauncey Belknap, New York Bar Foundation Project, April-May, 1975.

⁵ “300 Get Degrees from Old Princeton: William Dean Howells and G.H. Palmer are Now Doctors of Literature,” *Evening Star* (Baltimore, Maryland), June 11, 1912.

⁶ **The House of Truth**, 102.

⁷ *Id.*

⁸ Oral History, 7.

⁹ *Id.* at 10.

¹⁰ *Id.*

¹¹ **House of Truth**, 2.

¹² *Id.* at 102.

¹³ “Montgomery B. Angell Is Dead: Senior Partner in Law Firm, 70,” *The New York Times*, November 27, 1959.

¹⁴ Oral History, at 15.

¹⁵ “Frances N. Hart, Fiction Writer, 53,” *The New York Times*, October 26, 1943.

¹⁶ **House of Truth**, at 102.

¹⁷ Todd C. Peppers. “The Mystery of Charles Kennedy Poe.” *Supreme Court Historical Society Quarterly* Vol. XXXI, No. 3 (2009): at 6-9.

¹⁸ Oral History, at 16.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 15-16. Cherry bounce is a brandy-based drink.

²¹ *Heim v. McCall*, 239 U.S. 175 (1915), *Truax v. Raich*, 239 U.S. 33 (1915), and *Gegiow v. Uhl*, 239 U.S. 3 (1915).

²² *Stettler v. O’Hara*, 243 U.S. 629 (1917).

²³ *Steinfeld v. Zeckendorf*, 239 U.S. 26 (1915).

²⁴ *Penn. R.R. Co. v. Jacoby*, 242 U.S. 89 (1916).

²⁵ *Seven Cases of Eckman’s Alterative v. United States*, 239 U.S. 510 (1916).

²⁶ *New York v. Sage*, 239 U.S. 57 (1915).

²⁷ Ezra Ripley Thayer was the Dean of Harvard Law School from 1910 to 1915. The law school was rocked by his suicide in the fall of 1915.

²⁸ Walbridge A. Field, Chief Justice of the Massachusetts Supreme Judicial Court from 1890 to 1899.

²⁹ John Henry Wigmore was the Dean of Northwestern Law School and a noted legal scholar. He wrote **Wigmore on Evidence**, published in 1904.

³⁰ Emmanuel Kant and Rudolf von Jhering, eighteenth- and nineteenth-century German philosophers.

³¹ The Willard Hotel, now the Willard Intercontinental Washington.

³² Thaddeus Austin “Thad” Thomson, Jr., was a graduate of the United States Naval Academy. In 1915, he was stationed at the Naval Gun Factory, Naval Yard in

Washington, D.C. Shoemaker possibly refers to James Marshall Shoemaker of Montana, who was a 1915 graduate of the Naval Academy.

³³ Traditionally, the purchase of alcohol has been restricted by Blue Laws on Sundays in certain jurisdictions. These restrictions were repealed in Washington, D.C. in 2013.

³⁴ Mrs. Harrison is probably the wife of George Harrison, who clerked for Justice Holmes the previous Term.

³⁵ Frank Brett Noyes, Frances Noyes’s father, was the president of the Evening Star Newspaper Company and founded the Associated Press, later becoming its president as well.

³⁶ Lord Chief Justice of England, Baron Reading’s visit was noted in the *Washington Post* on October 14, 1915. Lord High Chancellor Herschell sat with the Supreme Court in 1883. Lord Chief Justice Coleridge sat with the Supreme Court in 1889.

³⁷ The British Ambassador from 1912 to 1918 was Sir Cecil Spring Rice.

³⁸ The Belasco Theatre, formerly the Lafayette Square Opera House, was built in 1895 at the current site of the U.S. Court of Federal Claims building.

³⁹ A long coat with a top layer like a short cape, popular during this time.

⁴⁰ Also known as **The Symposium**; Percy Shelley’s translation calls it **The Banquet**.

⁴¹ James J. Hill built a vast network of railroads across the United States Hill authored **The Trust: Its Book** (which he co-authored, about taxation law) and **Highways of Progress**.

⁴² 239 U.S. 3 (1915).

⁴³ David Lawrence graduated from Princeton in 1910 and became a prolific journalist, covering eleven Presidents.

⁴⁴ As a member of the Twentieth Massachusetts Volunteer Infantry, Holmes took part in the Battle of Ball’s Bluff on October 21, 1861 in Loudon County, Virginia. It was a disastrous encounter for the Union Army in general and the Twentieth Massachusetts in particular, as Holmes’ regiment suffered significant losses. First Lt. Holmes himself was initially hit by a spent bullet and later shot in the chest.

⁴⁵ Felix Adler, **The World Crisis and its Meaning** (D. Appleton, 1915).

⁴⁶ Johann Wolfgang von Goethe, German writer and statesman.

⁴⁷ President William Howard Taft had appointed Justices Hughes, Lamar, Lurton, Pitney, Van Devanter, and White.

⁴⁸ *Steinfeld v. Zeckendorf*, 239 U.S. 26 (1915).

⁴⁹ Translated, “Do not gloss the Statute; we understand it better than you do for we made it.” Y.B. 33 Ed. I. Mich., Rolls Ed., 83. Holmes did use this quote in his opinion in the *Steinfeld* case. *Steinfeld* at 30. “Fred Pollock” is a reference to Sir Frederick Pollock, a British jurist and

historian with whom Holmes maintained a long correspondence.

⁵⁰ Walter Bagehot, **Physics and Politics** (1872).

⁵¹ Roscoe Pound was a critic of the Supreme Court's "freedom of contract" line of cases and an influential legal educator who became dean of Harvard Law in 1916.

⁵² *United States Fidelity and Guaranty Co. v. Riefler*, 239 U.S. 17 (1915).

⁵³ The case is *Stettler v. O'Hara*, 243 U.S. 629 (1917). It was first argued before the Court on December 16, 1914, and was restored to the docket for re-argument on June 12, 1916. It was again reargued on January 18, 1917. Holmes originally drafted a dissent that he shared with Belknap (see November 22, 1915 diary entry). The Court decided the case in April 1917. Because Justice Brandeis had been involved in the case as an attorney, he did not take part in its consideration. The result was an equally divided Supreme Court, which meant that the Oregon Supreme Court's original holding, which upheld the constitutionality of the minimum wage law in question, prevailed.

⁵⁴ Likely Oliver Wendell Holmes, **Speeches** (Boston: Little, Brown & Co., 1900).

⁵⁵ *New York v. Sage*, 239 U.S. 57 (1915).

⁵⁶ *Truax v. Raich*, 239 U.S. 33 (1915).

⁵⁷ Belknap may have written the essay "Freedom of Contract Under the Constitution" (no author identified), which appears in the March 1915 issue of the *Harvard Law Review*. The essay references *Raich* along with the New York alien labor law case.

⁵⁸ Belknap perhaps uses "sister" here to mean "fellow woman," as Frances's only sister, Ethel, is Mrs. Lewis.

⁵⁹ Paul Verlaine, a French poet who died in 1896, authored the *Grotesques*.

⁶⁰ Latin: a goal, object, or course of action.

⁶¹ *Penn. R.R. Co. v. Jacoby*, 242 U.S. 89 (1916).

⁶² Justice Henry Billings Brown served as an Associate Justice of the Supreme Court from 1890 to 1906.

⁶³ **The King's English** was written by Henry Watson Fowler and Francis George Fowler and first published in 1906 by Clarendon Press.

⁶⁴ *Missouri v. Holland*, 252 U.S. 416 (1920), dealt with the Migratory Bird Treaty Act of 1918, but this unidentified earlier case appears to be laying the domestic groundwork for that major decision.

⁶⁵ These cases addressed the application of the Constitution to the United States territories acquired as a result of the 1898 Treaty of Paris. They included: *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

⁶⁶ By its own force or vigor.

⁶⁷ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), dissolved a company formed by the stockholders of the Great Northern and Northern Pacific railroad companies, which had essentially formed a monopoly. Although the Supreme Court ruled as Roosevelt wanted, he was infuriated by Holmes's dissent.

⁶⁸ Philander C. Knox served as U.S. Attorney General from 1901-1904, a Pennsylvania senator (1904-1909, 1917-1921), and Secretary of State (1909-1913).

⁶⁹ **Marius the Epicurean** by Walter Pater. Belknap had written about this book in the previous entry: "I spent most of the afternoon and evening over *Marius*; not the least noteworthy feature of the book is the interest which Walter Pater arouses in the bare story of a mental and spiritual life. It is more a philosophic essay than a piece of fiction."

⁷⁰ Norman Hapgood (Harvard Law School Class of 1893) was a journalist, writer and editor. Thurlow Gordon (Harvard Law School Class of 1911) maintained a long correspondence with Holmes; in 1912, Gordon was a special assistant to the Attorney General. Robert Szold, a young attorney, worked as assistant to Solicitor General John W. Davis from 1915-1918. George Rublee helped establish the Federal Trade Commission and played a prominent role in international affairs.

⁷¹ William Leavitt Stoddard graduated from Harvard with a degree in journalism 1908, was a member of the War Labor Board during World War I, and authored books on writing and Shakespeare.

⁷² George M. Trevelyan was a British historian who later taught at Cambridge and Trinity University.

⁷³ Lester Ward, American botanist and sociologist, wrote **Outlines of Sociology** in 1898.

⁷⁴ Edward Alsworth Ross, American sociologist and eugenicist.

⁷⁵ John Drew was a famous actor of the time as well as an uncle to fellow actor John Barrymore.

⁷⁶ Henry Bourne Higgins, "A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration," *Harvard Law Review* Vol. 29 (1915): 13-39.

⁷⁷ *Stettler v. O'Hara*, 243 U.S. 629 (1917).

⁷⁸ 198 U.S. 45 (1905).

⁷⁹ Thomas "Tad" Lincoln was the fourth son born to Abraham and Mary Lincoln.

⁸⁰ See October 11, 1915 diary entry; *Heim v. McCall*, 239 U.S. 175 (1915).

⁸¹ Melville Fuller was Chief Justice of the Supreme Court from 1888 to 1910. His daughter married Hugh Campbell Wallace, who became Ambassador to France from 1919-1921.

⁸² *Reese v. Philadelphia & R. R. Co.*, 239 U.S. 463 (1915). Justice McReynolds wrote the opinion for the Court affirming the judgment below finding the railroad not liable for the death of an employee.

⁸³ This petition had 500,000 signatures; it would be five more years before Congress passed the 19th Amendment in 1920, granting women the right to vote.

⁸⁴ In 1913, Wilson became the first President since President John Adams in 1800 to deliver his State of the Union message in a spoken address to Congress. President Thomas Jefferson began a 112-year tradition of sending a written letter rather than giving a speech.

⁸⁵ Joseph Cannon, an Illinois Representative and former Speaker of the House, served for forty-six years in Congress.

⁸⁶ James R. Mann, an Illinois Representative from 1911-1919, was the Minority Leader of the House.

⁸⁷ Champ Clark, a Missouri Representative, was the Speaker of the House.

⁸⁸ Lindley Garrison, Secretary of War; William McAdoo, Secretary of the Treasury, married to Woodrow Wilson's daughter, Eleanor Randolph Wilson; Josephus Daniels, Secretary of the Navy; W.C. Redfield, Secretary of Commerce; David F. Houston, Secretary of Agriculture; and William B. Wilson, Secretary of Labor.

⁸⁹ Henry Cabot Lodge was a Senator from Massachusetts for over thirty years; John Kern was a Senator from Indiana from 1911-1917.

⁹⁰ Oscar Underwood, Alabama senator from 1915 to 1927.

⁹¹ James Paul Clarke was an Arkansas senator and the president *pro tempore* of the Senate.

⁹² Tom Miller was a Representative for Delaware from 1915-1917. He served in World War I and later in the administration of President Warren G. Harding, but was convicted in 1927 of conspiring to defraud the U.S. Government.

⁹³ Meyer London, a New York Representative from 1915 to 1919, was one of two Socialist Party members elected to Congress. Lawrence Todd, an American journalist best known for serving as a correspondent for a Soviet news agency for three decades beginning in the 1920s, was London's personal secretary from 1915 to 1916.

⁹⁴ David Warfield, American stage actor under Belasco management. Vander Decken was the first captain of the *Flying Dutchman*; Belasco's play was inspired by the legend.

⁹⁵ Frederick Pollock, **Introduction to the History of the Science of Politics** (Macmillan and Company, 1895).

⁹⁶ *Ex parte Uppercu*, 239 U.S. 435 (1915).

⁹⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁹⁸ Arthur Dehon Hill was a well-known attorney in Boston, a friend of Holmes and, later, Frankfurter.

⁹⁹ Translated as **The Hunchback of Notre Dame**, by Victor Hugo.

¹⁰⁰ *Bushwa* was an informal word for rubbish or nonsense circa 1915-1920.

¹⁰¹ Nicholas Longworth, Ohio Representative; Joseph W. Fordney, Michigan Representative; Franklin Wheeler

Mondell, Wyoming Representative; and James Mann, Illinois Representative and House Minority Leader.

¹⁰² Charlie Storey graduated from Harvard in 1912 and from Harvard Law School in 1915. He was working at the Justice Department, and Belknap saw him frequently. However, Charlie was married and did not have the same social freedom as did Belknap. Moorfield Storey, Charlie's father, had served as president of the American Bar Association in 1896 and became the first president of the National Association for the Advancement of Colored People (NAACP) in 1909.

¹⁰³ Gideon Welles was Secretary of the Navy from 1861-1869.

¹⁰⁴ William H. Seward was Secretary of State from 1861-1869. *Piquant bon mots*: anecdotes.

¹⁰⁵ Helen Taft was the wife of William Howard Taft and the First Lady from 1910-1913.

¹⁰⁶ The Drapers lived at 1705 K Street.

¹⁰⁷ Sophie Johnston or Johnstone appears throughout the diary. She is likely the wife of James M. Johnston, an 1870 graduate of Princeton University who later worked at Riggs & Company.

¹⁰⁸ *Stettler v. O'Hara*, 243 U.S. 629 (1917). The opinion referred to in the diary entry was not printed because the Court was equally divided. See note 53 above.

¹⁰⁹ This was the Montsweag Farm Breakfast, named for Butler's farm in Maine. Over 100 men attended the breakfast. The guests of honor were delegates to the Pan-American Scientific Congress. Menus were printed in Spanish and accompanied by sketches of the Montsweag Farm and contiguous territory. *The Washington Post*, January 2, 1916. Butler wrote **A Century at the Bar of the Supreme Court of the United States** (G.P. Putman's Sons, 1942), discussing his experiences with the Court, including his stint as Reporter of Decisions from 1902 to 1916.

¹¹⁰ Carlos Octavio Bunge came from a distinguished Argentinian family. His sister, Delfina, was a writer and philanthropist. His brother, Roberto, was a leader of the Socialist party. Bunge was a highly regarded intellectual whose contributions to science in the early twentieth century were primarily in the area of psychology.

¹¹¹ "President Expected to Name Successor to Lamar at Once," *The Washington Times*, January 3, 1916.

¹¹² Horace Lurton served as an Associate Justice from 1909 to 1914. He was sixty-five years old when he was confirmed, making him the oldest Justice at the time of his appointment in the history of the Court.

¹¹³ Rufus Peckham sat on the Supreme Court from 1896 to 1909.

¹¹⁴ John Marshall Harlan sat on the Supreme Court from 1877 to 1911.

¹¹⁵ Stephen J. Field sat on the Supreme Court from 1863 to 1897. Holmes may be referring to John Wells, who sat on the Massachusetts Supreme Court from 1866 to 1875.

¹¹⁶ Horace Gray sat on the Supreme Court from 1882 to 1902.

¹¹⁷ Alfred Eckhard Zimmern was a British classical scholar and historian.

¹¹⁸ *Seven Cases of Eckman's Alternative v. United States*, 239 U.S. 510 (1916).

¹¹⁹ Charles Devens was an associate justice of the Massachusetts Supreme Judicial Court and Attorney General under Rutherford B. Hayes during the late nineteenth century.

¹²⁰ Marcus Morton was chief justice of Massachusetts Supreme Judicial Court from 1882 to 1890.

¹²¹ John Slidell was a former Louisiana senator and a staunch defender of Southern rights. During the war, Slidell and James Murray Mason were captured by the United States Navy shortly after they embarked on a diplomatic mission to England aboard the *RMS Trent*. International anger over their capture in violation of maritime law led to their eventual release.

¹²² Gustave Le Bon was a French psychologist and author.

¹²³ Herbert Henry Asquith, 1st Earl of Oxford and Asquith, was the Liberal Prime Minister of Great Britain from 1908-1916.

¹²⁴ United Kingdom slang for "drunk."

¹²⁵ Because of his involvement in the case, Justice Brandeis ultimately recused himself from the Court's decision. See notes 53 and 108 above.

¹²⁶ Holmes turned seventy-five on March 8, 1916.

¹²⁷ *Strauss v. Notaseme Hosiery Co.*, 240 U.S. 179 (1916). Holmes did ultimately write the opinion of the Court in this case about whether defendants were liable for infringement or unfair competition for imitating an unregistered, and therefore unprotected, trademark.

¹²⁸ 234 U.S. 548 (1914). The cases were argued October 15, 1913, but not decided until June 22, 1914. Addressing a series of specific issues, the Pipe Line cases considered the constitutionality of the Hepburn Act, which regulated corporations and persons engaged in the interstate transportation of oil. The Court upheld the law as constitutional because the interstate transportation of oil constituted interstate commerce.

¹²⁹ *The Baltimore Sun*, February 5, 1916. The newspaper reports that more than 2,000 people attended the event.

¹³⁰ Oliver "Ollie" James, Senator from Kentucky

¹³¹ Notably, Daniels relied heavily on his Assistant Secretary, Franklin Delano Roosevelt, to help manage the day-to-day affairs of the Navy.

¹³² His father's popular written account of his search for his injured son.

¹³³ Dorothy Kirchwey Brown was the daughter of George Washington Kirchwey, a Columbia professor

who served as the warden of Sing Sing from November or December 1915-July 1916. He replaced and was in turn replaced by Thomas Mott Osborne, a millionaire and prison reformer who voluntarily served a sentence in Auburn and whose reforms led to political unpopularity such that an inmate (one who benefited from the rampant corruption within the prison system) was able to instigate an investigation that led to the indictment of Osborne. The indictment was later discharged, restoring Osborne to his position as warden.

¹³⁴ Lewis Einstein, American historian and diplomat, went to Bulgaria in 1915 and published a book in 1918 about the Ottoman Empire and anti-Armenian atrocities. He also had a long-time correspondence with Justice Holmes.

¹³⁵ Paul Warburg, born in Germany, moved to New York in 1902 and became a successful banker. Warburg wanted to reform the banking system and was appointed to the Federal Reserve Board in 1914.

¹³⁶ Belknap later described Justice McReynolds as "thoroughly lazy." Oral History, at 47. He added that, at the end of October Term 1915, Holmes had to write several opinions originally assigned to McReynolds.

¹³⁷ *Ackerlind v. United States*, 240 U.S. 531 (1916).

¹³⁸ Probably a reference to bearer bond coupons.

¹³⁹ Oscar Wilde's play about marital faithfulness and family loyalty.

¹⁴⁰ Belknap had been reading a novel by George Meredith, a Victorian era British writer, a few days earlier.

¹⁴¹ *Kelly v. Griffin*, 241 U.S. 6, 13 (1916).

¹⁴² John Chipman Gray was a Massachusetts lawyer and Harvard legal scholar and professor. He was half-brother to Supreme Court Justice Horace Gray.

¹⁴³ *Harvard Law Review*, Volume 29, Issue 6 (April 1916).

¹⁴⁴ Eugen Ehrlich was an Austrian legal scholar and sociologist of law.

¹⁴⁵ Prince Rupert's drops result when molten glass is dropped into cold water, forming tear-shaped hardened glass. The teardrop itself will withstand the blow of a hammer, but if the tail of the tear is even slightly damaged, the whole tear will shatter.

¹⁴⁶ Barbara Belknap interview

¹⁴⁷ Oral History, 23.

¹⁴⁸ David Margolick, "Chauncey Belknap, Lawyer, Dies: Led One of the Largest Firms in City." *The New York Times*, January 25, 1984.

¹⁴⁹ Barbara Belknap interview

¹⁵⁰ Interview with Gilles Carter.

¹⁵¹ Barbara Belknap interview.

The Sit-In Cases: Explaining the Great Aberration of the Warren Court

CHRISTOPHER W. SCHMIDT

The Warren Court is remembered for its commitment to advancing the rights of the disempowered. In cases involving contentious national issues—school desegregation, criminal justice, voting rights—the Supreme Court under the leadership of Chief Justice Earl Warren (1953–1969) offered bold new interpretations of the Constitution. But in a line of cases in the early 1960s—cases many at the time believed to be as significant as any the Warren Court faced—the Court broke pattern. When faced with cases involving appeals of criminal convictions for involvement in lunch counter sit-in demonstrations, the Court ducked, again and again. The Court overturned convictions of the sit-in protesters, but always on narrow grounds. A majority of the Justices never squarely faced the difficult constitutional question at the core of the sit-ins: did the Equal Protection Clause of the Fourteenth Amendment allow private businesses that cater to the general public to use race as a qualification for service?

In other lines of cases, when the struggle for racial equality faced constitutional barriers to achieving its objectives, the Warren Court reworked constitutional law. This was particularly true when civil rights activists in the streets were able to secure broad constitutional support for the constitutional claims the civil rights lawyers were pressing in the courts. When it came to the sit-in cases, public opinion had clearly swung behind the cause of the sit-ins protesters. By the middle of 1963, an overwhelming majority of Americans supported equal access to eating facilities.¹ In 1964, when Congress was about to pass the Civil Rights Act, which included a national prohibition on racial discrimination in public accommodations, most of the nation lived under state or local laws requiring nondiscriminatory access to public accommodations.² Despite this transformation taking place outside the Court, the Court still refused to align itself squarely with the students. In fact, in late 1963, a majority of

the Justices were poised to squarely *reject* the students' constitutional claim. The sit-in cases stand as the great—and largely forgotten—aberration of the Warren Court.

Why did the Justices, such stalwart defenders of other civil rights claims during this period, have so much difficulty with the sit-in cases? When the Justices approached the constitutional claim of the sit-ins, they saw the same basic issues that captured the attention of the American people.³ They appreciated the powerful egalitarian message of black students sitting at lunch counters, denied their share of American citizenship for no reason other than the color of their skin. They supported the passage of federal legislation ending this shameful situation once and for all. But they also faced concerns that were particular to their places in the institution perched at the apex of the American judicial system. The Justices worked with a distinctive tool, the language of

constitutional doctrine, with its particular categories of analysis and reliance on precedent. And they were moved by distinctive institutional interests, the most significant of which was an overriding concern with protecting the legitimacy and integrity of the judicial process. The Justices differed among themselves as to the nature, import, and relative weight of these factors, but taken as a whole, they explain why the Court fell out of step with the rest of the nation when it came to the fundamental constitutional question raised by the sit-ins.

This article breaks down the Supreme Court's confrontation with the sit-in cases into four acts. Act One examines two cases, each originating in challenges to racial discrimination that predated the sit-in movement, that arrived at the Court in late 1960 and early 1961, in the aftermath of the sit-ins. I use these cases to introduce the central constitutional issues raised in the sit-in cases



A majority of the Justices on the Warren Court never squarely faced the difficult constitutional question at the core of the sit-ins: did the Equal Protection Clause of the Fourteenth Amendment allow private businesses that cater to the general public to use race as a qualification for service?

as well as to explore the Justices' understanding of these issues around the time of the sit-in movement. Act Two looks at the first appeal of student criminal convictions from the sit-in movement to reach the Court, in late 1961. The particular facts of these cases allowed the Court to overturn student convictions on relatively narrow grounds, but they also indicated growing divisions among the Justices.

Act Three centers on cases decided in 1963 in which the Court continued to find ways to overturn protester convictions without squarely facing the looming constitutional issue. The Court used these cases to strike out at official segregationist policy while avoiding the more difficult question of the constitutional status of discrimination in the private sphere. Act Four looks at the 1963–1964 Term, where the Justices faced a group of cases in which there did not appear to be a way to side with the students without facing the constitutional question. In the most important of these cases, *Bell v. Maryland*, a majority of the Justices were ready to decide the constitutional issues.⁴ A majority initially formed to deny the students' constitutional claim. A remarkable series of last minute vote switches created a majority to come out the other way, in favor of students on broad constitutional grounds. Ultimately, however, when the decision came down in June 1964, the Court was fractured. Although six Justices finally addressed the core constitutional issue, they split evenly on whether this meant the students won or not. The three remaining Justices found, yet again, a way to side with the students while avoiding the constitutional question.

Most accounts of the interplay between social movement mobilization and constitutional change center on episodes in which the Court eventually accepted the movement's claims. They are stories of judicial victories.⁵ The history of the sit-in cases offers a different kind of story. It is a story that is messier and less triumphant. It is a story of the potential of constitutional change litigation as well as its limits.

Act One: *Boynton v. Virginia* and *Burton v. Wilmington Parking Authority* (1960-1961)

In the period after the sit-in movement had started, but before any of the appeals of criminal convictions from the protests had made their way to the Supreme Court, the Justices considered two cases involving racial discrimination in public accommodations. Although each stemmed from incidents that occurred before the 1960 sit-ins, the student movement informed the Justices' and the public's response to these cases.

The first case arrived at the Court in early 1960. Bruce Boynton, an African-American student at Howard University Law School in Washington, D.C., was heading home to Alabama for holiday break in December 1958 when he requested service in the whites-only section of a restaurant located in the Richmond, Virginia, bus terminal. Boynton explained to a waitress who directed him to the black section that, as an interstate passenger, he had a legal right to eat there. (The Supreme Court had issued a line of decisions, dating back to 1941, holding that federal law prohibited racial discrimination in interstate railroad travel.⁶) The manager asked him to leave, and Boynton refused. The manager then contacted the police and Boynton was arrested on trespassing charges. A Virginia judge found him guilty and fined him ten dollars. The Justices accepted the case for review on February 23, 1960, in the midst of the explosion of lunch counter sit-ins across the South, and heard arguments the following October.⁷

The National Association for the Advancement of Colored People Legal Defense Fund (LDF) represented Boynton and Thurgood Marshall argued the case before the Supreme Court. In its brief, LDF urged the Court to take the opportunity to resolve the constitutional issue at the heart of the sit-in movement: could operators of privately owned public accommodations run a segregated business and ask the state to step in

when customers transgressed this policy? Marshall pressed on the Court the constitutional arguments LDF had developed the previous spring in response to the sit-ins.⁸ The civil rights lawyers received surprising support from Eisenhower's Justice Department, which participated as *amicus curiae* in the case and urged the Court to accept LDF's constitutional claim.⁹

In its December 1960 ruling in *Boynton v. Virginia*, the Court passed on the opportunity to declare state enforcement of private discrimination unconstitutional in this context, opting instead to dispose of the case on statutory grounds. Justice Hugo L. Black wrote for a seven-Justice majority, holding that the Interstate Commerce Act's nondiscrimination requirement applied to a restaurant within a terminal that was designed to serve interstate passengers. There were "persuasive reasons" to avoid the constitutional question, Black noted.¹⁰ The Court, predicted *New York Times* Supreme Court reporter Anthony Lewis, will avoid this question "as long as possible, because it is an explosive one."¹¹

The fact that two Justices—Charles E. Whittaker and Tom C. Clark—dissented in *Boynton* was an early example of how the issue of discrimination in public accommodations challenged existing patterns at the Supreme Court. Since the 1940s, the Justices sought to speak with one voice in racial segregation cases. *Brown* was unanimous, as were its key predecessors striking down segregation in higher education.¹² In desegregation rulings that followed *Brown*, the Court emphasized its solidarity by issuing unsigned *per curiam* rulings and, most dramatically, in *Cooper v. Aaron*, the 1958 Little Rock school desegregation case, by having all nine Justices sign the Court's opinion as a show of unity against white southern defiance of *Brown*.¹³ When it came to the Justices' assessment of the kinds of discrimination prohibited by the Equal Protection Clause, the Warren Court Justices

were basically in agreement. Where they agreed less, however, was about the reach of the Equal Protection Clause, specifically the limits of the Fourteenth Amendment's "state action" requirement.

In its narrowest form, the state action doctrine is quite straightforward: The Fourteenth Amendment restricts government, not private individuals. The Supreme Court's seminal articulation of the state action doctrine, the *Civil Rights Cases* of 1883, outlined the basic public-private dichotomy on which the doctrine was based. The Fourteenth Amendment does not protect against "the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," the Court explained. "The wrongful act of an individual is simply a private wrong . . ."¹⁴ The Court never abandoned this basic principle. Yet, beginning in the 1940s, the Court steadily expanded the definition of state action to incorporate more and more activity that it had previously confined to the private sphere, thereby expanding the reach of the Fourteenth Amendment.¹⁵

The sit-in cases raised a difficult state action question because in these cases the discrimination was made by the owner of a public accommodation that was not required by state law either to segregate or not to segregate. It was, as a formal matter, a "private" choice. Could one claim that the discrimination policy of this person itself constituted an equal protection violation? The claim in this case would be based on the argument that a public accommodation that opens its doors to all customers and provides a basic service to its community, even if technically private, in effect functions as a state actor.¹⁶

Another legal wrinkle was the possibility of a constitutional challenge not to the owner's discriminatory choice, but to the involvement of the state in enforcing that choice. Even if there were no constitutional limitation to a private business owner's choice of whom to serve, there could be a



In 1963, college student Dorothy Bell waited at a Birmingham lunch counter for service that never came. She was later arrested with twenty others at a sit-in protest.

constitutional problem when the owner, faced with an African American who refused to leave the establishment after being denied service, called the police. Although the police were acting to enforce a trespassing or disorderly conduct statute—laws that were racially “neutral,” in that the text of the statute made no reference to race—and although they were enforcing a private choice, the arrest and subsequent prosecution were obviously actions of the state. Were southern states denying African Americans equal protection of the laws by enforcing the discriminatory policies of private business owners? The critical precedent here was the 1948 case *Shelley v. Kraemer*, in which the Supreme Court held that judicial enforcement of private contractual agreements to refuse to sell property to African Americans violated the Equal Protection Clause.¹⁷

For the Warren Court, cases involving racial discrimination in public accommodations would be uniquely divisive. Minor

cracks among the Justices on these issues would grow into angry fissures.

The second case in this first act of the Supreme Court’s confrontation with the legal issues raised by the sit-ins involved a privately run restaurant, located in a municipal parking garage, that refused to serve blacks. In August 1958, in Wilmington, Delaware, William H. Burton, an African American and a member of the Wilmington city council, parked his car in a city-owned garage and walked into the Eagle Coffee Shoppe, which was located in the garage. He was refused service. Burton’s lawsuit challenging the restaurant’s discriminatory policy ran headlong into the state action limitation of the Fourteenth Amendment. The restaurant was a private business, so Burton sued the city for operating a parking garage that leased space to a business that discriminated. The question, then, was whether the relationship between the city and the restaurant was strong enough to hold the city responsible for the

restaurant's policy. The Delaware trial court found that Burton had been subject to unconstitutional racial discrimination.¹⁸ The state's supreme court reversed, holding that the restaurant acted in a "purely private capacity" and thus was not constrained by the Fourteenth Amendment.¹⁹

Burton fared better at the U.S. Supreme Court. In a 6-3 decision, issued in April 1961, the Justices sided with Burton—and the Solicitor General, who filed an amicus brief on Burton's behalf. The Court held that the city government had "so far insinuated itself into a position of interdependence" with the restaurant that it became a "joint participant" in the discriminatory policy. The analysis in Justice Clark's majority opinion relied on a context-driven balancing test—he described this as "sifting facts and weighing circumstances"—to evaluate whether there was the necessary state involvement to rise to the level of state action under the Fourteenth Amendment. He noted the location of the restaurant in a building that was not only government-owned but was an ongoing government-run business. The mutual dependency of the parking garage and the restaurant created the necessary state action in this instance.²⁰

Clark ventured further, however, offering an additional, and quite far-reaching, line of reasoning in his state action analysis. A state refusal to act to prevent private discrimination might itself be a form of state action under the Fourteenth Amendment, he suggested. "By its inaction, the . . . State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."²¹ This reference to what has been called a "permission" or "inaction" theory of state action had potentially dramatic implications. If a state could prohibit a form of private discrimination but chose not to, then it could be said that it permitted that discrimination. But once one starts down this path, it is hard to know when to stop. The

permission theory of state action contains the seeds of a rejection of the entire premise of state action as defining the boundary between the private and public realms. In suggesting the existence of affirmative government obligations under the Equal Protection Clause, Clark seemed to open the door to a reconsideration of the scope of government responsibility under the Constitution to protect people from discrimination by private actors.

But then, perhaps recognizing the potentially radical nature of his state action analysis, Clark pulled back. A Texan with a solidly liberal reputation on civil rights issues during his time as U.S. Attorney General under President Truman and then, beginning in 1949, as a Supreme Court Justice, Clark was generally not recognized for the rigor or vision of his legal analysis. Do not read too much into my opinion, he basically said: "Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested." In a highly regulated society, "a multitude of relationships might appear to some to fall within the [Fourteenth] Amendment's embrace," he noted, but then cautioned that the only test of when state involvement with private actors was "significant" enough to justify a finding of state action was to look to "the peculiar facts or circumstances present."²² By the end of the opinion, Clark seemed intent on limiting his holding to the facts of the Eagle Coffee Shoppe.

Justice John M. Harlan dissented. Harlan was the grandson of the Justice with the same name who wrote a famous solo dissent in *Plessy v. Ferguson*, the 1896 Supreme Court decision holding that state-mandated racial segregation did not violate the Fourteenth Amendment.²³ In his sixth year on the Court, the second Justice Harlan was emerging as the conservative voice of the Warren Court,

frequently warning against the bold doctrinal innovations his more liberal brethren favored. Cases involving the state action issue offered another platform for his cautionary message. “The Court’s opinion,” he wrote in his *Burton* dissent, “by a process of first indiscriminately throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of ‘state action.’”²⁴

Commentators and scholars also expressed frustration at the expansive ambiguity of Clark’s opinion. Some questioned whether the Court had gone too far. Some urged the Court to go further and apply its reasoning to lunch counters and other facilities that served the public: “[W]e regret that [the Court] felt any necessity for hedging” wrote the editors of the *Washington Post*; the *Pittsburgh Courier*, a black newspaper, called the ruling a “defeat in a victory.”²⁵ And some wondered what to make of this “vague and obscure” opinion.²⁶

Court-watchers knew that *Boynton* and *Burton* were just the tip of the iceberg. The law on questions of segregation in public accommodations “remains unsettled at critical points, with much development evidently still ahead,” noted the *New York Times*’ Anthony Lewis after *Boynton* came down.²⁷ In January 1961, less than a month after *Boynton* and several months before *Burton*, the Supreme Court received its first petitions for certiorari in cases emerging from the sit-in movement.

Act Two: The Louisiana Cases (1961)

In their early confrontations with appeals emerging from the lunch counter sit-in protests, the Justices overturned the convictions of sit-in protesters, but they did so on relatively narrow grounds. The Justices resisted the entreaties of the LDF lawyers

to embrace any of the vague invitations offered in Clark’s *Burton* opinion. Observers assumed that the Justices were waiting for the right moment, their cautious rulings in these cases laying the foundation for a subsequent ruling that would place the Court squarely behind the students’ constitutional claim.

Of the hundreds of convictions that arose out of the 1960 sit-ins, the first to reach the Supreme Court on appeal came out of Louisiana. On March 21, 1961, while the Justices were writing their opinions in *Burton*, the Court agreed to hear three appeals of disturbing-the-peace convictions stemming from March 1960 sit-ins in Baton Rouge. Although *Garner v. Louisiana* would eventually be decided unanimously,²⁸ behind the scenes, divisions among the Justices were growing and hardening, breaking apart longtime allies and drawing together usual antagonists.

When the Justices first met to discuss whether to hear the cases, Black and Felix Frankfurter formed a rare alliance, both opposing the LDF’s constitutional argument. The two men were a study in contrasts. Black grew up in rural Alabama, where he practiced law before climbing the ranks of Alabama politics—a climb that was aided by his membership in the local Ku Klux Klan. He became a U.S. Senator in 1926, and his staunch support for Franklin D. Roosevelt’s New Deal helped get him appointed to the Court in 1937. As a Justice, Black sought to make up for his lack of formal education, putting himself through a rigorous course of self-education. He also sought to make up for his ignominious history on the race issue, emerging as one of the Court’s most aggressive champions of equal rights for African Americans. Frankfurter was born in Austria and came to New York City with his family at age twelve. His exceptional academic abilities got him into Harvard Law School, where he graduated first in his class and where he would soon return as a professor. During his years teaching at Harvard, he was an

outspoken defender of liberal causes and he served as an advisor to the NAACP. Once appointed to the Court in 1939, however, he became the Court's leading voice of judicial restraint, regularly warning his colleagues against weighing in on controversial social issues. This had produced some ironic moments at the high court, such as during the lead-up to *Brown*, when the ex-KKK member from Alabama was urging the Court to strike down segregation while the ex-NAACP advisor from Massachusetts was urging the Court to avoid the issue. Frankfurter and Black also differed on whether the protections of the Bill of Rights applied to the states, one of the most pressing issues during their time on the Court. They engaged in epic battles over the direction of the Court's constitutional jurisprudence throughout the 1940s and 1950s.²⁹ The sit-in cases were different, however. Here, the longtime antagonists were in unusual accord. When the Justices privately met to discuss the first sit-in cases for the first time, Black insisted that, as far as the Constitution was concerned, the "merchant can make his stores segregated or desegregated."³⁰

The brilliant, irascible, and uncompromising William O. Douglas, who typically aligned with Black in jurisprudential battle against Frankfurter, emerged as Black's most dedicated adversary in the sit-in cases. For Douglas, the case was nothing more than a simple extension of the doctrine of *Shelley v. Kraemer*—once the police got involved, the business owner's "private" choice to discriminate became a matter of government policy, thus bringing with it the constraints of the Fourteenth Amendment. When he thought the Court would deny review of the Baton Rouge cases, Douglas drafted an angry dissent. Allowing these convictions to stand would mark a "retreat" from the *Shelley* principle that judicial enforcement of private discrimination was state action, he argued. If the Court wanted to take this path, it should do so explicitly, not by refusing to review the case.

"Members of both races have the right to know whether the line we once drew still exists . . ." The Court eventually agreed to hear the cases, and Douglas filed away his draft dissent, saving its arguments for future sit-in cases.³¹

The Court heard oral arguments in the Louisiana cases in October 1961. Jack Greenberg, recently promoted to director-counsel of LDF after Thurgood Marshall's appointment as a federal appeals court judge, argued the students' case. He led with the constitutional argument that Douglas was making behind closed doors, that Marshall had offered in *Boynton*, and that the LDF would push in all the subsequent sit-in cases: *Shelley* established that the authority of the state—in the form of arrests and prosecutions—could not be used to protect racial discrimination by businesses that served the public.³²

Greenberg also gave the Court an alternative way to overturn the convictions—one that the Justices would gratefully accept. The facts of the case, he argued, failed to show that the protests met the legal threshold for a disturbing-the-peace conviction. All the Baton Rouge demonstrators did was sit down and ask to be served. There were no counter-protesters. There was no evidence of a public disturbance. Louisiana could not claim that the mere breaking of a segregation custom was itself a disturbance of the peace. (When asked at trial how the demonstrators were disturbing the peace, the arresting officer answered: "By sitting there."³³) To do so would mean, in effect, that the students "were convicted of being Negroes at a white lunch counter," Greenberg told the Justices, and this the state could not do under the Equal Protection Clause. For this reason, he argued, the convictions could be overturned for a lack of evidence.³⁴

Louisiana's assistant district attorney presented arguments that echoed claims opponents of the sit-in movement had been making all along, and also anticipated claims



In 1960, local Nashville men attempted to drag black students from the lunch counter at Woolworths, where they had staged a sit-down seeking integration. The police came and arrested seventy-three students, mostly black, at a variety of stores.

that would be replayed at the Supreme Court in the coming years. He emphasized the imminence of violence in the sit-in protests. As Louisiana had claimed in its brief, “In almost every instance of the staging of a militant ‘sit-in demonstration’ violence had occurred with resulting fist fights between members of the two races.” Although such a characterization required some rewriting of recent history, as most sit-ins did not lead to violence, and was a self-serving elision of the fact that the violence that did occur was invariably initiated by white segregationists, it was effective at drawing attention to the substantial public disorder that the sit-in protests often ignited. Agree or disagree with the students’ cause, the state lawyers insisted, one must recognize the responsibility of the state and local government to ensure the law and order of its communities.³⁵ This argument increasingly resonated with certain

members of the Supreme Court in the years to follow.

When the Justices’ responded skeptically toward his portrayal of the facts, Louisiana’s attorney offered another argument. He accused the NAACP lawyers of scheming to explode the state action limitation on the Fourteenth Amendment—a doctrinal path with dangerous consequences. Louisiana, he insisted, was not discriminating. “We have enacted no statute which requires segregation in these places. We have enacted no statute which requires integration in these places.” The state did nothing more than enforce race-neutral policies designed to protect the peace of the community.³⁶

Louisiana’s attorney also argued that the rights of business owners needed protection as well. The core issue of the case came down to “whether or not in our country, a private property owner still has the right to admit or

deny access to his property or to restrict in some fashion the use of that property for any reason that he may choose." He warned against taking away from the people their "right to privately discriminate or, to state it correctly . . . the right to associate, and the corresponding right not to associate, with whomsoever they please for whatever reason they please, that is guaranteed to *them* by the Constitution."³⁷

When the Justices met to discuss the cases following oral argument, Douglas wanted to issue a broad constitutional ruling that would overturn the disorderly conduct arrests on both free speech and equal protection grounds. The issue was simple for Douglas: "a state cannot restrict either by statute or by judicial decision the use of a public place to one race." To rule otherwise would be to make the same mistake the Court did in *Plessy v. Ferguson*: it "would fasten segregation in a constitutional way on all the private enterprises in the south and perhaps in other areas as well." Chief Justice Warren and Justice William J. Brennan indicated some degree of support for this position.³⁸

Black and Frankfurter aligned against Douglas, and, by Douglas's estimate, they had the support of Harlan and Clark. Frankfurter told the Justices that this was a time to "creep along rather than be general."³⁹ The Louisiana cases, he explained in a letter to the Chief Justice, "should be disposed of on the narrowest allowable grounds." Because "we are all fully conscious of the fact that it is just the beginning of a long story," the Court should "make of this a little case."⁴⁰ In urging this gradual path, Frankfurter had influential backing from the U.S. Justice Department. Although in the previous Term, Eisenhower's Solicitor General had called on the Court to strike down any state enforcement of racial discrimination in public accommodations, the Solicitor General under the Kennedy Administration, Archibald Cox, a labor law expert who had been teaching at Harvard Law School, took a more cautious approach. His

amicus brief asked the Court to resolve the issue in favor of the students "without involving broader and largely uncharted questions concerning the meaning of 'State action.'"⁴¹

On December 11, 1961, two months after oral arguments, the Justices unanimously overturned the convictions of the Baton Rouge protesters. "[W]e find it unnecessary to reach the broader constitutional questions presented," Warren explained in his opinion for the Court, which rejected Louisiana's argument that the mere act of refusing to leave the lunch counter when asked to do so amounted to a disturbance of the peace under Louisiana law. The protesting students, stated Warren, "not only made no speeches, they did not even speak to anyone except to order food; they carried no placards, and did nothing, beyond their mere presence at the lunch counter, to attract attention to themselves or to others." Thus, the Court concluded, the convictions were "so totally devoid of evidentiary support" that they violated the students' constitutional right to due process of law.⁴² As the Supreme Court usually allows state courts the last word when it comes to measuring the evidence required to support a state-law criminal conviction, this was a remarkable holding.

Three Justices wrote concurring opinions. Frankfurter questioned Warren's reading of the Louisiana statute but ultimately agreed that the prosecution lacked evidence.⁴³ Harlan's main argument was that the First Amendment prohibited state prosecutions under a "general and all-inclusive breach of the peace prohibition" that had the effect of restricting speech.⁴⁴

Douglas brushed aside his colleagues' concerns about moving too quickly in these cases. "[T]he constitutional questions must be reached," he declared at the opening of his concurrence. Douglas offered a grab bag of rationales for why the state should be held responsible for violating the equal protection rights of the protesting students. For Douglas,



These sit-ins inspired a massive social protest movement, which, in turn, pressured Congress to pass landmark civil rights legislation. Ironically, however, the sit-in protests made the Court more divided and ultimately less likely to give the movement a sweeping constitutional victory. Above are peaceful protesters in Tallahassee Florida, in 1960.

the case boiled down to a simple fact: “[T]he police are supposed to be on the side of the Constitution, not on the side of discrimination.” Douglas also argued that the Court should recognize pervasive community customs and practices as a form of state action. “Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law.”⁴⁵

Douglas also staked out a broad claim for rethinking the constitutional responsibilities of public accommodations. He offered two overlapping reasons why, when it came to applying the Equal Protection Clause of the Fourteenth Amendment, restaurants should be distinguished from other private enterprises.

First, restaurants require state licenses to operate, and “[a] license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public.” Second, public accommodations have a distinctive responsibility in American society. Restaurants have a “public consequence”; they are “affected with a public interest.” As such, they should be treated like state-operated public facilities and the protections of the Equal Protection Clause fully applied.⁴⁶ In the coming years, Douglas’s *Garner* concurrence provided a guiding light for civil rights lawyers who sought to make the case that discrimination in public accommodations violated the Constitution.

“For those who had hoped for a sweeping expansion of state action under the fourteenth amendment,” Warren’s “drab” reasoning was a “disappointment,” wrote law professors Kenneth Karst and William W. Van Alstyne. Yet, they added, “there was something for everyone in the *Garner* case.”⁴⁷ CORE praised the “historic” ruling as “the dawn of a new day of equality,” and in Baton Rouge, where the *Garner* case originated, members of the group launched a new round of sit-in protests on the day the Supreme Court decision came down.⁴⁸ Others lauded Warren for his cautious judicial statesmanship. The Court left the issue “to the consciences of the people concerned,” Eugene Patterson, editor of the *Atlanta Constitution*, approvingly noted.⁴⁹ Southern state officials downplayed the ruling, saying it had no effect on the sit-in convictions they continued to pursue on appeal, since they were based on trespass convictions or breach-of-peace convictions in which they insisted they had sufficient evidence.⁵⁰

Reading the tea leaves, some observers assumed that Douglas, whose *Garner* concurrence was filled with what Professors Karst and Van Alstyne described as “dazzling moves,” charted a course that the rest of the Court would soon follow.⁵¹ “The feeling is that when the justices reach the question of segregation in private businesses such as lunch counters, in cases that cannot be decided on technical grounds, they will declare the practice unconstitutional,” reported the *New York Times*.⁵²

Act Three: The Sit-In Cases of 1963

Despite these optimistic predictions, the reworking of the state action doctrine that seemed in the offing in the 1961 *Burton* and *Garner* cases never happened. In some ways, the 1961 cases were the high-water mark of the Court’s reconsideration of the contours of the state action doctrine in response to the sit-

in movement. The Court never picked up on the tantalizing hints in *Burton* and never coalesced around any of Douglas’s invitations in his *Garner* opinion. The Justices continued to find ways to overturn the convictions of the protesters without deciding the larger constitutional question. These decisions, complained one law professor, “were not convincing of anything except the Court’s patent desire to avoid deciding the troublesome question.”⁵³

The next round of cases involved appeals of trespass conviction for protests in cities across the South: Birmingham, Durham, New Orleans, and Greenville, South Carolina. These cases displayed sharpening divisions within the Court. What had been behind-the-scenes battles were breaking out into the open. Douglas had already publicly declared his frustration with the Court’s cautious approach. Others now did the same. On the other side, the Justices who were most skeptical of the argument that the students had a viable constitutional claim were becoming more adamant and more outspoken. Justice Harlan, who in his *Garner* concurrence had discussed situations in which sit-in protests might fall under the protection of the First Amendment, now warned against what he viewed as the Court’s willingness to manipulate facts and law to overturn protester convictions. And Justice Black expressed growing unease with the direction of the civil rights movement. His concerns that the sit-in protests threatened the property rights of white proprietors would lead him to articulate a passionate defense of the state action limitation of the Fourteenth Amendment.

In early November 1962, the Court heard three days of arguments in this new batch of sit-in cases. Oral arguments were a largely predictable debate between LDF lawyers, who argued for overturning the convictions because they violated the Fourteenth Amendment, and the lawyers for the states, who argued that the prosecutions were race-neutral

efforts to protect private property and public order.

Solicitor General Cox again urged minimalist resolutions. Greenberg had pleaded with Kennedy Administration lawyers to stand behind LDF's position. The primary obstacle proved to be Cox, who believed not only that the Justices were not ready to accept such an argument, but that they should not accept it.⁵⁴ To ask the Court to abandon a doctrine that had been in place since the late nineteenth century, Cox recalled, "took an awful, awful gulp, according to my views of the law and the need to preserve the ideal of law." He felt that expanding the state action doctrine to cover privately operated public accommodations would have problematic consequences. How, he asked Greenberg, could the courts distinguish a private social gathering from having dinner at a restaurant? Wouldn't LDF's position lead to more violence as business owners took it upon themselves to enforce their discriminatory policies? As Cox recalled, "[H]ere my philosophy about the role of judges and the prestige of the Court, the legitimacy of the Court's decisions, did play an important role."⁵⁵ Greenberg was unimpressed. "If you believe in your position, write it up in the *Harvard Law Review*," he said. "But now you're the Solicitor General of the United States, and it is the policy of the Kennedy administration to oppose discrimination wherever it can."⁵⁶ Other lawyers in the Justice Department, including Burke Marshall, head of the Civil Rights Division, were more sympathetic to LDF's constitutional argument. But Cox had the final word.

Following a lively oral argument, notable in particular for Justice Black's obvious skepticism toward the students' constitutional claim, the Justices met in their private Conference.⁵⁷ Warren led off the discussion by explaining that the student convictions should be overturned, although he believed the Court could do so on narrow grounds once again. Black agreed, but he added, "if it is

necessary," he would "meet these cases on their merits." His views on the constitutional issue were clear: "a store owner as a home owner has a right to say who can come on his premises and how long they can stay." And with that right came the option to call on the police to enforce it. Harlan, Clark, and Potter Stewart all signaled their support for Black's position on the constitutional question.⁵⁸

On May 20, 1963, the Supreme Court issued its rulings. The Court's decisions in the cases from Greenville, Durham, and Birmingham turned on the fact that, at the time of the protests, these cities had ordinances requiring segregation in public eating places. Although no protesters were arrested for violating these patently unconstitutional ordinances, their mere existence meant the private business's choice to discriminate was not a truly "private choice," wrote the Chief Justice. By retaining their segregation laws, the city "has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons."⁵⁹

In the New Orleans case, where there was no applicable segregation ordinance, the Court located the hand of discriminatory government authority in the public statements by the police chief and mayor asserting that the city had a responsibility to prevent the sit-ins. Just as in the Greenville case, "the voice of the State direct[ed] segregated service," wrote Warren, and this the Constitution did not allow.⁶⁰

Divisions among the Justices were widening. In a concurring opinion, Douglas continued to demand a bold judicial resolution of the issue. "We should not await legislative action before declaring that state courts cannot enforce this type of segregation," he wrote, alluding to the federal civil rights bill that the Kennedy Administration had recently proposed, which included a provision that would prohibit racial discrimination in public accommodations. He



Justice Douglas wanted to issue a broad constitutional ruling that would overturn the arrests of sit-in protesters. “No question preoccupies the country more than this one,” he wrote; “it is plainly justiciable; it presses for a decision one way or another; we should resolve it.”

reiterated arguments from his *Garner* concurrence, concluding that the Constitution did not allow a state to “license and supervise a business serving the public and endow it with the authority to manage that business on the basis of apartheid.”⁶¹

Justice Harlan also wrote a separate opinion. Unlike Douglas, who believed the Court was too beholden to its state action precedents, Harlan felt the 1963 decisions went too far in weakening a venerable and valuable doctrine.⁶² He defended the “vital functions in our system” the state action doctrine served. At issue in these cases was “a clash of competing constitutional claims of a high order: liberty and equality.” Harlan was concerned that liberty was being undervalued. “Freedom of the individual to choose

his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference,” he warned.⁶³

Having rejected the majority’s assumption that the mere existence of the segregation policy was enough to remove the possibility of treating the discrimination as the product of private choice, Harlan then turned to the facts of the particular cases before the Court. In the *Greenville* case, he found sufficient evidence that the business manager acted because of the ordinance. In the *Birmingham* and *Durham* cases he found no such evidence, and therefore argued that the convictions should be upheld. In the *New Orleans* case,

Harlan interpreted public statements of local officials as efforts to preserve the peace rather than segregation; he called for a new trial to assess the connection between the mayor and police chief's statements and the store manager's actions.⁶⁴

In order to "present as united a front as possible," Warren explained in a letter to Douglas, he was willing to "leav[e] some facets of the problem to be dealt with next Term." The next Term the Court would face a new group of sit-in cases, none of which could be disposed of based on the reasoning the Court had deployed thus far. *Bell v. Maryland*⁶⁵ presented the constitutional issue in its starkest terms. The protest occurred not in the Deep South, where the pervasive nature of explicit official support for racial segregation and the intertwined nature of segregation custom and law offered ample opportunities to locate discriminatory state action, but in Maryland, where segregation was less firmly embedded in custom and policy. In *Bell*, it appeared that the Justices finally had a sit-in case in which they would have to squarely face the constitutional issue.⁶⁶

Act Four: *Bell v. Maryland* (1964)

"The great battle of the 1963 Term was fought . . . over the Sit-In Cases," wrote Justice Brennan's clerks in a memo they prepared at the Term's end. They "were argued on the first day of the Term and decided on the last, and were the subject of fierce debate for much of the time in-between." When the Justices at the close of the previous Term agreed to hear a new series of sit-in appeals, they assumed they would finally have to confront the state action issue they had been carefully avoiding. As Brennan's clerks described the situation:

In view of the prevalence of sit-in demonstrations throughout the country and the heated emotions

aroused by the issue of racial discrimination in places of public accommodation, the Court, led by Justice Black, thought it imperative that a definitive constitutional ruling be announced as to whether such demonstrators could constitutionally be convicted of trespass.⁶⁷

Bell had its origins in the arrest of twelve African Americans for a sit-in protest at a Baltimore restaurant in 1960. The protesters were convicted under Maryland's criminal trespass statute, and the state's high court upheld the conviction.⁶⁸ The existence of segregation laws on the books or public proclamations of support for segregation practices were not available here. Indeed, Maryland argued in its brief, at a number of the restaurants the protesters targeted prior to their arrest, they were served without incident. The restaurant owner who chose to press trespass charges against the protests professed to be "in sympathy" with the objectives of the protesters, if not their methods.⁶⁹

Oral arguments in the cases fell into what was now a familiar pattern. LDF attorney Jack Greenberg parried questions about the limits of his arguments against state enforcement of private discrimination. Does it apply to the home? asked Justice Stewart. No. A private club? No (assuming it was a "genuinely private club" and not a "sham"). A buying cooperative? Not sure about that one. A church? No. Greenberg found himself making strong claims on behalf of the right to discriminate in areas of society that are truly private but then using this partial concession to strengthen his central argument: that a public accommodation—"a place fully open to the public, fully subject to regulation"—is in a distinct category.⁷⁰

At their Conference following oral argument, Warren expressed regret about the position in which the Court found itself. He had hoped the Justices would be able to



Justice Black expressed concern that the sit-in protests threatened the property rights of white proprietors and vigorously defended the state action limitation of the Fourteenth Amendment. By the mid-1960s, Black had become increasingly uncomfortable with the rising tide of civil rights activism. Above is a replica of his home office, reconstructed at the University of Alabama Law Center.

“take these cases step by step, not reaching the final question until much experience had been had.” But now, in these cases, “[t]hat course seems to me to be impracticable.”⁷¹

In three of the cases a majority of the Justices voted to overturn convictions on narrow grounds, as they had done before. But in the remaining two, *Bell* and *Robinson* (the Florida case), the Justices voted 5-4 to affirm the trespass convictions based on the principle that the Fourteenth Amendment does not apply to private discrimination and that a restaurant owner’s policy of whom to serve was a private choice. Voting to affirm were Justices Black, Clark, Harlan, Stewart, and Byron White. Black was the most outspoken in his opposition to the sit-in protesters’ constitutional claim. He once again spoke about his father’s right to serve whom he wanted in his Alabama general store. As the senior Justice in the majority, Black assigned himself the opinion of the Court affirming the convictions.⁷²

According to an account Brennan’s law clerks prepared based on Brennan’s descriptions of the Justices’ private Conference, the “discussion was very heated, not only because of the importance of the issue and the fervor with which views were held on both sides, but also because the minority Justices feared that the affirmance might have a crippling effect on prospects for Congressional passage of the Civil Rights Bill.” These Justices, led by Brennan, sought to delay the opinion in the hope that either Congress would pass the bill or, if the bill failed, one of the majority might be convinced to switch sides. (Brennan thought White was most likely.) Black, in contrast, was particularly concerned with what he saw as a growing threat to law-and-order from the strengthening civil rights protest movement. He believed that the Court had a responsibility to decide the issue as quickly as possible.⁷³

The debate continued at a later Conference. Arthur Goldberg, who had replaced

Justice Frankfurter on the Court in late 1962 and had quickly aligned himself with Warren and Brennan in the sit-in cases, made another plea for the Court to resolve the cases on narrow grounds. Considering the pending civil rights bill, “[i]t would be a great disservice to the nation to decide this issue 5-4.” It would be a “tragedy.” Black refuted his arguments point by point and held his majority.⁷⁴

The discussion then turned to whether they should invite the Solicitor General to present the government’s position on the state action question, as the government’s brief had carefully avoided this question, but this too divided the Court. The Black-led group saw this as nothing more than a delay tactic (which it clearly was). Stewart defected from the majority on this issue and gave Brennan the fifth vote he needed.⁷⁵

Four days after the Court requested further briefing from the Solicitor General, President Kennedy was assassinated, and Lyndon B. Johnson became the nation’s new President. Jack Greenberg and Joseph Rauh, the liberal activist and lawyer who was arguing one of the sit-in cases before the Supreme Court, met with Johnson’s assistant for civil rights to urge the new administration to embrace LDF’s legal arguments in the sit-in cases. “We argued,” Greenberg recalled, “that Cox was obliged to advocate the position of the United States, not his personal philosophy.” The Solicitor General eventually submitted a brief to the Court that placed the federal government in basic alignment with LDF’s position.⁷⁶

Undeterred by this new, bolder intervention by the federal government, Justice Black moved ahead with his original plan. He circulated a draft of his majority opinion in early March 1964. Harlan praised Black’s opinion as “a splendid job, and eminently right,” and Clark described it as “just right” and expressed his hope that it would soon be released. Black’s majority was “absolutely solid and indestructible,” Clark assured Goldberg.⁷⁷

Black’s draft opinion squarely rejected the argument that the Constitution prohibited a store operator from calling on the police to enforce his choice of whom to serve, even if his choices was driven by racial prejudice. As long as the state did not enforce its trespass laws “with an evil eye and a prejudiced heart and hand,” the equal protection requirement was met. “We do not believe that the Amendment was written or designed to interfere with a property owner’s right to choose his social or business associates, so long as he does not run counter to a valid state or federal regulation.” Here Black was making clear that he saw private property rights as a limit on the courts in their reading of the Fourteenth Amendment, but not on state legislatures or Congress when they passed public accommodation laws.⁷⁸

Douglas countered with a scathing dissent. He opened, “Never in our cases, unless it be the ill-starred *Dred Scott* decision, has property been more exalted in suppression of individual rights.” He also accused the majority of making “corporate management the arbiter of one of the deepest conflicts in our society.”⁷⁹

The normally measured Chief Justice drafted a dissent that contained all the anger of Douglas’s. He attacked the majority for “interpos[ing] principles of privacy and protection of property rights between Negro petitioners and the right to equal treatment in public places” and predicted the ruling would undermine “the future development of basic American principles of equality.” Writing of the department store policy of serving African-American customers everywhere but when seated at the lunch counter, Warren wrote:

The store might as well have offered to feed only Negroes who would crawl in on their hands and knees, or, as in other caste systems, who would purchase food under conditions that would not cause their

shadow to fall on the food of whites. It saddens me deeply to think that this Court, which has so far advanced the notion of equal dignity of all men before the law, would sanction the right so publicly first to shame and then to punish one who merely seeks that which any white man takes for granted.

Warren challenged Black's excessive reverence for the property rights of business owners, writing that "the important civil right of equal access to public places is a right which the Constitution forbids a State to deny in the name of private property." The Fourteenth Amendment protects "that little bit of humanity" that is lost "each time a state-sanctioned inferior status is publicly thrust upon" a person—a line that echoed the famous reference in his *Brown* opinion about the damages segregated schooling inflicted on the psyches of black children.⁸⁰

Around this time, with the angry debate over the sit-in cases echoing in the halls of the High Court, Brennan's clerks hatched an escape plan. Maryland, they learned, had recently passed a public accommodations law. Further research found that Baltimore, where the protest in *Bell* had taken place, had had a similar regulation in place for two years. What if this new law were read to apply retroactively, thereby vacating pending sit-in convictions? According to the clerks' account, "The new idea evoked a favorable, or at least interested, reaction from Justice Brennan and others to whom it was presented."⁸¹

For the time being, the Court continued to move ahead on the assumption that Black would be writing a majority opinion in *Bell* upholding the trespassing convictions. Justice Harlan wrote to Black that he was anxious to announce their decision "without further unnecessary delay." In mid-April, Brennan began writing a dissenting opinion, arguing that the convictions should be overturned

because of the passage of the state and local public accommodations laws. Goldberg circulated a dissent arguing that the Fourteenth Amendment prohibited the trespass convictions. Tensions steadily rose. Black told Goldberg that "the whole tone of your opinion would have to be changed in order to make it the temperate kind of reasoned argument any opinion of this Court should have in this highly emotional field." Black was hoping to have the opinions ready to be handed down on May 4. Brennan and Warren were still working on their dissents and asked for more time. Black reluctantly agreed to push back *Bell's* hand-down yet again.⁸²

Brennan's draft dissent condemned the Court's intervention in the national debate over the civil rights bill. "[W]e cannot be blind to the fact that today's opposing opinions on the constitutional question decided will inevitably enter into and perhaps confuse that debate." He declared it an "error" to "reach[] out to decide the question." The Justices "unnecessarily create the risk of dealing the Court a 'self-inflicted wound'—because the issue should not have been decided at all." This language would be deleted in subsequent drafts, likely the price paid to get the Chief Justice and Justice Goldberg to join his opinion. (Douglas remained committed to a strong opinion supporting the constitutional claim of the sit-in protesters.) Brennan concluded his draft dissent noting that, although he believed the constitutional question should not be decided, he "felt obliged, since the Court has done so, to express my position on that issue." He joined the opinions of his fellow dissenters—Douglas, Goldberg, and Warren—that decided the constitutional question in favor of the protesters.⁸³

The drafting done, the decision was scheduled to come down on Monday, May 18. But on Friday, May 15, as the final drafts of the *Bell* opinions circulated among the Justices' Chambers, the alignments that had been set the previous fall shifted. At the

Justices' Conference, Clark indicated that he wanted more time to consider Brennan's approach based on the retroactive application of Maryland's public accommodation law. Angry at this last-minute defection from a majority opinion about which he felt so strongly, Black said little in the short, tense meeting. Douglas, who felt just as strongly as Black that the constitutional issue needed a clear judicial response, declared he would not join Brennan's opinion. At the end of the Conference, there appeared to be a majority of votes to overturn the convictions but no majority on the legal reasoning by which this was to be done.⁸⁴

Persuaded by Brennan's concern that upholding the convictions would undermine the pending federal civil rights legislation, on May 27 Clark informed the Justices that he was joining Brennan's opinion. Brennan followed with a memorandum explaining that, as there were enough votes to overturn the convictions without facing the constitutional issue, he would no longer be joining the opinions of Douglas, Goldberg, and Warren. Justice Brennan's clerks began reworking his dissent into a judgment (if not an opinion) of the Court.⁸⁵

"Oh shit!" Douglas exclaimed when he arrived at the Court and learned what had happened. He immediately challenged Brennan's claim to have a majority, explaining that he would only sign onto an opinion that ruled on constitutional grounds. By Douglas's count, this meant that a majority of the Court opposed Brennan's side-stepping resolution. "I suffered a real shock," Douglas wrote Brennan, "when I realized you were in dead earnest in vacating *Bell* and remanding it to the State court and thus avoiding the basic constitutional question."⁸⁶

Black wrote a scathing dissent to Brennan's opinion, arguing that, since the majority of the six Justices who reached the constitutional merits of the case believed the convictions should be upheld, the decision of the Court was to affirm, not vacate or reverse.

Harlan urged Black to adopt more moderate language. With Douglas's support, Black also countered Brennan by proposing that the Court accept for review a new set of sit-in cases with the goal of finding a case in which there was no way to avoid the constitutional issue. Black argued that the Court should fast-track the case and should even hold a special summer session of oral arguments if necessary.⁸⁷

Before Black's desperate plan to find a way to decide the constitutional question could be put into effect, there was yet another turn in this remarkable drama. Clark, whom Brennan had been able to lure away from the Black majority with his late discovery of a legal off-ramp, now declared himself willing to decide the constitutional question in favor of the students.⁸⁸ Exactly why Clark performed this about-face was not fully clear. It might have been a negative reaction to Black's extraordinary efforts to force the issue upon the Court; it might have been a late reassessment of the merits of the constitutional issue; it might have been what Brennan's clerks described as "the consummately executed bluff of a skilled Texas poker player," with the goal of forcing the Court into another side-step of the central constitutional question.⁸⁹

Bluff or not, Clark circulated his draft opinion. It was a stunning reversal of positions, as aggressively supportive of LDF's constitutional argument as anything Douglas had written (Douglas, always the hero in his own mind and memoirs, claimed that the opinion "was conceived in my office in a talk I had with Clark.")⁹⁰ Clark's finding that a trespassing prosecution for a sit-in protest violated the Equal Protection Clause relied on the same catch-all reasoning he had deployed several years earlier in *Burton v. Wilmington Parking Authority*, where he wrote that if a state is involved in private choice "to a significant extent," that is state action. In *Bell*, the "totality of circumstances" met the necessary quantum of state action.

Clark described the Fourteenth Amendment as creating “a constitutional right in all Americans, regardless of color, to be treated equally by all branches of Government.” He quoted approvingly a legal scholar who described access to public accommodations as having become “a piece of the fabric of society.” Racially discriminatory treatment, when hardened into a community “standard,” is “foreign to the Equal Protection Clause.”⁹¹ Clark also insisted that nothing in his bold opinion should be read to undermine the need for the federal civil rights bill, which at this point had passed in the House of Representatives and was moving toward passage in the Senate. Indeed, he insisted that the Court’s decision should only reinforce the need for federal legislation.⁹²

On June 11, Warren informed the other Justices that Clark was now writing the opinion of the Court.⁹³

Sitting on the bench on June 15, Justice Stewart was irritated. In his six years on the Court, the Ohio Republican had established himself as a generally centrist vote, valuing careful legal reasoning and respect for judicial precedent over the ideological wars some of his colleagues seemed intent on waging. He was listening to the Chief Justice announce the Court’s decision in *Reynolds v. Sims*, one of a series of landmark cases uprooting malapportioned legislative districts across the nation and establishing the new constitutional requirement of a one person–one vote standard in drawing legislative district lines.⁹⁴ Stewart felt the Court had gone too far in the reapportionment cases and that its ruling was a misguided “fabrication” of a new constitutional requirement.⁹⁵ While listening to Warren, he was also thinking about the sit-in cases. In Stewart’s eyes, they were another liberal effort to fabricate a new constitutional rule that aligned with their sympathies. And because of Clark’s last-minute defection, Stewart was about to lose here as well. So he decided to reshuffle the

cards once again. When he got back to his chambers, he announced he would sign on to Brennan’s opinion in the sit-in cases. He just could not stand to see the Clark opinion prevail, he explained to his clerks. With Stewart on board, Brennan would now write the opinion of the Court, overturning the sit-in convictions based on the subsequent passage of local and state public accommodations laws. Stewart, Clark, Goldberg, and Warren would join Brennan’s opinion, the latter two also expressing their position that the prosecutions violated the Fourteenth Amendment.⁹⁶

Bell came down on June 22, 1964. Brennan’s opinion noted that the passage of Baltimore and Maryland antidiscrimination laws meant these sit-ins “would not be a crime today.” State and local law “now vindicates their conduct and recognizes it as the exercise of a right, directing the law’s prohibition not at them but at the restaurant owner or manager who seeks to deny them service because of their race.” Although the public accommodations laws included no provision explicitly applying them retroactively, those who passed them “probably did not desire that persons should still be prosecuted and punished for the ‘crime’ of seeking service from a place of public accommodations which denies it on account of race.” Considering these changed legal circumstances, it would be unjust to allow the convictions to stand, Brennan concluded. Applying the common law doctrine of “abatement,” which prohibits prosecution for something that is no longer a crime, Brennan vacated the convictions and sent the case back to Maryland’s high court.⁹⁷ (“Until that time,” Jack Greenberg noted, “I had never heard of abatement and neither had any of our cocounsel.”⁹⁸)

The six Justices who were willing to answer the core constitutional question in *Bell*—Douglas, Goldberg, and Warren on one side; Black, Harlan, and White on the other—believed the Court had a responsibility to

offer a clear, principled resolution to the sit-in controversy. This would help restore law and order to a national situation that they feared risked spiraling out of control. They differed sharply, however, as to who were the culprits of the disorder: the discriminating proprietors or the sit-in demonstrators. This question had a circularity to it, of course, because locating the source of the breakdown of the rule of law required a prior judgment about what the law actually required in this situation. The crucial question, then, was which party was acting outside the law. And the answer to this question turned more on the Justices' attitudes toward direct-action protest as a tactic for claiming a new legal right than it did on the abstract question of whether the discriminatory choice was truly private.⁹⁹

The concurrences by Douglas and Goldberg—Warren joined the latter—in which they argued that the right to nondiscriminatory service in public accommodations was constitutionally protected, laid out the terms of the problem. “We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme,” Douglas wrote. “No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it . . . When we default, as we do today, the prestige of law in the life of the Nation is weakened.”¹⁰⁰

In the end, Black's dissent—long, impassioned, and bristling with anger—was joined by only White and Harlan. “It would betray our whole plan for a tranquil and orderly society,” Black asserted, “to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace.” His opinion then took an apocalyptic turn, reflecting Black's pessimism toward the rising tide of protests taking place across the nation. “[T]he Constitution does not confer upon any group the right to substitute rule by force for rule by law,” he

wrote. “Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons.”¹⁰¹

Black, the ex-politician, knew how to play to an audience, and during the opinion announcements, he “was in rare form,” reported the *New York Times*. “He mixed drama, wit and savage ridicule of the Goldberg opinion as he extemporized on his written views.” Black also noted, in a sarcastic aside, that if Goldberg were right, and the Fourteenth Amendment had prohibited racial discrimination in public accommodations all along, then the heroic battle to pass civil rights legislation in Congress had been “a work of supererogation.”¹⁰²

Response to *Bell* was predictably mixed. The *Washington Post* described Brennan's opinion as written “[i]ngeniously if not altogether convincingly,” while the Goldberg and Douglas opinions were “illuminating and persuasive.”¹⁰³ The conservative *Chicago Tribune* editorial page, still fuming over the reapportionment decision from a week earlier, took the opportunity to attack the Court, seeing in the willingness of even three “hotspurs of the high bench” to rule in favor of the students' Fourteenth Amendment claim as further evidence of the Court's trend toward “judicial absolutism.”¹⁰⁴ Conservative commentator William F. Buckley attacked the “practical effect” of the sit-in cases as “encourage[ing] anyone at all to believe that he may with impunity enter somebody's premises and, for as long as he desires, lie down on the hall carpet.”¹⁰⁵ In Alabama, the *Montgomery Advertiser*, having spent the last decade condemning Justice Black for his role in *Brown*, now celebrated the homecoming of their wayward son. “The essence of the Black opinion was that the proprietor had an all-American right to throw the bums out and that his right to bigotry was sacred.” After quoting at length from Black's dissent, the editorial noted, “many will not believe it came from Black. They will insist that it was from the

state papers of George Wallace,” Alabama’s arch-segregationist governor.¹⁰⁶

Why Did the Supreme Court Pull Back?

What explains the uncharacteristic hesitancy of the Warren Court, in the sit-in cases, to support a reading of the Fourteenth Amendment that the sit-in movement had forced onto the nation’s consciousness and the civil rights movement now made both viable and urgent? The American people were ready. But the Court would not follow—not this time. In fact, for much of the 1963-1964 Court Term, five of the Justices were ready to face the state action issue squarely and to *reject* the students’ constitutional claim. What happened?

Congress’s struggle with the Civil Rights Act influenced the Court’s assessment of the sit-in cases. But it is not quite the case, as is often assumed, that the Court would have stepped forward if Congress had not. The reality was more complicated. In early Fall 1963, with passage of the Civil Rights Act still uncertain, the Black-led majority was poised to issue the civil rights lawyers a stinging defeat. The pending civil rights bill played a clearer role, however, in moving the Court in the spring of 1964. When passage of the bill looked more certain, some in Black’s majority worried that rejecting the students’ constitutional claim would undermine the passage of the law. When they abandoned Black’s majority, the *Bell* decision was left fractured. And the state action dilemma the sit-ins had pressed upon the nation’s legal agenda was left unresolved.

The Justices’ perception of the constraints imposed by constitutional doctrine offers another factor in the Court’s hesitancy to embrace the students’ Fourteenth Amendment claim. The Justices were concerned both with the limits of existing constitutional doctrine and the consequences of a broad constitutional ruling on areas of law beyond

racial discrimination in public accommodations. Apart from Douglas, all expressed some apprehension regarding these issues. The words of caution from influential voices—Solicitor General Cox first and foremost, but also various law professors and commentators—made a major reworking of the state action doctrine appear risky and minimalist resolutions more attractive. Apart from Douglas, who was never one for coalition-building and whose sway over his colleagues in the sit-in cases was limited by his unwillingness to entertain the doctrinal and institutional concerns with which even his most liberal colleagues struggled, the Warren Court’s leading liberals never matched the commitment of Black and his allies in the sit-in cases. Black never wavered, and his confidence in his constitutional position pulled others along. The same did not occur on the other side. Brennan, so often the pied piper of the liberal wing of the Warren Court, did not play this role in the sit-in cases, and the same could be said for the Chief Justice. Their commitment to the students’ constitutional claim was always negotiable.

As Black’s paean to “peaceful and orderly society” in his *Bell* dissent indicates, another factor in the ultimate failure of the constitutional claim put forth by the students in the sit-in cases was the Justices’ discomfort with disruptive forms of social protest. A number of them had serious concerns with extrajudicial methods of resistance, and this colored their assessment of the constitutional issues in the sit-in cases. Much of the Warren Court’s hesitancy in the sit-in cases was a product of skepticism, even antagonism, toward the civil rights movement’s efforts to bypass litigation and lobbying as the primary modes of social change in favor of direct-action protest—a pivot the sit-in movement of 1960 had initiated.

No one on the Court felt this antagonism toward social protest more deeply than Justice Black. For him, the issue was first and foremost a question of protecting the rule

of law. In Conference discussions, he referenced the need to protect the associational rights of private citizens as a basic tenet of an orderly society. In his files relating to the October Term 1963 sit-in cases, he kept a collection of newspaper clippings filled with stories of the escalating tensions resulting from efforts to integrate public accommodations. As his wife recorded in her diary, Black believed the Court needed to issue a strong, clear ruling defining the limits of the Fourteenth Amendment because “the Negroes . . . continue to break the law in the belief the Supreme Court will sustain the legality of their claims.”¹⁰⁷

Black was certainly not alone in his skepticism toward direct action protest and civil disobedience. Prior to signing on to Black’s *Bell* dissent, Justice White drafted a brief dissent in which he warned that treating a state trespass conviction derived from a private discriminatory choice as impermissible state action “would be nothing short of an invitation to private warfare and a complete negation of the central peace-keeping function of the State.”¹⁰⁸ For at least some of the Justices, a sharp discomfort with direct-action protest contributed to their opposition to using the sit-in cases as a platform for a reconsideration of the state action doctrine.¹⁰⁹

Conclusion

One of the most striking elements of the Supreme Court’s confrontation with the sit-in cases was the fact that the issue seemed to become more divisive for the Justices over the period from 1960 to 1964. Even as the sit-ins and subsequent civil rights demonstrations were having their intended effect on the nation by moving public opinion behind the cause of federal intervention on behalf of civil rights, the constitutional challenge raised by the sit-ins was fracturing the Court. Most notably, Justices Douglas and Black, long-time allies in battles against McCarthyism

and school segregation, could not have been further apart when it came to the sit-in cases. Douglas came out early in support of the students’ constitutional claim. Black feared the property rights of the businesses were being overlooked, a concern that only strengthened as the protests of the civil rights movement gained momentum. In the school desegregation cases, the Court had come together. The sit-in cases pulled it apart. The Court’s struggles over the sit-ins anticipated the divides at the Court that would become commonplace in the coming years as the civil rights battlefield moved beyond dismantling of de jure segregation to confronting racial discrimination in the private marketplace, where property, privacy, and associational rights pressed back against equality claims.

An irony lies at the heart of the sit-in cases. Among the achievements of the sit-ins was that they inspired a massive social protest movement, which, in turn, pressured Congress to pass landmark civil rights legislation. But these very achievements made the Court more divided and ultimately less likely to give the movement a sweeping constitutional victory. Civil rights activists and many Supreme Court observers kept predicting that the Court was about to issue the breakthrough ruling in which it found the students’ demands justified in the Equal Protection Clause of the Fourteenth Amendment. It was not to be. There was to be no judicial breakthrough like *Brown* in the sit-in cases.

Editor’s Note: This article was adapted from a chapter in the author’s **The Sit-Ins: Protest and Legal Change in the Civil Rights Era** (University of Chicago Press, 2018).

ENDNOTES

¹ “How Whites Feel about Negroes: A Painful American Dilemma,” *Newsweek* (October 21, 1963), 45.

² *Bell v. Maryland*, 378 U.S. 226, 284 (1964) (opinion of Douglas, J.) (appendix listing state public accommodations laws); “Survey Shows Rights Laws Now Cover

65% of Nation,” *Washington Post*, December 26, 1963, A17.

³ On the sit-in movement and the nation’s response to it, see generally Christopher W. Schmidt, **The Sit-Ins: Protest and Legal Change in the Civil Rights Era** (Chicago: University of Chicago Press, 2018).

⁴ *Bell v. Maryland*, 378 U.S. 226 (1964).

⁵ See, for example, David Cole, **Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law** (New York: Basic Books, 2016).

⁶ *Mitchell v. United States*, 313 U.S. 80 (1941); *Henderson v. United States*, 339 U.S. 816 (1950).

⁷ *Boynnton v. Virginia*, 364 U.S. 454, 455–456 (1960).

⁸ Brief for Petitioner, *Boynnton v. Virginia*, 364 U.S. 454 (1960), October Term 1960 (No. 7), August 25, 1960; Schmidt, **Sit-Ins**, chap. 2; Christopher W. Schmidt, “Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement,” 33 *Law and History Review* 93, 118–29 (2015).

⁹ Brief for the United States as Amicus Curiae, 16–27, *Boynnton v. Virginia*, 364 U.S. 454 (1960), October Term 1960 (No. 7), September 1960.

¹⁰ *Boynnton v. Virginia*, 364 U.S. 454, 464 (1960).

¹¹ Anthony Lewis, “Court Broadens Desegregation,” *New York Times*, December 11, 1960, E6.

¹² *Brown v. Board of Education*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

¹³ *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁴ 109 U.S. 3, 17 (1883).

¹⁵ Cases expanding the limits of state action include *Smith v. Allwright*, 321 U.S. 649 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Terry v. Adams*, 345 U.S. 461 (1953); and *Barrows v. Jackson*, 346 U.S. 249 (1953). For a detailed account of developments in the state action doctrine during this period, see Christopher W. Schmidt, “The Sit-Ins and the State Action Doctrine,” 18 *William & Mary Bill of Rights Journal* 767 (2010).

¹⁶ The most relevant precedent for this kind of constitutional claim was *Marsh v. Alabama*, in which the Court held that for purposes of the First Amendment a private “company town” could be treated as a state actor. 326 U.S. 501 (1946).

¹⁷ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁸ *Burton v. Wilmington Parking Authority*, 150 A.2d 197 (Del. Chan. Ct. 1959).

¹⁹ *Wilmington Parking Authority v. Burton*, 157 A.2d 894 (Del. 1960).

²⁰ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

²¹ *Id.* at 725.

²² *Id.* at 725–26.

²³ 163 U.S. 537 (1896).

²⁴ *Burton*, 365 U.S., at 728 (Harlan, J., dissenting). Whittaker joined Harlan’s dissent and Frankfurter wrote his own dissent.

²⁵ Editorial, “Jim Crow by Lease,” *Washington Post*, April 24, 1961, A14; “Editorials: Defeat in Victory,” *Pittsburgh Courier*, April 29, 1961, A6.

²⁶ Jerre S. Williams, “The Twilight of State Action,” 41 *Texas Law Review* 347, 382 (1963). For a discussion of *Burton* and its critics, see Christopher W. Schmidt, “On Doctrinal Confusion: The Case of the State Action Doctrine,” *Brigham Young University Law Review* 575, 594–95 (2016).

²⁷ Anthony Lewis, “Court Broadens Desegregation,” *New York Times*, December 11, 1960, E6.

²⁸ *Garner v. Louisiana*, 368 U.S. 157 (1961).

²⁹ See Noah Feldman, **Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices** (New York: Twelve, 2010).

³⁰ Conference notes, March 17, 1961, re Nos. 617, 618, 619, William O. Douglas Papers, Washington, D.C, Box 1269, Folder: “Nos. 26, 27, 28(c) *Garner v. Louisiana*, Misc. Memos, Certs.,” Library of Congress, Manuscript Division.

³¹ Douglas, draft dissent from denial of certiorari, March 17, 1961, Douglas Papers, Box 1269, Folder: “Nos. 26, 27, 28(c) *Garner v. Louisiana*, Misc. Memos, Certs.”

³² Oral Arguments, *Garner v. Louisiana*, 368 U.S. 157 (1961), October 18–19, 1961, available at <https://www.oyez.org/cases/1961/26>.

³³ Brief for the United States as Amicus Curiae, 9, *Garner v. Louisiana*, 368 U.S. 157 (1961) October Term, 1961 (Nos. 26, 27, 28), September 11, 1961 [hereinafter *Garner* U.S. Brief].

³⁴ *Garner* Oral Arguments.

³⁵ *Garner* Oral Arguments; Brief on Behalf of Respondent State of Louisiana, *Garner v. Louisiana*, 368 U.S. 157 (1961), October Term 1961 (Nos. 26, 27, 28), October 4, 1961 [hereinafter *Garner* Louisiana Brief].

³⁶ *Garner* Oral Arguments; *Garner* Louisiana Brief, 52.

³⁷ *Garner* Oral Arguments; *Garner* Louisiana Brief, 50; Supplemental Brief on Behalf of Respondent State of Louisiana (October 19, 1961), *Garner v. Louisiana*, 368 U.S. 157 (1961), October Term 1961 (Nos. 26, 27, 28).

³⁸ Douglas Conference Notes, October 20, 1961, Douglas Papers, Box 1269, Folder: “Nos. 26, 27, 28(c) *Garner v. Louisiana*, Misc. Memos, Certs”; Douglas, Memorandum re No. 26, Nov. 6, 1961, *ibid.* (comparing the issue to *Plessy* and identifying Warren and Brennan as his only sure allies on this issue); Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (New York: New York University Press, 1983), at p. 402–404.

³⁹ Douglas Conference Notes, October 20, 1961; **The Supreme Court in Conference, 1940–1985**, ed. Del Dickson (New York: Oxford University Press, 2001), at p. 708.

⁴⁰ Frankfurter to Warren, December 4, 1961, Earl Warren Papers, Box 600, Folder: “Nos. 26, 27 & 28—Garner, etc. v. Louisiana,” Library of Congress, Manuscript Division; Earl Warren to Felix Frankfurter, December 6, 1961.

⁴¹ *Garner* U.S. Brief, 4; *Garner*, 368 U.S., at 163.

⁴² 368 U.S., at 163, 170.

⁴³ 368 U.S., at 174–176 (Frankfurter, J., concurring).

⁴⁴ *Id.* at 201, 203 (Harlan, J., concurring).

⁴⁵ *Id.* at 177, 181 (Douglas, J., concurring).

⁴⁶ *Id.* at 181–185.

⁴⁷ Kenneth L. Karst and William W. Van Alstyne, “Comment: Sit-Ins and State Action—Mr. Justice Douglas Concurring,” 14 *Stanford Law Review* 762, 762, 763 (1962).

⁴⁸ Anthony Lewis, “High Court Voids Sit-In Conviction in Louisiana,” *New York Times*, December 12, 1961, 1; Major Johns and Ronnie Moore, “It Happened in Baton Rouge, U.S.A.,” CORE Pamphlet (1962), available at http://www.crmvet.org/info/61_batonrouge.pdf; Adam Fairclough, **Race and Democracy: The Civil Rights Struggle in Louisiana, 1915–1972** (Athens: University of Georgia Press, 1995), at p. 289–290.

⁴⁹ Eugene Patterson, “Supreme Court, Lincoln and Lee,” *Atlanta Constitution*, December 12, 1961, 4.

⁵⁰ “Negroes in South Hail Sit-In Ruling,” *New York Times*, December 12, 1961, 50; Elsie Carper, “Court Decision on Sit-Ins Not Expected to Affect Area Trespass Cases,” *Washington Post*, December 13, 1961, A10.

⁵¹ Van Alstyne and Karst, “Mr. Justice Douglas Concurring,” 763.

⁵² “The Nation,” *New York Times*, December 17, 1961, E2.

⁵³ Philip B. Kurland, “Egalitarianism and the Warren Court,” 68 *Michigan Law Review* 629, 654 (1970).

⁵⁴ Jack Greenberg, **Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution** (New York: Basic Books, 1994), at p. 309–310.

⁵⁵ Archibald Cox Oral History, June 19, 2000, Columbia University, Oral History Research Office, available at http://www.columbia.edu/cu/lweb/digital/collections/oral_hist/cox/interview.html; Ken Gormley, **Archibald Cox: Conscience of a Nation** (New York: Da Capo, 1997), at p. 189.

⁵⁶ Victor S. Navasky, **Kennedy Justice** (New York: Atheneum, 1971), at p. 289.

⁵⁷ Anthony Lewis, “Court Weighs Sit-In Rights,” *New York Times*, November 11, 1962, 208.

⁵⁸ Warren Conference notes, 1962 Term sit-in cases, November 9, 1962, Warren Papers, Box 604, Case File: “sit-in cases”; Douglas Conference notes, *Lombard v. Louisiana*, November 9, 1962, Douglas Papers, Box 1291, Case File: “No. 58”; Douglas Conference notes, *Peterson v. City of Greenville*, November 9, 1962, Douglas Papers, Box 1281, Case File: “No. 71.”

⁵⁹ *Peterson v. Greenville*, 373 U.S. 244, 248 (1963).

⁶⁰ *Lombard v. Louisiana*, 373 U.S. 267, 273–274 (1963).

⁶¹ *Id.* at 276–283.

⁶² *Peterson*, 373 U.S., at 249 (Harlan, J., concurring and dissenting).

⁶³ *Id.* at 250.

⁶⁴ *Id.* at 253–258.

⁶⁵ *Bell v. Maryland*, 378 U.S. 226 (1964).

⁶⁶ Warren to Douglas, May 18, 1963, Douglas Papers, Box 1281, Case File: “court memoranda”; Memorandum from the Chief Justice, Re: The Sit-In Cases Remaining on the Docket of the Court, May 1963, id.

⁶⁷ Opinions of William J. Brennan, October Term 1963, xii, William J. Brennan Papers Box II: 6, Folder 6 (memorandum prepared by Justice Brennan and law clerks) [hereinafter Brennan Memo]. On June 10, 1963, the Court accepted four new sit-in cases for review: *Barr v. Columbia*, 374 U.S. 804 (1963); *Bell v. Maryland*, 374 U.S. 805 (1963); *Bouie v. City of Columbia*, 374 U.S. 805 (1963); and *Robinson v. Florida*, 374 U.S. 803 (1963). These were considered alongside *Griffin v. Maryland*, 370 U.S. 935 (1962), an appeal of a trespass conviction for a June 1960 protest at a segregated amusement park, which the Court held over from the previous Term.

⁶⁸ Brief of Respondents, 3, *Bell v. Maryland*, 378 U.S. 226 (1964), October Term 1963 (No. 12); *Bell v. Maryland*, 227 Md. 302, 176 A. 2d 771 (1962). See also Kenneth W. Mack, “Civil Disobedience, State Action, and Lawmaking Outside the Courts: Robert Bell’s Encounter with American Law,” 39 *Journal of Supreme Court History* 347 (2014).

⁶⁹ Brief of Respondents, 5–6, *Bell v. Maryland*, 378 U.S. 226 (1964), October Term 1963 (No. 12).

⁷⁰ Oral Argument, October 14, 1963, *Bell v. Maryland*, 378 U.S. 226 (1964), in **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law**, eds. Philip B. Kurland and Gerhard Casper (Arlington, Virginia: University Publications of America, 1975), vol. 59, at p. 541–542, 579 [hereinafter *Bell* Oral Argument].

⁷¹ Warren Conference notes, 1963 Term sit-in cases, October 23, 1963, Warren Papers, Box 510, Case File: “sit-in cases”; Black Conference notes, October 23, 1963, in A.E. Dick Howard & John G. Kester, “The Deliberations of the Justices in Deciding the Sit-In Cases of June 22, 1964,” 3, Hugo L. Black Papers, Box 376,

“Oct. Term 1963: Sit-In Cases,” Library of Congress, Manuscript Division [hereinafter *Deliberations*].

⁷² Brennan Memo, xiii.

⁷³ Brennan Memo, xiii-xiv, xvi; Black Conference notes, October 23, 1963; Hugo L. Black and Elizabeth Black, **Mr. Justice and Mrs. Black** (New York: Random House, 1986), at p. 112; **In Conference**, at p. 722 (comments of Justice Goldberg); Roger K. Newman, **Hugo Black: A Biography**, rev. ed. (New York: Fordham University Press, 1997), at p. 546 (quoting Brennan interview).

⁷⁴ Brennan Memo, xiv; **In Conference**, at p. 722-723; Douglas, Memorandum to the Conference, October 21, 1963, Douglas Papers, Box 1315, “No. 12—Bell v. Maryland: Law Clerks—3”; Black Conference notes, October 23, 1963.

⁷⁵ Brennan Memo, xiv-xv; *Bell v. Maryland*, 375 U.S. 918 (1963).

⁷⁶ Greenberg, **Crusaders**, at p. 313; Supplemental Brief, *Griffin v. Maryland*, 378 U.S. 130 (1964), January 17, 1964; *Robinson v. Florida*, 378 U.S. 153 (1964).

⁷⁷ Brennan Memo, xv-xvi; *Deliberations*, 9, 13; Clark to Black, March 9, 1964, in *Deliberations*, 10; Harlan to Black March 9, 1964, in *Deliberations*, 11.

⁷⁸ Black draft opinion for the Court, No. 12: *Bell v. Maryland*, March 12, 1964, reprinted in Bernard Schwartz, **The Unpublished Opinions of the Warren Court** (New York: Oxford University Press, 1985), at p. 149-163, quotation at p.160-161.

⁷⁹ Douglas, draft dissent, No. 60: *Robinson v. Florida*, 1, 6, March 11, 1964, Douglas Papers, Box 1314, Folder: “No. 12—Bell v. Maryland: Galley Proofs-2.”

⁸⁰ Earl Warren, draft dissent in *Barr v. City of Columbia*, May 7, 1964, Warren Papers, Box 510, Folder: “Sit-in cases, O.T. 1963; No. 9—Barr v. City of Columbia.” Warren’s draft dissent is also reprinted in Schwartz, **Unpublished Opinions**, at p. 164-172.

⁸¹ Brennan Memo, xvi-xvii.

⁸² Brennan Memo, xvii; Harlan to Black, April 16, 1964, in *Deliberations*, 16; *Ibid.*, 17; Black to Goldberg, April 23, 1964, in *ibid.*, 18.

⁸³ William Brennan, Draft Dissenting Opinion in *Bell v. Maryland*, May 5 Draft, Brennan Papers, Box I: 97, Folder 8; Brennan Memo, xix-xxi; Black and Black, **Mr. Justice**, at p. 92.

⁸⁴ Brennan Memo, xxi.

⁸⁵ Tom C. Clark, Memorandum to Conference, Re Nos. 9, 10, 12—Barr, Bouie and Bell, May 27, 1964, Douglas Papers, Box 1311, Folder: “O.T. 1963: Opinions: No. 9 *Barr v. City of Columbia*; No. 10 *Bouie and Neal v. Columbia*; No. 12 *Bell et al. v. State of Maryland*” (hereinafter “Clark Memorandum.”); Brennan Memo, xxii.

⁸⁶ Clark Memorandum; *Deliberations*, 25; Douglas to Conference, May 27, 1964, in *Deliberations*, 25;

Douglas to Conference, May 28, 1964, in *ibid.*, 27; Douglas to Brennan, June 3, 1964, “re: sit-in cases,” Douglas Papers, Box 1315, “No. 12—Bell v. Maryland: Misc. Memos, Cert Memo”; Brennan Memo, xxii-xxiv; Douglas, memorandum for the files, June 20, 1964, Douglas Papers, Box 1315, “No. 12—Bell v. Maryland: Misc. Memos, Cert Memo” (hereinafter “Douglas *Bell* Memorandum”).

⁸⁷ Harlan to Black, June 2, 1964, in *Deliberations*, 29; Brennan Memo, xxvi; *Deliberations*, 32.

⁸⁸ Warren, Memorandum to the Brethren, June 11, 1964, Douglas Papers, Box 1315, “No. 12—Bell v. Maryland: Misc. Memos, Cert Memo.”

⁸⁹ Brennan Memo, xxvi; Schwartz, **Unpublished Opinions**, at pp. 188-89.

⁹⁰ Douglas *Bell* Memorandum.

⁹¹ Clark, draft opinion in *Bell v. Maryland*, June 11, 1964, Warren Papers, Box 512, “No. 12—Bell v. Maryland, Opinion by Justice Clark” (hereinafter “Clark Bell Draft Opinion”). Clark’s draft opinion is reprinted in Schwartz, **Unpublished Opinions**, 173-186. The “fabric of society” quotation is from Thomas P. Lewis, “The Sit-In Cases: Great Expectations,” 1963 *Supreme Court Review* 101, 144. Brad Ervin offers a strong case for the bluff interpretation, that is, that Clark did not actually believe the arguments he put into his opinion and never intended to release it, in “Result or Reason: The Supreme Court and Sit-In Cases,” 93 *Virginia Law Review* 181, 232-233 (2007).

⁹² Clark Bell Draft Opinion.

⁹³ Warren to Conference, June 11, 1964, in *Deliberations*, 34.

⁹⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹⁵ *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 747-48 (1964) (Stewart, J., dissenting).

⁹⁶ Brennan Memo, xxvii; Schwartz, **Super Chief**, at p. 524; Brennan to Conference, June 16, 1964, in *Deliberations*, 35.

⁹⁷ *Bell*, 378 U.S., at 230, 235.

⁹⁸ Greenberg, **Crusaders**, at p. 314.

⁹⁹ For an elaboration of this point, see Christopher W. Schmidt, “The Sit-Ins and the State Action Doctrine,” 18 *William & Mary Bill of Rights Journal* 767, 798-802 (2010).

¹⁰⁰ *Bell*, 378 U.S., at 244-245.

¹⁰¹ Brennan Memo, xxviii; *Bell*, 378 U.S., at 327-328, 346.

¹⁰² Anthony Lewis, “High Court Voids Sit-In Convictions of 42 in 3 States,” *New York Times*, June 23, 1964, 1, 16.

¹⁰³ Editorial, “Apartheid at Home,” *Washington Post*, June 26, 1964, A18.

¹⁰⁴ Editorial, “The Nine Caesars,” *Chicago Tribune*, June 28, 1964, 22.

¹⁰⁵ William Buckley, "Supreme Court's Latest Actions Hurt Nation's Defensive Ability," *Los Angeles Times*, June 29, 1964, A5.

¹⁰⁶ Editorial, "Justice Black: Defense of Property Rights," *Montgomery Advertiser*, July 1, 1964, 4.

¹⁰⁷ The newspaper clippings can be found in Black Papers, Box 376, "Oct. Term 1963: Sit-In Cases." Black and Black, *Mr. Justice*, at p. 92. See also Christopher W. Schmidt, "Hugo Black's Civil Rights Movement," in Daniel W. Hamilton and Alfred L. Brophy, eds.,

Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz (Cambridge, Mass.: Harvard Law School, 2009), at pp. 246-266.

¹⁰⁸ Byron R. White, unpublished draft dissent, *Bell v. Maryland*, June 17, 1964, 1, Warren Papers, Box 512, "No. 12-Bell v. Maryland, Opinion by Justice White."

¹⁰⁹ Several years later, Justice Stewart wrote the most Court's powerful condemnation of civil disobedience of the civil rights era in *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

Sitting by Designation: Retired Justice Tom C. Clark's Federal Court Service

CRAIG ALAN SMITH

Introduction

In March 1967, Associate Justice Tom C. Clark announced his Supreme Court retirement soon after his son, Ramsey, was nominated to become U.S. Attorney General. Clark planned to retire at the end of the term to avoid any appearance of impropriety. He was sixty-seven years old, he had served on the Court for eighteen years, and he could continue judging on any other federal court with the Chief Justice's approval.¹ Like other retired Justices, Clark brought a certain distinction when he sat "by designation," but the impact of his decisions was—and continues to be—far greater. Over the course of ten years, literally until the day he died, Clark set a remarkable pace for himself: making over sixty visits to different Circuit Courts of Appeals and participating in around 575 appellate cases. In addition to sitting on every geographic circuit (at the time, there were ten circuits plus the D.C. Circuit) and

presiding over several district court trials, Clark also served as Special Master and on the Court of Customs and Patent Appeals (CCPA), the Court of Claims, and the Customs Court.²

Most accounts of Clark's retirement have focused on his efforts to improve judicial administration, so much so that historian Michael Belknap concluded, "Reflecting the intensity of Clark's interest in judicial administration and the importance of his efforts to reform it, more articles can be found on this subject than on any aspect of his work on the bench."³ As a result, Clark's lower court service has received scant scholarly attention. Without examining his rulings, two purported biographies mentioned some of his district court trials as well as three of his appellate opinions facing Supreme Court review.⁴ Other accounts of Clark's lower court service counted his record rather than analyzing it. At times, even counting Clark's opinions came up short.⁵ Therefore, Clark's

lower court judging was usually lauded for one remarkable feat—that he judged on every geographic circuit.⁶ However, that failed to address larger questions, for example, how he influenced opinion assignments, whether his position on lower federal courts was consistent with his Supreme Court service, how he made use of Supreme Court decisions, and how his district and appellate opinions fared under circuit or Supreme Court review.⁷ These larger questions, including whether his appellate opinions addressed significant contemporary issues, are the subject of this article, which offers the first comprehensive analysis of Clark's role and influence as a lower court federal judge. His judgments had greater impact than the geographic extent of his judging and the sheer number of his opinions. What he decided, how he reached his conclusions, and whether those rulings made a lasting difference deserve greater attention.⁸

Clark's Lower Court Service and Influence

Clark began his lower federal court service soon after his Supreme Court retirement—in fact, much sooner than previously recognized. He sat first with the CCPA in December 1967, releasing his first opinion six months later.⁹ Next, he had his one and only sitting with the Court of Claims, but he authored no opinions there.¹⁰ One year later, he sat with the Second Circuit Court of Appeals, where he spent more time but did not write more opinions than in other circuits. He returned to the CCPA in June 1969 and sat with the Seventh Circuit in May 1970 before making his first appearance as a district court judge in San Francisco.¹¹

Initially, Clark was hesitant to accept Chief Judge George Harris's invitation to serve on the Northern District of California. He had never judged a jury trial; in fact, the last time he even participated in a jury trial

was twenty-six years earlier as an assistant attorney general in the prosecution of two Nazi spies before a military commission. "What disturbed me," Clark later said, "were the rules of evidence. They change from time to time. . . . [but] I soon found that you become accustomed to it. Instead of getting butterflies, I looked forward to it."¹² Although he characterized his trial court cases as "a lot of cats and dogs," Clark developed an abiding respect for trial judges. "In the final analysis," he said, "the nation's law is made in the trial court."¹³ Clark found presiding over jury trials "quite a rewarding experience." "I am having a ball trying cases out here," he wrote a friend, "Some of the judges say that I should have been here before I went to the Court. This would have afforded me more insight into the problems of the trial judge and possibly would have resulted in more votes on his side."¹⁴ Following his first trial in a tax refund case, Clark delivered his jury instructions: "Ladies and gentlemen, before I discharge you, let me thank you. It's been quite an experience, quite a different experience sitting with you than sitting on the Supreme Court. In fact, it is much more pleasant here."¹⁵

In addition to several sittings in the district courts in San Francisco (June 1970–June 1971) and New York (December 1973–January 1974), Clark also visited the Southern District of Texas in Houston in May 1972. These trial court appearances produced one published opinion.¹⁶ Far more numerous, if not consequential, were Clark's appellate opinions. Over nearly ten years, he authored 125 majority opinions in the courts of appeals. That number surpassed all of his authored opinions, including separate opinions, from his first eight years on the Supreme Court.¹⁷

By all accounts, Clark remained as active in retirement as he had been on the Supreme Court. "It's mindboggling," his son, Ramsey, once told an interviewer, "He has enormous energy and enthusiasm. He's a very productive person. He'll work until two in the



After Justice Tom C. Clark retired in 1967, at age sixty-seven, he continued judging on lower courts with the Chief Justice's approval. Over the next ten years he participated in around 575 appellate cases. Above he chats with President Lyndon B. Johnson in the Oval Office.

morning or get up at 5:00 a.m.”¹⁸ During the two years he served as Special Master (1973-1975), for example, Clark made as many as twenty trips visiting eight different circuits. Shortly afterwards, news reports indicated that he was busier in retirement than when serving on the Court—hearing about 160 cases a year and writing, by his own estimate, anywhere from three to five times as many opinions.¹⁹

When Clark sat by designation on the courts of appeals, he preferred, as he put it, to follow the rule of Julius Caesar: “While in Rome do as the Romans do,” he wrote, “When I sit on circuit, I do as that Circuit does.”²⁰ As a result, Clark wrote just three dissents, far fewer proportionately than other retired Justices.²¹ He certainly *threatened* to write separately more often, but Clark typically deferred to his panel colleagues



When Justice Clark sat with the Fourth Circuit (courthouse pictured above), Chief Judge Clement Haynsworth assigned him a student free speech opinion to add the gravitas of a Supreme Court Justice to what was becoming unacceptable stonewalling by school authorities limiting free speech. Yet, in other instances, chief judges refrained from assigning Clark an opinion because they did not want to write a dissent opposing a former Supreme Court Justice.

unless he was firmly convinced that they erred. As an example of the latter, Clark dissented to a Seventh Circuit opinion supporting a district judge's ruling to set aside a \$498,000 jury award in an antitrust case. At issue was whether price discrimination under the Robinson-Patman Act applied to intrastate as well as interstate commerce. The district judge had used Seventh Circuit precedent to set aside the verdict, but Clark thought that a Supreme Court case decided while he was still on the Court offered better guidance.²² Calling Judge Wilber Pell's interpretation of "primary" vs. "secondary" lines of competition "an arbitrary distinction entirely without a difference," Clark believed that setting aside the jury verdict was "entirely unsupportable." Even the district judge supported Clark and hoped for Supreme Court review.²³

In another dissent—possibly his most intemperate—Clark bristled at an opinion by D.C. Circuit Chief Judge David Bazelon, privately calling it "the worst miscarriage of

justice" he had experienced in twenty-eight years as a Justice and "a farce of the criminal justice system."²⁴ Bazelon had reversed a criminal conviction because the evidence presented at trial offered "an exceedingly thin strand" upon which to connect the defendant with the crime.²⁵ Believing that Bazelon defended the suspect more forcefully than had the defendant's own counsel, Clark insisted the conviction be upheld, even though he confused certain facts in the case with another criminal conviction he heard during the same appellate sitting.²⁶ Clark's dissent prompted a request for *en banc* review from non-panel Judge George MacKinnon, who thought that Bazelon "takes the defendant's view of the evidence instead of the jury's," and "it was about time he got called on it." When the circuit split in its vote for *en banc* review because of an abstention, MacKinnon frankly admitted, "You ran into a buzzsaw" opposing Bazelon.²⁷

In terms of disagreement within appeals court panels, another judge on Clark's panels

more often wrote separately. In fact, two appellate colleagues, Ellsworth Van Graafeiland (2nd Cir.) and Wilber Pell (7th Cir.), each wrote as many dissents opposing Clark as Clark did in all the time he rode circuit. In total, fifteen different judges from eight circuits wrote twenty-two separate opinions when Clark authored the majority; understandably, more of those came from the Second, Seventh, and Eighth Circuits, where Clark wrote more opinions overall including *per curiams*.²⁸ Slightly more than half of those separate opinions involved cases in which Clark reversed a lower court judge, but Clark upheld lower court rulings more often than he reversed. In his 125 majority opinions, he affirmed a lower court in sixty-eight cases and reversed, vacated, or denied enforcement in fifty-seven cases.

The give-and-take of opinion circulation led Clark to put aside a few contemplated separate opinions. In a Seventh Circuit case, after he persuaded Judge Wilber Pell to address whether a district judge should define “reasonable doubt” to a jury, Clark dropped his planned dissent when Pell’s opinion circulated among the active circuit judges to gain majority approval.²⁹ Another time, Clark planned to write separately because Pell’s opinion in a patent infringement case resembled a “tortuous Sisyphian application of the doctrine of equivalents.” When Pell incorporated Clark’s ideas into his opinion, for Clark to write separately became beside the point.³⁰ In another case, Clark indicated he would dissent, but Judge Thomas Fairchild took so long—twenty-one months—to prepare his opinion that Clark lost interest in writing separately.³¹

Clark’s extensive lower federal court service affected whether he received opinion assignments. After all, having a retired Supreme Court Justice on a panel could be as daunting as it was exhilarating. In a CCPA case, for example, Clark authored most of the five-person majority opinion, but it was then re-assigned to another panel member because

Chief Judge Francis Worley wanted to dissent without the stigma of opposing a Supreme Court Justice. “I have no pride in authorship,” Clark admitted, “Indeed, I am honored to have Judge [Arthur] Smith use my opinion.” Clark’s replacement, Judge Smith, responded, “It continues to be a matter of embarrassment to Judge [Giles] Rich and me that [Worley] insisted that the authorship of the opinion be assigned to me. Only your gracious understanding of this difficult situation makes it possible for this issue to be finally resolved.”³² In another case, Clark’s name appeared on an Eighth Circuit opinion initially authored by Judge Donald Lay, with Lay making the change principally because he wanted to avoid an inter-court conflict with the district judge whom Lay was reversing for the fifth time in the past year. After preparing what was intended to be a *per curiam* opinion, Lay wrote, “It is my feeling that [this judge] would probably recognize my writing style . . . There is, I know, a good deal of resentment over this.”³³

In several instances, Clark did receive certain opinion assignments because of his stature as a retired Justice. For example, Fourth Circuit Chief Judge Clement Haynsworth assigned Clark a student free speech opinion because the other panel members, Haynsworth and Judge Albert Bryan, had participated in similar cases, and it was now time to add the gravitas of a Supreme Court Justice to what was becoming unacceptable stonewalling by school authorities limiting free speech.³⁴ Eighth Circuit Chief Judge Charles Matthes “purposely assigned” Clark an opinion in order to make an impact on local federal authorities. The case involved the “inordinate and indefensible” time that an inmate was medically detained to determine his competency to stand trial. Although Clark ultimately ruled the case moot, he declaimed, “These cases are stacking up and show a shocking callousness to the rights of inmates. . . . Unless the situation [in Springfield, Missouri] is corrected

there will be another day in which we will have the power to act.”³⁵ Seventh Circuit Chief Judge Thomas Fairchild initially planned to issue an unsigned order in a housing discrimination case because the case did “not announce any new principle of law.” However, Judge (later Justice) John Paul Stevens, who was not on Clark’s panel, urged Fairchild to assign the case to Clark. Stevens saw “special importance to permitting ‘maximum visibility’” to the court’s enforcement of housing anti-discrimination laws, particularly since the circuit judges’ views were “endorsed by our illustrious fellow traveler.”³⁶ In an Eighth Circuit racial discrimination case—this time on hiring schoolteachers—Clark provided a Justice’s imprimatur. According to one of his panel colleagues, Judge Myron Bright, Clark received this “very controversial” case because “we always gave him the tough civil rights cases to write. By tough cases, I mean those that were on the cutting edge of the law and where we needed a liberal opinion.”³⁷

Noteworthy Contemporary Issues Clark Considered

Clark’s lower federal court service coincided with a tumultuous decade in U.S. history, and several of his appellate cases dealt with significant cultural or political issues. The Vietnam War and disillusionment with the war led to widespread protests. The Women’s Liberation Movement challenged traditional mores, leaving politicians and judges floundering over the extent of women’s rights. Native Americans became more militant, using direct action campaigns that culminated in the Wounded Knee occupation. And President Richard Nixon’s administration, re-elected in a 1972 landslide, fell apart during the ensuing Watergate investigation, resulting in the first presidential resignation. All of these issues—in one form or another—had their “day in court,” and Clark was there

to hear them. When asked about his service on the appellate courts, Clark told an interviewer that “the mix of cases is much more frivolous” than at the Supreme Court, and “only a couple had any meat in them” resulting in written opinions.³⁸ Following are some of the “meatier” cases he considered.

The now famous rock opera *Jesus Christ Superstar*, by Tim Rice and Andrew Lloyd Webber, began as a “concept” album released in October 1970. The music’s instant popularity led to numerous unauthorized performances all over the country. In a Second Circuit opinion, Clark sustained an injunction in the first of many challenges claiming copyright infringement. At the time, he could not have foreseen the musical’s tremendous worldwide success, as his opinion antedated its Broadway premiere by three months and its cinematic release by two years.³⁹

In 1969, just prior to the first draft lottery of the Vietnam War, a group calling themselves “The Beaver 55” destroyed over 100,000 draft registration cards at Selective Service headquarters in Indianapolis. “We have done this because we will no longer tolerate this madness,” their statement read, claiming responsibility, “We will no longer tolerate any form of conscription to kill.” Six years later, Clark’s Seventh Circuit panel considered appeals for reduced sentences from three of the participants. By then, President Nixon was disgraced and out of office; his successor, Gerald Ford, had offered conditional amnesty to draft dodgers; and Saigon had fallen to North Vietnamese forces. The prevailing mood of the country was forbearance, and within a year, President Jimmy Carter fulfilled his campaign promise of unconditional pardons to draft dodgers. Clark, on the other hand, was not so magnanimous. Calling the protesters’ conduct “an insolent challenge to the integrity of the processes of our government itself,” he asserted that, “to let such an offense go unpunished would be a direct affront to the governmental system.”⁴⁰ These were not



In 1973, AIM Oglala Sioux Indians observed the Department of Justice decision to remove government forces from around Wounded Knee with a ceremonial peace pipe smoking. Dennis Banks, Russell Means, and Carter Camp, all AIM leaders are pictured at right. On the Eighth Circuit, Judge Clark held that the district judge's dismissal of charges against Means and Banks constituted a final ruling and that, under the Double Jeopardy Clause, the government could not try them again.

draft evaders; they were vandals. In this instance, for Clark their destructive behavior mattered more than their political views. The oldest of the group and its only female, Jane Kennedy, for example, received no clemency from Clark: "To permit her to go free of punishment would not only be a miscarriage of justice, but would be very detrimental to the interests of the public."⁴¹

Clark's attitude towards civilian war protesters was more reflective of his "law and order" views as Attorney General (1945-1949) than was the tenor of most of his appellate opinions. By and large, as to judicial philosophy, in retirement Clark leaned liberal. Concerning abortion—one of the most contentious issues from the era—he was progressive. Two years before Clark heard an abortion-related appeal, he wrote a law review article that defined what he considered a constitutional standard for abortion. At the

time, some states were liberalizing their abortion laws, and the AMA had relaxed its prosecutions of doctors who performed abortions. Clark was concerned with protecting doctors from liability, and he thought a judicially "uniform scheme concerning abortion [was] highly desirable."⁴²

His constitutional standard for abortion—really, the first foray into the issue by any federal judge—was remarkably predictive. After reflecting upon legal, medical, psychological, sociological, theological, and even economic arguments for protecting or prohibiting abortions, Clark founded his "constitutional appraisal" upon a fundamental right to privacy—the very basis upon which the Supreme Court made its historic ruling in *Roe v. Wade* nearly four years later.⁴³ Of course, the Court had explicitly recognized the right to privacy in a contraception case, *Griswold v. Connecticut*, even though the

Justices split over where, exactly, it was grounded constitutionally.⁴⁴ Clark was serving on the Court during *Griswold*—in fact, he was the only Justice to join William Douglas’s Court opinion—and he relied upon *Griswold* to inform his views on abortion. “The vital question,” he wrote, “becomes one of balancing” a state’s legitimate interest in protecting life and an individual’s constitutionally protected rights. “I submit that until the time that life is present,” he wrote, “the State could not interfere with the interruption of pregnancy through abortion. . . . If an individual may prevent contraception, why can [she] not nullify that conception when prevention has failed?”⁴⁵

One year after Clark’s article appeared, a three-judge district court panel, quoting with approval his defense of privacy rights, declared Texas’s abortion law unconstitutional.⁴⁶ The following year, Clark wrote a Second Circuit opinion concerning New York’s abortion statute, although his opinion did not consider its constitutionality as the issue before him was a question of state comity. The appellant in the case, a physician who performed an abortion, initially challenged the law on privacy grounds, but on appeal, he enlarged his attack to include an equal protection claim. The federal district court preferred that New York’s appellate courts consider all constitutional claims first. As the Texas challenge was then pending before the Supreme Court, Clark thought that the privacy argument was ripe for adjudication, and he vacated the district court ruling, essentially ordering it to consider the privacy issue.⁴⁷

Had Clark remained on the Supreme Court, he undoubtedly would have supported Justice Harry Blackmun’s *Roe v. Wade* opinion. Blackmun shared Clark’s views on the common law history of abortion, and in *Roe* he gave passing reference to Clark’s law review article.⁴⁸ Clark may have differed with Blackmun over whether to recognize “potential” life as compelling as “actual” life, but Blackmun’s reliance on medical ethics, standards, and advances might have assuaged

Clark’s preference for letting doctors rather than judges determine when life begins.

Other notable cases in which Clark participated included the government’s appeal of the dismissal of charges against Wounded Knee occupation leaders, and the conviction of a government official embroiled by Watergate. Although he did not author these opinions, Clark did influence their final dispositions. In the end, he was dissatisfied with both of their outcomes.

Wounded Knee, located on the Pine Ridge Sioux reservation in South Dakota, was the site of an 1890 massacre of Native Americans. In late February 1973, members of the American Indian Movement (AIM) took control of the historic area to draw attention to their plight. Government agents laid siege, and a seventy-one-day standoff left two protesters dead. The ensuing eight-month trial of AIM leaders Russell Means and Dennis Banks ended in a cloud of suspicion and the dismissal of all charges. The issue confronting Clark and his Eighth Circuit panel was whether the district judge’s dismissal of charges against Means and Banks constituted a final ruling. If it did, then the Double Jeopardy Clause prevented the government from further prosecution; if not, then the government could try again.

Compounding the case for District Judge Fred Nichol were accusations of prosecutorial misconduct and the sudden illness of one juror after deliberations began. Nichol considered portions of the government’s case “intentional deception” or “grossly negligent conduct.” When the jury decreased to eleven, both Nichol and the defendants agreed to proceed to a verdict, most likely acquittal. The government objected, hoping instead for a mistrial and a second chance at prosecution. Nichol was in a quandary: “Although it hurts me deeply,” he wrote, “I am forced to the conclusion that the prosecution in this trial had something other than attaining justice foremost in its mind. . . . [T]his case was not prosecuted in good faith.”⁴⁹

At the Eighth Circuit, Chief Judge Floyd Gibson drafted an opinion upholding Nichol's dismissal of all charges. In his initial draft, however, Gibson was unwilling to exonerate Means and Banks, leading Judge Donald Lay to request modifications. Lay did not want to express "our opinion that the defendants were guilty of the crimes charged" because that "would be pouring fuel on the fire" and "serve little purpose other than to antagonize the American Indian Movement." Clark agreed, and he fashioned language that Gibson incorporated into a final dictum on the "erosion of public confidence in the effective administration of justice."⁵⁰ Privately, Clark "detested" the outcome, as he thought that Means and Banks deserved punishment, but he saw "no other alternative" to dismissal. The government had lied; it was not "scrupulously honest and above board." When the government failed to follow its own rules, Clark believed it "must be held to the consequences."⁵¹

Holding government accountable for malfeasance became the motif of Clark's only Watergate-induced appeal. Coming a few months after the Wounded Knee appeal, the high-profile case of Edwin Reinecke, former lieutenant governor of California (1969-1974), had striking parallels. Once again, questions of guilt or innocence were discreetly avoided to reach a just, if unsatisfactory, ruling. This time, the real drama unfolded "behind the scenes," as Clark and the D.C. Circuit panel on which he sat negotiated over the final *per curiam* opinion, shifting from upholding Reinecke's perjury conviction to overturning it. All the while, Clark felt stymied in his pursuit of justice; like many in the wake of Watergate, he wanted the lawbreaker punished.

In summary, Reinecke's involvement with the Nixon administration and subsequent Watergate investigation began in 1969 when the Justice Department under John Mitchell brought an antitrust suit against International Telephone and Telegraph (ITT).

Two years later, the Justice Department suspiciously dropped its lawsuit, and ITT settled favorably out of court. When Mitchell resigned in 1972 to direct Nixon's re-election campaign, Richard Kleindienst endured one of the longest confirmation hearings in Senate history to become the next Attorney General. At those hearings, Reinecke testified that he told Mitchell about an ITT pledge of \$400,000 to Nixon's campaign if San Diego hosted the Republican Convention, although, as it turned out, the convention went to Miami Beach. Under oath, Reinecke denied speaking to Mitchell *before* the ITT settlement. Within months of Reinecke's testimony, burglars broke into the Watergate complex.

One year after the break-in, the special prosecutor's office discovered that Reinecke had lied to the Senate Judiciary Committee. He had, in fact, discussed ITT's pledge with Mitchell *before* the favorable settlement. White House tape recordings later revealed Nixon's complicity, as he had ordered then deputy attorney general Kleindienst to drop the lawsuit. Reinecke was indicted for perjury, found guilty, and received an eighteen-month suspended sentence. Before year's end, Nixon resigned in disgrace, most of his co-conspirators were in jail, and Reinecke began his appeal.⁵²

Against this backdrop of political scandal, Clark, joined by D.C. Circuit Judge J. Skelly Wright, voted to affirm Reinecke's conviction. The other panel member, Judge George MacKinnon, voted to reverse. In his appeal, Reinecke did not defend the truthfulness of his Senate testimony but instead argued that the Judiciary Committee that received his testimony was not a "competent" tribunal. The Senate had a long-standing tradition that committee rules became effective only when they were published. Because the Judiciary Committee had not published its one-man quorum rule in time for Reinecke's testimony, he argued, it should not matter whether he lied to it.

Initially, Clark prepared an opinion affirming Reinecke's conviction, and MacKinnon wrote a dissent. By the time MacKinnon's dissent circulated, Wright was "leaning the other way," Clark's clerk complained, and MacKinnon "fails to even mention the possibility that Reinecke's lying was conduct that must be condemned."⁵³ MacKinnon now had a majority, and Clark prepared a scathing dissent where he criticized the distrust bred by Watergate:

To set aside a conviction on such a mischievous offense by reason of such a flimsy technicality can and will be our undoing. Of late, lying has become a popular pastime . . .

Reinecke, like some other former high government officials, suffered no punishment for his admitted brazen affront to the law.

The panel continued negotiating through fall 1975—one year after President Gerald Ford's pardon of Nixon—and Clark next prepared a concurrence where he tolerated reversal but still vented his spleen over Reinecke's lying:

Reinecke's claim that he was being punished for volunteering when he had no duty to volunteer is pure sophistry. Even volunteers do not have a license to lie. . . . I always regret having to reverse convictions where the evidence, as here, clearly proves guilt, but that is my duty where the defendant, no matter how despicable, has been deprived of a fundamental right.

In the end, Clark decorously filed away his three opinions in the case.⁵⁴ It must have been time, to borrow Ford's words, to end the "prolonged and divisive debate" over Watergate and maintain "the tranquility to which this nation has been restored."⁵⁵

Clark's Consistency and Reliance on Supreme Court Precedent

Rarely has an individual served on all three levels of the federal judiciary. Clark was one of the few who did, but, unlike other Justices who *began* their service on the lower federal courts, he *ended* his service there.⁵⁶ At times this put him in the curious position of relying upon Supreme Court precedents established while he served there. The Court, however, leaned in a more conservative direction during Clark's retirement. How would he rely upon Court rulings? Would he hold to the positions he took as an active Justice or adhere to more recently adopted precedent?

For much of his retirement, Clark relied wherever possible upon precedents of the courts of appeals on which he sat, as expected of a visiting judge. When he did turn to Supreme Court rulings, he respected the Court's recent pronouncements, regardless of whether the Court had moved in a new direction. As an example, in a Fourth Circuit opinion Clark overturned a Virginia school board's racially discriminatory test for hiring teachers. Because the test was the sole criterion for employment and there was a racially disparate impact, Clark relied upon recent Court rulings to require the school board to justify its test "by clear and convincing evidence." Qualifying tests had to measure a person for a job, Clark concluded, but in this case the *sine qua non* of employment measured candidates in the abstract. It was an "affirmative duty," Clark reasoned, no less in school employment than in student composition, for schools to eradicate "root and branch" every vestige of discrimination.⁵⁷

As an example of Clark relying upon Court precedents from his active service there, in an Eighth Circuit appeal involving commercial speech he ruled that consumer credit reports were not protected speech, and, therefore, Congress could regulate them

through the Fair Credit Reporting Act. To make that determination, he distinguished between commercial speech, obscenity, and libel, using cases with which he was familiar. He also found an “overlay” between free speech and personal privacy and concluded that consumer reporting agencies had to furnish derogatory reports to investigated individuals.⁵⁸

Relying upon Court precedents with which he agreed, however, was not nearly as noteworthy as when he disagreed with them or they appeared inconsistent, particularly when his former Court colleagues had criticized rulings in later cases. Clark faced difficulty, for example, in a Sixth Circuit case when he had to distinguish between two seemingly incompatible Court precedents. The case involved a conscientious objector who refused to participate in a high school’s compulsory R.O.T.C. training program in lieu of physical education. In his opinion, Clark had to distinguish between *Braunfeld v. Brown*, which denied the Free Exercise claims of Jewish merchants compelled by state law to close their stores on Sundays, and *Sherbert v. Verner*, which upheld the Free Exercise claim of a Seventh Day Adventist who was denied unemployment benefits when she declined Saturday work because of religious principles.⁵⁹

In their Sixth Circuit appeal, school officials relied upon *Braunfeld*, while the student relied upon *Sherbert*, nor were they the only ones to see a conflict. Justice John M. Harlan, who had concurred with the judgment in *Braunfeld*, dissented in *Sherbert*, claiming that *Sherbert* “necessarily overrules” *Braunfeld*. Justice William O. Douglas, on the other hand, had dissented vigorously in *Braunfeld*, but he concurred in *Sherbert*, reminding readers that he would “still dissent” to *Braunfeld*. Clark extricated himself from the apparent conflict to rule in favor of the student’s Free Exercise claim by finding an association between a compulsory activity (R.O.T.C.) and the deprivation of an

important state benefit (education). Such an association, to his mind, did not occur in *Braunfeld*, but it did in *Sherbert*. “The state may not put its citizens to such a Hobson’s choice,” he concluded.⁶⁰

In a Second Circuit case involving racially discriminatory housing and potential state involvement, Clark relied upon one of his own Supreme Court opinions while accepting the authority of another Court precedent to which he had dissented. In *Burton v. Wilmington Parking Authority*, Clark found what he called “nonobvious” state involvement because the state, through its inaction, had “elected to place its power, property and prestige behind the admitted discrimination.” In *Reitman v. Mulkey*, on the other hand, Clark had dissented when the Court found similar state involvement, accusing the Court of looking for state-sanctioned discrimination when the state, in fact, maintained its neutrality in the face of private discrimination.⁶¹ In the Second Circuit appeal, city authorities argued that racial discrimination was unproven, but Clark rejected that argument, instead concluding that “racial motivation resulting in invidious discrimination guided the actions of the City.” Rather than reconciling his positions in *Burton* and *Reitman*, Clark used them both to “completely undercut” city authorities’ purported neutrality. “The mosaic of . . . discrimination is a sad one,” he announced, “This panoply of events indicates state action amounting to specific authorization and continuous encouragement of racial discrimination.”⁶²

Perhaps the best example of Clark’s relying upon a Supreme Court case in which he had previously dissented was a Seventh Circuit appeal involving a defendant’s *Miranda* rights. In the Court’s landmark *Miranda v. Arizona* decision requiring that detained criminal suspects be informed of their constitutional rights, Clark had vehemently dissented, accusing the five-person majority of going “too far on too little” and

upbraiding the other three dissenters for not going “quite far enough.” Calling *Miranda* an “arbitrary Fifth Amendment rule” that unfairly mischaracterized the vast majority of law enforcement, Clark claimed that the new requirements “inserted at the nerve center of crime detection may well kill the patient.”⁶³

The following term, Clark’s misgivings about *Miranda* had persisted. In a case involving counsel’s presence at a police lineup, *Miranda*’s other three dissenters again took exception, reminding readers that they “objected then to . . . an uncritical and doctrinaire approach without satisfactory factual foundation.” Clark shared their apprehension, but, he admitted, *Miranda* was “on the books,” so he was “bound by it now, as we all are.”⁶⁴ After Clark retired, the other Justices still quarreled over *Miranda*’s merit, with Justice Potter Stewart going so far as to assert, in a case extending *Miranda*’s procedural safeguards beyond the station house, “It seems to me that those of us who dissented in *Miranda* remain free . . . to express our continuing disagreement with that decision.”⁶⁵

In the Seventh Circuit appeal, Clark made no mention of his *Miranda* dissent or of the Court’s internecine disputes over *Miranda*’s application. Instead, he unapologetically endorsed *Miranda*’s mandate and expressed exasperation with perceived recalcitrance:

The police just will not give the warnings required and the prosecutors continue to present the resulting illicit evidence to juries. The fear seems to be that if the officer warns the subject, the latter will refuse to talk. . . . Compliance with *Miranda* does not result in the suspect “clamming up.”

In *Miranda*, Clark had dissented because he preferred to follow “the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments” instead of “acting in the dark” and “in one full sweep

changing the traditional rules of custodial interrogation.” Once the rules changed, however, Clark accepted—even embraced—the change. He expected prosecutors to “enforce *Miranda* to the letter” and police to “obey it with like diligence.”⁶⁶

Clark seldom relied on his own Court precedents. Once, in a relatively insignificant case, he cited what became his most-often-referenced opinion. In sustaining the narcotics conviction of a former professional football player, Clark cited *Anders v. California*, a case few outside the legal community recognize but one with profound implications for public defenders. *Anders* established that indigent defendants had the same rights to appeal as those who could afford a lawyer, so court-appointed public defenders could not remove themselves from “wholly frivolous” lawsuits until they filed what came to be known as an *Anders* brief outlining all the grounds for appeal.⁶⁷ In a First Circuit appeal, Clark used *Anders* to urge court-appointed counsel to stop wasting time on pointless appeals they could not hope to win.⁶⁸

A final example of Clark’s relying upon recent precedents instead of citing his own Court opinions was *United States v. Rabe*, a Seventh Circuit appeal in which Clark overturned the conviction of a Jehovah’s Witness, Layne Rabe, who had failed to report to military induction because he claimed conscientious objector status.⁶⁹ Clark was certainly familiar with Jehovah’s Witnesses, as he had written the 1953 Court decision providing ministerial exemptions to Witnesses and in 1955 had authored a quartet of cases in which Witnesses claimed conscientious objector status.⁷⁰ Of course, he may best be remembered for the now-classic 1965 conscientious objector case, *United States v. Seeger*, which established that religious belief does not have to be theistic if it “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”⁷¹ In the Seventh Circuit appeal, Clark made no



In several of his lower court opinions, Clark relied upon a Supreme Court case in which he had previously dissented. For example, in a Seventh Circuit appeal involving a defendant's criminal rights, he upheld the warnings outlined in *Miranda v. Arizona* (1966), a case in which he dissented, writing that he expected the police to "obey it with like diligence."

mention of these cases, as he eschewed citing his own opinions. Instead, he relied upon recent Court precedents that conspicuously referenced his opinions.

To overturn Rabe's conviction, Clark used a three-part test: first, whether Rabe objected to war in any form; second, whether that objection was based on religious training and belief; and, third, whether those beliefs were sincerely held. Interestingly, the Court had used these same three criteria to overturn the conviction of legendary heavyweight boxer Muhammad Ali (a.k.a. Cassius Clay) one year earlier. For the test's first part, Clark cited *Gillette v. United States*, which the Court similarly used in Ali's case.⁷² For the second part, he cited *Welsh v. United States*, but the Ali decision (*Clay v. United States*) relied as much upon Clark's *Seeger* opinion as it did upon *Welsh*. In fact, the Court had

overturned Elliott Welsh's conviction in large part by relying on *Seeger*.⁷³ For the third part, Clark cited the Court's now famous *per curiam* opinion in *Clay v. United States*, the case that overturned Ali's conviction; but the Court had had to rely on Clark's opinion in *Witmer v. United States*, which was a better precedent anyway because *Witmer* focused on sincerity of belief, whereas *Clay* did not.⁷⁴ Self-effacing to a fault, Clark may have intentionally steered clear of his opinions in *Seeger* and *Witmer*. Moreover, he used the three-part test to show how Rabe established a *prima facie* claim for conscientious objector status. As the local draft board had rejected that claim without stating a reason, Clark reversed the board's decision and ordered Rabe's indictment dismissed. The Court had similarly reversed Ali's conviction largely because the state Appeal Board gave no

reason for its decision. According to the Court, that put *Clay* “squarely within the four corners” of another Clark opinion, *Sicurella v. United States*.⁷⁵ Had he wanted, Clark could have rested *Rabe* on three of his own Supreme Court opinions, but that was not his style.⁷⁶

Clark's District and Appellate Opinions Under Review

As a retired Justice sitting by designation, Clark faced the unenviable prospect of having his opinions reviewed—and possibly reversed—by a higher court. Overall, it did not appear that Clark fared well under review: four of his district court decisions faced review but only one was upheld, and the Seventh Circuit sitting *en banc* reversed one of his circuit opinions.⁷⁷ Clark did no better before the Supreme Court, which reviewed seven of his opinions and upheld only two. Of Clark's 125 authored opinions, forty-three were appealed, and the Court denied *certiorari* for thirty-six of them. Of the forty-three appealed, Clark affirmed a lower court ruling twenty-four times and reversed/vacated nineteen times. More often, the Court accepted cases where Clark reversed (six times) than when he affirmed (one time). Additionally, the Court rejected the recommendation he made as Special Master and reversed one of the *per curiam* opinions he wrote so that the same circuit panel had to issue a different *per curiam* two years later, making Clark's record less than auspicious. He took it all in stride; in some instances, reversal meant that the Court itself had changed direction, while in others it meant that Clark's preferred position prevailed.

Clark's one decision as a district court judge affirmed on appeal was less remarkable for his ruling than for how he received the case. Originally, Judge John Singleton presided over a trial in which ALCOA was accused of monopolizing ninety percent of a

4,000-acre natural gas field. When the jury awarded damages in excess of \$143,000, Singleton set aside the verdict and ruled that there was no antitrust violation.⁷⁸ On appeal, the Fifth Circuit, noting the case's long and tortured history, reversed Singleton and ordered the jury's verdict reinstated. Not wanting the case returned to him, Singleton sought a way out by having it assigned to Clark.⁷⁹ With the assent of the chief judges of the Fifth Circuit and the Southern District of Texas, Clark presided over the case on remand. He reinstated the jury verdict against ALCOA, and, unsurprisingly, the Fifth Circuit upheld his decision.⁸⁰

As Clark published only one district court opinion, his identity as the trial judge facing reversal in two other cases became evident only from circuit opinions. One of those was a bench trial in the Eastern District of New York in which Clark considered charges of racial discrimination and fair housing. At issue were a private landlord's financial criteria for determining renters' eligibility. Relying on the fair housing requirements of the 1968 Civil Rights Act and the 1866 Civil Rights Act, low-income renters challenged the landlord's criteria as racially discriminatory for effectively barring recipients of public assistance from access to affordable housing. Although the intent of the criteria may have been economic, Clark ruled in favor of the low-income renters because the *effect*—what came to be known as disparate impact—was discriminatory. A divided Second Circuit, however, reversed Clark by distinguishing between an employer's “test” for eligible workers and the landlord's “test” for eligible renters. Apparently, the latter could be discriminatory, but not the former.⁸¹ In the end, Clark's views ultimately prevailed when the Second Circuit overruled its earlier decision *sub silentio*.⁸²

Clark's other ruling without opinion that was reversed was an antitrust decision in the Northern District of California. At the time of his decision, Clark's views on antitrust

violations were well-established from his Supreme Court service. In *White Motors v. United States*, Clark had strenuously dissented because the Court refused to extend a *per se* antitrust violation to vertical arrangements involving territorial restrictions. The Court preferred to use a “reasonableness” standard, but Clark thought that whenever competition was eliminated, then a *per se* violation occurred. Four years later, in Clark’s last term, the Court changed course in *United States v. Arnold, Schwinn* and ruled that vertical arrangements with territorial restrictions were *per se* antitrust violations.⁸³ At a jury trial three years later, possibly much to his satisfaction, Clark relied upon *Schwinn* and found a *per se* antitrust violation. The Ninth Circuit sitting *en banc*, however, reversed him in a close decision, with the majority preferring to use *White Motor’s* reasonableness standard and the dissenters accusing the majority of overruling *Schwinn*. More to the point, the Ninth Circuit majority accused Clark of adopting his *White Motor* dissent in his jury instructions, while the dissenters argued that he correctly applied *Schwinn* in another circuit case.⁸⁴ By the time the Supreme Court considered Clark’s ruling, *Schwinn* had become the object of widespread criticism, and a newly constituted Burger Court was prepared to overrule it explicitly. Clark never learned of the Court’s decision, as he died ten days before the Court announced it.⁸⁵ The Court cast aside Clark’s preferred *per se* rule and reverted to the reasonableness standard, one that Justice Clark had rejected.⁸⁶

The Ninth Circuit also reversed Clark’s one published district court opinion, another antitrust decision. That case involved a contract dispute between a Major League baseball team and a company that formerly sold concessions at its games, with the team accusing the company of monopolistic restraint of trade. Without going into the details of “this long and tangled story,” as the Ninth Circuit put it, Clark ruled in favor of the

baseball team and charged the concessionaire with monopolization. On appeal, the Ninth Circuit disagreed with Clark’s definition of the relevant market, which he thought was “major league baseball concessions” involving concessionaires selling their services to baseball clubs. The Ninth Circuit, on the other hand, ruled that the relevant market was the franchise that any professional sports team sold to its concessionaires.⁸⁷ Clark had doubts about retaining the case for himself on remand, so he requested that the case be transferred to Judge Robert Peckham, who had previously ruled in the case. Using the Ninth Circuit’s definition for relevant market, Peckham still found an antitrust violation, which a different Ninth Circuit panel upheld. This time, in order to distinguish between the separate rulings of two district court judgments, the Ninth Circuit opinion prominently named Justice Clark and Judge Peckham.⁸⁸ Regardless of the definition for relevant market, Clark’s initial ruling of an antitrust violation ultimately prevailed.

Clark’s record as a lower court judge before the Supreme Court was unimpressive. One of his two court of appeals opinions that were affirmed was a Second Circuit decision awarding attorney fees to a worker facing exclusion for criticizing his union. Clark upheld the worker’s free speech in an impassioned defense of workers’ rights against the excessive abuses of labor unions.⁸⁹ His other affirmed opinion was arguably his most consequential appellate decision, even though recent scholarship largely overlooked it, because, as we will see, Court reversals garnered more attention.⁹⁰ For this other affirmance, Clark had to convince the Justices that his opinion was distinguishable from a recently announced Court ruling pointing in the opposite direction.

The case was *Gautreaux v. Chicago Housing Authority*, and the obstacles that Clark overcame to fashion a remedy for housing discrimination were substantial.

Gautreaux began in 1966 when Dorothy Gautreaux, among others, charged the Chicago Housing Authority (CHA) with maintaining racial segregation through its tenant assignment and site selection procedures and the U.S. Department of Housing and Urban Development with assisting in fashioning a racially discriminatory public housing system.⁹¹ By the time *Gautreaux* reached the Seventh Circuit panel on which Clark served in 1974, Judge Richard Austin had ruled five times on different aspects of the case, and three other circuit panels had heard appeals from those rulings.⁹² Now it was Clark's turn, and the substantial question the panel faced was whether a remedial plan to address constitutional violations could include surrounding suburbs or must be confined to the Chicago city limits. Judge Austin preferred the latter, but Clark reversed him on that point. The "callousness" of the

CHA, Clark observed, "towards the rights of the black, underprivileged citizens of Chicago" was "beyond comprehension." Confining a remedy within city limits was "not only much too little but also much too late in the proceedings." Austin's narrow decision meant that black tenants, "having won the battle back in 1969, have now lost the war."⁹³

The first obstacle that Clark's intercity remedy faced was the Supreme Court's recent decision in *Milliken v. Bradley*. Clark was still recovering in a Boston hospital following emergency gall bladder surgery when the Court announced *Milliken* on the last day of an unusually late Court term. Faced with intractably segregated schools, Detroit residents had sought an inter-district remedy to accomplish desegregation; in other words, they wanted to move urban and suburban students—and the lower courts agreed—across school district boundaries. Writing



In his most celebrated appellate opinion, *Gautreaux et al. v. Chicago Housing Authority*, Clark sought a solution to discriminatory housing patterns in Chicago. The plaintiff, Dorothy Gautreaux, is pictured above. She died at forty-one without knowing the success of her case.

for a five-person majority, however, Chief Justice Warren E. Burger declared that “without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”⁹⁴ This new principle, the *Milliken* standard, appeared to stand in the way of Clark’s proposed *Gautreaux* decision.

When Clark first drafted his opinion, he asked Judge Walter Cummings, who called it “courageous,” to help him address the *Milliken* obstacle. The other panel member, Judge Philip Tone, saw no way around *Milliken* and planned to dissent.⁹⁵ Concern for *Milliken*’s controlling principle even led Judge John Paul Stevens to request *en banc* review of Clark’s opinion. Writing to all active Seventh Circuit judges, Stevens argued that *Milliken* limited judicial discretion in fashioning regional remedies. “I think it would be far better for this court,” he urged, “to correct its own mistake than to await possible Supreme Court review.”⁹⁶ Clark’s opinion stood; only Judges Tone and Pell voted with Stevens for *en banc* review. Now it was up to the Supreme Court.

When *Gautreaux* arrived at the Court, the central issue was how to square it with *Milliken*, and Clark gave them the answer. In his *Gautreaux* opinion, he had carefully distinguished between school and housing segregation and the appropriate equitable relief when one but not the other had a “deeply rooted tradition of local control.” Recognizing that Justice Stewart’s separate opinion had provided the decisive fifth vote in *Milliken*, Clark made sure to rely on it, reminding the Court that *Milliken* clarified an equitable limitation without overruling one. Logistical and historical considerations offered enough of a difference to fashion a broad metropolitan remedy for housing that was not possible for single-district school segregation. “We must not sentence our poor, our underprivileged, our minorities to the jobless slums of the ghettos,” Clark intoned, “and thereby forever trap them in the vicious

cycle of poverty which can only lead them to lives of crime and violence.”

Chief Justice Burger strategically assigned *Gautreaux* to Stewart, who, according to Clark’s law clerk at the time, got out from under “that dreadful [*Milliken*] opinion” “as gracefully as possible.”⁹⁷ Speaking for a unanimous Court, Stewart ruled that “nothing in the *Milliken* decision suggests a *per se* rule [prohibiting] remedial efforts beyond the municipal boundaries of the city where the violation occurred.” Housing discrimination was different from school segregation, particularly when federal agencies were involved, and, therefore, the remedies for them could differ.⁹⁸

Gautreaux proved to be Clark’s greatest success before the Supreme Court, which fully vindicated his opinion and firmly established his role in prompting significant urban housing reform. *Gautreaux* became “a model of success for our nation,” remarked then Housing Secretary Henry Cisneros thirty years after the Court’s landmark decision. “It helped change the face of public housing in Chicago” and became “one of the leading civil rights cases of our time.”⁹⁹ Shortly after the Court announced *Gautreaux*, Walter Cummings, who served on the panel with Clark, wrote to him, “As it turned out, we had very little to worry about!”¹⁰⁰

In other areas, Clark did not fare as well before the Court. For example, the Court vacated his Fourth Circuit ruling that a suspect could not be charged with both the theft and the possession of stolen goods. A few weeks earlier the Court had established new guidance for handling cases dealing with mutual possession and theft charges. On remand, Clark modified his opinion to find the accused guilty only of theft.¹⁰¹ The Court also reversed him in two unsigned *per curiam* opinions.

One of those, which proved to be the Court’s *closest* decision reversing Clark, involved the property rights of a discharged employee who failed to receive notice or

hearing. Clark's Second Circuit panel did not consider the property interest of the employee who had lost two public sector jobs because of damaging information contained in his personnel record; instead, Clark ruled that a stigma attached from the reporting of an alleged suicide attempt, which precluded public sector employment. A five-person majority reversed Clark by sidestepping the stigma claim altogether, ruling instead that the employee was not entitled to a hearing because he never disputed the report's falsity. The Court's four dissenters were no solace to Clark, however, because they preferred that he consider the employee's property interest in continued employment.¹⁰²

The Court's other *per curiam* reversal of Clark involved private first-class Mark Avrech, who, shortly after his February 1969 arrival in Vietnam, criticized the nation's military involvement. "I've been in this country now for 40 days," he reflected, "and I still don't know why I'm here. . . . The United States has no business over here. . . . We've been sitting ducks for too long." When Avrech attempted to print and distribute his reflections, he was court-martialed for violating the Uniform Code of Military Justice, Article 134, dealing with conduct that threatened "good order and discipline." Avrech challenged his conviction on First and Fifth Amendment grounds, arguing particularly that Article 134 was overbroad. When his case reached the D.C. Circuit four years later, the war was winding down and a peace agreement was at hand. In that context, the panel supported Avrech's Fifth Amendment claim and ruled that Article 134 was unconstitutionally overbroad. "Nothing could point more accusingly to the vagueness of Article 134," Clark wrote, "than for the Court of Military Appeals to say that in the final analysis. . . . [the Article's] vague and indefinite language is absolutely controlling."¹⁰³

At the same time that *Avrech* reached the Supreme Court, the Justices considered another Vietnam war protest, *Parker v.*

Levy. Ironically, the Third Circuit panel that heard Captain Levy's appeal relied upon Clark's *Avrech* opinion, decided one month earlier, to reach a similar result. Captain Levy, an army physician stationed stateside, made similarly disparaging remarks about America's war effort (although he encouraged disobedience), and the Supreme Court considered both cases together.¹⁰⁴ Using *Levy* as the lead case, Associate Justice William H. Rehnquist announced the Court opinion reversing the Third Circuit because military considerations placed soldiers in different circumstances from civilians; Article 134 did not infringe upon free speech because "speech that is protected in the civilian population may nonetheless undermine the effectiveness of response to command."¹⁰⁵ One month later, the Court used *Levy* to reverse *Avrech*, and three Justices dissented: Douglas defended Avrech's free speech while Thurgood Marshall and William J. Brennan wanted Clark to rule on Avrech's free speech.¹⁰⁶

Avrech was remanded to the D.C. Circuit, where, two years later, it was heard by the same three-judge panel. This time around, Judge Malcolm Wilkey drafted the court opinion after both sides presented additional briefs on Avrech's First Amendment claim. Wilkey's initial draft ruled decisively against Avrech. "It is generals, not judges from a sitting position who lead armies," he proclaimed. "Soldiers, when entering a combat zone, perform better as soldiers if they leave their editorial typewriters at home." Coming soon after the fall of Saigon to North Vietnamese forces and massive evacuations, Wilkey's draft suggested that war protesters like Avrech were responsible for America's withdrawal. The other panel member, Judge J. Skelly Wright, dissented based upon Avrech's First Amendment protection, leaving Clark the deciding vote. In the end, Wilkey toned down his opinion to keep Clark's vote, and Clark joined Wilkey to uphold Avrech's conviction.¹⁰⁷

The Supreme Court also reversed Clark in two signed opinions. In the first of those—his first reversal as an appellate judge—Clark relied on recent Court precedent even though he disagreed with the Court's change in direction. To appreciate the Court's twists and turns regarding warrantless civil searches, we need to return to Clark's Supreme Court service, when *Frank v. Maryland* allowed such searches. In *Frank*, a five-person majority, including Clark, had ruled that city health inspectors could enter a premise without a warrant, because health regulations stemmed from a community's general welfare and not suspected criminal activity.¹⁰⁸ Eight years later, in Clark's final term, the Court reversed course and explicitly overruled *Frank* in a pair of cases dealing with housing and fire code administrative inspections. In his final published Supreme Court dissent, Clark took exception to overruling *Frank*, calling the Court's "newfangled 'warrant' system" for civil searches a "legalistic façade."¹⁰⁹ Sitting with the Tenth Circuit four years later, a panel on which Clark sat had to decide whether federal agents needed a warrant to inspect gun storage areas, particularly when the 1968 Federal Gun Control Act did not require one. Using recent Court rulings regarding liquor control and the Court's change in direction on warrantless searches, Clark ruled that federal inspections without a warrant or the owner's permission were unconstitutional, and the evidence seized (in this case, two sawed-off rifles) was inadmissible. He later remarked, "I thought I was following the cases."¹¹⁰

The Supreme Court, in a decision by Justice Byron White, reversed Clark because "pervasively regulated" businesses, like alcohol and firearms, lost some of their "justifiable expectations of privacy" when they applied for federal licenses. "If inspection is to be effective and serve as a credible deterrent," White declared, "unannounced, even frequent, inspections are essential." Warrant requirements could "easily frustrate"

compliance.¹¹¹ Unlike the close votes in *Frank* or subsequent decisions overruling it, this time only Justice Douglas supported Clark's analysis. It seemed the Court had come full circle—at least, with respect to certain types of civil inspections—and returned to the warrantless type of search allowed in *Frank*, much to Clark's satisfaction. Taking it in his stride, he wryly remarked, "I don't mind. My dissent in the other case is now law."¹¹²

The other authored opinion reversing Clark was also the last time he was reversed as an appellate judge, and the outcome was no better than his first reversal. This time, the Eighth Circuit considered whether the Hazelwood School District, located outside of St. Louis, Missouri, used racially discriminatory hiring practices. In August 1973, the Justice Department accused Hazelwood of violating Title VII of the 1964 Civil Rights Act, which became effective in March 1972. With so little time to prove a discriminatory purpose, according to one of Clark's panel colleagues, Judge Myron Bright, "the government had a fairly weak case."¹¹³ Clark was not deterred; with Bright's vote, he reviewed Hazelwood's entire hiring history to demonstrate a "pattern or practice" of discriminatory hiring, and then he ordered relief for sixteen of fifty-five black applicants denied teaching jobs.¹¹⁴

Chief Judge Floyd Gibson would not join Clark's opinion, however. "I have attempted to reconsider my position," Gibson wrote, "but the more I get into the matter the stronger I feel that the majority opinion goes much too far in both finding discrimination and in interfering with the internal operations of the school district."¹¹⁵ Hoping to stymie Clark before the opinion was announced, Gibson sought *en banc* review. According to Bright, Gibson's efforts failed substantially "because it was Tom Clark." In dissent, Gibson argued that Clark's remedial plan requiring Hazelwood to justify every hiring decision over the next three years amounted to "reverse

discrimination operating in favor of a specified minority,” and he challenged Clark’s statistical analysis, which included St. Louis (city) in the relevant labor market. Such an analysis would negatively distort the ratio of black teachers hired at Hazelwood, as St. Louis maintained a racially balanced teacher workforce, but that may have been Clark’s intention. He and Bright wanted to strike down discriminatory hiring. “Tom and I might have been wrong on our statistics,” Bright later recollected, “but we were right in our hearts.”¹¹⁶

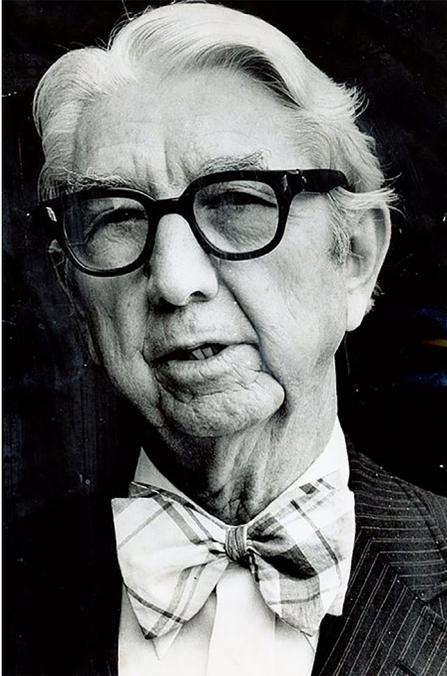
Regardless of Clark’s intention, the Supreme Court reversed him. In the opinion for the Court, Justice Stewart accepted Gibson’s contentions—that Clark erred by including St. Louis in the relevant labor market, and that the government failed to prove a “pattern or practice” of racial discrimination, because after 1972 Hazelwood did, in fact, hire some black teachers. Most damaging for Clark, however, was that, in the same term, the Court refined its employment standard for “pattern or practice” discrimination. Under this new standard, discriminatory hiring had to be “standard operating procedure,” and Hazelwood, since 1972, had not regularly excluded black applicants.¹¹⁷ About the only portion of Clark’s opinion that the Court accepted was his refusal to rely upon the district court finding that the number of minority teachers in a school district somehow bore a relationship to the number of minority students.¹¹⁸ Only Justice John Paul Stevens supported Clark’s analysis of the relevant labor market, and, in his dissent, he conspicuously named Clark as the judge facing reversal, which seemed felicitous since they served together on Seventh Circuit panels.¹¹⁹ Clark never saw the Court’s opinion reversing him, however, as he died two weeks prior to its announcement.

The only other time that Clark faced Supreme Court review, except for one of his *per curiam* opinions, was in his role as

Special Master. Typically, this involved settling boundary disputes between states under the Court’s original jurisdiction. Rather than hold trial, the Court chose a Special Master to gather evidence (including testimony) and to make a recommendation, which the Court could accept or reject. This time, the Court rejected Clark’s recommendation.¹²⁰

The boundary dispute between Maine and New Hampshire concerned coastal rights to fishing, particularly for lobster, within and around the Piscataqua River, so the controversy was known locally as “the Lobster War.” Maine had stricter regulations on the size of lobsters that could be caught, and enforcement of those regulations led the two states to court.¹²¹ Clark expected to hold hearings in mid-1974 in Boston and D.C., but they never took place. In an effort to reach a settlement, and possibly to avoid costly trials, the states’ two chief executives crafted a consent decree which relied upon a 1740 boundary established by King George II. Although New Hampshire lawmakers approved a resolution for a different boundary, Clark endorsed the consent decree and used it as the basis for his final recommendation.

In that recommendation, however, Clark indicated that the two states still disputed certain language in the 1740 decree concerning the “middle of the river,” and he charged the Supreme Court with settling that dispute in fulfillment of its Article III duty. To the contrary, the Court accepted the consent decree as presented, essentially rejecting Clark’s recommendation that the Justices distinguish between the main navigable channel and the geographic middle of the river as measured from the shore. Three Justices dissented, preferring to follow Clark’s recommendation for establishing the river’s “middle.” After he had served for two years as Special Master, it appeared that Clark had accomplished little more than the two states had on their own, yet he appeared as unperturbed as with any of his appellate



As a judge sitting by designation, Clark (pictured in 1974) was deferential: he typically followed circuit precedents and wrote few dissents. He became more liberal in retirement, siding with those claiming to be victims of discrimination or government overreach.

reversals, remarking, “I think everyone was disappointed with my decision.”¹²²

Conclusion

During his ten years in retirement, Tom C. Clark remained as active and influential a judge as at any time during his Supreme Court service. He kept up a relentless schedule and willingly traversed the country year-round, but the impact of his judging extended farther than the geographic reach of his circuit riding. He received certain opinion assignments, like tough civil liberty cases, because of his stature as a Justice. He tackled some of the more momentous issues of the decade, from Vietnam War protests to a woman’s right to choose an abortion. He agonized over the appeal of a defiant perjurer mired in the Watergate scandal. As the Burger Court moved in a more conservative direction,

Clark appeared to lean liberal. He wanted the Wounded Knee perpetrators punished, but he acknowledged government abuses. In his most celebrated appellate opinion, he sought a solution to discriminatory housing patterns in Chicago, leading the way for significant urban housing reform.

As a judge sitting by designation, Clark was deferential. He typically followed circuit precedents and wrote few dissents. When relying upon Supreme Court precedents, he refrained from using his own opinions, preferring instead to follow the Court’s recent pronouncements. He even endorsed decisions like *Miranda* in which he had dissented. Although his record under Supreme Court or appellate review was less than stellar, he claimed he followed the cases. More often, he sided with those claiming to be victims of discrimination or government overreach. He supported the claims of minority renters and teachers who faced disparate treatment, even though higher courts reversed him. He ruled in favor of a Vietnam soldier who questioned American military involvement, only to see that overturned. His views on warrantless searches ultimately prevailed, but his favored *per se* rule for certain antitrust violations did not. In sum, Clark appeared to become a more activist judge in retirement.

Postscript: He Died as He Lived

Clark intended to continue judging for as long as his body allowed. In 1977, doctors discovered he had atrial fibrillation, which he hoped to control through medication. Chief Justice Burger half-heartedly threatened to deny Clark any further assignments unless he slowed his pace.¹²³ Clark already had made plans to serve on eight different circuits beginning in the fall of 1977 and extending through the spring of 1978. All of that came to naught on June 13, 1977, as he prepared for another Second Circuit sitting. He was in New York, staying at Ramsey’s home, when

he died in his sleep. At the time of his death, at least twenty-six appellate decisions in which he was participating were pending in eight different circuits. In some instances, the final opinion identified Clark as a panel member without mentioning his passing, but in others the final opinion indicated a decision was reached without him due to his untimely death.¹²⁴

There were a few instances, however, where the appellate opinion announced Clark's vote (assent) with the case outcome. For example, in an obscure Fifth Circuit case involving the medical mistreatment of a prisoner, Clark initially composed a *per curiam* opinion ruling in favor of the prisoner, but the Supreme Court reversed him one year later in the only known instance where the Court reviewed one of his *per curiam* opinions. Interestingly, Justice Stevens wrote the lone dissent where he named the "three fine judges" whom the Court reversed.¹²⁵ The case returned to the same Fifth Circuit panel on remand, and a new *per curiam* was prepared. This time, the panel ruled against the prisoner, and the final opinion indicated that Clark had concurred in the result before he died.¹²⁶

Among the opinions announced after Clark's death, there were a few that he had completed himself. He authored an Eighth Circuit employer liability opinion released three days after his death, as well as a Fourth Circuit opinion involving a regulatory agency decision published more than a month after his death, likely a result of delay waiting on Judge Hiram Widener's separate opinion.¹²⁷ However, the most unusual of Clark's posthumous opinions, announced more than two months after his death, appeared as though it was decided *without* him. The final, published *per curiam* opinion in a Seventh Circuit criminal conviction case stated that Clark "heard oral argument and participated in the disposition conference," but that "his death occurred before this opinion was prepared." That was misleading, because

Clark prepared the opinion: tucked away in his case file was a note to his former clerk indicating that the panel agreed to publish his opinion post mortem.¹²⁸

At the time of his passing, Clark was revered among the judiciary, both states and federal. Public pronouncements from past and present Justices lauded his devotion to improving judicial administration. Justice Lewis F. Powell remarked, "It is likely that Mr. Justice Clark was known personally and admired by more lawyers, law professors, and judges than any Justice in the history of the Supreme Court." Even President Jimmy Carter recognized Clark as a "tireless and perceptive advocate of judicial reform."¹²⁹ Improving judicial administration, however, was but half of Clark's post-Court legacy. He was also, in the words of President Carter, "a devoted jurist," one who should be recognized for his astoundingly large number of lower court opinions. At Clark's funeral, Chief Justice Burger best expressed Clark's dedication to serving—and sitting—by designation: "He died as he lived, deeply committed and involved in the judicial work he loved—and literally, in the tradition of the West—'with his boots on.'"¹³⁰

ENDNOTES

¹ Assignment of retired Justices to active duty, 28 U.S.C. §294 (a); in September 1964, at age sixty-five with fifteen years of active service, Clark became eligible to retire at full salary.

² In 1980, Congress reorganized the U.S. Customs Court as the U.S. Court of International Trade. In 1982, the former CCPA and the Court of Claims were abolished when their judges and much of their jurisdiction were transferred to the new U.S. Court of Appeals for the Federal Circuit; in that same year, Congress created a new U.S. Claims Court, now the U.S. Court of Federal Claims.

³ Michael Belknap, "Tom Campbell Clark," in **Biographical Encyclopedia of the Supreme Court: The Lives and Legal Philosophies of the Justices**, ed. Melvin Urofsky (Washington, D.C.: CQ Press, 2006), at p. 142. See also John P. Frank, "Justice Tom Clark and Judicial Administration," *Texas Law Review*, 46 (November 1967): 5-56; James Gazell, "Justice Tom C.

Clark as Judicial Reformer,” *Houston Law Review*, 15 (January 1978): 307-329; Dennis D. Dorin, “Tom C. Clark: The Justice as Administrator,” *Judicature*, 61 (December-January 1978): 271-277; and Vincent Johnson, “Justice Tom C. Clark’s Legacy in the Field of Legal Ethics,” *The Journal of the Legal Profession*, 29 (2004/2005): 33-70.

⁴ Mimi Clark Gronlund wrote an admiring portrait of her father as a “trial judge,” **Supreme Court Justice Tom C. Clark: A Life of Service** (Austin: University of Texas Press, 2010); and Alexander Wohl wrote a dual biography about Clark and his son, Ramsey, **Father, Son, and Constitution: How Justice Tom Clark and Attorney General Ramsey Clark Shaped American Democracy** (Lawrence: University Press of Kansas, 2013).

⁵ Minor Myers mistakenly claimed that Clark heard approximately 380 cases; that he wrote seventy appellate opinions and one dissent; that he sat on one district court (California); and that the Supreme Court reviewed three of his opinions, “The Judicial Service of Retired United States Supreme Court Justices,” *Journal of Supreme Court History*, 32 (March 2007): 46-61. Jon A. Gryskiewicz relied upon Myers, but, instead of duplicating Myers’s numbers, he replaced some of them with equally mistaken numbers, “The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals,” *Seton Hall Circuit Review*, 11 (Spring 2015): 285-326. Stephen L. Wasby corrected Myers’s flawed numbers, particularly for Clark, and updated Myers’s study to show with which judges Clark served and how many times they served together, “Retired Supreme Court Justices in the Courts of Appeals,” *Journal of Supreme Court History*, 39 (March 2014): 146-165.

⁶ To bolster this hollow accomplishment, Myers named one case from each circuit in which Clark *participated*, but only two of Clark’s *opinions*. Joshua Glick similarly named one case from each circuit in which Clark *participated*, but only three of Clark’s *opinions*, “Comment: On The Road: The Supreme Court and The History of Circuit Riding,” *Cardozo Law Review*, 24 (April 2003): 1753-1843.

⁷ Wasby did consider many of these questions, but principally in relation to Justices Sandra Day O’Connor and David Souter.

⁸ In discussing Supreme Court Justices’ ratings, William Ross observed, “Few justices have had significant careers after leaving the bench. . . . [T]heir post-Court careers [were] so insignificant that what they did after leaving the Court is not likely to greatly affect their judicial reputation.” Ross named five Justices who “retired in their prime” as the “only twentieth century examples.” “The Ratings Game: Factors that Influence Judicial Reputation,” *Marquette Law Review* 79, no. 2 (Winter

1996): 420. Tom C. Clark, who retired in his prime, was not on Ross’s list. Furthermore, Clark did have a significant post-Court career, one that should affect his reputation.

⁹ *In re Leslie F. Wiggins*, 397 F. 2d 356 (C.C.P.A. 1968).

¹⁰ Evidence of Clark serving on the Court of Claims was found in a memo of agreement to Chief Justice Earl Warren, General office material: General correspondence and office files (GC), box B124, Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin (hereinafter Clark Papers).

¹¹ Myers, Gronlund, and Wohl miscalculated the beginning of Clark’s lower court service. Myers, at 51, posited that it was Clark’s 1970 sitting with the Seventh Circuit. Gronlund, at p. 247, and Wohl, at p. 372, maintained that it was his 1970 district court service. Their error in this regard was traced to Paul Hoffman, whose 1973 exposé averred that Clark began judging once he retired as director of the Federal Judicial Center, “Tom Clark at 74: Riding Circuit and Leaning Liberal,” *Juris Doctor* (October 1973): 27-28.

¹² Quoted in Hoffman, 27. See also *St. Petersburg Times*, June 17, 1970.

¹³ Glen Elsasser, “Ex-Justice Clark runs firm court, rides herd on lawyers,” *Chicago Tribune*, January 20, 1974. Only one other retired Justice, Willis Van Devanter, presided as a district court judge, but he never sat by designation on a Circuit Court of Appeals.

¹⁴ Clark to Bernard Meyer, September 25, 1970, Other Courts Material: United States District Court case files (USDC), Northern District of California, 1970 June-Sept. (N.D. Ca.), box D160, Clark Papers.

¹⁵ Transcript provided by John M. Youngquist, November 24, 1970, USDC, N.D. Ca., box D160, Clark Papers.

¹⁶ *Twin City Sportservice v. Finley*, 365 F. Supp. 235 (N.D. Cal. 1972).

¹⁷ Clark also authored seventy-seven *per curiam* opinions on the Courts of Appeals. A complete list of all of Clark’s lower court opinions is available from the author upon request.

¹⁸ Quoted in Hoffman, 27.

¹⁹ *Minneapolis Tribune*, October 14, 1975, and *St. Louis Post-Dispatch*, January 19, 1976, Other courts material: Miscellaneous court files (Misc.), box D167, Clark Papers.

²⁰ *Bank of America v. United States*, 552 F. 2d 302 (9th Cir. 1977).

²¹ For example, although Justice Stanley Reed wrote more dissents (five), his ratio was one dissent for every three-point-four opinions, while Clark’s ratio was one dissent for every forty-one-point-three opinions. Other retired Justices’ dissents include Burton (three), ratio of one for every two-point-six opinions, and Powell (three), ratio of one for every twelve opinions. See Wasby, 148.

²² *Borden v. Federal Trade Commission*, 339 F. 2d 953 (7th Cir. 1964); and *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954).

²³ *Mayer Paving and Asphalt v. General Dynamics*, 486 F. 2d 763 (7th Cir. 1973). Judge J. Samuel Perry to Clark, no date, Other courts material: United States Court of Appeals case files (USCA), Seventh Circuit Court of Appeals (7th Cir.), box D124, Clark Papers. Partial vindication came in 1998 when the Eighth Circuit rejected Pell's holding, *Godfrey v. Pulitzer*, 161 F.3d 1137 (8th Cir. 1998).

²⁴ Clark to Judge George MacKinnon, who did not serve on this panel, April 18, 1977, USCA, District of Columbia Circuit Court of Appeals (D.C.), box D155, Clark Papers.

²⁵ *United States v. Williams*, 561 F. 2d 859 (D.C. Circ. 1977). In 1946, then Attorney General Clark had selected Bazelon as assistant attorney general in charge of the Public Lands Division (today Environment and Natural Resources).

²⁶ Clark to Bazelon and Judge Spottswood Robinson, February 24, 1976, and Bazelon to Clark, February 26, 1976, USCA, D.C., box D155, Clark Papers. The other case was *United States v. Davis*, 562 F. 2d 681 (D.C. Cir. 1977).

²⁷ MacKinnon to Clark, April 15, 1977, and MacKinnon to Clark, April 28, 1977, USCA, D.C., box D155, Clark Papers.

²⁸ Interestingly, each of Pell's dissents exceeded Clark's opinions in length, and in each case Pell's dissent transformed an unsigned Final Order into a signed opinion.

²⁹ Judge Robert Sprecher to Pell, October 29, 1974, USCA, 7th Cir., box D128, Clark Papers. The case was *United States v. Lawson*, 507 F. 2d 433 (7th Cir. 1974).

³⁰ Clark's concurrence; Pell to Clark, January 4, 1974; USCA, 7th Cir., box D123, Clark Papers. The case was *Laser Alignment v. Woodruff*, 491 F. 2d 866 (7th Cir. 1974).

³¹ Clerk memo, January 8, 1974, USCA, 7th Cir., box D123, Clark Papers. The case was *J.L. Simmons v. The Fidelity and Casualty*, 511 F. 2d 87 (7th Cir. 1975).

³² Clark to Smith and Rich, June 25, 1968; and Smith to Clark, July, 2, 1968; GC, box B33, Clark Papers. The case was *Swingline v. IB Kleinert Rubber*, 399 F. 2d 283 (CCPA 1968).

³³ Lay to panel, April 19, 1972, USCA, Eighth Circuit Court of Appeals (8th Cir.), box D138, Clark Papers. The case was *Abraham v. Mitchell*, 459 F. 2d 955 (8th Cir. 1972).

³⁴ *Nitzberg v. Parks*, 525 F. 2d 378 (4th Cir. 1975). The school had already revised its policy four times. Haynsworth participated in *Quarterman v. Byrd*, 453 F. 2d 54 (4th Cir. 1971), and Bryan participated in *Baughman v. Freiemuth*, 478 F. 2d 1345 (4th Cir. 1973),

which presented similar factual circumstances and final rulings.

³⁵ *Henry v. Ciccone*, 440 F. 2d 1052 (8th Cir. 1971). Matthes to panel, January 26, 1971, USCA, 8th Cir., box D137, Clark Papers.

³⁶ *Moore v. Townsend*, 525 F. 2d 482 (7th Cir. 1975). Stevens to Clark, Fairchild, and Robert Sprecher [no date]. Despite Fairchild's disinclination for a signed opinion, the assistant attorney general of the Civil Rights division, Stanley Pottinger, thought Clark's opinion dealt with "a number of important issues" for which there was "comparatively little appellate precedent." Pottinger to Fairchild, June 23, 1975, USCA, 7th Cir., box D130, Clark Papers.

³⁷ *United States v. Hazelwood School District*, 534 F. 2d 805 (8th Cir. 1976). Bright to Mimi Clark Gronlund, December 30, 1999, copy on file with author (courtesy of Stephen Wasby).

³⁸ Hoffman, at 28.

³⁹ *Rice v. American Program Bureau*, 446 F. 2d 685 (2d Cir. 1971). See, for example, *Stigwood v. Sperber*, 457 F. 2d 50 (2nd Cir. 1972), decided the following year, where Judge Irving Kaufman described the production's popularity and resulting lawsuits.

⁴⁰ *United States v. Donner*, 528 F. 2d 276 (1975). The group also claimed responsibility for ransacking Dow Chemical offices in Midland, Michigan, "5 Beaver 55 Members Jailed," *Toledo Blade*, November 23, 1969.

⁴¹ Sister Margaret Ellen Traxler, one of the best-known, if controversial, and revered Catholic nuns, was disappointed by Clark's opinion, particularly with regard to Kennedy: "Jane's offense was non-violent and had to be judged in the context of the 1969 climate... [It] was more humane than napalm or bombing of open cities." Traxler to Clark, December 30, 1975, USCA, 7th Cir., box D132, Clark Papers.

⁴² "Religion, Morality and Abortion: A Constitutional Appraisal." *Loyola University, Los Angeles Law Review*, 2 (April 1969): 4.

⁴³ 410 U.S. 113 (1973).

⁴⁴ 381 U.S. 479 (1965).

⁴⁵ "Religion, Morality and Abortion," 8-9.

⁴⁶ *Roe v. Wade*, 314 F. Supp. 1217 at 1222 and n. 13 (N.D. Tex. 1970).

⁴⁷ *United States ex rel. Williams v. Zelker*, 445 F. 2d 451 (2nd Cir. 1971). The patient died as a result of the more restrictive abortion laws, permitting it only to save a woman's life. In light of *Roe v. Wade*, New York's law was declared unconstitutional, 360 F. Supp. 667 (S.D. N.Y. 1973); and, after Dr. Jesse Williams spent seven years in prison for first-degree manslaughter, his conviction was overturned retroactively, 497 F. 2d 337 (2nd Cir. 1974).

⁴⁸ 410 U.S. 113 at n. 37 (1973).

⁴⁹ *United States v. Banks and Means*, 383 F. Supp. 389 (S.D. 1974). Nichol reportedly told news men, “Its hard for me to believe that the FBI I revered for years has gone to that low a state.” “Dennis Banks and Russell Means Cleared of Charges” *NBC Nightly News*, New York, NY: NBC Universal, 09/16/1974. Accessed Fri Jan 30 2015 from NBC Learn: <https://preview-archives.nbclearn.com/portal/site/k-12/browse/?cuecard=37580>.

⁵⁰ *United States v. Means and Banks*, 513 F. 2d 1329 (8th Cir. 1975). Lay to Gibson, April 3, 1975, USCA, 8th Cir., box D141, Clark Papers.

⁵¹ Clark to Gibson, April 8, 1975, USCA, 8th Cir., box D141, Clark Papers.

⁵² See, for example, *San Francisco Chronicle*, July 19, 1974; *New York Times*, July 23, 1974, and July 27, 1974. Reinecke’s perjury conviction ruined him politically, and he lost his bid for the California Republican gubernatorial nomination.

⁵³ Undated memo, USCA, D.C., box D154, Clark Papers.

⁵⁴ *United States v. Reinecke*, 524 F. 2d 435 (D.C. Cir. 1975). Except for the *New York Times*, December 9, 1975, the press largely overlooked Clark’s presence on the panel.

⁵⁵ Ford’s proclamation granting Pardon to Nixon, September 8, 1974. Clark was skeptical of Ford’s pardon: “In my view, the pardon was premature. Mr. Nixon had no formal charges filed against him, no conviction, and hence no basis for a pardon.” Clark to Wayne Davis, August 16, 1976, GC, box B34, Clark Papers.

⁵⁶ Justice Sonia Sotomayor served on the District Court for the Southern District of New York (1992–1998) and on the Second Circuit Court of Appeals (1998–2009). Before that, Justice Charles Whittaker (1957–1962) served on the District Court for the Western District of Missouri (1954–1956) and on the Eighth Circuit Court of Appeals; and Justice Samuel Blatchford (1882–1893) served on the District Court for the Southern District of New York (1867–1878) and on the Second Circuit Court of Appeals (1878–1882).

⁵⁷ *Walston v. Nansemond County School Board*, 492 F. 2d 919 (4th Cir. 1974), relying upon *Keyes v. School District No. 1*, 413 U.S. 189 (1973), *Griggs v. Duke Power*, 401 U.S. 424 (1971), and *Green v. County School Board*, 391 U.S. 430 (1968).

⁵⁸ *Millstone v. O’Hanlon*, 528 F. 2d 829 (8th Cir. 1976), relying upon *Ginzburg v. United States*, 383 U.S. 463 (1966), *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court had recently explicated the commercial speech doctrine in *Bigelow v. Virginia*, 421 U.S. 809 (1975).

⁵⁹ 366 U.S. 599 (1961), and 374 U.S. 398 (1963). Clark was not alone in joining both majorities.

⁶⁰ *Spence v. Bailey*, 465 F. 2d 797 (6th Cir. 1972). Here, Clark reflected the language of Justice Potter Stewart,

who called *Braunfeld* a “cruel choice,” and Justice William J. Brennan, who presented a similarly impossible choice in *Sherbert*.

⁶¹ 365 U.S. 715 (1961), and 387 U.S. 369 (1967). Clark joined Harlan’s dissent, along with Black and Stewart.

⁶² *Kennedy Park Homes v. Lackawanna*, 436 F. 2d 108 (2d Cir. 1970). Clark also relied upon *Shelley v. Kraemer*, 334 U.S. 1 (1948), for the “freedom from discrimination . . . in the enjoyment of property rights.” As Attorney General, Clark had prepared the amicus brief in *Shelley*.
⁶³ 384 U.S. 436 (1966).

⁶⁴ *United States v. Wade*, 388 U.S. 218 (1967).

⁶⁵ *Orozco v. Texas*, 394 U.S. 324 (1969). Stewart also joined Justice White’s dissent, which objected to extending *Miranda* to an “unwarranted extreme.” Justice Harlan had a “strong inclination” to join White and Stewart in dissent, but he concurred in the result, even though “the passage of time has not made the *Miranda* case any more palatable to me than it was when the case was decided.”

⁶⁶ *United States v. Jackson*, 429 F. 2d 1368, (7th Cir. 1970). Clark also relied upon *Orozco* to rule that the defendant’s statements were inadmissible; however, he sustained the conviction because their admission was “harmless error.”

⁶⁷ As of this writing (2017), Westlaw searches show that *Anders* topped the lists of total references (126,728) and case references (80,180), compared to Clark’s popularly recognized opinions like *Mapp v. Ohio* (24,189 total), *Abington v. Schempp* (6,664), *Heart of Atlanta Motel v. United States* (4,998), and *Berger v. New York* (4,219), all of which had more secondary source references than *Anders*.

⁶⁸ *United States v. Cain*, 544 F. 2d 1113 (1st Cir. 1976), relying upon 386 U.S. 738 (1967). In 1972, Alfonso Cain was the seventeenth round draft pick of the Dallas Cowboys (442 overall, which made him the last collegiate player drafted that year). He had no professional career after that.

⁶⁹ 466 F. 2d 783 (7th Cir. 1972).

⁷⁰ *Witmer v. United States*, 348 U.S. 375 (1955); *Sicurella v. United States*, 348 U.S. 385 (1955); *Simmons v. United States*, 348 U.S. 397 (1955); and *Gonzales v. United States*, 348 U.S. 407 (1955).

⁷¹ 380 U.S. 163 (1965).

⁷² 401 U.S. 437 (1971). In this case, the Court ruled against the conscientious objectors, who were willing to fight in what they considered just wars but not unjust ones (i.e. Vietnam).

⁷³ 398 U.S. 333 (1970).

⁷⁴ 403 U.S. 698 (1971).

⁷⁵ 348 U.S. 385 (1955).

⁷⁶ Clark also cited *United States v. Lemmens*, 430 F. 2d 619 (7th Cir. 1970), which similarly overturned the conviction of a conscientious objector because

authorities failed to provide a reason for rejecting his claim. Clark served on that panel, and Judge Thomas Fairchild relied, in part, on Clark's opinions in *Seeger* and *Witmer*.

⁷⁷ *Chapman v. United States*, 541 F. 2d 641 (7th Cir. 1976), reversed by *Chapman v. United States*, 575 F. 2d 147 (7th Cir. 1978). Judge Philip Tone had requested *en banc* review, but Clark never saw Tone's opinion reversing him, as he had died a year earlier. Judge Latham Castle, who served on Clark's original panel, dissented from reversing him.

⁷⁸ *Woods Exploration v. ALCOA*, 304 F. Supp. 845 (S.D. Tex. 1969). Singleton believed that natural gas was too heavily regulated to allow price fixing. See also *Woods Exploration v. ALCOA*, 284 F. Supp. 582 (S.D. Tex. 1968).

⁷⁹ *Woods Exploration v. ALCOA*, 438 F. 2d 1286 (5th Cir. 1971). Singleton to Judge John Brown, February 19, 1972, USDC, Southern District of Texas, box D158, Clark Papers.

⁸⁰ *Woods Exploration v. ALCOA*, 509 F. 2d 784 (5th Cir. 1975). There is no indication in the court's opinion that Clark presided over the trial on remand, but archival records show that he did.

⁸¹ *Boyd v. Lefrak*, 509 F. 2d 1110 (2nd Cir. 1975). Clark's role as trial judge was prominently featured in the majority opinion, and his views on disparate impact can be inferred from Judge Walter Mansfield's dissent.

⁸² *NAACP v. Huntington*, 844 F. 2d 926 (2nd Cir. 1988), affirmed by *Huntington v. NAACP*, 488 U.S. 15 (1988).

⁸³ 372 U.S. 253 (1963), and 388 U.S. 365 (1967). Clark was on the Court for argument and announcement but did not participate in *Schwinn* because his son, Ramsey, was then serving as Attorney General.

⁸⁴ *GTE Sylvania v. Continental TV*, 537 F. 2d 980 (9th Cir. 1976). Clark also found an antitrust violation in *Reed Brothers v. Monsanto*, 525 F. 2d 486 (8th Cir. 1975).

⁸⁵ *Continental TV v. GTE Sylvania*, 433 U.S. 36 (N.D. Cal. 1977). Judge William Ingram heard the case on remand, *Continental TV v. GTE Sylvania*, 461 F. Supp. 1046 (1978).

⁸⁶ Myers, at 53, considered Clark's role "remarkable, though not immediately obvious," and he surmised that Clark's preferred position prevailed. This prompted former Justice Sandra Day O'Connor, who relied on Myers, to conclude mistakenly that "Justice Clark won out in the end," and that the Court's final decision "vindicated Justice Clark's view of the Law." **Out of Order: Stories from the History of the Supreme Court** (New York: Random House, 2013), at p. 149.

⁸⁷ *Twin City Sportservice v. Finley*, 365 F. Supp. 235 (N.D. Cal. 1972), reversed by *Twin City Sportservice v. Finley*, 512 F. 2d 1264 (9th Cir. 1975).

⁸⁸ *Twin City Sportservice v. Finley*, 676 F. 2d 1291 (9th Cir. 1982). Clark to Peckham, August 26, 1975, and

Peckham to Clark, August 29, 1975, USDC, N.D. Ca., box D162, Clark Papers.

⁸⁹ *Cole v. Hall*, 462 F. 2d 777 (2nd Cir. 1972); affirmed by *Hall v. Cole*, 412 U.S. 1 (1973).

⁹⁰ Myers named one case the Court affirmed and two reversals; Wasby mentioned two reversals; and Wohl summarized three reversals.

⁹¹ By all accounts, Dorothy Gautreaux was a remarkable community organizer and driving force behind the Chicago civil rights movement. She died in August 1968 at the age of forty-one, without knowing the success of her case. Remarkably, her lawyer "forgot" to remove her name from the title of the case. Alexander Polikoff, **Waiting for Gautreaux: A Story of Segregation, Housing, and the Black Ghetto** (Evanston, IL: Northwestern University Press, 2006), at p. 65.

⁹² Clark reversed *Gautreaux v. Romney*, 363 F. Supp. 690 (N.D. Ill. 1973); Judge Austin also ruled in *Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967); 296 F. Supp. 906 (N.D. Ill. 1969); 304 F. Supp. 736 (N.D. Ill. 1969); and 342 F. Supp. 827 (N.D. Ill. 1972). Other circuit panels considered *Gautreaux v. Chicago Housing Authority*, 436 F. 2d 306 (7th Cir. 1970); *Gautreaux v. Romney*, 448 F. 2d 731 (7th Cir. 1971); and *Gautreaux v. City of Chicago*, 480 F. 2d 210 (7th Cir. 1973).

⁹³ *Gautreaux v. Chicago Housing Authority*, 503 F. 2d 930 (7th Cir. 1974).

⁹⁴ 418 U.S. 717 (1974).

⁹⁵ Cummings to Clark, July 3, 1974, and Cummings to Tone, August 16, 1974, USCA, 7th Cir., box D128, Clark Papers.

⁹⁶ Stevens to Seventh Circuit Judges, September 27, 1974, USCA, 7th Cir., box D128, Clark Papers. Stevens and Otto Kerner were the two active Seventh Circuit judges who did not serve on panels that had considered *Gautreaux*.

⁹⁷ William Hannay to Clark, April 21, 1976, USCA, 7th Cir., box D128, Clark Papers. One of Clark's former Supreme Court law clerks, Bernard Weisberg, assisted in filing briefs on behalf of Chicago residents.

⁹⁸ *Hills v. Gautreaux*, 425 U.S. 284 (1976). Justice Stevens took his Court seat one month prior to argument in *Gautreaux* but did not participate.

⁹⁹ Jeff Lyon, "Go, *Gautreaux*," *Chicago Tribune*, September 15, 1996, and "The *Gautreaux* Lawsuit," and "History," at Business and Professional People for the Public Interest, www.bpichicago.org (accessed October 8, 2017).

¹⁰⁰ Cummings to Clark, April 21, 1976, USCA, 7th Cir., box D128, Clark Papers. In 1995 the Supreme Court split over the distinction between *Gautreaux* and *Milliken* in *Missouri v. Jenkins*, 515 U.S. 70 (1995), which effectively ended Kansas City's (Missouri)

court-ordered desegregation plan—or “magnet” schools—that tried to effectuate an inter-district remedy. This time, Justice Stevens joined Justices Souter, Ginsburg, and Breyer in dissent.

¹⁰¹ *United States v. Sellers*, 520 F. 2d 1281 (4th Cir. 1975), vacated by *United States v. Sellers*, 424 U.S. 961 (1976), in light of *United States v. Gaddis*, 424 U.S. 544 (1976). Clark modified his ruling in *United States v. Sellers*, 547 F. 2d 785 (4th Cir. 1975).

¹⁰² *Velger v. Cawley*, 525 F. 2d 334 (2nd Cir. 1975), reversed by *Codd v. Velger*, 429 U.S. 624 (1977).

¹⁰³ *Avrech v. Secretary of Navy*, 477 F. 2d 1237 (D.C. Cir. 1973).

¹⁰⁴ *Levy v. Parker*, 478 F. 2d 772 (3rd Cir. 1973). Levy was also charged with disobeying a direct order, which was not an issue in *Avrech*.

¹⁰⁵ *Parker v. Levy*, 417 U.S. 733 (1974), quoting *United States v. Priest*, 21 U.S.C.M.A. 564 (1972).

¹⁰⁶ *Secretary of Navy v. Avrech*, 418 U.S. 676 (1974).

¹⁰⁷ *Avrech v. Secretary of Navy*, 520 F. 2d 100 (D.C. Cir. 1975).

¹⁰⁸ *Frank v. Maryland*, 359 U.S. 360 (1959); the four *Frank* dissenters developed their objections further in *Eaton v. Price*, 364 U.S. 263 (1960), a *per curiam* decision by an equally divided Court.

¹⁰⁹ Clark's dissent was in *See v. Seattle*, 387 U.S. 541 (1967); its companion case was *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹¹⁰ Hoffman, 28. In addition to *Camara* and *See*, Clark also relied upon *Colonnade Catering v. United States*, 397 U.S. 72 (1970), and *Bumper v. North Carolina*, 391 U.S. 543 (1968).

¹¹¹ *United States v. Biswell*, 406 U.S. 311 (1972), reversing *United States v. Biswell*, 442 F. 2d 1189 (10th Cir. 1971). The *Colonnade-Biswell* doctrine arose from these decisions. See, for example, *New York v. Burger*, 482 U.S. 691 (1987).

¹¹² Hoffman, 28.

¹¹³ Bright to Gronlund, December 30, 1999.

¹¹⁴ *United States v. Hazelwood Schools*, 534 F. 2d 805 (8th Cir. 1976).

¹¹⁵ Gibson to Clark, April 1, 1976, USCA, 8th Cir., box D144, Clark Papers.

¹¹⁶ Bright to Gronlund, December 30, 1999.

¹¹⁷ *Hazelwood Schools v. United States*, 433 U.S. 299 (1977), relying upon *Teamsters v. United States*, 431 U.S. 324 (1977).

¹¹⁸ Ironically, this case offers an historical glimpse into shifting cultural attitudes about racial epithets. Throughout his opinion, Clark referred to teachers and students as “black,” as did Judge Gibson and Justice Stevens in dissent, whereas Stewart's opinion used the soon-to-be-dated and deprecated adjective “Negro.”

¹¹⁹ Interestingly, Clark sat by designation on the Seventh Circuit before Stevens's appointment, and he continued to do so after Stevens's elevation to the Supreme Court.

¹²⁰ For an account of Clark serving as Special Master, see Joseph F. Zimmerman, *Interstate Disputes: The Supreme Court's Original Jurisdiction* (Albany: State University of New York Press, 2006), at p. 76-77.

¹²¹ See, for example, *New York Times*, November 7, 1973.

¹²² *Minneapolis Tribune*, October 14, 1975. See also *Washington Post*, June 27, 1974, and March 16, 1975, Misc., box D167, Clark Papers. *New Hampshire v. Maine*, 426 U.S. 363 (1976). Incidentally, one of the lawyers representing New Hampshire was future Justice David Souter.

¹²³ *St. Petersburg [FL] Times*, June 14, 1977.

¹²⁴ See, for example, *Pine Crest Preparatory School v. Phelan*, 557 F. 2d 407 (4th Cir. 1977), decided June 28, 1977; and *Katz v. Clayton Schools*, 557 F. 2d 153 (8th Cir. 1977), decided June 20, 1977.

¹²⁵ *Gamble v. Estelle*, 516 F. 2d 937 (5th Cir. 1975), reversed and remanded by *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹²⁶ *Gamble v. Estelle*, 554 F. 2d 653 (5th Cir. 1977).

¹²⁷ *Murphy v. L & J Press*, 558 F. 2d 407 (8th Cir. 1977); and *Motor Carriers Traffic Association v. United States*, 559 F. 2d 1251 (4th Cir. 1977).

¹²⁸ Judge Walter Cummings to Thomas Hughes, August 17, 1977, USCA, 7th Cir., box D136, Clark Papers. The case was *United States v. Dorn*, 561 F. 2d 1252 (7th Cir. 1977).

¹²⁹ *New York Times*, June 14, 1977. See also Johnson, “Justice Tom C. Clark's Legacy,” 69.

¹³⁰ *Reading Eagle [PA]*, June 17, 1977.

The Judicial Bookshelf

DONALD GRIER STEPHENSON JR.

I.

“The fourteenth and fifteenth amendments are in this respect a novelty,” remarked James Bryce as he interrupted a closely reasoned passage about federalism in his late nineteenth century examination of political systems in the United States. In particular, he observed the absence in the Constitution, as it came from the hands of the framers, of restrictions on *state* governments to safeguard basic civil rights and liberties. “These omissions are significant. They show the framers of the Constitution had no wish to produce uniformity among the States in government or institutions, and little care to protect the citizens against abuses of State Power.”¹

The Fourteenth Amendment became part of the Constitution 150 years ago, after Secretary of State William Seward issued a proclamation on July 18, 1868, certifying that the amendment which had successfully cleared the Senate (33–11) on June 8, 1866, and the House of Representatives (120–32) on June 13, 1866, had been approved by the legislatures of the requisite number of states. Along with the Thirteenth (1865) and Fifteenth (1870), the Fourteenth remains the

constitutional legacy of the Republic’s greatest domestic crisis. Its sesquicentennial remains a reminder not only of the events and circumstances that marked the beginnings of profound systemic change in the American polity but also an acknowledgement that students of American constitutional history and the Supreme Court would find it difficult to comprehend the last century and a half without this particular addition to the Constitution.

II.

Samuel F. Miller was the first Justice appointed from a trans-Mississippi state. For him, “[t]he most cursory glance” at the Reconstruction amendments “discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning.” As he explained for the majority in the *Slaughterhouse Cases*,² “the one pervading purpose found in [the amendments], lying at the foundation of each, and without which none of them would have been even suggested [was] . . . the freedom of the slave race, the security and firm establishment

of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”³ Moreover, as Miller might have acknowledged, slavery itself had hardly been a novel issue for the Court.

The slavery jurisprudence of three members of the High Court is the focus of **Supreme Injustice** by legal historian Paul Finkelman, visiting professor at the University of Pittsburgh School of Law at the time the book was published and presently president of Gratz College.⁴ Without question, Finkelman’s book is hard-hitting. It may even be unsettling for those who customarily view the Court principally as a guardian of freedom and human dignity. Others will find it an illustration of the contemporary rejection by some of the forebears now deemed morally unworthy of their descendants. The book is also benchmark scholarship that no subsequent writing on the nineteenth-century Court and its members can easily (or wisely) ignore.

Given the transforming events that have occurred since 1865 in the United States, it may be difficult for present-day readers to comprehend the scope of slavery—what some euphemistically called the South’s “peculiar institution.” Finkelman reports that, during John Marshall’s time on the Court, slavery virtually disappeared in the northern states through state constitutional provisions and legislative enactments. It declined from some 37,000 in 1800, just before Marshall went on the Bench, to about 1,100 in 1840, five years after his death. In contrast, slavery became further entrenched in southern states, with numbers rising from 900,000 in 1800 to about 2,250,000 at the end of Marshall’s life. Because slaves were a form of property where individual slaves were bought, sold, and traded, such numbers meant that enormous wealth in the South was embedded within the institution. That wealth in turn was linked to all aspects of the economy, society, culture, and politics.

From study of the slave cases in which Chief Justice Marshall, Justice Joseph Story, and Chief Justice Roger B. Taney participated or wrote an opinion, Finkelman argues that the goal of each was “to prevent opposition to slavery (and the moral disgust slavery engendered among many Americans) from undermining the nation’s constitutional and political arrangements.”⁵ The irony for Finkelman is that the cumulative effect of their judicial service could have been vastly different. These individuals, whom Finkelman believes were the three most important Justices on the antebellum Supreme Court, were not only exceedingly competent but “were leaders on the Court and highly respected public men. In their judicial opinions, publications, public speeches, and private correspondence, they might have played a role in mediating between slavery and freedom in American law.”⁶

Had they done so, Finkelman believes they might individually have contributed to a political solution for the problem of slavery—the most salient and troublesome question in American politics in the several decades before 1861. Indeed, to the degree that years of service translate into an opportunity for a Justice to make an impact on American law, the three were truly blessed: Marshall sat for thirty-four years, Story thirty-three, and Taney twenty-eight, for a total of ninety-five years.

Juxtaposing what might have been with what was, Finkelman finds that “these jurists almost always failed to consider liberty and justice in cases involving slavery and race. To the contrary, with only a few exceptions in their many years on the bench, they continuously strengthened slavery in the American constitutional order.”⁷ In doing so, they squandered the chance to leave the nation with a legacy of liberty and justice, consistent with America’s founding ideology of equality and unalienable rights rather than one of “slavery, racism, and oppression.”⁸ Believing that abolitionists were “mostly

correct” that the Constitution prior to 1865 was a pro-slavery document, Finkelman nonetheless insists that the Constitution and the political system “still allowed for numerous ways to hem in slavery, to prevent its expansion, to suppress the African slave trade, and to protect free blacks.” Marshall, Story, and Taney “might have read the Constitution in a way that would have allowed that,” as did Justices John McLean and Smith Thompson. “But these three leading jurists did not. They leaned toward slavery and discrimination—and in doing so, were supremely unjust.”⁹ Throughout, Finkelman’s approach is prosecutorial: emphasizing the inculpatory and minimizing what might be the exculpatory. The result is analysis that is grim indeed. Were his book a report card, none of the three would receive a passing grade.

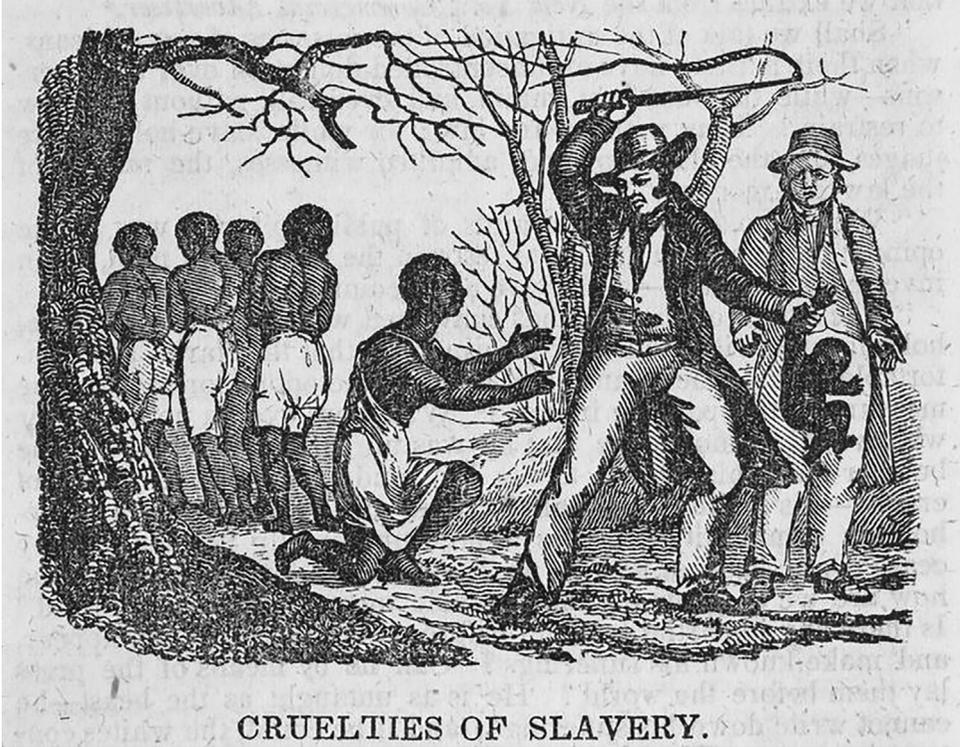
Evidence of support for slavery in the antebellum Constitution is the focus of Finkelman’s first chapter, which points to the framers’ “careful circumlocution”¹⁰ whereby the word “slave”—although it was spoken frequently at the Philadelphia Convention—remained cleverly absent from their handiwork, where they instead wrote of “other persons,” “such Persons,” or “Person held to Service or Labour.” Other parts provided direct and indirect supports for the institution. These included the slave trade clause of section 9 of Article I that barred congressionally imposed limits on the importation slaves prior to 1808 and the absence of a requirement that limits ever be imposed. In addition, the fugitive slave clause of paragraph three, section 2 in Article IV prohibited non-slave states from emancipating runaway slaves and mandated that they “be delivered up on Claim of the Party to whom such Service or Labour may be due.”

Perhaps the most famous provision was what came to be called the three-fifths compromise, under which, for purposes of the census, five slaves were counted as three persons. The resulting tally determined a state’s representation in the House of

Representatives and so affected its vote in the Electoral College as well. (The same provision, however, would have affected the stipulation that any direct or capitation tax be apportioned on the basis of population. Although one was never enacted, it would have nonetheless required slave owners to pay for the privilege of having their representation boosted by their property.)

Finkelman might beneficially have included in the first chapter some discussion of the impact of the structure of the federal judicial system on the Supreme Court itself, even though boundaries of the circuits were (and are) a function of congressional preference rather than of constitutional mandate. By the 1830s, for example, the custom had become well established that Presidents appointed Supreme Court Justices from within the circuit to which the predecessor Justice had been assigned or at least from the circuit to which the new Justice would be assigned. This practice seemed necessitated by the requirement initially imposed by Congress in 1789 that Justices, along with the respective U.S. district judge, would comprise the U. S. circuit court for a particular judicial district. (The result was that Justices spent far more time each year holding circuit court—and traveling throughout their respective circuits—than sitting as the Supreme Court in Washington.)

Some attention to the circuit arrangement in particular would have enriched the extensive discussion of the *Dred Scott* case later in the book. Specifically, a look at circuit boundaries in 1857 when that case came down would help illuminate, if not explain, the positions of some of the Justices. The Supreme Court in 1857 had nine Justices, a roster size then most recently set in 1837, when the federal judicial system overall was expanded from seven to nine circuits. Furthermore, in drawing circuit boundaries, Congress had been cognizant not only of state lines but of whether states were free or slave. The result was that no circuit in 1857 included



CRUELITIES OF SLAVERY.

In his new book *Supreme Injustice* Paul Finkelman argues that John Marshall, Joseph Story, and Roger B. Taney “almost always failed to consider liberty and justice in cases involving slavery and race. To the contrary, with only a few exceptions in their many years on the bench, they continuously strengthened slavery in the American constitutional order.”

a mixture of both free and slave states. Instead, each of the nine circuits consisted of free states *or* slave states. There was no intermingling. When *Dred Scott* was decided, the Court’s membership consisted of five Justices (Taney, John A. Campbell, John Catron, Peter V. Daniel, and James M. Wayne) appointed from slave circuits, and four (Benjamin R. Curtis, Robert C. Grier, John McLean, and Samuel Nelson) from free circuits. The vote was 7–2, with Curtis and McLean in dissent, suggesting that the majority reflected, although it was not assured by, judicial topography. With Grier from Pennsylvania and Nelson from New York, allegiance to the Democratic Party may have played a role.

Except for a brief coda or conclusion, the remainder of the book prior to the notes, index of cases, and index, consists of examinations of the lives and especially judicial careers of

Marshall, Story, and Taney. Marshall is treated in two chapters comprising a total of eighty-six pages, Story and Taney in single chapters of fifty-seven and forty-six pages, respectively. Helpfully, the first Marshall chapter and the Story and Taney chapters include enough biographical information to place discussion of each jurist in context. [However, students and faculty at Dickinson College, Taney’s alma mater (class of 1795), will be amazed to read that their institution is “in Lancaster, Pennsylvania.”¹¹ It is not. Dickinson then and now is located in Carlisle, Pennsylvania, some sixty miles west of Lancaster.]

In the first chapter on Marshall, Finkelman is especially critical of Court scholars who “have mostly ignored his personal and judicial relationship with slavery.”¹² He quotes from the work of one who reports

that “John Marshall was not a slave owner,” and from another who writes that Marshall heard “relatively few freedom suits.”¹³ This failure of many scholars to confront his slavery jurisprudence and his role a slave owner might be explained, Finkelman suggests, because it does not sit well with the usual narrative of the “Great Chief Justice,” with the result that this part of Marshall’s life is typically given cursory treatment. Moreover, Marshall “never wrote much about slavery” and so “avoided leaving a paper trail of insensitivity and hypocrisy like Jefferson’s or of grotesque racism, at least on the Court, like Chief Justice Taney’s.”¹⁴ Yet, says Finkelman, this inattention ignores the realities that Marshall’s Court heard more than fifty cases involving slavery and that “Marshall wrote numerous opinions in freedom suits and on the African slave trade.”¹⁵ The fact that “Marshall *never* wrote an opinion supporting black freedom,”¹⁶ insists Finkelman, stands in contrast to the fact that slave-owning colleagues James M. Wayne and Gabriel Duvall did. Equally significant, he believes, is that Marshall, from his appointment as Chief Justice in 1801 until the 1820s when his famed dominance of the Court began to wane, “wrote almost every decision on slavery, shaping a jurisprudence that was hostile to free blacks and surprisingly lenient to people who violated the federal laws banning the African slave trade.”¹⁷

As to how many slaves Marshall owned during his life, or even at any one time, we are told that exact numbers can probably not be known but they were almost certainly extensive, numbering into the hundreds at various times, given Marshall’s extensive land holdings at Oak Hill and other places, aside from his residence in Richmond. Taking issue with one biographer who reported that Marshall “neither condemned nor defended slavery itself, but simply accepted it, along with racial prejudice and social inequality, as part of the ‘actual state of the world.’” Finkelman insists that Marshall did more than merely accept the institution, but instead actively participated in it. “Unlike

Jefferson, who inherited his hundreds of slaves, Marshall aggressively bought—and sometimes sold—slaves throughout his life.”¹⁸

For Finkelman, even Marshall’s leadership in the American Colonization Society “was not inspired by any personal discomfort with slavery,” but instead “stemmed from his fear of slave rebellions and his hostility to free blacks.” The society’s goal “was to remove American free blacks to Africa, not to end slavery. It was at most mildly antislavery, given that it helped some masters manumit their slaves while never challenging slavery on moral or political grounds.”¹⁹

In contrast to the Marshall chapters, Finkelman’s assessment of Justice Story yields a somewhat more nuanced picture. This second of President James Madison’s appointments to the High Bench in 1811 arrived “with a New Englander’s hostility to slavery,” a view that he nonetheless ignored for a time as a partisan Jeffersonian “in his enthusiasm for an idealized Jeffersonian Virginia.”²⁰ As a loyal colleague of Marshall, Story “never once strayed when the Chief Justice failed to vigorously enforce the federal laws banning the African slave trade.” Indeed, in his earliest years on the Bench “Story said virtually nothing about slavery and never lifted his pen in defense of human liberty.” Statements against slavery and the slave trade would not be noticed until 1815. The result overall was support for “Marshall’s proslavery jurisprudence.”²¹

What Finkelman calls “Story’s brief period of antislavery exuberance” became evident in response to Virginia’s “growing and aggressive states’ rights ideology” and the debates in Congress at that time over what came to be called the Missouri Compromise, legislation that Story opposed publicly in that Missouri was admitted to the Union as a slave state. These were developments “that probably made Story regret his early admiration for Virginia.”²²

However, it was in 1819 and 1820, through the medium of charges to circuit court grand juries in New England, that Story

aired his views on the evils of slavery and the slave trade. In one such charge, Story insisted the “existence of Slavery under any shape is so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find in it any adequate justification.”²³ In the author’s estimate, “[few] national officials—and none as highly placed as Story—had ever publicly offered such a devastating critique of the fundamental immorality of slavery.” In another charge, he railed against the African slave trade, reminding his hearers that

it begins in corruption, and plunder, and kidnapping. It creates and stimulates holy wars for the purpose of making captives. It desolates whole villages . . . for the purpose of seizing the young, the feeble, the defenceless, and the innocent . . . It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice. Brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted.²⁴ [sic]

Either statement could comfortably have fit in an abolitionist pamphlet.

Similar rhetoric, however, was absent from Story’s opinion for the Supreme Court in the *Amistad* case, the tragic story of which had begun with a mutiny or revolt on board a schooner packed with slaves in 1839.²⁵ For Finkelman, “if that case became a “great antislavery moment,” it happened “in spite of Story’s opinion, which neither denounced slavery nor offered any legal or moral support for abolition, even as it liberated a shipload of Africans who had been brought to Cuba in violation of Spanish law.”²⁶ Furthermore, Story’s opinion denied them a prompt return

to Africa “courtesy of the United States government” and “forced American abolitionists to spend almost a year raising money to send the Africans home.” (The *Amistads*, as those Africans were typically identified, finally reached their homeland in 1842.)²⁷

Discussion of the *Amistad* case precedes Finkelman’s account of *Prigg v. Pennsylvania*,²⁸ the last major slavery case of Story’s career, which “produced a menacing outcome for the 170,000 free blacks living in the North,” and from the perspectives “of supporters and opponents of slavery, U.S. public policy and law, and African Americans . . . was the Court’s most important case before *Dred Scott*.” Finkelman then adds that while *Prigg* is less well known, it is “actually more important than *Dred Scott*.”²⁹

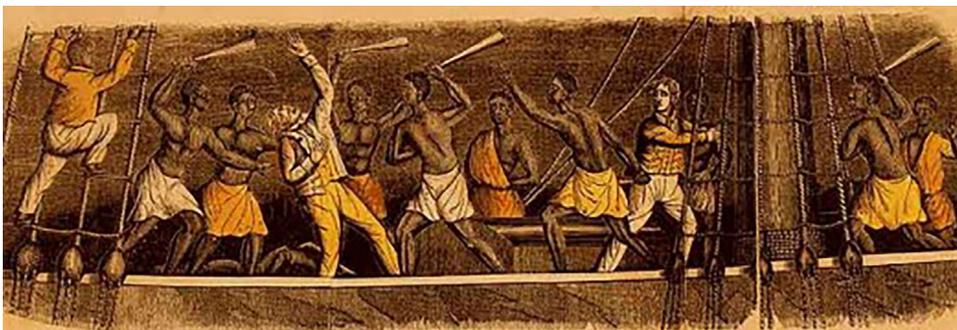
Because *Prigg* has largely disappeared from the contemporary canon of constitutional law despite its significance for current debates on border security and because of what it reveals about Story’s views, Finkelman properly explores the case in detail. In 1832, a black woman named Margaret Morgan moved from Maryland to Pennsylvania. Although she had never officially been manumitted, her owner, John Ashmore, had granted her nearly full freedom to move about. After Ashmore’s death, his heirs wanted her returned as a slave and sent Edward Prigg, a professional runaway slave catcher, to bring her back. However, after capturing Morgan in York County, Pennsylvania, just north of the Maryland-Pennsylvania line, Prigg was convicted in Pennsylvania court for violating the commonwealth’s personal liberty law prohibiting the removal of persons from the state for the purpose of enslaving them. The United States Supreme Court, with eight Justices voting to reverse, held Pennsylvania’s law invalid as a violation of both the Constitution and the Fugitive Slave Act of 1793; Justice Story wrote for the majority and Justice McLean dissented.

Finkelman’s analysis highlights the majority’s five major conclusions. First, the 1793 federal statute was valid. Second, no state could

add requirements that would impede the return of fugitive slaves. Third, the Constitution “provided a common law right of recaption—a right of self-help—which allowed slave owners to seize fugitive slaves and remove them without complying with the provisions of the federal fugitive slave law, as long as this could be accomplished without a breach of the peace.” Fourth, state officials were supposed to enforce the federal law of 1793 but could not be required to do so. And fifth, “no one seized as a fugitive slave was entitled to any due process hearing or trial beyond a summary proceeding to determine if the person seized was the person described in the affidavit or other papers provided by the claimant who did not have to comply with even this minimal procedure, however, if he exercised self-help under the right of recaption.”³⁰

In Finkelman’s assessment, Story’s opinion nationalized southern slave law . . . The fact that slave catchers could now operate without having to prove the seized person’s slave status threatened all northern blacks. Perhaps Story saw his role “as mediating on the Court to keep the South within the union. But in *Prigg* there was no mediation. The South and slavery won it all.”³¹

Among people with at least a casual familiarity with the history of the Court, the Justice they would most closely identify with slavery is undoubtedly Chief Justice Roger Taney—an ignominy surely attributable almost entirely to his opinion for the majority in the *Dred Scott* case. Yet, as Finkelman acknowledges, Taney’s reputation has “waxed and waned” through the years,³² a view that accords with that stated by Frank O. Gatell some five decades ago that the fifth Chief Justice’s “reputation has been subject to the cyclical variations that have influenced the retrospective evaluation of many of our political figures.”³³ Estimates have ranged from Massachusetts Senator Charles Sumner’s confident prediction in 1865 that “the name of Taney is to be hooted down the page of history”³⁴ to the generous judgment in 1931 by Chief Justice Charles Evans Hughes, as he unveiled a bust of Taney in Frederick, Maryland: “With the passing of the years and the softening of old asperities, the arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice.”³⁵ (Subsequent events have attached irony to



Death of Capt. Ferrer, the Captain of the Amistad, July, 1839

Don Jose Ruiz and Don Pedro Montez, of the Island of Cuba, having purchased fifty-three slaves at Havana, recently imported from Africa, put aboard the Amistad, Capt. Ferrer, in order to transport them to Principe, another port on the Island of Cuba. After being out from Havana several days, the African captives on board, in order to obtain their freedom, and return to Africa, armed themselves with cane knives, and rose upon the captain and crew of the vessel. Capt. Ferrer and the cook of the vessel were killed; two of the crew escaped; Ruiz and Montez were made pris-

Finkelman criticizes Justice Story’s opinion for the Supreme Court in the *Amistad* case because it “neither denounced slavery nor offered any legal or moral support for abolition, even as it liberated a shipload of Africans who had been brought to Cuba in violation of Spanish law.” He argues that the tragic case involving a revolt on board a schooner packed with slaves in 1839 could have been “a great antislavery moment.”

both assessments. Sumner's condemnation was made in February 1865 in the context of blocking a congressional appropriation for a bust of Taney. A bust of Taney for the courtroom in the Capitol was later funded in January 1874 along with one for Salmon P. Chase after the sixth Chief Justice's death in 1873.³⁶ In 2017, the bust of Taney that Hughes had celebrated was hoisted along with its base into an old Chevrolet pickup truck and moved from its prominent location outside the city hall in Frederick, Maryland, to Mount Olivet Cemetery about one mile away.)³⁷

Finkelman's assessment of Taney is much closer to Sumner's than to Hughes's. "Today it is clear that his impact on the law was great. For the first twenty years of his tenure he successfully guided the Court and helped develop important constitutional doctrines, especially in economic matters. Yet he is most remembered for *Dred Scott*. . . ."³⁸ Dredging up a position on citizenship that he had first expounded as President Andrew Jackson's Attorney General, Taney not only wrote African Americans out of the political community that comprised the United States but placed a political solution to the slavery controversy effectively beyond the reach of Congress.

When Taney's whole career is examined, [that decision] becomes part of more than three decades of efforts to strengthen slavery, protect the South, make war on free blacks, and, after 1861, undermine the union cause . . . [H]e ultimately failed in creating a jurisprudence that could defend fundamental liberty and human rights. That failure will always overshadow his successes.³⁹

Finkelman might well agree that among the many tragedies a contemporary scholar finds in the *Dred Scott* decision is the Court's grave misreading of the potency and durability of its own prestige. This was an error that led the majority presumably to believe that the national division over the future of slavery

in westward expansion—a controversy that had strained the political process to the breaking point—was amenable to judicial resolution. Instead, the ruling demonstrated that the Court not only tested but exceeded the limits of its authority and squandered its legitimacy among a large segment of the population.

III.

Surely an essential component of any institution's authority is legitimacy—the perception that an official or agency of government is not only entitled to make a decision but benefits from the presumption that the decision is entitled to respect and is to be obeyed. Without legitimacy orderly governing vanishes, and peaceful and routine resolution of disputes becomes impossible. However, unlike the advantage nearly always enjoyed in the United States by the elected branches, the Supreme Court's legitimacy cannot be assumed but must, as it were, be earned.

The reasons stem from what might be called the institution's triple debility. The first element is its ambivalent authority in that the constitutional and textual underpinnings of the Court's role as chief interpreter of the nation's fundamental law are equivocal at best. The second is its anti-democratic function in a nation founded upon an ideology of "government by the consent of the governed" and "government by the people." Judicial review, after all, assumes the authority of an unelected branch to invalidate decisions made by the elected branches. The third is its operational and structural aloofness. Not only do the Justices do much of their work away from the public eye and shun the sort of publicity that most politicians crave and cultivate, but a decision of the Court on constitutional grounds cannot be altered through the devices one ordinarily employs to change public policy. Instead, a decision on constitutional grounds

may be changed only by the Court itself or by the extraordinary resort to amendment of the Constitution. Nonetheless, recent data indicate that most contemporary Americans continue to place confidence in the High Court, giving the Justices approval and trust ratings that surely make members of Congress and some recent presidents envious.⁴⁰

The link between the Court's institutional standing and public support for judicially blessed policies is the subject of **The Limits of Legitimacy** by Michel A. Zilis, who teaches political science at the University of Kentucky.⁴¹ The Court's generally strong public stature leads Zilis to ask whether the institution might draw upon that reservoir of support and "use its decisions to increase approval of controversial policies"—a prospect that "hints at intriguing possibilities for consensus building in a polarized society."⁴² That question echoes the work of the early Court when the Justices,

during their circuit duties, would frequently use a charge to a jury as a medium and teaching moment through which to convey basic principles of the young republic.⁴³ Even some of the opinions of Chief Justice Marshall in key cases can be read as stand-alone civics lessons.

Zilis begins by reminding the reader of the information-sharing environment within which the Justices function today. In an observation that will surprise few, he notes that, for a variety of reasons, the link between the Court and the public is at best indirect—indeed, one might add, as it has always been. Lacking "both the expertise and motivation to wade into legal minutiae,"⁴⁴ few Americans take the time to read the written opinions. In contrast to proceedings in Congress, there is no live or even delayed television coverage from the courtroom and even delayed radio broadcasts of oral argument, if more common today, occurs only occasionally. Moreover,



In his new book, *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions*, Michael A. Zilis finds that media coverage of Supreme Court rulings varies widely. For example, unanimous holdings attract uncontested depictions of the Court's reasoning, while non-unanimous decisions tend to receive much more complex, often critical coverage.

the “Court as an institution places comparatively little value on making its work transparent and framing its decisions for public consumption.”⁴⁵ Such conditions combined with “the reluctance of justices to describe their perspectives on specific cases outside the courtroom” yield a situation where “most of the information available about landmark rulings [and, one suspects, all the other rulings as well] originates from sources other than the Court.”⁴⁶ After all, the Public Information Office at the Supreme Court is just that: an information office. Unlike a congressional office, an executive branch agency, or the White House itself, there is no attempt made at the Court to “explain” a Justice’s vote or opinion or to put a spin on a particular ruling.

Those outside sources, Zilis explains, include “leading politicians and other political elites, legal experts and parties to the cases, and issue activists with vested interests in the outcomes.” Nonetheless, the national news media bear “primary responsibility for describing and interpreting the work of the justices” for the public, producing a situation where “for ordinary Americans, the law of the land receives meaning as much through the publications of journalists as it does through the pens of the justices.”⁴⁷ Moreover, as the nation approaches the end of the second decade of the twenty-first century, the universe of news media has become remarkably diverse, including not merely long-familiar newspapers and magazines and the proliferation of cable news options and other television programs, but elements of social media and a growing variety of internet outlets as well. Indeed, it may now be the case that non-traditional channels of information have become the primary news source for younger citizens.

In an effort to understand “the panoply of reactions that have followed landmark Supreme Court rulings in recent years, Zilis writes that his approach differs from other recent research by exploring “in detail the nature of media coverage afforded” such decisions.⁴⁸ That coverage in turn influences the degree of public approval for

policies the Court upholds. Specifically, he argues “that the depiction of Supreme Court rulings varies in response to voting signals sent by the justices themselves . . .” Because “such coverage offers complex and often critical portraits of rulings, the Court faces limits on its ability to increase popular support for the policies it upholds.” Ironically, those “limits do not necessitate a loss of institutional reputation, as the Court’s legitimacy functions as a weak persuasive currency in debates over the wisdom of Court-endorsed policies.”⁴⁹

Zilis tests his argument through an analysis of what he terms “dissensus dynamics,” defined as the “links between judicial voting outcomes and favorable media coverage of rulings.”⁵⁰ He examines reaction to two cases decided within a month of each other in 2005 that presented similar questions: *Lingle v. Chevron*⁵¹ and *Kelo v. City of New London*.⁵² While the first hardly ranks as a landmark decision, the latter surely does. Both involved the Takings Clause of the Fifth Amendment that specifies “nor shall property be taken for public use, without just compensation.” Always applicable to the national government, these words were the first provision of the Bill of Rights to be applied to the states through the due process clause of the Fourteenth Amendment.⁵³

In its most common application, the Takings Clause restricts the power of eminent domain—government’s authority to acquire control or possession of private property. When that is done, “just compensation” must be paid. The clause thus disperses the costs of public policy. A taking without compensation places the burden squarely on the property owner. A taking with compensation distributes the burden or costs throughout the taxpaying public. Sometimes a takings case involves a physical seizure or occupation of property. Other takings cases involve a regulatory taking where the aggrieved party believes a government directive is so onerous as to amount to a seizure. *Lingle* fell into the latter category, *Kelo* into the former.

In *Kelo*, five Justices determined that the Connecticut city's resort to eminent domain for economic revitalization comported with the public use stipulation even though the planned redevelopment took the homes of several long-term residents. *Lingle*, by contrast, involved a Hawaii law enacted in 1997 to help curb rising gasoline prices by placing a limit on the rent oil companies like Chevron could charge dealers who leased company-owned service stations. Rejecting the corporation's argument that the law amounted to an unconstitutional taking of its property, all nine Justices agreed that takings clause challenges to regulations had to be based on the severity of the burden that the regulation imposed upon property rights, not upon the effectiveness of the regulation in furthering the governmental interest. The Supreme Court then remanded the dispute to the lower court, all the while having made it more difficult for attacks on the law to succeed.

Thus, in both cases the challenged governmental action survived a constitutional challenge. Moreover, the decisions offered a broad view of government power under the Fifth Amendment, whether the complainant was an individual or a large corporation. Yet the two decisions were treated very differently in media reports, a pattern that in turn was reflected among the general public.

Indeed, the press's portrayal of property rights shifted dramatically between April and July 2005. "The unanimously decided *Lingle* did little to disturb vague media narrative about the invulnerability of American property rights, even as it rendered those narratives hollow."⁵⁴ Reports on *Lingle* "framed the decision as an unremarkable application of the Takings Clause, replete with recognition that government at times possessed the power to sharply regulate and/or seize private property. Because the press made little effort to give voice to *Lingle*'s critics the decision passed with minimal notice," doing "little to change news coverage of property rights in the United States."⁵⁵

In contrast "the five-four outcome in *Kelo* had both direct and indirect effects on coverage." Internal disagreements on the Court that became very visible once *Kelo* came down "caused the press to call into question the wisdom of the decision and raise alarms about property rights" in the nation.⁵⁶ "The media may have ignored [Justice] Thomas's textualist critique of the decision, but it seized on Justice O'Connor's contention that the Court had made all property vulnerable."⁵⁷ Moreover, unlike *Lingle*, *Kelo* continued to resonate." Before the decision, most national news coverage portrayed property rights in vague terms as a sacred part of the political system. One year later, however, discussions of the issue regularly explored the intricacies of government takings. More than sixty percent of the stories published on the issue between July 23 and July 22, 2006 (that is, about one year later) continued to mention eminent domain controversies,"⁵⁸ From this contrast, Zilis suggests that the content of media reports responds to voting coalitions at the Court and the opinions, especially dissents, that spring from those coalitions.

The lessons and findings emerging from Zilis's book are significant but may surprise few. First, in coverage of judicial decisions, journalists "eschew[] deference for controversy,"⁵⁹ parallel to what one typically finds in television news coverage of local events. Second, variation in the coverage of high profile Supreme Court rulings is quite pronounced. While the small number of unanimous holdings—which signal to reporters the need to provide simple and accurate accounts of widely accepted legal principles—attract uncontested depictions of the Court's reasoning, many other non-unanimous decisions garner much more complex, often critical coverage.

Third, "not all dissenting opinions are created equal. Dramatic, compelling, evocative language . . . has a disproportionate influence on the contours of news coverage."⁶⁰ Such critical coverage is then often magnified by

issue activists, intemperate comments by cable news pundits, and so on. The result is that “across a range of issues, critical media coverage depresses support for Court-endorsed policies though not for the institution itself.”⁶¹

Fourth, “the single-largest threat to the Court’s ability to garner favorable media coverage and approving public responses for its decisions,” Zilis insists, “is internal.”⁶² As a result, the “choice facing each justice as he or she weighs the decision to join the majority in a given case [and, one suspects, the phrasing of a separate opinion] implicates not only personal ideological preferences and the attendant strategic considerations but also the reception the ruling will receive from a conflict-attuned press and an often agnostic public.”⁶³ (For the difference that unanimity, and even a Justice’s physical presence may make, especially with a decision likely to be momentous, one need look no further than the Court’s pronouncement in the school segregation cases⁶⁴ of 1954, a point John Q. Barrett highlighted on May 17, 2018 in his Robert H. Jackson blog.)⁶⁵

IV.

Neither *Kelo* nor *Lingle* would have been possible without the Fourteenth Amendment, in that in its absence the Supreme Court would have had no jurisdiction. Moreover, that amendment with its Equal Protection and Due Process Clauses has long been inextricably linked with issues of discrimination. The connections among the Court, the political process, and protection against government oppression are the focus of **The U.S. Supreme Court and Racial Minorities**, by political scientist Leslie F. Goldstein, emerita professor at the University of Delaware. Her book⁶⁶ joins a vast literature that explores the subject of constitutional protections for minorities, but it nonetheless qualifies for must-consult status, given its encyclopedic range and the depth of information it contains.

Among their objectives in 1787, the framers of the Constitution sought to “secure

the blessings of liberty,” an objective embodied in the document’s design. To be avoided was “tyranny,” which James Madison defined in *The Federalist* No. 47 as the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective.” As he explained further in No. 51, the “great difficulty” confronting the Philadelphia Convention had two dimensions: delegates had first to “enable the government to control the governed; and in the next place oblige it to control itself.” To achieve these ends, aside from empowering the government, the framers created a complexus of structural controls known today as federalism and separation of powers. For Alexander Hamilton, the resulting “vibrations of power” were the “genius of our government.”⁶⁷

Particularly for individuals like Hamilton and Madison, who initially opposed adding a bill of rights, the belief was that a combination of enumerated—and therefore limited—powers, the political process itself, and the Constitution’s design would be sufficient safeguards. To this mix was soon added judicial review, thanks to the Supreme Court. Since the founding era, therefore, protection of individual rights, especially for minorities, has been a product of the interplay among these various forces and factors.

This arrangement poses the question Goldstein attempts to answer: In the context of governmental treatment of racial minorities in the United States, has “the Court over the long haul been more supportive of the Constitutional rights of unpopular racial minorities than the other branches?”⁶⁸ Her query sits alongside the tradition represented by Justice Story’s insistence that “there can be no security for the minority in a free government except through the judicial department.”⁶⁹ In pursuing this question, she has organized the book chronologically, beginning with the Marshall and Taney Courts. Throughout, she examines treatment not only of African Americans but also of Hispanics, Native

Americans, and Asians. With respect to the first category, therefore, her work partly complements several of Finkelman's chapters. The Civil War and Reconstruction eras precede examination of the Fuller, White, and Taft Courts and policy in the mid- and late-twentieth century. Regardless of period, however, Goldstein's analysis is qualitative, not quantitative. That is, she does not award or deduct points or keep score. Instead, her method is examination of pertinent judicial, legislative, presidential, and bureaucratic actions and policies across time to arrive at an assessment of whether one or another part of the national government was caring, indifferent, or abusive of minority interests. Especially helpful for the reader, in addition to a thorough index, table of cases, and a bibliography of twenty-five pages, is a feature rarely found today in books: citations and parenthetical comments that appear in *footnotes*.

Goldstein's query leads to what she considers a "perhaps unsatisfying answer." Whether the Court has been more protective of minority interests than have the elected branches "turns out to have varied according to historical period and particular personnel. And which minority would get judicial protection also varied across periods and across branches."⁷⁰ Nonetheless, she writes, "[O]ne can conclude that for most periods in the Court's first 200 years, the answer to my basic query, with important qualifications is 'Yes' . . ." Yet, this qualification is then qualified when she explains that the "qualifications to this broad conclusion are not small ones."⁷¹ Finally, she notes that, while the Court's insulation "has not been able to prevent majority oppression of racial minorities," that independence has "provided the Supreme Court with enough protection that the Court has in fact helped to some degree, some of the time, to check such oppression."⁷²

V.

Not quite seven decades before ratification of the Fourteenth Amendment, Chief Justice

John Marshall commented on the "original right" of the making of the nation's Constitution as "a very great exertion; nor can it nor ought it to be frequently repeated."⁷³ While intervening years have witnessed no national constitutional convention, they have nonetheless witnessed not only ratification of twenty-seven amendments, but also a nearly continuous outpouring of suggestions and informal proposals for constitutional change. Moreover, these stand alongside to the six amendments formally proposed by Congress under Article V but not ratified by the states.⁷⁴ (Subjects of the six include: apportionment of the U.S. House of Representatives, acceptance of a title of nobility or emoluments from a foreign government, protection of slavery; regulation of child labor, gender equality, and congressional representation and electoral votes for the District of Columbia in conjunction with repeal of the Twenty-third Amendment.)

It is the much larger former group of proposals that comprises **Re-Framers** by John R. Vile, who teaches political science and is dean of the Honors College at Middle Tennessee State University.⁷⁵ This thoroughly researched, comprehensive, and useful volume enriches and expands upon his earlier publications on constitutional amendments and related subjects.⁷⁶

Acknowledging that he has possibly missed a few (because there is no official clearing house or archive to consult for suggested changes in the Constitution), Vile has nonetheless unearthed some 170 that qualified under his selection criteria, including an ample number relating to or affecting the Supreme Court and the Fourteenth Amendment. These criteria led him to "focus on individuals who called for a new constitution or who advocated a multifaceted amendment or series of amendments . . . that would collectively represent a significant departure from, or addition to, existing constitutional norms." This stipulation required that he exclude "consideration of proposals that call for reinterpreting existing constitutional provisions without

adopting a new constitution or series of amendments.”⁷⁷ Also out of bounds were proposals for a single amendment, such as Henry George’s call for a flat tax, where such proposed changes “could be adopted without changing the existing constitutional system.” For each included proposal or suggestion, Vile provides information on the sponsoring individual and the context within which the proposal was made. In his words, the proposals represent “a kind of alternate constitutional history of the nation centered not so much on familiar Supreme Court decisions, but on areas in which contemporaries, often from political parties or persuasions that are out of power at the time, have diagnosed issues and problems.”⁷⁸ Even with the limitations the author imposed on his work, there is no shortage of content. The attractively produced book with its extensive index and list of references exceeds 390 pages. As with Vile’s, each of the books surveyed here reflects parts of American constitutional development, a process that unfolds anew with each term of Court. What James Bryce considered a novelty two decades after ratification of the Fourteenth Amendment remains a force in shaping the polity well beyond even his vision.

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

FINKELMAN, PAUL. *Supreme Injustice: Slavery in the Nation’s Highest Court*. (Cambridge, MA: Harvard University Press, 2018). Pp. 250. ISBN: 978-0-674-05121-8, cloth.

GOLDSTEIN, LESLIE F. *The U.S. Supreme Court and Racial Minorities: Two Centuries of Judicial Review on Trial*. (Northampton, MA: Edward Elgar Publishing, 2017). Pp. xvii, 461. ISBN: 978-1-78643-882-9, cloth.

VILE, JOHN R. *Re-Framers: 170 Eccentric, Visionary, and Patriotic Proposals to Rewrite the U.S. Constitution*. (Santa

Barbara, CA: ABC-CLIO, 2015). Pp. xvi, 396. ISBN: 978-1-61069-733-0, cloth.

ZILIS, MICHAEL A., *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions* (Ann Arbor, MI: University of Michigan Press, 2016). Pp. 243. ISBN: 978-0-472-05274-5, paper.

ENDNOTES

¹ James Bryce, *The American Commonwealth* (rev. ed., (1921) vol. 1, at p. 318. Bryce’s work was initially published as three volumes in 1888. He was British ambassador to the United States in 1907-1913. This quotation is from a two-volume edition that Macmillan published in 1921.

² 83 U. S. (16 Wallace) 36 (1873).

³ *Id.* at 67, 71.

⁴ Paul Finkelman, *Supreme Injustice* (2018), hereafter cited as Finkelman.

⁵ *Id.* at p.1.

⁶ *Id.*

⁷ *Id.*, at p. 3.

⁸ *Id.*, at p. 2.

⁹ *Id.*, at p. 10.

¹⁰ *Id.*, at p. 12.

¹¹ Finkelman, at p. 178.

¹² *Id.*, at p. 26.

¹³ *Id.*, at p. 27.

¹⁴ *Id.*, at p. 48.

¹⁵ *Id.*

¹⁶ *Id.*, at p. 28, emphasis in the original.

¹⁷ *Id.*, at p. 34.

¹⁸ *Id.*

¹⁹ *Id.*, at p. 60.

²⁰ *Id.*, at pp. 112-113.

²¹ *Id.*, at p. 114.

²² *Id.*, at p. 115.

²³ *Id.*, at p. 121.

²⁴ *Id.*, at p. 124.

²⁵ *United States v. The Schooner Amistad*, 40 U. S. (15 Peters) 518 (1841).

²⁶ Finkelman, at p. 134.

²⁷ *Id.*, at p. 139.

²⁸ 41 U.S. (16 Peters) 539 (1842).

²⁹ Finkelman, at p. 140.

³⁰ *Id.*, at p. 142.

³¹ *Id.*, at p. 171.

³² *Id.*, at p. 176.

³³ Frank Otto Gatell, “Roger B. Taney,” in Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions* (1969), vol. 1, at p. 635.

³⁴ Finkelman, at p. 173.

³⁵ Carl Brent Swisher, **Roger B. Taney** (1935), at p. 582.

³⁶ The sum of \$1,000 was appropriated for the Taney bust, although the work was done for \$700.

https://www.senate.gov/artandhistory/art/artifact/Sculpture_21_00018.htm (last accessed on Jun 19, 2018).

³⁷ Jessica Anderson, "A Troubling Legacy Is Taken Away," *Baltimore Sun*, March 19, 2017, at p. 2.

³⁸ Finkelman, at p. 214.

³⁹ *Id.*, at pp. 214-215.

⁴⁰ For example, see this recent survey: <https://fixthecourt.com/wp-content/uploads/2018/06/Fix-the-Court-national-SCOTUS-poll-toplines.pdf> (last accessed on June 12, 2018).

⁴¹ Michael A. Zilis, **The Limits of Legitimacy** (2016), hereafter cited as Zilis.

⁴² *Id.*, at p. 10.

⁴³ Charles Warren, **The Supreme Court in United States History**, (rev. ed., 1926), vol. I, at p. 59.

⁴⁴ Zilis, at p. 171.

⁴⁵ *Id.*

⁴⁶ *Id.*, at p. 5.

⁴⁷ *Id.*, at pp. 5-6.

⁴⁸ Zilis, at p. 7.

⁴⁹ *Id.*, at p. 8.

⁵⁰ *Id.*, at p. 185.

⁵¹ 544 U.S. 528 (2005).

⁵² 549 U. S. 469 (2005).

⁵³ *Chicago, B. & Q. R. Co. v. Chicago*, 1897).

⁵⁴ Zilis, at p. 49.

⁵⁵ *Id.*, at p. 75.

⁵⁶ *Id.*, at p. 49.

⁵⁷ *Id.*, at p. 75.

⁵⁸ *Id.*, at pp. 75-76.

⁵⁹ *Id.*, at p. 172.

⁶⁰ *Id.*

⁶¹ *Id.*, at p. 173.

⁶² *Id.*, at p. 174.

⁶³ *Id.*

⁶⁴ *Brown v. Board of Education*, 347 U. S. 483 (1954)

and *Bolling v. Sharpe*, 347 U. S. 497 (1954).

⁶⁵ "On Saturday morning, May 15, Justice Frankfurter wrote a note to Chief Justice Warren. Frankfurter, indicating his understanding that Jackson [who had been hospitalized] now could join the Court on the bench,

urged the Chief to announce the decisions on May 17:

Dear Chief:

An opinion in a touchy and explosive litigation, once it has been agreed to by the Court, is like a soufflé—it should be served at once after it has reached completion. And so I venture to urge that no room be left for contingencies—one can never tell—nor for the real danger of leakage, since walls are supposed to have ears.

I am assuming, of course, that all are in and that Bob can be here Monday! Yrs

FF

<http://johnqbarrett.com/2018/05/17/jackson-list-nine-votes-nine-present-the-unanimity-of-brown-v-board-of-education-1954> (last accessed on May 21, 2018).

⁶⁶ Leslie F. Goldstein, **The U. S. Supreme Court and Racial Minorities** (2017), hereafter cited as Goldstein.

⁶⁷ Letter to Rufus King, June 3, 1802, in Carson Holloway and Bradford Wilson, eds., **The Political Writings of Alexander Hamilton**, vol. 2, at p. 558

(2017).

⁶⁸ Goldstein, at p. 4.

⁶⁹ Joseph Story, **Commentaries on the Constitution of the United States** (rev. ed., 1851), vol. II, §1612, p. 397.

Story's point seems especially apt in an age when there are attacks on judicial independence.

⁷⁰ Goldstein, p. 396.

⁷¹ *Id.*, at p. 399.

⁷² *Id.*, at p. 400.

⁷³ *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 176 (1803).

⁷⁴ See <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-7.pdf> (last accessed on May 27, 2018).

⁷⁵ John R. Vile, **Re-Framers** (2015), hereafter cited as Vile.

⁷⁶ His works include John R. Vile, **The Constitutional Amending Process in American Political Thought** (1992); **Rewriting the United States Constitution** (1991); **Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues**. (3rd ed., 2010).

⁷⁷ Vile, **Re-Framers**, at p. xiv.

⁷⁸ *Id.*, at p. 350.

Review Essay: Paul Finkelman, *Supreme Injustice: Slavery in the Nation's Highest Court* (Cambridge, Mass., Harvard University Press, 2018)

CHARLES F. HOBSON

Paul Finkelman has led a long and distinguished career as a legal historian of slavery and race in the United States. He is truly a peripatetic scholar, having held a dizzying number of academic appointments throughout this country and abroad. Most recently, he has alighted as president of Gratz College in Philadelphia. The present book is an outgrowth of the Nathan I. Huggins Lectures, delivered at the W.E.B. DuBois Center at Harvard University in 2009.

While compiling an extensive list of publications over the past four decades, Finkelman established his scholarly credentials in two principal works: **An Imperfect Union: Slavery, Federalism, and Comity** (1981) and **Slavery and the Founders: Race and Liberty in the Age of Jefferson** (1996 third edition, 2014). The former traced the breakdown in “comity” between northern and southern legal systems regarding the transit of

enslaved and freed persons during the two decades preceding the Civil War. This collapse, signified by increasing emancipations of slaves brought northward by sojourning masters and re-enslavement of freed blacks who returned to the south, was the prelude to the breakup of the federal Union in 1860.

From this specialized study, Finkelman enlarged his scope in **Slavery and the Founders**, a series of connected essays elaborating his great theme “that slavery was a central issue of the American founding.”¹ With this book, Finkelman secured his reputation as a harsh critic of the founding generation for its failure to confront the contradiction between its idealistic rhetoric in favor of liberty and equality and the reality that vast numbers of black persons were held in bondage. It was not just that the founders failed to translate Revolutionary idealism into effective action to challenge slavery but that

they actually strengthened the institution by providing constitutional and legal protections.

Finkelman has deservedly drawn praise for his critical assessment of the nation's fateful unwillingness at its founding moment to deal effectively and honorably with the institution of slavery. No one has done more to place this painful truth at the forefront of our early national history. As both a historian and engaged activist on behalf of racial justice, he believes that a realistic understanding of our imperfect past is essential if Americans "are to do better in our own times." He forthrightly denies the charge of presentism, of interpreting the past through the distorting lens of the present. He insists that he judges past actors by the standards of their day, not our own, though acknowledging that statesmen like Thomas Jefferson should be held to the highest standards of their day. They are not to be excused for merely being "better than the worst" of their generation.² He has little patience for letting the founders off the hook by portraying them as tragically bound by their historical milieu, stumbling uncertainly into an unknown and unknowable future. Finkelman believes that an important part of the historian's duty is to render moral judgments. He is not one of those excessively contextualizing historians who in seeking to understand or explain past actions in terms of particular exigencies of time and place risk excusing or exonerating.

At the heart of the moral historian's enterprise is the assumption that past actors had clear choices and the freedom to choose one course of action or another. For Finkelman early national statesmen too often and with ill intent rejected policies that could have ameliorated the conditions of slavery and pointed toward its eventual demise. Phrases like "could have," "should have," and "might have" (sometimes paired with "easily") regularly recur in his depressing narrative of politicians failing the moral test by choosing "slavery" over "freedom." Finkelman professes to take no joy in his project, noting that

the "stain of racism and the legacy of slavery" make for unpleasant reading.³ Still, it is evident that he derives some grim satisfaction in bringing the revered founders down from their exalted level to the realm of flawed humanity.

Supreme Injustice is of a piece with the author's previous work, at once enlightening and argumentative, aimed at challenging received wisdom. The title perfectly captures the book's thesis, promising readers to expect an unsparing judgment of the antebellum Supreme Court's record on slavery. To be accurate, it is not the Court as an institution that Finkelman brings to account but rather its "three most important justices" (at p. 1): Chief Justice John Marshall, Associate Justice Joseph Story, and Chief Justice Roger B. Taney. With Story and Taney, the focus is primarily on two famous (or perhaps infamous) opinions: *Prigg v. Pennsylvania* (1842), in which Story held that a Pennsylvania law to prevent the forcible removal of black persons into slavery was void as clashing with the federal Fugitive Slave law of 1793 and *Dred Scott v. Sandford* (1857), in which Taney in the course of denying a freedom claim declared that blacks could not be citizens and that the federal government had no power to regulate slavery in the territories acquired after the creation of the United States (thereby overturning the Missouri Compromise of 1820).

Unlike Story and Taney, Marshall has largely avoided close scrutiny of his slavery jurisprudence, apparently because there is too little to yield much substance. No case directly bringing in issue the legitimacy or constitutionality of slavery came before the Marshall Court. Yet it did hear a number of cases arising from petitions for freedom and from slave trade violations whose decision turned on the free or slave status of black persons. These constituted a small but not insignificant portion of the court's docket. Historians and legal scholars are familiar with two cases that come closest to revealing the Court's views on slavery and the slave trade:

Mima Queen v. Hepburn (1813), a freedom suit, and *The Antelope* (1825), which dealt with the legality of the international slave trade. The latter case has received the most attention, including a book-length study.⁴ Finkelman has delved deeply into the early **U.S. Reports** and gleaned additional cases that he believes previous scholarship has overlooked.⁵ Taking these cases and considering them in conjunction with *Mima* and *Antelope*, he finds a clear pattern of bias against freedom on the part of the “great chief justice.” The evidence is sufficiently incriminating to join Marshall with Story and Taney as a trio of “supremely unjust” Justices (at p. 10).

Finkelman has previously written on *Prigg* and Story and on *Dred Scott* and Taney. The greater part of the present book is devoted to Marshall, who has not previously drawn the author’s particular notice. What follows focuses almost entirely on the Marshall chapters because they present new information about the Chief Justice as a Virginia slaveholder. Such emphasis also better fits my background as a student of Marshall and annotator of his collected papers.

Finkelman wastes no time in stating his case that Marshall, along with Story and Taney, should be held personally responsible for the institutional failure of the Supreme Court to exercise its authority in a way that favored freedom over slavery in the decades before the Civil War. He sketches an alternative scenario in which these three Justices could have contributed to a “political solution to the problem of slavery” or at least have ameliorated the system by upholding more claims to freedom and vigorously protecting the rights of free blacks. A “different jurisprudence,” he says, “would have left the nation with a legacy of liberty and justice, rather than one of slavery, racism, and oppression.” Such a jurisprudence was readily available for adopting, consistent with the ideals set forth in the Declaration of

Independence and the preamble to the otherwise proslavery Constitution, with public opinion north and south that condemned slavery as morally wrong and a threat to national security, and with the legal rule that in cases of doubt courts should lean toward life and liberty. Instead of embracing a jurisprudence more friendly to freedom, Marshall, Story, and Taney, quite the contrary, “continuously strengthened slavery in the American constitutional order” and thereby “helped” bring on the Civil War and “the death of some 630,000 young Americans” (at p. 1-3).

This is a heavy charge for these three jurists to bear, made in the confident belief that individuals have great capacity to shape history and therefore to be assigned blame for history’s failings. These Justices, Finkelman writes, “profoundly altered the politics of slavery and the course of national history.” Notwithstanding “constraints” on their ability to act, they had “great flexibility” to choose a jurisprudence of freedom that “would have changed the course of history” (at p. 220). Finkelman seems particularly eager to consign Marshall to this judicial hall of shame, having already done so with Story and Taney. In taking his first critical look at Marshall, he is pumped with new information that he believes should radically revise our estimate of the “great chief justice.”

Marshall as a Slaveholder

Thanks to Finkelman’s research, we now know that Marshall owned many more slaves than was previously believed to be the case. Earlier historians and biographers have been content to pass on the received knowledge that Marshall owned a small number of slaves at his Richmond home and on his Chickahominy farm a few miles outside town in Henrico County. According to the 1830 federal census, Marshall owned seven slaves in Richmond and sixty-two in Henrico. The same census for Fauquier

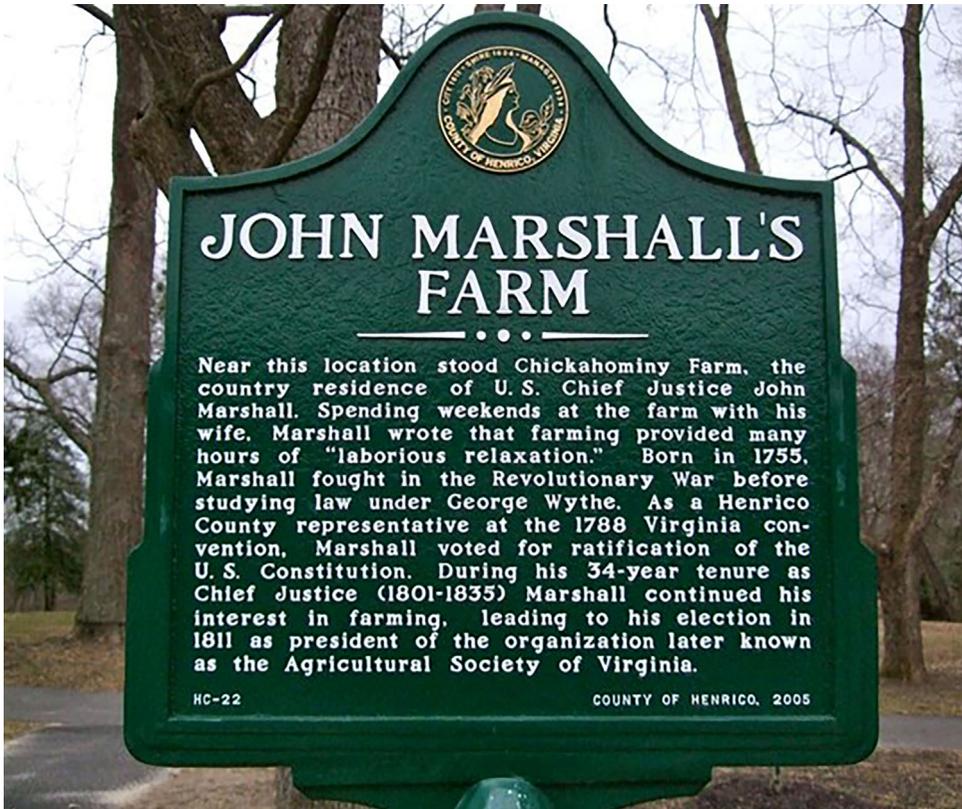
County lists forty-odd slaves under Marshall's overseer and at his "quarter." Add to these (as Finkelman does) those listed under the names of Marshall's five sons, Fauquier County farmers, and you have a substantial Marshall family investment in slave property—more than 250 slaves in 1830 (at p. 36-37, 46-47, 233 n. 9). Until Finkelman, no one had bothered to check the Henrico census records, even though Marshall's correspondence mentions slaves at Chickahominy and a passage in his will apportions his slaves there. The Fauquier records were overlooked as well, even though Marshall made annual summer visits there to see his sons and tend to his own property interests.

The misconception that Marshall owned relatively few slaves in the urban setting of Richmond crept into the literature seemingly as a consequence of unexamined assumptions. In his monumental biography early in the twentieth century, Albert Beveridge barely touched on the subject beyond noting that Marshall inherited a few slaves from his father and recorded purchases in his early account books.⁶ Subsequent researchers showed a surprising lack of curiosity to dig deeper. Even Irwin S. Rhodes, who unearthed real and personal property records pertaining to Marshall with antiquarian zeal, missed counting the slaves at Chickahominy and in Fauquier.⁷ More recently, Jean Smith states that, since Marshall "was never involved in large-scale agriculture, he had no significant holdings."⁸ Kent Newmyer describes Marshall as "a small urban slaveholder," though noting that he had slaves at Chickahominy and was involved to some extent in plantation slavery through his sons.⁹ Frances Howell Rudko cites Rhodes's compilation of federal census records for 1810, 1820, and 1830 to show that Marshall's "slave ownership was never large," but these count only the Richmond numbers.¹⁰ My own book, which was not a full-scale biography, did not question the view that Marshall possessed "a modest number of slaves."¹¹ However, in

annotating Marshall's collected papers, notably his will, I should have searched the Henrico census records on microfilm, which now can be quickly accessed online through Ancestry.com.

In his analysis of Marshall as a slave owner, Finkelman, like others before him, draws on an account book covering the years 1783 through 1795. Using the annotated text in the **Papers of John Marshall**, he counts some twenty distinct purchases between 1783 and 1790. He also cites Richmond city tax records as compiled by Marshall's editors for information on slaveholdings through 1795. Marshall, he notes, was also at this time "populating" his estates in Henrico and Fauquier with slaves, though he does not cite any records for those counties (at p. 40). From 1795, Finkelman jumps forward to 1827, when Marshall wrote the first of several wills. The wills, coupled with the 1830 census records, indicate the extent of his slave-owning at that time. Thus armed with data from both ends of Marshall's adult life, Finkelman conjures an image of Marshall as actively, constantly, and aggressively involved in the business of buying and selling slaves "throughout his life" (at p. 37). Sentences to this effect pop up recurrently, often within the space of a few paragraphs, as if repetition strengthens the argument. Usually, he adds the qualifier "sometimes" or "occasionally" when speaking of Marshall as a seller. But the only transaction of this kind he cites is the sale of the slaves on the estate of John Marshall, Jr., after the son's death in 1833. No extant documents—deeds, bills of sale, or correspondence—show Marshall in the act of buying after the 1790s, though surely his acquisition of slaves must have continued beyond this time. For Finkelman, the records unambiguously reveal Marshall as a lifelong trader in slaves.

According to Finkelman, "the fact of Marshall's vast slaveholding forces a reconsideration of his personal feelings on slavery" (at p. 48). With revisionist ardor, he casts in



No scholar had made a full accounting of John Marshall's slaveholding records before Paul Finkelman, who estimates that the Chief Justice and his five sons owned more than 250 enslaved persons in 1830. At his Chickahominy farm in Henrico County he owned sixty-two.

an unfavorable or unsympathetic light practically everything Marshall did or said regarding slavery, rarely cutting him any slack by giving him the benefit of the doubt. Even the Chief Justice's seemingly compassionate hope to liberate his manservant Robin Spurlock is presented in a disparaging way. In this and other matters, Finkelman does not shy away from taking speculative leaps from the record—and sometimes from what is not in the record—to make sweeping assertions about Marshall's supposed bad faith if not mean-spiritedness. He seeks to demolish the image of Marshall as a benevolent master in the tradition of southern paternalism, one who treated his slaves kindly and recognized their humanity. In its place, he portrays a Marshall who regarded slaves as mere producers of wealth, as objects of commerce to be bought and sold. He scolds Marshall, author of the

Life of George Washington, for not measuring up to "his hero," for failing to learn how "a true hero of the Republic—even a slaveholder's republic—should treat people, including slaves." He quotes Washington as famously refusing "to buy or sell slaves 'as you would do cattle at a market.'" The paraphrase is somewhat misleading, for Washington actually said that he was "principled against selling negros, as you would do cattle in the market."¹² Finkelman likes the "cattle at a market" phrase so much that he repeats it a few pages later when he again chastises Marshall as a buyer and seller of slaves (at p. 45, 48). The passage contrasting Marshall with Washington is indicative of the author's insinuating style of argumentation.

Space precludes a full review of the author's catalog of Marshall's moral failings as a slaveholder. Certain of his charges that go

unnoticed here should not be taken as implied assent. At the outset and throughout, Finkelman strives to fashion a portrait of Marshall as a “very wealthy man,” “a wealthy southern gentleman with a significant number of slaves,” a “wealthy lawyer and planter,” and “a wealthy landowner” (at p. 33, 40, 44, 221). Even toned down from his draft describing him as “stunningly” or “fabulously wealthy,” his depiction of the Chief Justice as a man of large fortune does not ring true to those who have studied Marshall and visited the modest houses and homesteads owned by him and his family. To be sure, Marshall lived in comfortable circumstances but certainly not in the grand style. Visitors to his Richmond home spoke of the republican simplicity of his lifestyle. From 1800, he was in government service, including thirty-five years as Chief Justice. If instead he had remained a private citizen and practiced law, he might well have become very wealthy like his lawyer-neighbor John Wickham, whose Richmond townhouse was truly grand.

By all accounts, Marshall’s country place on the Chickahominy did not rate the status of a “plantation.” True, he once lightheartedly referred to it as “a plantation productive only of expence & vexation,” but more often simply as his “farm.”¹³ Today, a historical marker (“John Marshall’s Farm”) sits on the site where the farm and other buildings once stood. The house was evidently a small dwelling—“our little place in the country,” as Marshall described it in 1829.¹⁴ Marshall bought the place primarily as a retreat from the bustle of town life, most importantly for his invalid wife Polly, who because of an extreme nervous condition could not tolerate loud noises. Here, too, the Chief Justice could pursue farming, mostly as an avocation rather than as a source of productive income.

Whatever his true net worth might have been, Marshall never saw himself as entirely free of financial concerns, even in his later years. He had a large family to support, five sons and a daughter, whose wellbeing was a constant preoccupation. At age sixty, the

Chief Justice had three adolescent sons. He was over seventy when his youngest son graduated from college. The three younger sons, notably John, Jr., had a distressing habit of incurring large debts. In 1827, John’s pecuniary indiscretions involved the father “in debts which require all my resources and from which I shall be several years in extricating myself.” The next year he was “surprised as well as grieved” to learn the “magnitude” of son James’s debts. He was chagrined that his sons did not “feel the proper horror at owing money which cannot be paid.” In drawing his will, Marshall expressed a certain anxiety about being surety for his son-in-law Jaquelin Harvie “in considerable sums of money which I hope my estate will never be required to pay.”¹⁵

In overstating the degree of Marshall’s wealth, Finkelman creates the misleading impression that the basis of that wealth was large holdings of slaves. Marshall “owned hundreds of slaves during his life,” he writes, and “also a number of plantations around the state” from which “he clearly profited” (at p. 31). But, apart from his Henrico farm, he owned no other “plantations,” unless he is including the lands farmed by his sons in Fauquier. How he “profited” from their apparently debt-encumbered estates, or even from his Chickahominy farm, is not made clear.

Marshall did indeed possess vast quantities of land, not just in Henrico and Fauquier, but in distant counties of what is now West Virginia. His profits from these lands did not come from plantations worked by slave labor but his serving as a landlord selling lots and larger tracts, collecting rents on long-term leases, and selling the reversionary interest in these leases. Land, indeed, was the principal source of his income apart from his official salary as Chief Justice (\$4,000, increased to \$5,000 in 1819). He acquired most of his lands as a result of the one great business venture of his life. In 1793, he contracted to purchase the manor lands of the Fairfax family, the former proprietors of Virginia’s

Northern Neck. Marshall brought this deal to fruition in 1806 with the final payment to the Fairfax heirs, having in the intervening years devoted all his resources and income to this project—including writing a five-volume biography of George Washington that proved disappointing in its monetary returns.

Marshall's real business was real estate, which he truly did buy and sell all his life. From a prudent economic standpoint, Marshall at some point would have ceased buying more slaves and relied on natural increase to meet his needs and those of his sons. Even as slaves were essential to agricultural enterprise, he and other proprietors of enslaved persons in antebellum Virginia were acutely anxious about the increasing economic burden of such ownership. Slave property yielded less profit while adding more expense, as he noted in a letter written in 1825: "The general fact is known to be that it requires a combination of industry skill and economy in a proprietor of slaves to accumulate even a moderate fortune in the course of a long life. In truth, the profits of their labour, in the general, will barely support a family and rear up the young slaves." He made the additional observation that "[o]ld negroes too who have humane masters, continue for many years a burthen on their owners."¹⁶ Marshall here spoke from direct experience, as owner of a farm "productive only of expence & vexation," and from his sons' difficulties in keeping out of debt as Fauquier farmers. He surely believed himself to be a "humane" master with a paternalistic duty to clothe, feed, and provide care for his slaves through life.

Finkelman does concede that "[s]ometimes Marshall recognized the humanity of his slaves," as in his will providing for the distribution of his slaves in a way that "kept families together" as near as possible. Almost immediately, however, he reverts to his portrait of Marshall the lifelong slave dealer whose transactions necessarily entailed exiling "many of his slaves" from "family and

friends. This is a kind of cruelty that exceeds physical punishment" (at p. 37). As a buyer of slaves, Marshall signified his acceptance of slavery's evil consequences. In such transactions he probably never gave a thought to whether he was inflicting cruelty. If he did think about it, perhaps he rationalized that any enslaved person he bought would be well treated.

On Marshall's treatment of slaves, Finkelman extends a backhanded compliment mixed with innuendo. We cannot "actually know how these slaves were treated," he writes, acknowledging that there is "no evidence that Marshall whipped his slaves in Richmond, and such treatment coming directly from him seems unlikely." "But," he continues, "we also have no evidence of how Marshall's overseers, sons, nephews, and other men in his family treated the vast majority" of his slaves "in the countryside." He makes an invidious reference to Jefferson, who did not personally whip his slaves but left that "unpleasant business to underlings" (at p. 47). The lack of a documentary record of mistreatment of slaves does not deter Finkelman from supposing the worst. He wonders what John, Jr., might have done in a drunken and violent fit, though admitting "we cannot know how he behaved" (at p. 47-48). Thus the imagined sins of the son are visited upon the father.

In August 1832, Marshall added the following codicil to his will:

It is my wish to emancipate my faithful servant Robin and I direct his emancipation if he chuses to conform to the laws on that subject, requiring that he should leave the state or if permission can be obtained for his continuing, to reside in it. In the event of his going to Liberia I give him one hundred dollars, if he does not go thither I give him fifty-dollars. Should it be found impracticable to liberate him consistently with law

and his own inclination, I desire that he may choose his master among my sons, or if he prefer my daughter that he may be held in trust for her and her family as is the other property bequeathed in trust for her, and that he may be always treated as a faithful meritorious servant.¹⁷

According to family tradition, Robin Spurlock was given to Marshall as a wedding gift from his father in 1783. After the Chief Justice's death in 1835, the elderly servant chose to remain in slavery in the family of Mary Marshall Harvie.

Marshall's hope to emancipate "one slave among so many," writes Finkelman, was "hardly compelling evidence" of "paternalism and humanity." The choice presented to Robin was "hardly attractive": leave the state with some money and abandon friends and family or be "penniless" if he somehow could gain freedom and remain in the state. In effect, the offer of freedom with these "impossible conditions" virtually compelled Robin to remain in slavery. Marshall, "the wealthy lawyer and planter," writes Finkelman, "could easily have" provided the means and money for his "faithful servant" to live out his years in Richmond as a free man. But he took no steps to secure Robin's freedom because it was never his intention to add to Richmond's free black population by liberating him. The codicil thus "speaks volumes about [Marshall's] 'paternalism,' his views on race, and his lifelong support for slavery." For good measure, Finkelman berates the codicil's author for not dignifying Robin "with a last name" (at p. 43-44, 74-75, 236 n. 33). He seldom resists an opportunity to register his moral indignation, noting, for example, that "Marshall spent Independence Day buying slaves" (at p. 37, 38).

The constraints on Marshall in devising his estate were greater than Finkelman supposes; the choices facing him were not as easy as the author would have us believe.

He assures us that the Chief Justice "could easily have" emancipated his servant, but how can he or anyone really know all the circumstances that entered into Robin's continuing as a slave? Even if Marshall did not really expect Robin to accept the offer, for Finkelman to scorn the codicil's bequest as insincere or cynical, an act of bad faith, is unduly harsh. A fairer reading would see an aging Chief Justice in the very public way of a last will and testament expressing his high esteem for Robin "as a rational man capable of deciding his own fate." Marshall was comparable to other testators who did not free their slaves but in allowing a choice of masters "came the closest to recognizing their humanity" and thereby acknowledged "a will, however constrained, in the slave."¹⁸ The codicil spoke to a long and intimate relationship—between master and slave, to be sure, but also between two fellow humans who by all accounts enjoyed each other's company.

Late in 1833, John Marshall, Jr., died at the age of thirty-five, leaving a widow and three children. Fond of drink and gambling, this prodigal son had caused the Chief Justice no little anguish, dating at least from his expulsion from Harvard in 1815. In response to the son's financial "indiscretions," the father drafted a will in 1827 placing the property intended for John in the hands of trustees for the benefit of his family. This provision was also in the final will of 1832, but the expedient did not prevent the estate, *Mont Blanc*, from being heavily encumbered with debts at the time of John's death. Marshall advised his son James Keith, one of the trustees, on the various measures to meet this crisis, one of which was a sale of the estate's slaves.

Finkelman uses this episode—the one documented instance of selling slaves—to castigate Marshall, virtually accusing him of being an ungenerous owner of the enslaved, oblivious to their feelings. Once again, in his telling, Marshall had an easy choice. He could have paid off his son's creditors by drawing

on his own considerable assets—bank and turnpike stock, lands, and interest on loans—but “chose not to” and directed the sale of slaves for this purpose. The “admirable goal” of protecting the widow and children was thus accomplished “by increasing the misery of the slaves who had worked for years to support his son’s family.” The sale “would inevitably destroy slave families—separating husbands from wives and children from parents” (at p. 45).

Most of what we know about the sale of the Mont Blanc slaves comes from letters to James, who in addition to being a trustee was also his late brother’s executor. In April 1834, Marshall reported that he had sent \$700 “for the purpose of paying off the executions with my opinion that it will be advisable, unless you perceive strong reasons against it, to sell as far as the 700\$ will go under the executions and buy in my name for the family. The negroes &c I think should be sold on credit. Those which Elizabeth wishes to keep or which you think to keep—may be purchased in my name also.” The father goes on to say that James’s concern “about suits renders this sale absolutely proper. I do not know how other wise you can act safely, since the appraisalment I am told is too high to act upon it as the real value. I do not know how you can plead unless you know the actual amount of assets. You must act safely so as to expose yourself to no loss from illegal proceedings.” In the same letter, Marshall announced his willingness to secure a loan of \$5,000 by a mortgage on Mont Blanc, although he left that up to James, who had better knowledge of the “situation of the estate and the temper of the creditors.” He also said he would soon send another \$1,000. In a subsequent letter, he advised James that it would “be proper to allow creditors to bid” at the sale of the slaves and that those intended to be reserved for the family should be sold with the others and purchased in my name.”¹⁹

Marshall, though at a distance, was closely involved in decisions about how to

preserve some semblance of Mont Blanc’s solvency and to keep his widowed daughter-in-law and grandchildren on the farm. The sale of the estate’s assets, including the slaves, was regarded as “absolutely proper” for this purpose. Contrary to Finkelman’s insinuation, the Chief Justice did draw from his own funds, as he had done in earlier attempts to bail out his impecunious son.

According to the 1830 census, thirty-one slaves lived and worked at Mont Blanc. How many were sold at the 1834 sale, how many were bought back, and how many families were separated cannot be known. The slaves who had to leave Mont Blanc, or some of them, perhaps were able to stay in Fauquier on the farms of the other Marshall sons or of their neighbors.

Without question, Marshall participated more actively and deeply in slavery than was previously suspected. Yet there is still much we do not know—and perhaps will never know—about Marshall’s personal engagement with the institution. Having opened up a fresh field of inquiry, Finkelman might have added depth and context to the story by a closer examination of Marshall’s slaveholding over time. For example, he could have looked at the 1810 and 1820 censuses as well as that for 1830; the 1790 and 1800 Virginia census records were destroyed by fire. He could have carried his investigations even further by looking at personal property records to cover the years between the censuses. Virginia taxed slaves aged twelve and above, so the records do not count those under twelve. Between 1787 and 1835, the number of taxed slaves in the Marshall’s Richmond household remained fairly constant, fluctuating between seven and eleven. According to Henrico County land tax records, Marshall bought about a thousand acres of land “on Chickahominy Swamp” in 1799.²⁰ Personal property records for that year show that Marshall paid taxes on nine slaves. By 1807, that number had reached sixteen. In 1810, he was taxed on nineteen slaves out of a total of forty recorded on the federal census of

that year. Over the next ten years, the number of taxed slaves rose from twenty-two to twenty-eight in 1820, when the federal census counted a total of thirty-nine. In 1830, Marshall paid taxes on thirty-one slaves, just under half the total of sixty-two reported on the federal census.²¹

As for Fauquier County, the 1810 federal census recorded eight slaves under “John Dawson for Marshall”; in 1820, seventeen slaves were listed under “J Judge Marshall.” As noted above, the 1830 federal census counted forty plus slaves under an overseer’s name and at Marshall’s quarter.²² Marshall appears in the county personal property books as early as 1783 as owner of one taxable slave. That same year, his father, Thomas Marshall, is shown holding twenty-one slaves, including twelve not taxed. Both father and son then disappear from the books, the former moving

to Kentucky in 1785 and the son to Richmond around the same time. From 1806 through 1826, Marshall’s name shows up intermittently in the Fauquier tax records, recorded as paying taxes on slaves ranging in number from a high of thirteen down to three. Marshall’s two oldest sons, Thomas and Jaquelin, first appear as slaveholding taxpayers in 1812, joined by John, Jr., in 1817, James in 1822, and Edward in 1828.²³

The federal census and Virginia personal property records need to be analyzed more closely to obtain a clearer picture of Marshall’s slaveholding as it developed over time, from one slave in 1783 to hundreds owned by the Chief Justice and his five sons in 1830. This is a task future biographers cannot ignore. One question to pursue is how and why Marshall came to own so many more slaves than he was previously known to possess. Did he initially intend to make sizeable investments in this sort of property?

Marshall by age thirty had settled permanently in Richmond and begun to practice law. This suggests a deliberate decision not to depend on slave labor, at least not directly, as the means of building up the family fortunes. The Fairfax lands purchase was undertaken to provide a steady source of income as a landlord. Of particular interest to Marshall was Leeds Manor, situated mostly in his native Fauquier County. At the time of the 1793 purchase contract, Marshall had two sons. A daughter followed in 1795, and then three more sons were born between 1798 and 1805. Marshall hoped his sons would take up professions. He was disappointed when Thomas did not follow him into law. Another son was educated to be a physician. Marshall surely did not anticipate that all five sons would become farmers. Eventually, he set aside a portion of Leeds Manor, as well as the Oak Hill estate inherited from his father—not part of Leeds—for his sons. Against his original anticipation and inclination, Marshall was drawn into deeper engagement with slavery through his farmer



To the Chief Justice’s disappointment, his son Thomas chose to be a farmer and not a lawyer. Marshall passed on the Oak Hill estate he inherited from his father to him. All five sons became farmers, drawing Marshall more deeply into slave-holding.

sons. Conceivably, the slaves belonging to Thomas Marshall's estate in 1784 formed the core group on which the Chief Justice drew to give to his sons as they came of age and married.

Farming land with slave labor on the Chickahominy may not have figured in Marshall's long-term plans as he settled into law practice in Richmond during the 1780s. As with his other lands, he appears to have bought the Chickahominy tract with the intention of selling or leasing. In time he set up a farm and built a small house as a refuge for his wife and as a place for him to engage in the "laborious relaxation" of agriculture.²⁴ Presumably, he acquired additional slaves to work the farm, or perhaps he had a ready supply in the surplus beyond what he needed for his Richmond household. In any event, as time passed, Marshall found himself becoming more deeply entrenched in slavery.

Slavery Jurisprudence

The long discussion of Marshall as a slave owner is but a prelude to the exposé of the "unjust" Justice. In Finkelman's eyes, Marshall's "vast slaveholding," his deep personal investment in slavery, "seems to have affected his jurisprudence" (at p. 48). Finkelman later drops the "seems" and asserts unequivocally that Marshall was so deeply implicated in slavery that it shaped him into a jurist peculiarly hostile to claims for freedom and unwilling to support efforts to suppress the slave trade. Finkelman verges on a crudely reductionist explanation of Marshall's slavery jurisprudence as a reflection of selfish material interests. He also sees racism lurking. "Marshall's most aggressive racism and hostility to free blacks never appeared on the pages of **U.S. Reports** or in a book like Jefferson's **Notes on the State of Virginia**," he writes, "but he carried these ideas to the bench when he heard cases involving slavery" (at p. 51-52).

Marshall surely partook of the racism that permeated white antebellum society north and south. He unreflectingly accepted that blacks were a subordinate or degraded class. Like most white Americans of the time, he did not believe that whites and blacks could live together in freedom and equality. He was alarmed by the growing numbers of free blacks, especially after the Nat Turner uprising in 1831. He publicly supported efforts of the American Colonization Society, of which he was a member, to colonize free blacks in Liberia, though in private he probably thought colonization was a mere palliative. He shared the nearly universal belief among whites that emancipation without removal would expose the nation to a dangerous underclass of free blacks.

In the wake of the Nat Turner episode, Marshall, as chair of the Colonization Society of Virginia, submitted a petition to the Virginia legislature in December 1831 urging that body to provide funds to expedite colonization. To sound the alarm and prompt quick legislative action, the memorial spoke "of the miseries of the condition, and the vices of the life of the free person of colour. The *one* is an anomaly of wretchedness; the *other* a vegetation of sloth, or an activity of mischief and roguery." It went on to say that "half the criminals" tried for larceny in Richmond were "free persons of colour. Their idleness is proverbial . . ." After expressing alarm about their rapidly multiplying numbers, the memorial concludes:

If it be fixed as destiny, that the slave on the day of his subjection loses half his worth, it seems equally certain that the free negro on the day of his emancipation, loses all. And yet this same individual, the pest of a land which gives him only birth, when transported to a seat where his industry may have excitement and object, becomes the active, thriving and happy Colonist of Liberia.²⁵

Shocking as it is to modern ears, this characterization of free blacks was sadly commonplace at the time even among those who sincerely hoped for some sort of general emancipation. The Colonization Society's memorial was one of dozens presented to the legislature, many repeating this harsh language as if following a prescribed text.²⁶ James Madison, who agonized over the contradiction between slavery and the future of his beloved republic, noted that free blacks were "every where regarded as a nuisance, and must really be such as long as they are under the degradation which public sentiment inflicts on them." Even Madison's great admirer, Frances Wright, the Scottish-born social reformer and utopian advocate for emancipation, agreed that free blacks "form the most wretched and consequently the most vicious portion of the black population."²⁷

Although one cannot help but wince at the description of free blacks as idle, prone to mischief and criminality, and as pests, Marshall, like Madison and Wright, seems to treat these characteristics as arising not from their blackness but from their "wretched condition" that reduced them below the level of slaves. When this "pest" is transported to Liberia, "his industry may have excitement and object," and he "becomes the active, thriving and happy Colonist of Liberia." However preposterous, do these comments mark the chief justice as a racist on a par, say, with Jefferson or Taney? From the 1831 memorial with its fateful "pest" remark, Finkelman extrapolates a lifelong racial animosity toward free blacks that predisposed Chief Justice Marshall to rule against slave freedom.²⁸

Having to his satisfaction posited a deep-seated racism and self-interest as a slave-owner as determinants of Marshall's jurisprudence, the author considers some thirty Supreme Court cases dealing with slavery between 1805 and 1830. He divides these into two classes: suits for freedom and cases involving the African slave trade. He identified these cases by computer search, though he was apparently

unaware that this work had already been done and subjected to analysis by legal scholar Leslie Friedman Goldstein, whose 2007 article includes a table conveniently summarizing all the Marshall Court slavery cases and their dispositions. Her careful study shows that the Marshall Court often failed to uphold black freedom, even in cases that presented a legally respectable alternative. This was particularly true, Goldstein says, up until around 1817; after that year, she finds the Court moving "the law in a more pro-liberty direction."²⁹

Finkelman might not dispute Goldstein's conclusions about the overall trend of Marshall Court decisions on slavery. However, his focus is not on the Court as an institution but on the Chief Justice as an individual. If the Court did shift toward freedom, this was not true of Marshall, who "*never*" supported a slave's claim to liberty or punished illegal participation in the slave trade (at p. 5). Although one might quibble with Finkelman's emphatic assertion that no Marshall opinion came down on the side of "freedom," even the Chief Justice's warmest admirers must acknowledge that he "adhered to the law of slavery with a rigor that is painful to observe."³⁰ He resolutely shied away from judicial rulings that could be perceived as challenging the system.

With characteristic prosecutorial zeal, Finkelman impugns Marshall's very integrity as a jurist. It is not only that Marshall hid behind the "mask of the law"—that when claims to freedom clashed with property rights he invariably and timidly invoked the judge's duty to obey the "mandate" of the law rather than moral "feelings."³¹ It was that, in cases dealing with slaves, Marshall ignored or flouted accepted and widely prevailing legal principles and rules. He acted arbitrarily and callously in denying freedom to claimants. Marshall's "proslavery jurisprudence dovetailed with his lifelong, ambitious accumulation of slaves; his hostility to freedom cases reflected his lifelong fear and loathing of free blacks" (at p. 222).

According to Finkelman's exacting standards, there seems to be but one correct outcome in freedom suits. Given that Marshall was enmeshed in a system that sanctioned the legality of slavery and that recognized ownership of human beings as a property right no different in kind from other "sacred" rights of property, could a decision in favor of an owner's title claim and against an enslaved person's claim to freedom meet his test? Each party in a freedom suit has at least a plausible case supported by evidence and authorities. If the ruling goes against the slave petitioner—against the evidence and authorities adduced in support of the petition—does this in itself show bias against slave freedom? Is it possible for a judge in such a system to adjudicate competing claims in a disinterested and impartial way that denies slave freedom? If a decision in favor of freedom could only be accomplished by disregarding established rules of property, what is a judge to do? In a legal system that was so brutally weighted against the rights of black slaves, how do we distinguish between the bias of the law and the bias of the judge? Finkelman gives no indication of taking these questions into account as he castigates Marshall for misreading or flouting law, ignoring relevant precedent, or otherwise refusing to interpret precedent or a statute to free a slave. All is bright and clear; there is no ambiguity or nuance.

The Marshall Court decided thirteen freedom suits. Many of these came up from the U.S. Circuit Court for the District of Columbia. In these cases, the Supreme Court was a highest appellate court applying the laws of Maryland and Virginia in the District's two counties of Columbia and Alexandria. In eight cases, the Court ruled against the petitioning slave.³² With the exception of *Mason v. Matilda* (1827), in which Justice William Johnson spoke for the Court, Chief Justice Marshall gave the opinion denying the claim of freedom. In four decisions against freedom, the Court upheld the lower court.³³ In the other

four cases, the Court reversed the lower court and sent the case back for a new trial. One might ask if eight rulings against freedom, four of which sustained the lower court, constitute a sample large enough to reveal a consistent pattern of bias rather than mere coincidence. If it does show partiality against liberty for slaves and for the property rights of the master, is this result attributable to a law that is inherently biased or to the particular prejudices of Marshall? This brings up the question of who is on trial here—Marshall or the Marshall Court. When the Chief Justice delivers the decision against freedom, he alone bears the full brunt of Finkelman's obloquy. However, when another Justice gives the opinion—for example, Johnson in *Mason v. Matilda*—blame is diffused from the individual to the institution. In this case, it was the "Marshall Court" that once again "snatched" freedom from slaves (at p. 67-68). The Chief Justice, of course, often wrote or delivered the opinion, leaving a large paper trail. Perhaps we need to be reminded that Marshall was but one of seven Justices who decided the case. There is no doubt that he fully subscribed to the opinions he delivered denying freedom. It should also be acknowledged that those judgments, however severe their effects in keeping claimants in bondage, were reached through deliberation and consensus.

Finkelman creates a false picture of a Chief Justice as an autonomous agent, seemingly free to act arbitrarily and in complete disregard of law and precedent to deny freedom. With characteristic confidence, he assures us that Marshall "might easily have upheld" freedom, "chose to read the statute in favor of slavery," "might easily have given" a statute a pro-freedom construction, "should have" rejected an argument as a "nonstarter," "ought to have held" in favor of freedom, "could easily have found an exception to hearsay rules in freedom suits" (at p. 58, 60, 61, 62, 64). In his telling, there are no legal or institutional constraints that might have narrowed judicial discretion. Invariably, he

attributes Marshall's anti-freedom jurisprudence to free and deliberate choice, reflecting "his concerns with the ownership of private property, his persistent acquisition of slaves, and his hostility to the presence of free blacks in his society" (at p. 63). If Marshall's opinions so egregiously and maliciously misread the law, why, except for *Mima Queen v. Hepburn*, did they not provoke outraged dissent? Finkelman appears to believe that the Chief Justice was so dominant or his brethren so craven that he could easily impose his ungenerous and mean-spirited views as the opinion of the Court.

In five cases, the Court upheld freedom.³⁴ "Significantly," writes Finkelman, Marshall did not write the opinion in any of these cases (at p. 68, 80). As the Chief Justice takes the heat for opinions denying freedom, he gets no credit when the Court decides "correctly." In a backhanded way, Finkelman does acknowledge that Marshall's silence in one such case might have signified more than mere acquiescence. "We have no way of knowing whether Marshall agreed with this result," he says of Justice McLean's opinion in *Menard*, "or, having been outvoted on the court, simply acquiesced in the outcome" (at p. 73). Likewise, in Marshall Court decisions that upheld suppression of the African slave trade, the chief justice "remained strangely silent." In a kind of repetitive mantra, Finkelman lets us know that Marshall did not write any of these opinions, usually prefacing his comment with "significantly" or "however." The clear implication is that the Chief Justice either opposed the opinion or that his acquiescence was so tepid that he could not bring himself to write for the Court (at p. 85, 87, 90, 102). In the 1827 sequel to *The Antelope*, Justice Robert Trimble's opinion for the Court "recognized the humanity of the remaining Africans and of their right to be returned to Africa. Significantly, Chief Justice Marshall did not write this opinion." (at p. 101-102). Was this because he did not recognize the "humanity" of these Africans?

In three early freedom cases decided between 1806 and 1812, the Supreme Court reversed circuit court judgments for freedom. Two of them turned on the construction of Maryland and Virginia laws for preventing importation of slaves, each containing a proviso for masters intending to move into the respective states. Finkelman harshly condemns the Chief Justice's rulings that the claiming masters came within the proviso. In the first of these cases, Marshall "might easily have upheld freedom" by adopting the reasoning in other state cases. Only one such case had occurred earlier, however, and none were cited in argument (at p. 56-59). The Chief Justice, joined by the other four Justices present, treated the matter as a straightforward and uncontroversial exercise of statutory construction that was faithful to the "letter" and "spirit" of the law. In the second case, Finkelman baldly accuses Marshall of refusing "to interpret a law to emancipate a slave" (p. 60). The Chief Justice himself admitted that the act's language was ambiguous, conceding that "the one construction or the other may be admitted." But he went on to explain why the Court, after "an attentive consideration of that language," decided as it did. The slave claimant lost his bid for freedom, but this unhappy result came after careful deliberation by the five Justices. All was not lost, however. On a new trial in the circuit court, the slave claimant obtained a verdict in his favor.³⁵

In the third case reversing yet another verdict for freedom, Finkelman blames the outcome on "Marshall's hostility to free blacks and freedom suits." (at p. 60). The slaves in this case were children of a mother who had obtained a verdict for freedom based on descent from a free white woman in England. On the trial of the children's case, the lower court instructed the jury that the verdict for the mother in a case against a different party was "conclusive evidence" on their behalf. In a brief opinion with all seven judges present, Marshall stated for the Court that the verdict

for the mother was not “*conclusive evidence*” in the children’s case because there was “no privity” between the two different persons against whom the freedom claims were filed. Singling out Marshall for particular opprobrium, Finkelman rebukes him for so readily accepting an argument “completely at odds” with “universally accepted” American law. Because of his obsession with property rights, the Chief Justice “was more concerned about the nature of contract law than about the settled law of every slave jurisdiction in the country or the freedom of a handful of African Americans.” He “abused his power to deny liberty” to persons “considered free under the laws of every state in the union.” (at p. 60-62). One wonders why this seemingly egregious departure from settled law provoked no murmur of dissent from Justices Washington, Johnson, Livingston, Todd, Duvall, and Story.

Mima Queen v. Hepburn was the Marshall Court’s most well-known freedom suit. That the Court actually affirmed the lower court’s denial of freedom in this case perhaps only slightly mitigates the censure directed at that opinion for disallowing hearsay evidence to prove the ancestry of a slave claimant. Mima (Mina) Queen based her claim on descent from Mary Queen, a mulatto, who was alleged to be a free woman. Marshall for the Court found against this claim on the principle that “*hearsay evidence* is incompetent to establish any *specific* fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.”³⁶ Mostly silent during twenty-five years on the bench, Duvall uttered a brief but pointed dissent that has gained him a measure of acclaim among students of the Court. The Justice had been a witness on behalf of Queen at the trial below in 1810.³⁷ In his dissent, he appeared to agree with the lower court’s exclusion of “double hearsay” (hearsay of hearsay): “The Court below admitted hearsay evidence to prove the freedom of the ancestor from whom the petitioners claim, but refused to admit hearsay of hearsay. This Court has decided that

hearsay evidence is not admissible to prove that the ancestor from whom they claim was free. From this opinion I dissent.” It is not clear whether his actual vote was for or against the lower court’s ruling. In any event, Duvall’s objection was to the exclusion of all hearsay evidence, which he contended was contrary to Maryland law and practice. “It will be universally admitted,” he wrote, “that the right to freedom is more important than the right of property,” adding that “people of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection.”³⁸ These words constitute a powerful rebuke to the majority opinion. Many have since wondered why the Court did not adopt Duvall’s position, so accordant with modern sensibilities.

Marshall spoke on behalf of Washington, Johnson, Livingston, and Story. Perhaps knowing what Duvall was about to say, the Chief Justice acknowledged that in deciding the case, the Court had to subordinate individual “feelings” that might be “interested on the part of a person claiming freedom.” If this indicated some discomfort, the opinion otherwise betrayed no hint of doubt that it stated the law correctly and rested on good authority. To Finkelman, *Mima Queen* was just another illustration of Marshall’s “callous attitude toward black freedom,” which in turn derived from ownership of “hundreds” of enslaved persons. (at p. 62, 65). Kent Newmyer agrees that *Mima Queen* was “a harsh decision and difficult not to judge harshly.” The case “put Marshall to the test,” he writes, suggesting that he failed the test by expounding the law in a way that so clearly favored the property rights of the master. The failure did not spring from the Chief Justice’s personal animus against freedom, Newmyer says; rather, it lay in choosing “objective law” and reading it in a way that admitted no exceptions in favor of a freedom claim in this case. He is also careful to point out that all but Duvall subscribed to the Chief Justice’s opinion.³⁹

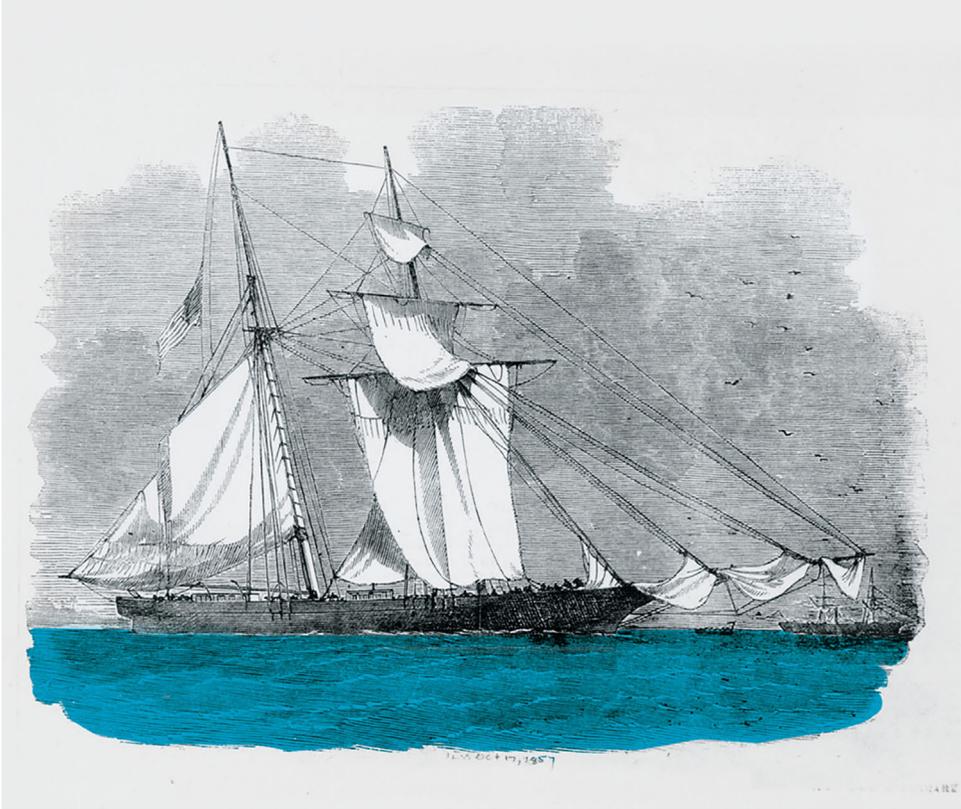
Finkelman considers some sixteen Marshall Court opinions pertaining to the slave trade. In several of these, it is difficult to say whether the decision fell clearly on one side or the other of suppressing or not suppressing the trade. Marshall wrote the opinion in six cases, in all of which Finkelman, employing his usual “might have” or “could certainly have,” portrays the Chief Justice as having virtually a free hand to “strike a blow against the African slave trade” (a phrase that appears twice in the same paragraph) but instead “chose to protect slave traders” (at p. 80, 81). Anyone who reads these opinions—including one that was just one unsigned sentence—might have difficulty detecting partiality toward slave traders unless predisposed to see it. Nor is there persuasive evidence of proslavery bias in the Court’s reversals of two decrees forfeiting vessels for illegal trading. The reversals were for imperfectly drawn or flawed libels. The Court remanded them for new trials on amended libels. In one, the Court upheld the forfeiture on the amended libel—in an opinion, Finkelman is quick to remind us, not by Marshall. In the other amended libel, the case did not come up again to the Supreme Court, perhaps indicating that the vessel owners did not contest a forfeiture decree.⁴⁰ Finkelman does rightly fault Marshall in these cases for being too rigid and technical, in contrast with his great opinions in constitutional law.

Finkelman devotes his greatest attention to *The Antelope* (1825), a case that has been closely studied and in which Marshall’s opinion in particular has been subjected to critical scrutiny.⁴¹ Finkelman predictably reproaches Marshall for refusing the opportunity to outlaw the slave trade as contrary to natural law, the law of nations, American piracy laws, and precedents of his own court. Among these precedents was *The Josefa Segunda*, in which the Supreme Court in 1820 affirmed a decree forfeiting a cargo of slaves claimed by Spanish owners.⁴² Finkelman accuses Marshall of gratuitously ignoring a

precedent (“not a decision he had written”) that he could have applied against the Spanish claimants in *The Antelope* (at p. 96). If this precedent was so on point, why was it not cited in argument by counsel for the Africans, particularly by William Wirt, who had won the 1820 case? Indeed, the only citation of this case was by counsel for the claimants.⁴³

“That [the slave trade] is contrary to the law of nature will scarcely be denied,” wrote Marshall in *The Antelope*.⁴⁴ Finkelman draws an unfavorable and facile contrast between Marshall’s use of natural law to support property and contractual rights while he “emphatically rejected the legitimacy of using natural law to decide” this case (at p. 52, 97-98). The Chief Justice, particularly in *Ogden v. Saunders* (1827), did appeal to natural law, but this was in support of an argument that the Constitution embraced a natural-law meaning of the obligation of contract. He decided the case on the “positive” written law of the Constitution. In *The Antelope*, he could not find any positive law such as an international compact to declare the slave trade illegal. Natural law was not sufficient by itself to interdict that trade.

In *The Antelope*, Chief Justice Marshall did have “an element of choice,” as Newmyer points out, but he stubbornly resisted the temptation to make a ringing pronouncement that the slave trade was contrary to the law of nations. To do so would be to exceed the bounds of judicial duty and competence as he perceived it. He would not allow moral “feelings” to seduce him “from the path of duty” and would “obey the mandate of the law.” He truly believed, says Newmyer, “that it was possible to separate morals from law.” His deeply felt constraints on judicial discretion to act in this case cannot be dismissed as hypocritical, as if they were merely cover for ingrained proslavery views. “The more tragic truth,” writes Newmyer, “is that he did not have to abandon his legal objectivity to uphold slavery and the slave trade.”⁴⁵



The United States captured more than 250 captive Africans aboard the slave ship *The Antelope* in 1820. The legal case on the fate of the slaves lasted for seven years. Finkelman argues that in writing his opinion for the Supreme Court Chief Justice Marshall passed on an opportunity to pronounce the slave trade contrary to the law of nations.

This comment on *The Antelope* may well stand as the appropriate judgment on the Marshall Court's slavery jurisprudence. Neither absolving nor condemning, Newmyer holds the "great chief justice" to proper account by assessing his actions within multiple layers of context, by doing the historian's job of defining the spaces within which his subject could realistically act. His critique, grounded in inquiry that seeks to understand and explain, is far more persuasive than Finkelman's ex parte indictment. The author of **Supreme Injustice** ascribes determinative influence to Marshall's "vast slaveholding," a fact that apparently made an even greater impression because he was the first to uncover the full extent of the Chief Justice's slave ownership. This revelation, indeed, looms so large that it appears to have led Finkelman to forsake scholarly caution, to have decided early on that Marshall must have

been an "unjust justice" and then to have assembled and laid out the evidence to prove this charge. He allowed the conclusion to drive the presentation and interpretation of the evidence.

Author's note: Before publication, Professor Finkelman sent me a late draft of his book and invited my comments. I complied with extensive dissenting remarks. He in turn accorded me a friendly, even fulsome, acknowledgment (at p. 265-266).

ENDNOTES

¹ Paul Finkelman, **Slavery and the Founders: Race and Liberty in the Age of Jefferson** (Armonk, NY: M.E. Sharpe, 2014), at p. ix.

² *Ibid.*, at p. 193.

³ *Ibid.*, at p. x.

⁴ John T. Noonan, Jr., **The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James**

Monroe and John Quincy Adams (Berkeley: University of California Press, 1977).

⁵ Leslie Friedman Goldstein has compiled a comprehensive list of all the Marshall Court slavery cases in “Slavery and the Marshall Court: Preventing ‘Oppressions of the Minor Party?’” *Maryland Law Review* 67 (2007): 166-199.

⁶ Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin), 4 vols., 1916-1919.

⁷ Irwin S. Rhodes, *The Papers of John Marshall: A Descriptive Calendar* (Norman: University of Oklahoma Press, 2 vols., 1969).

⁸ Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996), at p. 162.

⁹ R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), at pp. 414-416.

¹⁰ Frances Howell Rudko, “Pause at the Rubicon, John Marshall and Emancipation: Reparations in the Early National Period?” *John Marshall Law Review* 35 (2001): 75, 77, 79. The latest biography, Joel Richard Paul, *Without Precedent: Chief Justice John Marshall and His Times* (New York: Riverhead Books, 2018), at p. 46, relies on Rudko’s numbers—as supplied by Rhodes.

¹¹ Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), at p. 164.

¹² George Washington to Alexander Spotswood, Nov. 23, 1794 (The Papers of George Washington Digital Edition. Charlottesville: University of Virginia Press, Rotunda, 2008. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/GEWN-05-17-02-0136> [accessed 31 Jul 2018]).

¹³ John Marshall to Richard Peters, 12 Oct. 1815 (The Papers of John Marshall Digital Edition, Charles Hobson, editor. Charlottesville: University of Virginia Press, Rotunda, 2014 [Hereinafter Papers of John Marshall Digital Edition]. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-08-02-0025> [accessed 31 Jul 2018]). *See also* Marshall to Mary W. Marshall, 14 Feb. 1817 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-08-02-0045> [accessed 14 Aug 2018]); Marshall to James Monroe, 25 June 1812 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-07-02-0066> [accessed 14 Aug 2018]).

¹⁴ Marshall to James Rawlings, 25 July 1829 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-11-02-0116> [accessed 31 Jul 2018]).

¹⁵ Marshall to Martin P. Marshall, 7 Apr. 1828 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/>

[JNML-01-11-03-0001-0002](http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-11-03-0001-0002) [accessed 31 Jul 2018]). Marshall to James K. Marshall, c. 21 Dec. 1828 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-11-02-0079> [accessed 31 Jul 2018]).

Revoked Will and Codicils, 12 April 1827–17 August 1830 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-11-02-0003> [accessed 31 Jul 2018]).

¹⁶ Marshall to Lafayette, 26 Aug. 1825 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-10-02-0074> [accessed 31 Jul 2018]).

¹⁷ Will and Codicils, 9 April 1832–3 July 1835 (Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-12-02-0084> [accessed 31 Jul 2018]).

¹⁸ Newmyer, *Marshall*, at p. 415, quoting Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill, University of North Carolina Press, 1996, at p. 100).

¹⁹ Marshall to James K. Marshall, 12 Apr. 1834, in Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-12-02-0218> [accessed 31 Jul 2018]; Marshall to James K. Marshall, 19 May 1834, in *Ibid.* Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-12-02-0226> [accessed 31 Jul 2018]).

²⁰ Rhodes, *Calendar of Marshall Papers*, Vol 1, at pp. 65-68, 374-375.

²¹ Personal Property Tax Records for Henrico County, microfilm reels 171, 172, Library of Virginia; 1810; Census Place: Henrico, Virginia; Roll: 69; Page: 1004; Image: 00260; Family History Library Film: 0181429; 1820 U S Census; Census Place: Henrico, Virginia; Page: 231; NARA Roll: M33_132; Image: 206 1830; Census Place: Henrico, Virginia; Series: M19; Roll: 195; Page: 326; Family History Library Film: 0029674.

²² 1810; Census Place: *Fauquier, Virginia*; Roll: 68; Page: 235; Image: 00455; Family History Library Film: 0181428; 1820 U S Census; Census Place: *Fauquier, Virginia*; Page: 77; NARA Roll: M33_136; Image: 92; 1830 U S Census; Census Place: *Fauquier, Virginia*; Series M19; Roll: 194; Page: 473; Family History Library Film: 0029673; 1830 U S Census; Census Place: *Fauquier, Virginia*; Series M19; Roll: 194; Page: 470; Family History Library Film: 0029673.

²³ Personal Property Tax Records for Fauquier County, microfilm reels 110, 111, 112, 113, Library of Virginia.

²⁴ Marshall to James Monroe, 25 June 1812, in The Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/JNML-01-07-02-0066> [accessed 01 Aug 2018]).

²⁵ Memorial, 18 Dec. 1831, in The Papers of John Marshall Digital Edition. Canonic URL: <http://rotunda.upress.virginia.edu.proxy.wm.edu/founders/>

upress.virginia.edu.proxy.wm.edu/founders/JNML-01-12-02-0064 [accessed 01 Aug 2018]).

²⁶ Eva Sheppard Wolf, **Race and Liberty in the New Nation: Emancipation in Virginia from the Revolution to Nat Turner's Rebellion** (Baton Rouge: Louisiana State University Press, 2006), at pp. 242-247.

²⁷ As quoted in Drew R. McCoy, **The Last of the Founders: James Madison and the Republican Legacy** (New York: Cambridge University Press, 1989), at p. 278, 288.

²⁸ In a brief aside, he attempts to reinforce the notion of Marshall as a racist by a gross misreading of Marshall's Indian cases (at p. 5, 108-9, 227 n. 6, 237 n. 47).

²⁹ Goldstein, "Slavery and the Marshall Court," 179.

³⁰ Newmyer, **Marshall**, at p. 434

³¹ John T. Noonan, Jr., **Persons and Masks of the Law** (New York: Farrar, Straus & Giroux, 1976); Newmyer, **Marshall**, at pp. 432-433, quoting Marshall's opinion in *The Antelope*.

³² *Scott v. Negro London*, 3 Cranch (7 U.S.) 324 (1806); *Scott v. Negro Ben*, 6 Cranch (10 U.S.) 3 (1810); *Wood v. Davis*, 7 Cranch (11 U.S.) 271 (1812); *Mima Queen v. Hepburn*, 7 Cranch (11 U.S.) 290 (1813); *Negress Sally Henry v. Ball*, 1 Wheat. (14 U.S.) 1 (1816); *Negro John Davis v. Wood*, 1 Wheat. (14 U.S.) 6 (1816); *Mason v. Matilda*, 12 Wheat. (25 U.S.) 590 (1827); *Lagrange v. Chouteau*, 4 Pet. (29 U.S.) 287 (1830).

³³ *Mima Queen v. Hepburn* (1813), *Negress Sally Henry v. Ball* (1816), *Negro John Davis v. Wood* (1816), and *Lagrange v. Chouteau* (1830).

³⁴ *Le Grand v. Darnall*, 2 Pet. (27 U.S.) 664 (1829); *Menard v. Aspasia*, 5 Pet. (30 U.S.) 505 (1831); *Lee v. Lee*, 8 Pet. (33 U.S.) 44 (1834); *McCutchen v. Marshall*, 8 Pet. (33 U.S.) 220 (1834); *Fenwick v. Chapman*, 9 Pet. (34 U.S.) 461 (1835). Finkelman also cites *Wallingsford*

v. Allen, 10 Pet. (35 U.S.) 583 (1836), decided after Marshall's death.

³⁵ Jury Verdict, June 14, 1811, *Ben v. Sabret Scott*, Minutes of the U.S. Circuit Court for the District of Columbia, 1801-1863. In *O Say Can You See: Early Washington, D.C., Law & Family*, edited by William G. Thomas III, et al. University of Nebraska-Lincoln. Accessed August 1, 2018. <http://earlywashingtondc.org/doc/oscys.mb.0001.009>.

The case papers and records of the U.S. Circuit Court for the District of Columbia are now available online at *O Say Can You See: Early Washington, D.C., Law & Family*, a website established in 2015, too late for Finkelman's use. The researchers who created this site provide much useful information about the cases and the parties, lawyers, and judges who participated in them. We learn, for example, that the correct names of the claimants in *Scott v. Negro London* and in *Mima Queen v. Hepburn* were "Loudon" and "Mina."

³⁶ *Mima Queen v. Hepburn*, 7 Cranch 295.

³⁷ Minutes of the U.S. Circuit Court for the District of Columbia, 1801-1863, June 26, 1810, in *O Say Can You See*.

³⁸ *Mima Queen v. Hepburn*, 7 Cranch 298, 298-299.

³⁹ Newmyer, **Marshall**, at pp. 426-428.

⁴⁰ *Brig Caroline v. U.S.*, 7 Cranch (11 U.S.) 496 (1813); *The Mary Ann*, 8 Wheat. (21 U.S.) 380 (1823); *The Emily and The Caroline*, 9 Wheat. (22 U.S.) 381 (1824).

⁴¹ *The Antelope*, 10 Wheat. (23 U.S.) 66 (1825); Noonan, *The Antelope*, 111-117.

⁴² *The Josefa Segunda*, 5 Wheat. (18 U.S.) 338 (1820).

⁴³ *The Antelope*, 10 Wheat. (23 U.S.) 100.

⁴⁴ *The Antelope*, 10 Wheat. (23 U.S.) 120.

⁴⁵ Newmyer, **Marshall**, at p. 429, 434.

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Illustrations

- Pages 212–215, Collection of the Supreme Court of the United States.
- Page 220, Photo by Amanda Reynolds, Library of Congress.
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