

Editorial Foreword

Melvin I. Urofsky

With this issue of the *Journal of Supreme Court History*, a new board of editors takes over. Our tasks are several. First, we must maintain the high quality of the *Journal* that we inherited from the former board led by its chair, Michael H. Cardozo. Second, we must meet the expectations of the Society's membership for articles that are interesting and intellectually stimulating. Third, we have been charged to make the *Journal* attractive to the academic community as well, yet at the same time not converting it into still another law review.

These are difficult yet exciting challenges, and we hope that this issue shows we are taking those tasks seriously; the reaction of our readers and colleagues will tell us whether we are succeeding.

To achieve these goals we are instituting some new policies. First and most important, this will be a journal of original contributions. The greatly expanded interest in the Supreme Court by historians, political scientists and legal scholars means that there are many more people working in this area now than there were a decade ago. For an editor, that means a greater range of writers and topics to choose from. In this issue alone we have articles dealing with judicial philosophy, biography, and the appointment process, and our authors include people from a variety of disciplines as well as in private legal practice. The volume of new material may well make it possible for us to expand to two issues a year in the foreseeable future.

We are also instituting two new departments, as well as continuing an older one. D. Grier Stephenson, Jr., will continue to survey the literature on the Court in "The Judicial Bookshelf." In addition, we will have a "think piece" by a prominent scholar that will deal in general with some of the larger issues and problems that one confronts when writing about the country's highest tribunal. Our first such essay is by Professor Mark Tushnet of Georgetown, one of the nation's leading authorities on constitutional law.

The second department will be called "Great Cases Revisited." Often over time the reputation of particular decisions changes; what may appear important to one generation may appear less so to another. Sometimes the benefits of passing time allow scholars to make more careful analyses, or escape the political and emotional conditions that surrounded the case. Professor Michal Belknap has written the inaugural essay in this department, in which he goes back and takes another look at a case he wrote about a number of years ago, *Dennis V. United States* (1951).

We hope you, our readers, will enjoy these new departments and find them interesting, and we hope that if you are among the many people writing about our Supreme Court, you will consider us as a vehicle for displaying the fruits of your labor.

A Tribute to Justice Byron R. White

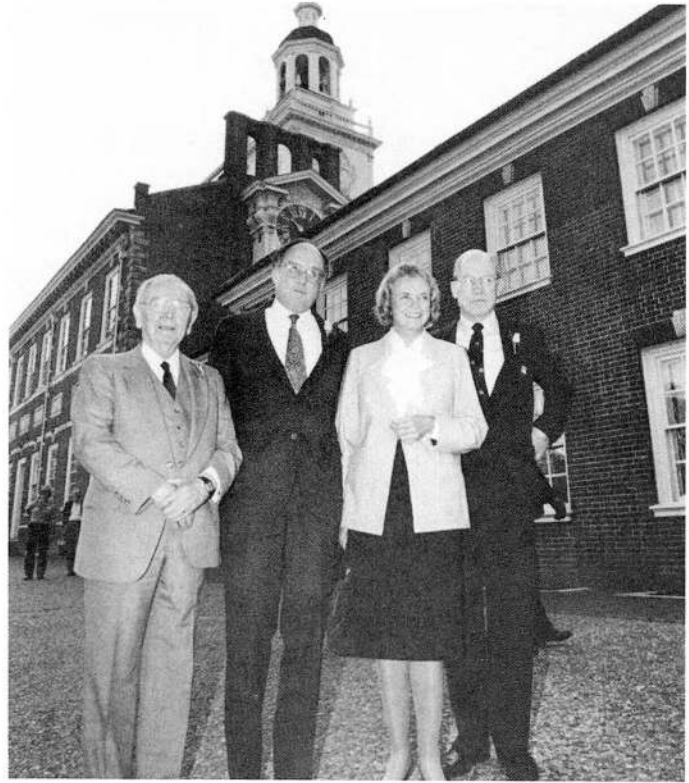
William H. Rehnquist

When Byron R. White first took his seat on the Supreme Court on April 16, 1962, he was one of the youngest appointments to the Court this century, and the first former Supreme Court law clerk to become a Justice.¹ In the course of his thirty-one year tenure on the Court, he served with three Chief Justices and twenty Associate Justices during the administration of eight Presidents. By the time he stepped down from the Bench on June 28, 1993, he had authored more than 450 majority opinions for the Court.

Since the announcement of his retirement, journalists, scholars, and commentators have analyzed the White personality, jurisprudence, and legacy. Some have described Byron White, for example, as a “very hard, tough-minded, well-reasoned” jurist. Others portray him as “non-doctrinaire”—a jurist without ideology or social agenda who decides each case narrowly and on its own merits. I think these views have a good deal of truth in them. As the members of the Court wrote to Justice White on the occasion of his retirement: “. . . you have exhibited a firm resolve not to be classified in any one doctrinal pigeonhole. The important decisions which you have authored for the Court in virtually every field of law will re-

main as a testament to your years of service here.”

The First Amendment is just one area of the law in which Justice White’s opinions for the Court have changed the legal landscape. These opinions also demonstrate how his judicial work



Chief Justice William H. Rehnquist with Justices William J. Brennan, Jr., Sandra Day O’Connor, and Byron R. White at the Old City Hall in Philadelphia, Pennsylvania. Chief Justice Rehnquist and Justice White served together on the Supreme Court for twenty-one years. For the final three years, Justice White was the senior Associate Justice, sitting at the Chief Justice’s right on the Bench.



Senator Barry Goldwater at a campaign rally during his 1964 presidential campaign. In *Red Lion Broadcasting Co.*, Justice White wrote the opinion for the majority upholding the Federal Communications Commission fairness doctrine. The case arose after radio station WGCB refused to allow Fred Cook, author of a book that was highly critical of Senator Goldwater, time to respond to comments made by Reverend Billy James Hargis.

defies easy categorization. In the well-known *Red Lion Broadcasting Co.*² case, decided in 1969, Justice White held for the majority that Federal Communications Commission regulations implementing the “fairness doctrine” did not violate the First Amendment. Three years later, in *Branzburg v. Hayes*,³ Justice White wrote the Court’s opinion determining that the First Amendment did not afford journalists a testimonial privilege against appearing before a grand jury to answer questions relevant to criminal investigations. In 1979, Justice White authored the opinion in *Herbert v. Lando*⁴ for the Court, holding the First Amendment did not bar a plaintiff seeking to prove actual malice in a defamation action from inquiring into the editorial process and the publisher’s state of mind.

In 1981, Justice White’s majority opinion in *Borough of Mount Ephraim*⁵ held that a local unit of government could not exclude all commercial live entertainment from its boundaries without violating the First Amendment. One year later, in

New York v. Ferber,⁶ Justice White wrote the opinion for the Court holding that child pornography—even though not obscene—is not entitled to First Amendment protection as free speech. In *Hazelwood School District v. Kuhlmeier*,⁷ Justice White’s majority opinion ruled that the First Amendment does not protect student speech inconsistent with a school’s basic educational mission. In 1991, writing for the Court in *Cohen v. Cowles Media Co.*,⁸ Justice White held that the First Amendment does not prohibit an anonymous source from recovering damages for a publisher’s breach of a promise of confidentiality.

Justice White authored countless other landmark opinions in countless fields of law—constitutional and otherwise. That no “Byron R. White School of Jurisprudence” remains behind only serves to underscore his unique influence on the Court during the years of his lengthy service. Those of us who daily served with him likely have a greater appreciation for his contributions than

can be obtained by simply reading his opinions or tallying his votes in cases decided during his tenure. Given the force of his powerful intellect, the breadth of his experience, and his institutional memory, Justice White consistently played a major role in the Court's discussion of cases at its weekly conferences. His comments there reflected not only his meticulous preparation and rigorous understanding of the Court precedent bearing on the question, but also pithily expressed

his sense of the practical effect of a given decision. Justice White's views carried great weight with the Conference for those reasons.

Byron White came as close as any of his colleagues whom I knew to meriting Matthew Arnold's encomium to Sophocles: he "saw life steadily, and saw it whole."⁹ His counsel will be missed in the Courtroom, halls and Conference Room of the Court he revered and served so long and well.

Endnotes

¹ Byron White clerked for Chief Justice Fred M. Vinson during the 1946-47 Supreme Court Term.

² *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

³ 408 U.S. 665 (1972).

⁴ 441 U.S. 153 (1979).

⁵ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61

(1981).

⁶ 458 U.S. 747 (1982).

⁷ 484 U.S. 260 (1988).

⁸ 111 S.Ct. 2513 (1991).

⁹ Matthew Arnold, *To A Friend*, in *The Poems of Matthew Arnold* 110, line 12 (Miriam Allott ed., 2d Ed. 1979) (1849).

On Greatness and Constitutional Vision: Justice Byron R. White

Rex E. Lee

One of the reporters who interviewed me when Justice Byron R. White announced his retirement asked whether I thought he was one of history's "good" Supreme Court Justices or one of the "greats." I answered great.

The reporter responded that that was what he would expect me to say, but pointed out that most people reserve the adjective "great" for those Justices who come to the Court with certain

identifiable doctrines favored by them, who then develop and adhere consistently to these doctrines throughout their careers, and who then live to see them (or at least some of them) become settled law partly (and in some cases largely) through their efforts. This pattern, the reporter said, has not described Justice White.

In one sense, the reporter had a point. It has been difficult to identify Byron White with any



Rex E. Lee clerked for Justice Byron R. White the first term White was on the Court. This photo was taken in White's chambers in the Supreme Court Building.

particular policy or viewpoint. As Professor Leon Friedman noted some fifteen years ago, “[b]ecause he has not aligned himself at either end of the spectrum of the Court, it is difficult to define his work or his judicial philosophy.”¹ A more recent (and decidedly less sympathetic) observer has asserted that Justice White appears “uninterested in articulating a constitutional vision.”² But, unlike the reporter (and the last quoted commentator), I believe that Justice White’s approach to constitutional adjudication neither disqualifies him for the adjective “great” nor establishes a lack of “constitutional vision.”³ On the contrary, Byron White’s constant and committed dedication to case-by-case adjudication, in the grand common law tradition of American constitutional law, both secures his claim to “greatness” and evidences his over-arching “constitutional vision.”

It is an article of faith among many that an absolute prerequisite to judicial greatness is a firm

commitment to “[a] persuasive judicial philosophy.”⁴ And, not only must one have a persuasive philosophy (meaning, I suppose, a personal commitment to pre-conceived notions of “liberty,” or “fairness” or “justice”), truly great jurists—so this line of reasoning goes—must be able to “project their philosophy from case to case.”⁵ I believe this measure of judicial greatness is seriously flawed.

The conscious development of policy over time through the exercise of one’s office is a function that we normally, and quite properly, associate with the members of the political branches. They are properly elected, responsive to the will of the people through periodic reelection, and their job is to make policy. The role of the judge, by contrast, should be to decide cases. To be sure, judges make both law and policy, but they do it in the context of deciding individual cases. The judicial authority granted in Article III is limited, by its own terms, to deciding cases and controversies.⁶ It follows, I believe, that the only legitimate way that policy should result from judicial minds and pens is

through the exercise of that case-by-case, decisional authority.

Policy development, in short, should not be *the* primary judicial objective. On the contrary, the judge’s forging of policy should be incidental to the decision of actual cases, progressing as necessity and experience mandate. In my view, that is the legitimate standard for assessing the “greatness” of any federal judge. And, evaluated by that standard, Justice White belongs with the best.

Byron White has been acutely aware of the respective competencies of the legislative and judicial branches.⁷ Indeed, at his confirmation hearing, Justice White testified that the “legislative power is not vested in the Supreme Court,”

and he asserted that the “major instrument for changing the laws in this country is the Congress of the United States.”⁸ This fundamental commitment to a limited judicial role, I believe, is the foundation for the Justice’s “preference for case-by-case adjudication,” as well as for his

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“aversion to large statements, to assertions of overriding philosophy.”⁹

Nevertheless, by the time of his retirement, after more than three decades of deciding cases, we know his views on abortion,¹⁰ the three-part *Lemon*¹¹ test for deciding establishment of religion cases,¹² whether *Miranda v. Arizona*¹³ was properly decided,¹⁴ and other important constitutional and law enforcement issues. But this has come about not because he defined a “philosophy” and then set about adhering to it. Rather, Justice White’s views have evolved over time as he exercised the only authority that the Constitution vests in Article III judges: to decide cases and controversies.

Justice White’s approach to the judicial role, moreover, has not resulted—as some have charged—in a jurisprudence that lacks “consistency.”¹⁵ It has become almost commonplace for certain commentators to bemoan that Justice White, a supposed “liberal” at the time of his appointment, has often joined “conservative” opinions.¹⁶ Building upon this observation, others have claimed that the Justice has reached



On January 29, 1961, Byron R. White prepares to be sworn in as Deputy Attorney General by Chief Justice Earl Warren as Jacqueline Kennedy, Vice President Lyndon Johnson and President John F. Kennedy look on. A year later, President Kennedy nominated White to the Supreme Court.

“inconsistent” results in individual cases.¹⁷ But, unlike many others, I do not believe that Byron White has been mercurial either in his philosophy or results.

To begin with, I am not at all certain that Byron White has, in fact, deviated from the supposed “liberalism” of the man who appointed him: John F. Kennedy. One can question, for example, whether John F. Kennedy himself was really as “liberal” as most people assume.¹⁸ Justice White’s jurisprudence, in fact, has been described as a “snapshot” of the Kennedy era: “pro-labor, pro-civil rights (but not affirmative action), strong on national security and very anti-crime.”¹⁹ If this description is accurate (as I believe it is), Byron White’s supposed “conservatism” may result more from shifts in the “liberal agenda” than from any discernible movement on the part of the Justice himself.²⁰

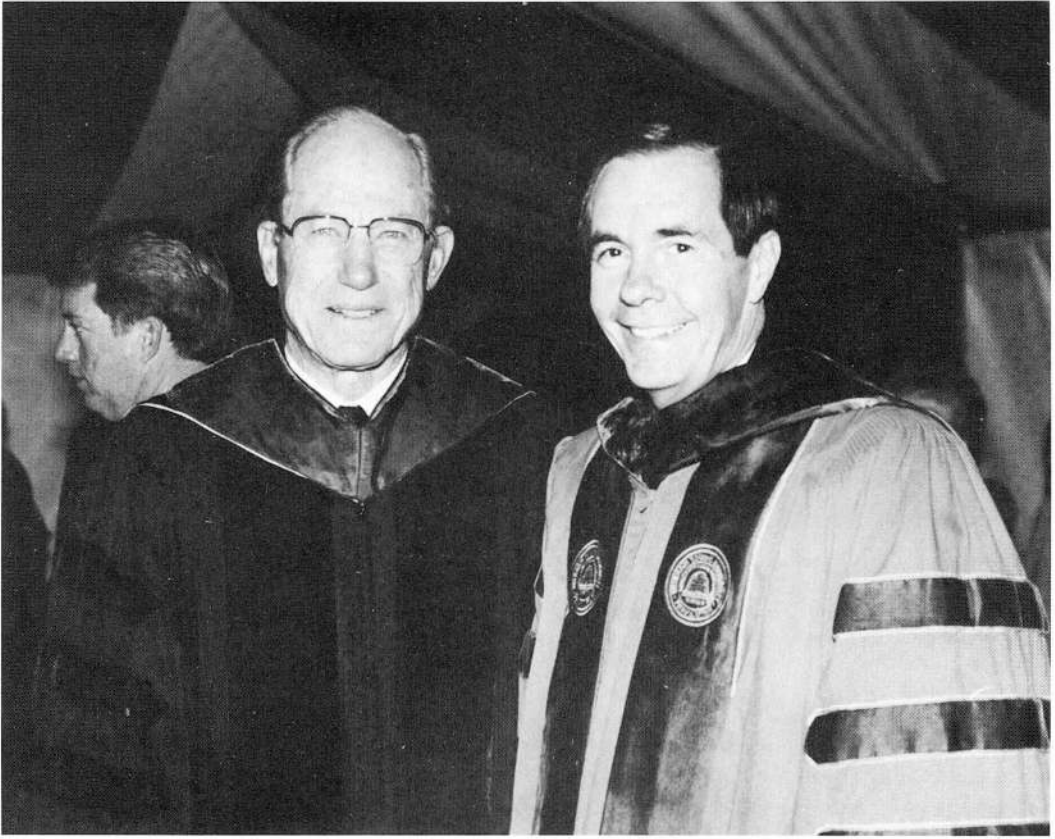
But, more important than any supposed lack of “consistency” with “liberalism” is the charge that Justice White has lacked “consistency” in deciding cases. On that issue, I have to ask, consistency with what? Precisely because the job of the Article III judge is to decide cases and controversies, it would be a mistake for a federal judge to fit himself or herself into a liberal or conservative pigeonhole and then decide cases on

that basis. Thus, the consistency that really counts is consistency with one’s Article III obligation, and not consistent performance as an ideologue. And, on this score, no one has evidenced more devotion to the careful decision of individual cases than Byron White.

A sampling of Justice White’s views regarding constitutional and legislative prohibitions on racial discrimination is illustrative. Early in his career, Justice White joined opinions which read the Fourteenth Amendment broadly to prohibit state practices (such as poll taxes) that limited access to the voting booth.²¹ He also joined opinions which greatly expanded congressional authority to regulate private, invidious discrimination,²² and recognized Congress’ plenary power to enforce the Equal Protection Clause.²³ Nevertheless, Justice White also wrote the Court’s opinion in *Washington v. Davis*,²⁴ which limited the reach of the Fourteenth Amendment to “purposeful” discrimination, and joined the opinion in *City of Richmond v. J.A. Croson Co.*,²⁵ which subjected a municipal ordinance affording class-based relief to minority businesses to “strict scrutiny.”

Are these positions consistent? Why would a Justice who voted to strike down a poll tax thereafter conclude that the Equal Protection Clause reaches only “purposeful” discrimination? Why would a Justice who would accord Congress substantial latitude in remedying racial discrimination nevertheless subject state-created class-based remedies to strict scrutiny? Are these results, as some have charged, merely the product of an *ad hoc* approach to the decision of constitutional questions that is pragmatic but ultimately unsound? I believe that there are plausible answers to these (and similar) queries, and that the decisions noted above are not only consistent, but display Justice White’s profound constitutional vision.

To begin with, Justice White’s voting record—from invalidating the poll tax²⁶ to *Washington v. Davis*—is consistent with the central command of the Equal Protection Clause: no “person” shall be denied “the equal protection of the laws.”²⁷ Indeed, if proof of a disproportionate impact—*i.e.*, the fact that a regulatory scheme bears more heavily upon blacks than whites, or males than females—were sufficient to establish a constitutional violation, the focus of the Equal Protection Clause would undergo a dramatic shift. “The



Justice Byron R. White spoke at the Inauguration of his former clerk Rex E. Lee as President of Brigham Young University on October 27, 1989.

central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race," wrote Justice White.²⁸ But, if disproportionate impact alone established a constitutional violation, government could never act *without* acting on the basis of race. Virtually every governmental decision—from taxation, to zoning, to usury rates—would become enmeshed in racial politics, resulting in a shift in focus from constitutional protection of the "person" to protection of the person's "class."²⁹

There is, furthermore, no inconsistency between the Justice White who would accord Congress substantial latitude to enforce the Fourteenth Amendment³⁰ and the Justice White who would subject state-created racial classifications to strict scrutiny.³¹ Nothing in *Croson* cuts back on congressional authority to implement class-based remedies. Indeed, one year after joining *Croson*, Justice White joined

the majority opinion in *Metro Broadcasting, Inc. v. FCC*,³² where the Court held that class-based remedies enacted by Congress need not pass strict scrutiny but, instead, will be tested under a substantially more deferential standard of review.³³ His apparent conclusion, *i.e.*, that state-created racial classifications are highly suspicious and therefore require rigorous justification³⁴ while similar federal actions do not, is hardly "inconsistent" or "unprincipled." On the contrary, it represents the modern embodiment of federal theory reaching back at least as far as the *Federalist Papers*: political action at the national level is less subject to abuse than similar action at the local level.³⁵

Justice White, finally, has refrained from inflexible, doctrinaire stands on the issues raised by the foregoing cases. Thus, while he insists upon proof of "purposeful" discrimination, he will accept—as indicative of "purpose"—evidence that some members of the Court have suggested

amounts to little more than a disguised “disproportionate impact” analysis.³⁶ Justice White’s record, in short, confirms the observation of one of his former clerks that he is “‘a lawyer’s lawyer, and . . . sees the cases as law cases, not as matters of social policy.’”³⁷

The results capsulized above are not the result of accident, nor do they evidence a lack of “vision.”³⁸ On the contrary, they confirm that Byron White is the most consistent member of the Supreme Court in the only respect in which consistency really matters: fidelity to the constitutional duty to decide individual cases in accordance with the facts and applicable law. Presented with discrete controversies, Justice White has concluded that there *are* limits beyond which the Fourteenth Amendment may come to protect a “class” rather than a “person,” and that there *is* a difference between congressional action dealing with race and similar action at the local level. And, while scholars and others may quibble with how Justice White has drawn these particular lines, no one can doubt that he has a clear vision of what he has done: decide cases.

At my inauguration as President of Brigham Young University, Justice White made the following remarks:

[O]ur leaders in the government and

the private sectors . . . must not let the country be paralyzed by the clash of special interest groups that may seem unwilling to recognize what must necessarily be done, or indeed what must be tried, once such a course becomes reasonably clear.³⁹

I believe that the above observation is the ultimate answer to critics who charge that Byron White lacks “greatness” or “constitutional vision.” He has not been paralyzed by the “clash of special interest groups,” and, instead, has had the courage—in the course of deciding individual cases—to do “what must necessarily be done, or indeed what must be tried,” once that course became “reasonably clear.”

As Leon Friedman once wrote, Justice White approaches each case without preconceived ideas and with a desire to examine the individual problem in that case rather than deducting the result from set principles. His approach makes his work more difficult to analyze but it makes for greater justice in the cases coming before our highest Court.⁴⁰

No grander claim to greatness or to constitutional vision could be made by any person who has served on the United States Supreme Court.

Endnotes

¹ Leon Friedman, “Byron R. White,” in 5 *The Justices of the United States Supreme Court: Their Lives and Major Opinions*, 345 (Leon Friedman, ed., 1978).

² Jeffrey Rosen, “The Next Justice: How Not to Replace Byron White,” *New Republic*, Apr. 12, 1993, at 21.

³ Justice White’s incremental and measured approach to judicial decision making clearly does not warrant dismissing him as a mere “legal technician” who has “never transcended his initial incarnation as the jock justice.” Rosen, *supra*, note 2 at 21.

⁴ Rosen, *supra* note 2, at 25.

⁵ *Id.*

⁶ U.S. Const. art. III, § 2.

⁷ See, e.g., Byron R. White, “Some Current Debates,” 73 *Judicature*, 155, 158, 161 (1989) (noting the interpretive problems faced by the Court in construing detailed legislative schemes, and outlining steps Congress might take to insure judicial implementation of legislative policy).

⁸ “Nomination of Byron R. White: Hearing Before the Senate Comm. on the Judiciary,” 87th Cong., 2d Sess. (1962) at 23 (statement of Byron R. White).

⁹ Pierce O’Donnell, “Justice Byron R. White: Leading from the Center,” *A.B.A. J.*, June 16, 1986 at 24, 27.

¹⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J. dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785 (White, J., dissenting); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2855, 2873 (concurring and dissenting opinions joined by White, J.).

¹¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹² See, e.g., *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment); *Lee v. Weisman*, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., joined by White, J., dissenting). However, despite Justice White’s disagreement with *Lemon*, he displayed his usual aversion to judicial activism by refusing to disregard that decision in *Lamb’s Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2148 n.7 (1993) (opinion by White, J.) (applying the *Lemon* test and reminding Justice Scalia that, until *Lemon* is “proper[ly] . . . inter[red],” the decision remains among the “living”).

¹³ 384 U.S. 436 (1966).

¹⁴ *Miranda*, 384 U.S. 436, 526 (White, J., dissenting); *Michigan v. Mosley*, 423 U.S. 96, 107 (1975) (White, J., concurring in result); *Harris v. New York*, 401 U.S. 222 (1971).

¹⁵ *E.g.*, Rosen, *supra* note 2, at 25 (asserting that Justice White somehow "relish[es] his inconsistencies").

¹⁶ *E.g.*, Fred Israel, "Byron R. White", in 4 *The Justices of the United States Supreme Court: Their Lives and Major Opinions* 2960-61 (Leon Friedman, ed., 1969) ("With White, a New Frontier Democrat, replacing Whittaker, a conservative Republican, it was expected that the Court balance would decisively tilt toward the liberal bloc—but alas, this was a misplaced expectation . . .") (emphasis added); David O. Stewart, "White to the Right," *A.B.A. Journal*, July 1990, at 40 (asserting that Justice White is "[o]rordinarily conservative").

¹⁷ See generally, Rosen, *supra* note 2, at 25.

¹⁸ Stuart Taylor, Jr., "Justice Byron White: The Consistent Curmudgeon," *Legal Times*, Mar. 22, 1993, at 30 (asserting that John F. Kennedy was "not the kind of liberal" that many assume).

¹⁹ Stewart, *supra* note 16, at 42.

²⁰ *E.g.*, Stewart, *supra* note 16, at 42 (noting that Justice White's Kennedy-era agenda "is not a pace-setting agenda because it is an agenda from the past").

²¹ *E.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

²² *E.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

²³ *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

²⁴ 426 U.S. 229 (1976).

²⁵ 488 U.S. 469 (1989).

²⁶ *E.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

²⁷ U.S. Const. amend. XIV, § 1.

²⁸ *Washington v. Davis*, 426 U.S. at 239.

²⁹ See, e.g., *Washington v. Davis*, 426 U.S. at 248: a rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and per-

haps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more than burdensome to the poor and to the average black than to the more affluent white." (emphasis added.)

³⁰ *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

³¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³² 497 U.S. 547 (1990).

³³ Under *Croson*, municipal class-based remedies must be necessary to further a compelling governmental interest. 488 U.S. 498-506. Under *Metro*, however, congressionally enacted class-based remedies will pass constitutional muster so long as they are substantially related to the achievement of an important governmental purpose. 497 U.S. at 565-66.

³⁴ See, e.g., *Croson*, 488 U.S. at 495-96 (noting that the class-based preference invalidated in *Croson* was adopted by a city council composed predominately of minorities).

³⁵ *E.g.*, *The Federalist No. 51*, at 324 (Madison)(Clinton Rossiter ed., 1961)(noting that the size of the federal government "will render an unjust combination of a majority of the whole very improbable, if not impracticable"); *The Federalist No. 10*, at 83 (Madison)(Clinton Rossiter ed., 1961) ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression").

³⁶ *E.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982) (concluding that the so-called "Zimmer factors," developed in a line of disparate impact cases, nevertheless established purposeful discrimination). See, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

³⁷ Stewart, *supra* note 16, at 42.

³⁸ Rosen, *supra* note 3, at 21.

³⁹ Byron R. White, Address at the Inauguration of President Rex Edwin Lee, Brigham Young University, Provo, Utah (October 27, 1989) at 3 (transcript in Brigham Young University Library).

⁴⁰ Friedman, *supra* note 1, at 356.

Writing Supreme Court Histories

Mark Tushnet

The Supreme Court's history is of interest to citizens, lawyers, and historians. They are likely to have different reasons and uses for their interest, however. Lawyers may want to understand the sweep of doctrinal change to understand better the problems they and their clients face.¹ Citizens may be more interested in the Supreme Court as an institution of the national government. The reasons people have for interest in the Supreme Court's history will help define what that history is—that is, what we understand the story of the Supreme Court to be. This essay explores different ways to tell the Supreme Court's story, showing how different interpretations illuminate varying aspects of our nation's history.

Supreme Court History

At first glance it might appear that the only substantial topic for Supreme Court historians would be a history of constitutional law. Such a history involves the Supreme Court, of course, because the Court is an important venue in which constitutional law has developed. A history of constitutional law, however, would deal with the Constitution first of all, and the Supreme Court secondarily.

It is worth noting, though, that some people might be interested in a history of the Supreme Court as an institution. Such a history would be analogous to a history of the Senate or the presidency. Treating the Court as an institution of government would lead an historian to pay atten-

tion to the way in which the Court's personnel were selected, the way its work was defined, and the way its members went about their work.

From the beginning of the Court's history Justices have been chosen because they satisfy both political and professional criteria.² President Herbert Hoover nominated Justice Benjamin Cardozo as a result of overwhelming sup-



An institutional history of the Supreme Court could examine the three Justices President Grant named to the Court as well as his means of selecting them.



Justice William J. Brennan, Jr., delivers the oath of office to Deputy Director of Budget Robert Merriam (left) and to Director of Budget Maurice Stans (middle) on March 18, 1958 as President Eisenhower and Vice President Nixon look on. Justice Brennan joined the Court in 1956 shortly before the November presidential election.

port for the nomination among the nation's legal elite. President Dwight Eisenhower nominated Justice William J. Brennan, Jr. primarily because he wanted to select a Northeastern Catholic Democrat to solidify support among key voters he was to face in the 1956 election. This kind of history of the Supreme Court would try to chart the different emphases given to political and professional criteria at different times, and might suggest some patterns. For example, in the modern era Republican presidents have tended to nominate sitting judges while Democratic presidents have tended to nominate people with substantial political experience (President Clinton's initial inclination to nominate former governor and Secretary of the Interior Bruce Babbitt was consistent with that pattern). I have suggested elsewhere that this pattern results from a party-oriented difference in the evaluation of the Supreme Court as a positive force in government: Democrats tend to believe in an active government, and so in an active Supreme Court whose members see their role as part of the general political process, while Republicans tend to believe in a sharp distinction between law and politics.³ A full-scale history of the Supreme Court might reveal other patterns at other times.

The Court's work would be another topic in a history of the Supreme Court. One part of this story would be the history of jurisdictional statutes.⁴ This study would undoubtedly be quite dry. Seen in broader perspective, however, the evolution of the Court's jurisdiction might show how a government institution matures. The overall story shows the Court's jurisdiction shifting from cases which Congress directed the Court to hear—its mandatory jurisdiction—to cases which Congress authorized the Court to hear if it chose—its discretionary jurisdiction.

Step by step Congress shifted categories of cases from the mandatory to the discretionary jurisdiction, ordinarily because of complaints from the Court and the bar that the mandatory cases were imposing too heavy a burden on the Court in light of its other obligations. Cases that once seemed so obviously important that the Court had to hear them, such as appeals from state court decisions denying constitutional challenges to state statutes, became indistinguishable from other cases that were part of the Court's discretionary jurisdiction. Yet, although Congress responded to caseload concerns in making these jurisdictional alterations, they had the effect of giving the Supreme Court greater control

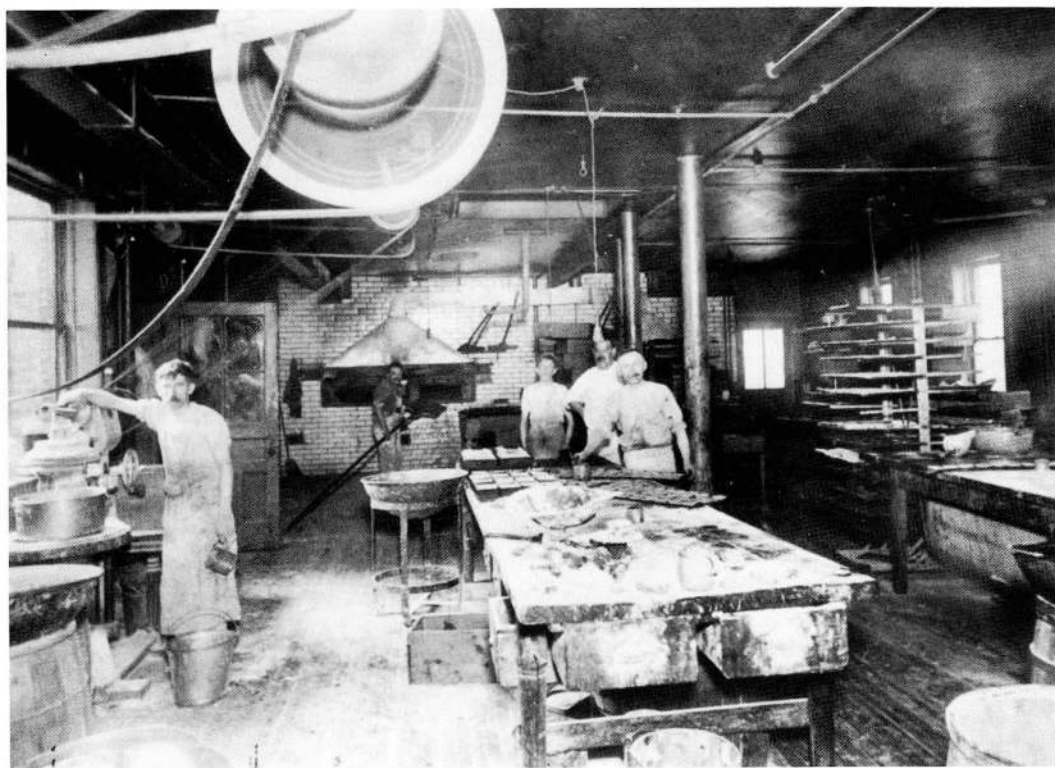
over its agenda. That, in turn, might be seen as the mark of an autonomous government institution.

A study of the actual distribution of the Court's work will reveal even more. It is already conventional for historians to distinguish between the Court's commercial and civil rights cases. If we analyze those categories, we might be able to chart how the Court heard one type of case or the other as more important at different times. Recently, for example, classic civil rights cases—those involving claims by African-Americans and other minorities that they have been discriminated against—have occupied a sharply reduced portion of the Court's time, as compared to a generation ago. A history of the Supreme Court would try to account for that change.

At some point histories of the Supreme Court should question the very categories used to analyze the Court's work. Today we might see *Lochner v. New York*, invalidating New York's maximum hours law for bakers, as a case involving constitutional law and business.⁵ It would take only a slight shift in focus to see it as a civil

rights case, involving the fundamental civil right to a decent living and reasonable working conditions. Perhaps more interesting are recent suggestions to recategorize cases with a feminist eye, to join together as "cases involving women" cases that earlier had seemed to involve disparate subjects such as jurisdiction, criminal law, and commercial law.⁶

The Supreme Court has to organize itself to get its work done. Here a history of the Supreme Court might examine how the Justices went about their work lives. In the early days the Justices frequently roomed together in Washington and then dispersed to ride circuit. Their ability to communicate, to discuss law and politics, was enhanced because of their close association in Washington, and was impaired because of their circuit duties. Even after circuit riding was substantially abolished, the Court did not have its own work place, meeting in a courtroom in the Senate basement and then in the old Senate chamber, with most Justices doing their opinion writing at home. Only with the construction of the Supreme Court building in 1935 did



Histories of the Supreme Court may question the traditional categories cases have fallen under. For example, is *Lochner v. New York* (Joseph Lochner's bakery is shown above) a case of constitutional law and business or a civil rights case?



BROWN'S INDIAN QUEEN HOTEL,
WASHINGTON CITY

Through John Marshall's tenure as Chief Justice, the Justices regularly shared a rooming house while in Washington, including the Brown's Indian-Queen Hotel (above). Since the Court lacked a home of its own, the Justices did much work at home. It was only after the opening of the Supreme Court Building in 1935 that the Justices had centralized offices.

the Justices have a single building that was the center of their work.

The bureaucratization of the Court is another part of the story of the Supreme Court as an institution. Beginning early in this century, and accelerating after World War II, the Court's staff grew.⁷ The Justices acquired law clerks, who gradually assumed larger roles in the decision making process. Justices, after all, tend to be generalists who can make decisions, but they need not be, and have not always been, people who can carefully and clearly explain their decisions, particularly in the highly technical cases that occupy part of the Court's docket. No longer is the Supreme Court distinctive among Washington's institutions as a place where the Justices do all their own work; law clerks now are functionally equivalent to speech writers for presidents and senators. An historian might try to interpret this change as an outgrowth of the Court's bureaucratization, and might suggest that these changes should not be surprising: after all, the

Supreme Court is part of the national government, and as other institutions modernize so will the Court.

In the past generation the Court's staff has increased beyond the Justices' chambers: The Court began to employ legal officers in the 1970s to screen routine matters and recommend action to the Justices, it acquired a press officer, and it developed a more elaborate security operation. Many of these developments are too recent to evaluate, except to suggest that they too are an aspect of the Court's modernization.

In sum, the possibilities of histories of the Supreme Court as an institution are rather promising. Such histories would connect the Court to other national institutions in interesting and, I believe, occasionally novel ways. For obvious reasons, though, historians and lawyers have usually written histories of constitutional law, not histories of the Supreme Court. Histories of constitutional law, though, have their own distinctive problems.

Constitutional History

Many histories of constitutional law fall into the trap of excessive focus on the Supreme Court's treatment of constitutional issues. Much that ought to interest students of constitutional history occurs outside the Supreme Court, though.

One way to see the limits of Court-focused histories of constitutional law is to examine the implications of the Court's justiciability doctrines limiting judicial consideration of constitutional issues. These doctrines include standing and mootness, but the most revealing category is the political questions doctrine. Under that doctrine, federal courts may not address certain constitutional challenges. The doctrine has kept the Court from deciding whether novel arrangements in state government violate the constitutional guaranty of a republican form of government, for example.

In recent years the political questions doctrine

itself has not significantly limited the Court's power. The 1993 decision in *Walter L. Nixon v. United States*, where a majority of the Court refused to consider a challenge to the truncated and arguably unconstitutional procedures Congress has adopted to deal with judicial impeachments, is the first clear-cut invocation of the doctrine by a Court majority in at least forty years.⁸ Still, the political questions doctrine expresses a mood of judicial forbearance, and a widespread belief that some fundamental constitutional issues ought not to be decided by the courts.

On the technical level, the political questions doctrine can be understood to say that the Constitution validates whatever decisions—about how to process impeachments, for example—the political branches make. Understood in that way, the doctrine demonstrates that important parts of constitutional law are determined outside the courts. Histories of constitutional law that focus



Walter L. Nixon, Jr., (center) with his wife, Barbara, and daughter, Courtney, leaves the Capitol November 3, 1989 after the Senate convicted him of two counts of perjury and stripped him of his lifetime appointment to the Federal Bench. In 1993 the Supreme Court refused to consider a challenge to the procedures Congress used in Nixon's impeachment hearing.



From the very beginning of United States history the Supreme Court engaged in a sustained effort to define areas in which the national government could not act. This interest in Federalism was largely abandoned in the years after the New Deal. There has been a revival of interest in Federalism by the Justices in the past two decades.

on the Supreme Court's decisions are apt to overlook those aspects of the creation of constitutional law.

If we take the political questions doctrine as a metaphor rather than as a part of the technical law of justiciability, the implications for histories of constitutional law are even more far-reaching. The metaphor of political questions directs our attention to what the British would call "the constitution," that is, the fundamental institutions of society that are basic elements in the nation's governing structure.

Constitutional histories of those fundamental institutions would necessarily look beyond Supreme Court decisions.⁹ Consider, for example, federalism. The allocation of authority between the national government and state governments has been a persistent issue in United States history. Until the mid-twentieth century it was possible to discuss that allocation by paying primary attention to Supreme Court decisions, for the Court engaged in a sustained effort to define areas in which the national government

could not act. After the New Deal, however, the Court essentially abandoned that effort. In the past two decades there has been a revival of interest among the Justices in enforcing federalism-based limits on national power. All the Court has done, though, is limit what it has called congressional commandeering of state government's institutions to carry out national business.¹⁰ It has not barred Congress from commanding citizens to comply with national requirements, even in the face of contrary demands from state governments. This is a pallid remnant of a once vigorous constitutional doctrine.

Yet, focusing on the Court's feeble efforts to limit national power would overlook the far more important political constraints on federal compulsion. Defenders of state sovereignty often overstate how much Congress has done to interfere with state authority. In fact, contemporary federalism is much more cooperative than coercive. A constitutional history that looked only to Supreme Court cases would miss this



Feminist historians have argued that constitutional history should be reexamined, using gender relations as a method of consideration. Legal historians have also begun to examine how common law has affected distribution of wealth.

important development.

Historians who adopt a British understanding of “the constitution” will examine much more than federalism, though. The two-party system in the United States results in large part from the peculiar Anglo-American attraction to a “first past the post” election system, in which whoever wins a simple plurality of votes wins the contested seat. (Elsewhere various forms of proportional representation have been thought much more compatible with majority rule and democratic responsibility.) Constitutional histories of this sort would examine how Americans came to develop their election system, how that system affected the development of the two-party system, and how third parties have occasionally affected national policy.

The currently prevailing view among historians of the party system stresses the importance of religion and ethnicity in party politics. Histories of constitutional law, to the extent they paid attention to the party system, would therefore have to say something about the social history of religion and ethnicity.

A complete understanding of the history of constitutional law must also address questions about the distribution of power and wealth in society. Feminist historians have rightly insisted on treating gender relations as one of the fundamental institutions of society, and some have begun to consider the varying ways in which legal rules have structured those relations. Similarly, legal historians have tried to describe how common law and statutory law have affected society’s distribution of wealth.¹¹ Histories of constitutional law that look beyond the Supreme Court would eventually have to incorporate much of this new learning.

Yet, if Supreme Court-focused constitutional histories fall into the trap of ignoring too much about the fundamentals of our nation’s governing institutions, constitutional histories with a broader scope face distinctive risks. They could too easily become general social histories, written by historians (or worse, lawyers) whose comparative advantage lies in explicating the constitutional law articulated by the Supreme Court. All of which may be to say only that it may be premature to expect a synthetic constitutional history that looked beyond the Supreme Court. Some promising starts have been made, but a fully satisfactory “social” history of constitutional law is likely to be a generation away.

Periodization

Doctrinal histories focusing on the Supreme Court face another problem, characteristic of the historical enterprise. To tell any historical story, we must divide the flow of events into manageable periods. Our divisions may be merely conventional, and they surely will respond to contemporary concerns, but some divisions there must be. The issue of periodization in constitutional history is now particularly pressing.

The Oliver Wendell Holmes Devise History of the Supreme Court adopted a clearly unsatisfactory periodization, dividing its volumes at the



The Oliver Wendell Holmes Devise adopted a periodization technique based on the Chief Justices. Thus one volume ends with the death of Chief Justice Marshall (left) and the next begins with the nomination of Chief Justice Taney (right).

points when one Chief Justice replaced another. This resembles an equally unsatisfactory periodization in general United States history, the so-called presidential synthesis, which uses presidential terms as its dividing lines. Among other curiosities, the “Chief Justice synthesis” means that one volume ends and another begins in the middle of the Civil War, a division that has no relation to anything of serious historical interest about the development of constitutional law.¹²

A more satisfactory division, at the center of recent work by constitutional theorist Bruce Ackerman, identifies three periods of constitutional history.¹³ The first extends from the Framing through the Civil War, in which the central issues were slavery and the scope of national power. The second extends from Reconstruction to the New Deal. One major issue of the period involved reconciling an expanded scope of national authority to the traditional respect for state authority. Another required the Court to work out the implications for national and state power in light of the new national commitment to the enforcement of individual rights, which initially focused on the newly freed slaves but gradually expanded to include the rights of all Americans. The third period begins with the New Deal’s

acknowledgment of essentially unlimited national authority and continues to the present. According to Ackerman, the central issue during this third period is how to understand the persistence of individual rights in a legal universe which acknowledges comprehensive government power to alter private relations.

Ackerman’s periodization certainly captures something important about the flow of constitutional history, but it is almost too neat. Even as Ackerman was writing, historians were developing a new perspective on the post-Civil War era that challenges Ackerman’s synthesis. Charles McCurdy, Alan Jones, and Howard Gillman, dealing with economic regulation, and Mark Graber writing on free speech law, have shown that an important element in post-Civil War constitutional jurisprudence, often derided as assuming that free market *laissez-faire* principles were embedded in the Constitution, was consistent with a populist anti-monopoly tradition expressed before the Civil War by Jacksonian Democrats.¹⁴ The Supreme Court’s “conservative” decisions restricting legislative authority to regulate the economy can be seen in this light as expressions of anti-monopoly, anti-corruption concerns—expressions which are analytically

and historically defensible.

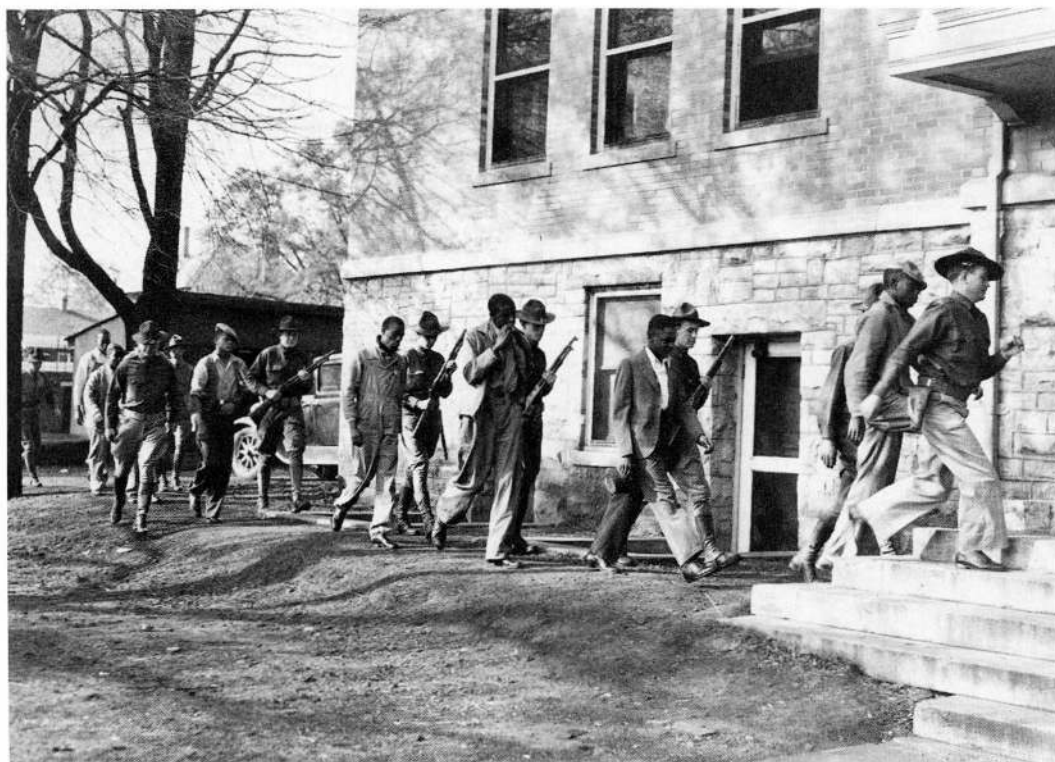
The historians' effort to retrieve the tradition of Jacksonian constitutionalism has only recently succeeded. If patterns of historical writing repeat themselves, we can expect a follow-up, as authors redefine supporters of economic regulation as advocates of what will probably be called an elitist Whig constitutionalism.¹⁵

This literature is not fully developed as yet, but its implications for present purposes are clear. Jacksonian constitutionalism overlaps Ackerman's first and second periods, and suggests that we ought to consider the first period closed when Jacksonian politics gained dominance (strikingly, this occurred around the time Chief Justice Roger Taney replaced Chief Justice John Marshall, and may account for the persistent attraction of the Chief Justice synthesis).

The historical literature available to challenge the New Deal's claim to a special place in constitutional history is not as rich as the literature on Jacksonian constitutionalism. There is enough to suggest, though, that it might be a

mistake to take 1937, the conventional date, as the opening of a new era. There are at least intimations of a more expansive view of government power in *Euclid v. Ambler Realty Co.* (1926), upholding zoning against constitutional challenge,¹⁶ and *Miller v. Schoene* (1928),¹⁷ an otherwise obscure case in which Justice Harlan F. Stone articulated what now seems a hard-line legal realist position on the relation between private property and government power. The Court's protection of individual rights also has a longer lineage than Ackerman's periodization suggests, with *Buchanan v. Warley* (1917) striking down a racially restrictive zoning ordinance,¹⁸ and *Powell v. Alabama* (1932) opening the revolution in constitutional criminal procedure by finding due process violated during the trials of the Scottsboro nine.¹⁹

These apparent anomalies might be handled by noting that all periodizations are inaccurate to some extent. Yet, it seems worth suggesting that, just as historians have retrieved Jacksonian constitutionalism, so too they may retrieve what



The National Guard (above) escorts the defendants in the Scottsboro Nine case to a meeting with their defense attorney in 1933 before their second trial. The Supreme Court overturned their convictions in *Powell v. Alabama* in 1932 because they had received inadequate counsel before their first trial.

might be called Progressive constitutionalism.²⁰ That would mean that our second period would end early in the twentieth century, rather than in 1937. Historians are notoriously reluctant to make judgments about recent history, and they probably would shy away from arguments about whether the third period, whether it began with the New Deal or earlier, has already ended.

Conclusion

Writing Supreme Court histories turns out to be as difficult as writing any other histories. Entirely apart from mastering the material, there are questions about what precisely the material is—the Supreme Court, constitutional decisions by the Supreme Court, constitutional law, “the constitution” in the British sense. The explanations historians and lawyers offer for their answers to these questions will illuminate United States history as much as, but in a different way from, the histories they write.

Endnotes

¹ Some lawyers have gone to the recently released papers of Justice Thurgood Marshall to gain insight about arguments that might appeal to the Justices. See Daniel Klaidman, “Gold Mine or Land Mine?: Marshall Papers Could Alter High-Court Litigation Strategy,” *Connecticut Law Tribune*, June 7, 1993, p. 12.

² See Henry Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (3d. ed., New York, 1992).

³ Mark Tushnet, “The Warren Court as History: An Interpretation,” in Mark Tushnet, editor, *The Warren Court in Historical and Political Perspective* (Charlottesville, 1993).

⁴ For an old study, see Felix Frankfurter and James Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York, 1927). Useful on relatively recent developments, though designed to support controversial policy recommendations, is *Report of the Study*

Group on the Caseload of the Supreme Court (Washington, 1972).

⁵ 198 U.S. 45 (1905).

⁶ Judith Resnik, “‘Naturally’ Without Gender: Women, Jurisdiction, and the Federal Courts,” 66 *New York University Law Review* 1682 (1991).

⁷ David O’Brien, *Storm Center: The Supreme Court in American Politics* (3d. ed., New York, 1993), charts many of these modern developments.

⁸ 113 S.Ct. 732 (1993).

⁹ Recent examples of such histories are Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York, 1988); Kermit Hall, *The Magic Mirror: Law in American History* (New York, 1989).

¹⁰ *New York v. United States*, 112 S.Ct. 2408 (1992).

¹¹ Morton Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge, 1977).

¹² Carl B. Swisher, 5 *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period, 1836-64* (New York, 1974); Charles Fairman, 6-7 *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88* (New York, 1971, 1987).

¹³ Bruce Ackerman, *We the People* (New Haven, 1992).

¹⁴ Charles McCurdy, “Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism,” 61 *Journal of American History* 970 (1975); Alan Jones, “Thomas M. Cooley and ‘Laissez-Faire Constitutionalism,’” 53 *Journal of American History* 751 (1967); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, 1993); Mark Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley, 1991).

¹⁵ For an early hint of such a development, see “One Hundreds Years of Judicial Review: The Thayer Centennial Symposium” 88 *Northwestern University Law Review* 1 (1993).

¹⁶ 272 U.S. 365 (1926).

¹⁷ 276 U.S. 272 (1928).

¹⁸ 245 U.S. 60 (1917).

¹⁹ 287 U.S. 45 (1932).

²⁰ For studies suggesting this periodization, see Melvin Urofsky, “State Courts and Protective Legislation During the Progressive Era: A Reevaluation,” 72 *Journal of American History* 63 (1985); John Braeman, *Before the Civil Rights Revolution: The Old Court and Individual Rights* (New York, 1988).

Brown v. Board of Education: Revisited

Herbert Brownell

Editor's Note: *This article was delivered as the Supreme Court Historical Society's Eighteenth Annual Lecture on June 7, 1993 in the Supreme Court Chamber.*

Mr. Chairman, Chief Justice Burger, and Friends of the Supreme Court Historical Society. I am pleased to have the opportunity that this occasion offers to greet many friends from my years in Washington, long ago as that was. As a

charter member of the Society I have been pleased, as I know you are, to watch its progress over the years and note its expanding influence with the bar and the public in its worthwhile mission. I congratulate the officers, past and present, for this achievement.

Today I would like to fill in some missing pages (or at least some unrecorded pages) of history from the early days of the enforcement of *Brown v. The Board of Education*¹, which surely



Herbert Brownell is sworn in as attorney general by Chief Justice Fred Vinson as President Eisenhower looks on. As the head of the Justice Department he oversaw litigation relating to the integration of schools as a result of the *Brown* decision.



(From left) Herbert Brownell, William P. Rogers, Chief Justice Fred Vinson, Warren E. Burger, Vice President Richard Nixon, and J. Lee Rankin at the Justice Department. Chief Justice Vinson swore in Rogers as Deputy Attorney General and Burger and Rankin as assistant attorneys general.

was one of the most important constitutional decisions ever handed down by the Court. It posed an immense problem of law enforcement for the Executive branch and that included us at the Justice Department.

The case—really five cases consolidated—was originally argued before the Court in the waning days of the Truman administration—in the period between Dwight Eisenhower’s election and his inauguration. On Inauguration day, the case had not been decided. The first intimation that the new administration was to have a significant role before the Supreme Court in the pending *Brown* case came just a few days after Eisenhower was sworn in as the new president.

A ceremony was being held at the Justice Department for the swearing in, by Chief Justice Fred Vinson, of the new deputy attorney general and two new assistant attorneys general. After the ceremony, the Chief Justice remained to visit with us informally about a number of matters affecting the judiciary as to which the previous attorney general had been asked to take action. I was called out of the room at one point by a telephone call. The Chief Justice continued in

my absence to speak to the new assistant attorney general for the Civil Division, Warren E. Burger, one of those who had just been sworn into office. As reported to me later by Burger, Chief Justice Vinson said that the Supreme Court would be interested in the views of the Eisenhower administration in the pending case of *Brown v. The Board of Education*. I doubt if Chief Justice Vinson surmised that he was delivering this message to a future Chief Justice of the United States.

The significance of Vinson’s seemingly off-hand remark did not sink in at the moment. In retrospect, it appears that the Court was not at that point unanimous in favor of school desegregation as it would later be. Later history appears to bear that out. It strikes me as plausible that Vinson was soliciting the new administration’s legal views to tip the balance, either by encouraging waverers on the Court to overturn *Plessy v. Ferguson*² if the Eisenhower administration was on that side of the school desegregation issue, or to dodge the question until public and political support were more evident and the Court would not have to risk its prestige in such a controversial constitutional area. Furthermore,

it can be reasoned that if a stronger majority or even unanimity among all the nine Justices could be attained, the country might be more willing to accept such a drastic change in its mores. This, of course, is speculation on my part. It is entirely within the realm of reason—although I think less plausible—that Vinson may have anticipated a negative response on the administration's part, which might have turned some Justices the other way.

Several months later, near the end of the Supreme Court term in June 1953, instead of handing down a decision, the Court issued an order setting the *Brown* case for reargument in October of that year. It requested the attorney general to appear for oral argument, as *amicus curiae*, and to respond to five specific questions listed by the Court.

The questions to the attorney general were searching ones. Included among them were some dealing with methods of enforcement of any decree to be issued by the Court. The Court order read:

In their briefs and on oral argument [on reargument] counsel are requested to discuss particularly the following questions insofar as they are relevant to the respective cases:

What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools? . . .

Assuming it is decided that segregation in public schools violates the Fourteenth Amendment (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions? . . .

[W]hat specific issues should the decrees reach[?]

[S]hould this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees[?]

[S]hould this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires.³

I immediately notified the president of the Court's request. The Court's forthcoming answers to its own questions obviously would be of vital interest to the whole Executive branch. President Eisenhower had already, as one of his first presidential acts, commenced, and was nearing completion of, desegregation of restaurants, hotels, theaters and other places of public accommodation in the District of Columbia to carry out a campaign pledge. But I think he was surprised at the Court's order in *Brown*.

His first reaction was that, since the federal government had not been, and was not, a party, to any of the five *Brown* cases, the Court's invitation should be declined under the doctrine of separation of powers. I argued otherwise and he accepted this advice.

The Department of Justice then formally appeared in the case. By that time, Chief Justice Earl Warren was presiding. We argued orally and in our *amicus* brief in favor of desegregation of the public schools and also submitted a detailed historical examination of the Fourteenth Amendment insofar as it might bear on school desegregation.

So much for the background of our subject today.

The Court handed down its unanimous and historic decision on May 17, 1954, but specifically left open the all-important decision of *how* the decision should be enforced—the enforcement problem was left in limbo for a year until



President Dwight Eisenhower ordered the desegregation of the District of Columbia public schools in 1955. The graduating class of Coolidge High School in 1963 had been integrated for almost three-quarters of their academic careers.

the Court's decision in the second *Brown* case, *Brown II*, in 1955.⁴

In our brief and oral argument in *Brown II*, the Justice Department favored a plan to have each school district where a dispute arose—either the school board or parents of school children—submit a desegregation plan to the local federal district court for approval. The plans might differ from school district to school district to meet local needs. The Supreme Court adopted this procedure. The alternative proposal before the Court, developed by the NAACP lawyers, was to require immediate desegregation of all school districts. The members of the Court, I believe, evidently believed, as did President Eisenhower, that this second proposal would meet with the massive resistance envisioned in the Southern Manifesto and would lead to having the federal government counter by sending in federal officials to supersede local officials. Our plan, on the other hand, had the definite advantage of decentralizing the resistance forces, and treating each district separately.

We also argued a second point in our brief—that all affected school districts should be re-

quired to submit a plan within a period of ninety days after the Court's decree. The Executive branch would be empowered to step in as soon as the lower court approved the plan to enforce desegregation.

The Supreme Court adopted our first recommendation, as I said, but rejected our second when it handed down its decision, again unanimous, in *Brown II* in 1955. Power of enforcement was given to the federal district courts but with no timetable for presentation of plans or for their completion. Desegregation was to take place "with all deliberate speed." Although the intent of this phrase was surely otherwise for members of the Court, it was interpreted by political leaders in the South as being so ambiguous as to mean *mañana*—at some indefinite date in the future. No statute existed for Executive branch action independent of the Court's decree and in any event Congress had not appropriated any funds for enforcement. President Eisenhower immediately exercised his direct authority over the government of the District of Columbia and called for and obtained desegregation of the public schools in the nation's

capital. But no such authority existed for the president to act with respect to the states of the Union..

In this connection, let me say the doctrine of separation of powers between the branches of the federal government is important. But the primary purpose of the doctrine should also be remembered—to check unbridled power by any individual or branch of government. Its aim is not to stymie or stall orderly government as Mr. Justice Jackson noted in the *Youngstown*⁵ case:

While the constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.⁶

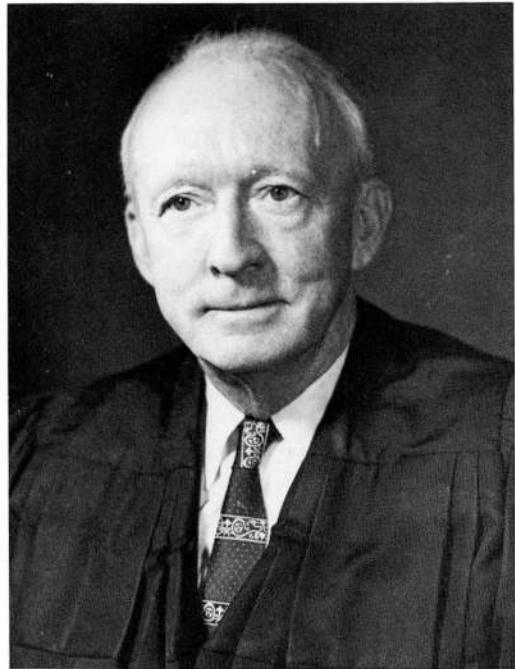
Applied to the *Brown II* case, I believe the Court could well have set a timetable for enforcement, once it decided the constitutional issue. It does sometimes, in effect, by pronouncing whether a decision is to be applied retroactively or only prospectively and, for further example, in some antitrust cases it sets an enforcement timetable. Violation of a timetable would have enabled enforcement officials to act much earlier. As it was, *Brown II* created uncertainty among local education and political officials. It unwittingly sowed the seeds for the violence that ensued at Little Rock and during the administrations of Presidents Kennedy and Johnson. Many years had passed, when in 1969 Justice Black stated for the Court in *Alexander v. Holmes*⁷ that “[a]ll deliberate speed’ has turned out to be only a soft euphemism for delay.”⁸

After a brief period of calm, the strategy of the segregationist forces became clear. One hundred ten members of Congress issued the Southern Manifesto encouraging massive resistance to *Brown*. The Manifesto stated “we pledge ourselves to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of force in its implementation.” The Southern Manifesto spawned the formation throughout the South of White Citizens Councils seeking to nullify the *Brown* decision by delay—a strategy that had worked during Reconstruction after the Civil

War. These so-called “Citizens Councils” in many cases condoned and even encouraged rioting to resist desegregation in the public schools.

I attempted to counteract the Manifesto by appealing to the attorneys general of the Southern states as fellow law enforcement officers, at their convention held in Phoenix, Arizona. After my speech I asked the attorneys general from the states in the Deep South to meet with me at an off-the-record session at midnight. I asked their professional help in eliminating segregation in the schools and in interstate bus and railroad transportation now that the *Brown* case had been decided. Some expressed sympathy with my enforcement problem but told me every state attorney general was a potential candidate for governor and that it would be political suicide to make any move favoring integration. Without rancor they said the federal government should not expect any help from them.

It was clear at this point that the enforcement of *Brown* depended primarily on the actions of federal judges, especially in the Southern states where resistance to any enforcement was con-



Associate Justice Hugo Black was a Senator from Alabama before he joined the Court in 1937. In 1969 he acknowledged that the “all deliberate speed” in *Brown II* “had turned out to be only a soft euphemism for delay.”



Judge John R. Brown being sworn in as a federal judge on September 12, 1955 in Houston, Texas. Judge Brown was one of the federal judges who bore the brunt of judicial enforcement of the *Brown* decision in the Southern Circuit.

centrated, and where plans for desegregating the schools in a hotly contested atmosphere would be considered first.

Ordinarily the recommendation of a senator from the federal district involved was an important factor in selecting federal judges. But candidates recommended by Southern senators during this period almost always had a public record of having been opposed to desegregation. As a result, we often made recommendations to the President for judicial positions in the Southern states without senatorial endorsement. The difficulties of senate confirmation were obvious if we didn't select persons of outstanding quality. Four such persons were known to me personally so I could vouch for them. They had no record of opposing desegregation and would approach this problem with an open mind.

One was Frank Johnson of Alabama. President Eisenhower had appointed him United States Attorney shortly after his first inauguration. I knew Johnson and his father earlier in Republican circles. Another was Albert Tuttle of Georgia, also a friend of my political days and at the time Assistant Secretary of the Treasury. The

third was John Minor Wisdom of Louisiana, a distinguished New Orleans attorney. The Wisdom appointment was especially significant in signalling the administration's commitment to enforcing desegregation because we selected Wisdom over Governor Kennon of Louisiana, a Democrat who had backed Eisenhower but remained a staunch segregationist. The fourth notable appointment was that of John Brown, a native of my own state of Nebraska, who practiced in Texas. All four were confirmed and bore the brunt of judicial enforcement of the *Brown* decision in the Southern states, suffering social snubs and bitter attacks in the local media as a result. Belatedly, I was delighted to see them honored by the bench and bar at the Joint Conference in New Orleans in 1989 of the Fifth and Eleventh (Southern) circuits.

Eisenhower realized the importance of appointing federal judges who would uphold the Constitution and who had not publicly opposed the desegregation decision. This is most clearly shown in the case of his nomination of Solicitor General Simon Sobeloff (who had argued for desegregation in the *Brown II* case) to be a judge of the Circuit Court of Appeals for the Fourth Circuit. The Sobeloff nomination was vigorously opposed by Southern senators but insisted upon by the President. Eisenhower also strongly backed our other choices—Judge Harlen H. Grooms of Alabama was one of these—despite the strong lobbying of Southern senators. I was usually the go-between in dealing with members of Congress dissatisfied with the president's judicial nominees. On occasion, they appealed directly to Eisenhower and were willing to trade legislative support for altering our suggested choices in favor of candidates who were unsupportive of civil rights. Eisenhower, however, resisted political temptation and supported our recommendations one hundred percent.

Sporadically, cases of rioting began to occur when local school board officials attempted to



John Kasper (right) is interviewed by two high schools journalists in Florida while a Grand Dragon of the Ku Klux Klan looks on. Kasper was a leader of Southern resistance to integration in his hometown of Clinton, Tennessee. He was later jailed for contempt of court for obstructing integration.

comply with the *Brown* decision. In one case, in Clinton, Tennessee, a man named John Kasper led a tumultuous mob that blocked the entry of black students into the local high school; the governor was forced to send in the National Guard to restore order. The federal district court ordered Kasper to desist from obstructing the integration, but Kasper persisted in his actions and the court began contempt proceedings against him. The Justice Department then stepped in and assisted the federal district judge, at his request, in obtaining a contempt of court conviction against Kasper who was sent to jail.

Violence also came close to home. Shortly after the Kasper affair, unknown persons burned fiery crosses in the front of the Washington residences of a number of Supreme Court Justices. The following Sunday, early in the morning, I heard a commotion outside my own home and turned on a master light switch. I found that kerosene had been dumped on the ground under the bedrooms where my children slept, but the intruders were nowhere to be seen. Thereafter the FBI provided protection for a time for my residence and accompanied the children to school

and to their social engagements. I might say my daughters did not like the idea of having an FBI agent in the front seat of the car when they went out on their dates.

During this period two legal theories for enforcing *Brown II* were being formulated and debated. One was pressed by the NAACP. It argued that *Brown I*, declaring public school segregation to be unconstitutional, was a sufficient basis for enforcement, without waiting for the District Court approval of a plan. It developed a test case based on its theory in a private action at Mansfield, Texas in October 1955. It sought to have the local school board, without seeking to have a prior approval of a federal court plan for desegregation, be required to desegregate. The local district court refused to order immediate desegregation. The circuit court on June 28, 1956 likewise refused to order immediate desegregation. It merely restated that *Brown I* had declared segregated schools to be unconstitutional and that the lower court should have so declared. It sent the case back to the district court saying that the school board should act with all deliberate speed. It also stated that the district



President Eisenhower greets Arkansas governor Orval Faubus at the White House with Herbert Brownell in the background. Governor Faubus gained national attention over the integration of the Little Rock schools. He defied both the federal court ruling and the request of the president to integrate the schools. Ultimately, the 101st Airborne Division was sent in to ensure the integration of the schools.

judge "if he had deferred to a later date" the question of injunctive relief, "he might well have been within the bounds of his discretion." In other words, a broad hint that further delay was legally within bounds. That was the end of the Mansfield litigation. Later Governor Shivers, at the opening of the next school term, sent in the National Guard to support the local authorities who wanted to continue segregated schools. But no plan for desegregation was passed upon by the local district court.

The second legal theory for enforcement of *Brown II* (in the absence of voluntary compliance) was the one adopted by the Department of Justice. We were well aware that if we brought a case or intervened and were rebuffed, we could have played into the hands of the White Citizens Councils and set back the cause of desegregation. Our interpretation of *Brown II* concluded that the decision could not be enforced by the Executive branch of the federal government until a plan of desegregation had been submitted to a federal district court, by a school board or by school parents, followed by court approval of the plan,

followed by defiance of the court order, and a request from the court to the Department of Justice to intervene.

However that may be, Little Rock furnished the test. The Supreme Court later unanimously upheld President Eisenhower's action of sending in the federal troops to enforce the district court order in Little Rock, upholding the school board's plan to allow black children into high school classes. The Little Rock story has been told many times and need not be repeated here.

Suffice it to say, in that case, after the school board presented its plan for gradual desegregation to the local District Court and the plan was approved by the Court, Governor Faubus of Arkansas defied the president's request and the local court's ruling. The court ordered the governor to comply and called on the Department of Justice to enter the case as *amicus curiae*. We did so. When all else failed, President Eisenhower, as we all know, sent in the 101st Airborne Division.

There never was a doubt after Little Rock that the Constitution, as defined by the Supreme Court in *Brown I* would be upheld by the full powers of the federal government. The old *Plessy v. Ferguson* decision was dead. Of course, it took more time, more Supreme Court decisions, more strong presidential actions and many heroic acts by individuals and lower court federal judges, to obtain general acceptance of *Brown*. But the story of the early exciting and controversial days of enforcement of *Brown*, I believe, is worth revisiting today.

Endnotes

- ¹ 347 U.S. 483 (1954).
- ² 163 U.S. 537. x (1896).
- ³ 345 U.S. 972-973 (1953).
- ⁴ 349 U.S. 294 (1955).
- ⁵ 343 U.S. 579 (1952).
- ⁶ 343 U.S. 579,635 (1952).
- ⁷ 396 U.S. 1219 (1969).
- ⁸ 396 U.S. 1218, 1219 (1969).

Louis D. Brandeis as Lawyer and Judge

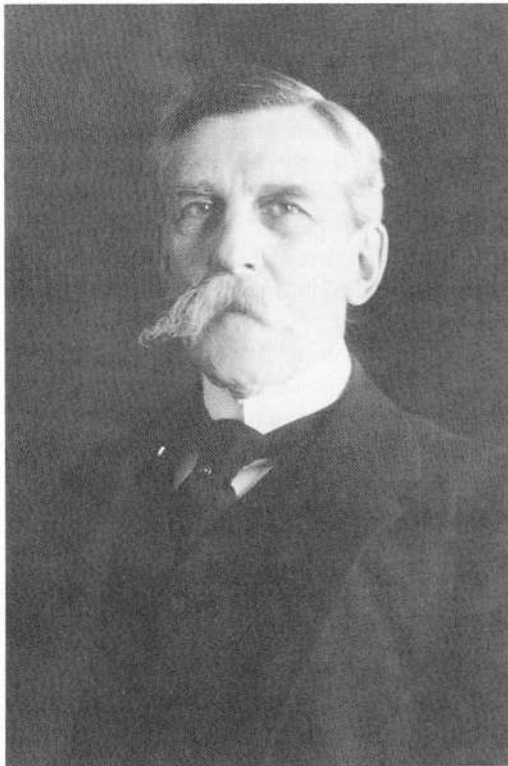
Philippa Strum

In his famous 1897 lecture, "The Path of the Law," Oliver Wendell Holmes declared that "for the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."¹ Whether or not he had his good

friend Louis Brandeis in mind when he wrote that is unknown, but no lawyer of the Progressive era and no judge in this century has come closer than Brandeis to Holmes' paradigm.

From the beginning of his career, Brandeis understood that a successful attorney not only had to know the law affecting a case, but even more importantly, the facts of the case. A memorandum in his handwriting, written early in his practice and entitled "The Practice of Law," says in part, "Know not only specific cases. [B]ut whole subject . . . know thoroughly Each fact. Don't believe client witness—Examine Documents. Reason. . . . Know the whole Subject. Know bookkeeping the universal language of business. . . . Know not only those facts which bear on direct controversy, but know all facts that Surround."²

Brandeis, both as a lawyer and later as a judge, carried into practice the theories of sociological jurisprudence Holmes and Roscoe Pound both expounded. Sociological jurisprudence, as Pound explained, attempted to analyze law not as a collection of legal tenets but as a reflection of societal needs in differing historical eras, and applied not only in private law but to constitutional litigation as well.³ The Constitution, as John Marshall had said, was "framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it."⁴ The implication was that the Constitution not only was expected to remain in existence long after the historical facts reflected in it had changed, but that it was written with an awareness that the precise meaning of the clauses it included would undergo similar transformations.⁵ It was the



Oliver Wendell Holmes, Jr., joined the Supreme Court in 1902, the year this photograph was taken. His 1897 lecture, "The Path of the Law," provided a paradigm for a lawyer and judge of the twentieth century that Louis Brandeis came close to matching.



Louis D. Brandeis had a long career as a practicing attorney before he joined the Supreme Court in 1916. As a practicing attorney, he faced the challenge of convincing judges that the sociological jurisprudence advocated by Oliver Wendell Holmes, Jr., and Roscoe Pound was proper.

function of judges to understand society sufficiently to permit the Constitution to be adapted to the changing "felt necessities" of the time. If a law was passed because people considered it useful in light of current circumstances, the courts could not strike it down unless it clearly violated a constitutional provision.

In Holmes' formulation, the courts had to interpret the Constitution as permitting any law unless "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."⁶ Holmes recognized that the clauses of the Constitution are relatively vague. The implication was that the courts would have little reason to strike down many laws as being inconsistent with them. Holmes neglected, however, to answer the question of how "reasonableness" was to be ascertained, or what criteria the judges would employ to differentiate "a rational and fair man" from one less able to reason.

His acceptance of Holmes' analysis did not mean Brandeis saw courts as having little or no

function. Holmes may have seen the judges as merely looking at a statute, asking whether it clearly violated the Constitution, and, if it did not, upholding it as valid. This was not quite Brandeis' view.

If the logic of Holmes and Pound is followed, it is not sufficient simply to adopt a stance of judicial restraint, the term used to describe the disposition of judges to minimize their interference with legislative policy making. Holmes' and Pound's starting point, after all, was the congruence of law and social conditions. The unspoken and therefore unaddressed element of their jurisprudence is the question of what happens when a legislature misperceives societal need. Holmes' cynicism about the ability of human beings rather than natural forces to affect their fate illuminated his devotion to judicial restraint. He would no doubt have answered that as long as a law did not conflict with the Constitution the judicial function was to uphold it, and if it was based on a misperception the electorate had an obligation to make its dissatisfaction clear to the enacting body.⁷ It was a jurisprudence that would later be enunciated, without the element of social Darwinism, by Felix Frankfurter.⁸ Again, this would not have satisfied Brandeis, because it denied the logical underpinnings of sociological jurisprudence; unlike Holmes, he did believe in the necessity for the law to be moral, and as a reformer, he had all too close a view of the corrupt legislatures of the late nineteenth and early twentieth century.

Brandeis had the additional burden, unshared by Holmes and Pound, of being a practicing attorney attempting to convince the courts of his time that sociological jurisprudence was proper. The approach to judging and particularly to constitutional litigation that was taken by most courts was either historical, based on what judges thought the clauses' writers meant, or mechanistic, relying on what the judges believed to be the plain meaning of the words. Brandeis and the attorneys who shared his views had to cope with judges who regarded the Constitution as a static document and interpreted it as delineating retention of property as the highest good. "Original intent" is not an approach sprung full-blown from late twentieth century jurisprudence;⁹ its genesis can be found in the earliest days of constitutional interpretation. More importantly



Portland, Oregon, circa 1908. Curt Muller's Grand Laundry in Portland was at the center of the controversy of minimum wage, maximum hours laws. On September 5, 1905, two years after Oregon had a ten hour work day as the maximum for women employed in factories and laundries, Joel Haselbock, the foreman at the laundry, required Mrs. Elmer Gotcher to work more than ten hours. Muller appealed his misdemeanor conviction and ten dollar fine to the Supreme Court.

for Brandeis, it was being enunciated by the judges before whom he had to appear and with whom he would later sit on the Supreme Court. Justice Owen J. Roberts, Brandeis' Supreme Court colleague from 1930 to 1939, declared, "All the court does" when a statute is challenged as unconstitutional is "lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."¹⁰ Brandeis would have denied that such a process was either possible or desirable.

Brandeis the litigator recognized that while the judges did not accept the doctrine of sociological jurisprudence, they might be persuaded to accept its application in specific instances. He had an opportunity to test his theory in 1908.

Oregon had passed a statute limiting women's work in manufacturing and mechanical establish-

ments and laundries to no more than ten hours a day. Curt Muller's Grand Laundry in Portland was held by the Oregon courts to have broken the law when one woman was required to work more than ten hours. Muller appealed his misdemeanor conviction to the Supreme Court on the grounds it violated his Fourteenth Amendment right to the "liberty of contract," which the Court proclaimed it had unearthed in the depths of the Due Process Clause.¹¹ Brandeis' sister-in-law Josephine Goldmark, who worked with the National Consumers' League, and Florence Kelley, the League's secretary general, asked him to defend the statute. The result was the famous "Brandeis brief."¹²

Although he would have preferred workers' hours to be decided jointly by employers and unions, Brandeis considered state regulation of hours legitimate because unions were not yet



Florence Kelley (above) served as secretary general of the National Consumer's League from 1899 until her death in 1932. Her tenure at the League saw much success in enacting minimum wage/maximum hours laws for women beginning with the Supreme Court upholding Oregon's law in *Muller*.

sufficiently strong to demand such working conditions successfully. He thought it only logical for both men's and women's work hours to be limited. He had good reason to believe, however, the Court would ignore the argument that overly long hours were bad for all workers. It had recently struck down a New York maximum hours law with an opinion that made clear its hostility to "interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people," particularly when the "interference" took the form of labor legislation. Brandeis was aware the Supreme Court and lower courts had said that maximum hours statutes might be constitutional where the state demonstrated that specific injury to the workers could result from overwork. He decided the best tactic would be to focus on women, emphasizing the particular health problems caused for them and their families by long hours. By far the largest share of the work on the brief was done by Goldmark, who turned up substantial data demonstrating the negative effect of long hours on women. She was also prepared with material showing overly long work days

were bad for all workers and that the sex of the worker was irrelevant.¹³

The brief was the result of a conscious decision to take a risk. It departed from recognized style in devoting only two pages to the traditional legal arguments and citations. Then came fifteen pages of state and foreign laws that limited women's hours, followed by a ninety-five page section entitled "The World's Experience upon which the Legislation Limiting the Hours of Labor for Women is Based." The numerous subtitles, covering every aspect of the issue from "The Dangers of Long Hours" and "Laundries" to "The Reasonableness of the Ten-Hour Day," introduced copious quotations from reports by American and English commissions, bureaus, committees, and authors. Almost all of the ninety-five pages, in fact, consisted of quotations, designed to demonstrate both the societal utility of maximum hours legislation for women and the general acceptance of the idea.

The gamble paid off; the Court upheld the law.¹⁴ Brandeis had not only won a case, however, nor had he only set a precedent for sustaining other maximum hours laws for women. He had also gotten the Court to depart from its usual posture that the Constitution was an unchanging entity, and he had set a precedent for bringing into the courtroom the kind of information that reflected what was really going on in the world outside. The Court could scarcely admit it had abandoned its static jurisprudence, however briefly, but it praised Brandeis by name in its opinion and took note of "the course of legislation as well as expressions of opinion from other than judicial sources." The Court appended to its opinion a list of the laws he had cited. Justice Brewer, writing for the majority, denied that constitutional questions could be settled "by . . . a consensus of present public opinion," but admitted that "a widespread belief" about a question of fact "is worthy of consideration" - or, to put it differently, the Court would utilize sociological jurisprudence if the facts were sufficiently persuasive and it did not have to acknowledge doing so.¹⁵

The legal profession and labor experts were electrified. Requests for copies of the brief poured in from lawyers, unions and universities all over the country. Illinois reenacted a women's maximum hours law that had been struck down by the

Court in 1895, and the League asked Brandeis to defend it. Brandeis and Goldmark did so, and went on to defend similar statutes as well as laws setting minimum wages for women until Brandeis was named to the Court in 1916 and Felix Frankfurter took on the League's cases.¹⁶

One reason for the success of the Brandeis approach, and for its subsequent emergence as the basis for the dominant jurisprudence and the basis of most modern constitutional litigation, was the brilliance of Brandeis himself. After hearing Brandeis argue one of the League's cases before the Supreme Court, a friend wrote to Felix Frankfurter, "I have just heard Mr. Brandeis make one of the greatest arguments I have ever listened to, and I have heard many great arguments. . . . When Brandeis began to speak, the Court showed all the inertia and elemental hostility which Courts cherish for a new thought, or a new right, or even a new remedy for an old wrong, but he visibly lifted all this burden, and without orationizing or chewing of the rag he reached them all. . . . He not only reached the Court, but he dwarfed the Court."¹⁷



Roscoe Pound (above), along with Oliver Wendell Holmes, Jr., was a proponent of sociological jurisprudence. Pound, whose graduate degree was in botany, served as Dean of Harvard Law School for twenty years.

Brandeis had strengths in addition to his mastery of oral argument. One of his opponents on the Supreme Court, Justice George Sutherland, was to remark ruefully, "My, how I detest that man's ideas. But he is one of the greatest technical lawyers I have ever known." Roscoe Pound added, writing about the Muller brief, "The real point here is not so much his advocacy of these statutes as the breadth of perception and the remarkable legal insight which enable him to perceive the proper mode of presenting such a question."¹⁸

Creation of the Brandeis brief is sufficient evidence of Brandeis' "remarkable legal insight" but he would have disagreed with Pound that the "real point" was "not. . . his advocacy of these statutes." That, Brandeis might have said, was at least part of the main point, because he could not draw a line between substance and methodology. Had he not possessed an "intense belief" in the cause he was espousing, he would not have bothered himself with the case. Brandeis believed passionately in a socially responsive law. In *Muller*, form followed substance: Brandeis invented the new kind of brief because he wanted to win a particular case. Nonetheless, the particular configuration of the brief reflected Brandeis' larger approach to the law in a democratic political system.

If the premise of democracy is that the people know best what is good for them, then it is logical for that premise to be reflected in the laws which are a major component of public policy. Legislators thus had an obligation to produce laws based on "felt necessities," and judges had a concurrent obligation to interpret laws—including the Constitution—according to the same criterion. The kind of judicial restraint implicit in sociological jurisprudence puts a substantial burden on all judges in its assumption that they will recognize societal needs and be prepared to legitimize their expression in statutes. But judges were meant to be removed from the popular will as well as the popular whim, and this was particularly true of federal judges, appointed by president and Senate for life. How were they to assess a statute in the light of "felt necessities"?

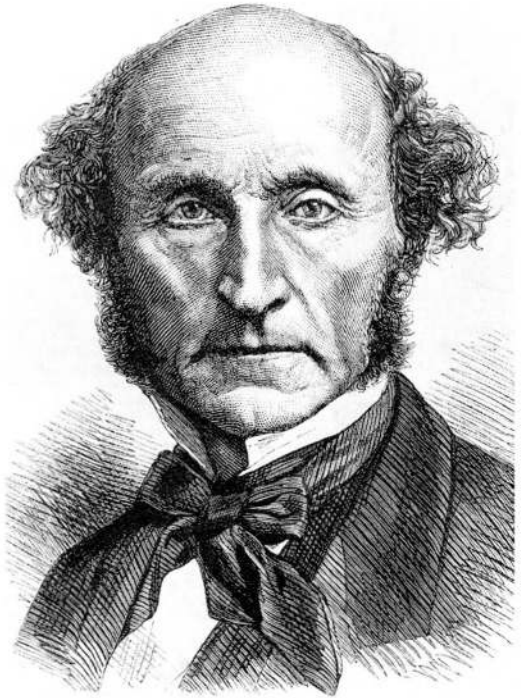
Here is where Brandeis the attorney added a crucial element to Holmes' and Pound's thought, and his answer was plain; it was the attorney's duty to bring courts the facts available to the

legislature, which was the societal information judges had to have if they were to make the right decision, "right" meaning accepting the statute if it was a rational response to a societal problem and not one specifically forbidden by the Constitution. Although Brandeis did not address the problem directly, he presumably would have followed his own logic and said that if the legislature failed to amass factual data before enacting the statute and its lawyers could not themselves demonstrate its social rationality, the law should be struck down. Brandeis' contribution to sociological jurisprudence was to spell out the way it would work in practice by informing lawyers and judges how to go about ascertaining felt necessities. A judge, he asserted, "rarely performs his functions adequately unless the case before him is adequately presented."¹⁹ With one brief, Brandeis heralded a major change in the function of constitutional lawyers in a democratic system. Their job was to explain the policies desired by the sovereign people, bridging the gap between the people and the judges who presided over the people's courtrooms. The mechanism they would use, so natural to "the man of statistics and the master of economics," would be facts: facts that would show the judges why it was reasonable for legislatures to respond to societal problems with the statutes at issue. Brandeis had told the Massachusetts legislature as early as 1891, "No law can be effective which does not take into consideration the conditions of the community for which it is designed."²⁰ Laws had to be firmly based in societal realities; by extension, laws that ignored societal needs were bad. Brandeis assumed unarguable facts were obtainable and they were the basis for all intelligent decisions; surely judges should understand that, and it was a lawyer's obligation to make sure that judges had the necessary facts in hand.

After Brandeis joined the Supreme Court in 1916, he acknowledged that his prescription for lawyers was not being followed. Eager though he was to accept the societal facts he expected to be given by statistics-conscious attorneys, he encountered what he considered too little factual information in the briefs presented to the Court. So his theory of attorney responsibility was broadened to include a theory of judicial responsibility.

Clearly, Brandeis saw law as anything but static. He recognized that major cases brought

before the Court reflected not merely differences about legal doctrine but disputes about alternative social policies. For that reason, the Court had not only to collect facts, but also to discipline itself not to substitute its own preferences for those of other equally capable bodies such as legislatures and administrative commissions. The Constitution provided the country with the power to handle all situations, but divided that power between the states and the federal government and among branches of the federal government. The Court, he warned, should not elevate "the performance of the constitutional function of judicial review" into "an exercise of the powers of a super-legislature." Nor should it insist on doctrines simply because it had created them. "Stare decisis is ordinarily a wise rule of action," he commented, but it "does not command that we err again when we have occasion to pass upon a different statute."²¹ This was particularly true when it came to the corporation and its constitutional "rights." Both corporations and their "rights" were artificial constructs, legitimated by government; both could be undone if government and the people it served found that proper. John



John Stuart Mill (above) argued that a legitimate government had to reflect societal circumstances. Louis Brandeis brought Mill's theory into the economic realm.

Stuart Mill had urged, "Let us remember . . . that political institutions . . . are the work of men. . . . Men did not wake on a summer morning and find them sprung up." Mill argued that a legitimate government had to reflect societal circumstances; Brandeis' approach implicitly brought Mill's thought into the economic sphere.²² In *Truax v. Corrigan* he reminded the majority that the "rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society."²³ Facts were needed so the Court could know whether its doctrines had become outmoded.

In 1929, the Court heard a case challenging an Oklahoma statute that required new ice companies to obtain a certificate of public convenience and necessity from the state.²⁴ The law's purpose was to avoid the kind of duplication of plants and delivery service that resulted in higher costs for consumers. Given his emphasis on competition, Brandeis might well have been expected to applaud the Court action striking the law down. But substitution of judicial beliefs for the will of the majority in economic policy ran counter to his thinking about the nature of democracy, and he dissented. He did not consider the briefs before him sufficient to bolster his point that the social problems that prompted the Oklahoma law could lead reasonable people to believe the statute embodied an appropriate solution. He was certain that the reasonableness of state regulations "can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed." His clerks had always spent as much time in the Library of Congress gathering sociological and economic material as they did in the law library, and that is where he sent his current clerk to get the facts he needed.²⁵

Brandeis used much extra-legal material when he wrote fourteen heavily footnoted pages to demonstrate the Oklahoma statute's rationality.

He did not agree that it was the right answer. He stated that "Whether that view [embodied in the statute] is sound nobody knows," pointing out that among the dangers of the law were the demands it placed on human intelligence and character, and he reminded the Court, "Man is weak and his judgment is at best fallible." But that was not his—or the Court's—business. Calling the Depression "an emergency more serious than war," he noted, "Economists are searching for the causes of this disorder and are re-examining the basis of our industrial structure." He slipped in a hint about his preferred remedy. "Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight." Many people disagreed, however, and "rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition." Since they thought so, they had a right to experiment with a limit upon competition.

He was concerned that in stifling such experimentation, the Court was interfering with the search for solutions, and he chided his colleagues, "Some people as-

sert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science. . . . To stay experimentation in things social and economic is a grave responsibility" which might be "fraught with serious consequences to the nation. . . . This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles." Experimentation was crucial to progress, and the best place for experimentation was the states, which were still the small laboratories suitable to experimentation that Jefferson had envisioned. Experiments could be dangerous, precisely because "Man is weak and his judgment is at best fallible." But human fallibility was everywhere, even on the Supreme Court, and so the wisest and most democratic approach was to minimize judicial limitations on reasonable experimentation: "If we would guide by the light of reason, we must let our minds be bold."²⁶

*The Depression was
"an emergency more
serious than war."*

Brandeis' approval of competition and his support for experimentation by the states came together in his dissent from the Court's overturning a Florida law that imposed heavier license fees on stores that were part of multicounty chains than on independent shops. The majority of the Court found the law to be an unconstitutional violation of the Fourteenth Amendment's equal protection and due process clauses, holding that the state had no reasonable basis for placing stores into the categories of "independent," "part of an intracounty chain," or "part of an intercounty chain." Brandeis' dissent was a parade of facts designed to demonstrate not only that there was a rational relationship between the problem identified by the state and the statute designed to solve it, but that the state was correct in perceiving bigness as antisocial. He traced the history of corporations in the United States and the states' early policy of denying the right to incorporate to businesses, as opposed to religious, educational, and charitable organizations. "It was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly."²⁷

To demonstrate that the fears were legitimate, Brandeis drew on studies such as Adolph A. Berle and Gardiner Means' *The Modern Corporation and Private Property*, Thorstein Veblen's *Absentee Ownership and Business Enterprise*, others by Stuart Chase, J. A. Hobson, and Arthur Dahlberg; articles in scholarly journals; and numerous congressional hearings, speeches, and government reports. What they showed, he argued, was that after "the desire for business expansion created an irresistible demand" for corporate charters and the states capitulated, corporations had grown to fearsome size: "Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have . . . brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State . . . the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men." This was a "negation of industrial democracy" and its replacement with "the rule of a plutocracy." "Such is the Frankenstein monster,"

Brandeis wrote, "which States have created by their corporation laws."²⁸

He continued to marshal facts. Two hundred nonbanking corporations controlled more than one quarter of the country's wealth. Five of the twelve plaintiffs in the case, each with assets of more than \$90 million were among those corporations. Their collective assets were \$820 million. One of the corporations operated over 15,000 stores; together, they owned 19,718 throughout the country. How, in the light of such facts, could the Court maintain that concentration of wealth was not a problem, or that the Florida law was an unreasonable solution to it? Judges had a responsibility to know their facts and decide accordingly.

Perhaps the best example of Brandeis' use of factual evidence occurred when the Court was asked to determine the constitutionality of a Nebraska consumer-protection law that set weight standards, including maximum weight limits, for commercially sold loaves of bread. The majority of the Court, much opposed to state regulation of commercial entities, held that the law took bakers' and dealers' property without due process of law. Brandeis disagreed and chastised his brethren for not examining the relevant facts. "Unless we know the facts on which the legislators may have acted," he declared in dissent, "we cannot properly decide whether they were. . . unreasonable, arbitrary or capricious." And to know those facts, the Justices had "merely to acquaint ourselves with the art of breadmaking and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws." Brandeis fulfilled this "mere" task by presenting the Court with fifteen pages of information about the baking industry, most of it in lengthy and forbidding footnotes.²⁹

Brandeis insisted on ferreting out facts to support social experimentation because of his belief that experimentation was one of the keys to human progress. As Frankfurter described his approach, "Problems, for him, are never solved. Civilization is a sequence of new tasks."³⁰ But his friend and colleague Holmes was more skept-



Justices Oliver Wendell Holmes, Jr., (left) and Louis D. Brandeis (right) served on the Bench together for eighteen years. The two were already close friends before Brandeis joined the Court and continued their friendship on the Bench. Although they often voted the same way in cases their means of reaching the decisions were sometimes very different.

tical about the possibility of progress. "Generally speaking, I agree with you in liking to see social experiments tried," he wrote to Brandeis, "but I do so without enthusiasm because I believe it is merely shifting the pressure and that so long as we have free propagation Malthus is right in his general view." He saw democracy as giving the majority the right to have the laws it wanted, but, a true social Darwinist, he didn't much care what the experiments were about or what effect they would have. His disdain for the futile efforts of mortals was expressed to Frederick Pollock when he wrote, "Long ago I decided that I was not God. When a state came here and wanted to build a slaughter house, I looked at the Constitu-

tion and if I couldn't find anything in there that said a state couldn't build a slaughter house I said to myself, if they want to build a slaughter house, God-dammit, let them build it." He therefore saw no need for an accumulation of factual material. Complaining to Pollock that Brandeis was pushing him to put his interest in philosophy aside temporarily and immerse himself in the facts of his society, Holmes grumbled, "I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn . . . I have little doubt that it would be good for my immortal soul to plunge into them [facts] . . . but I shrink from the bore."³¹

Brandeis, far from finding facts boring, thrived on them, and believed, given the educability of human beings, that experimentation was a precondition and harbinger of human progress. He was far more pragmatic and optimistic than Holmes about both the possibility of societal improvement and the role to be played in it by law, lawyers, judges and government. David Riesman, who clerked for Brandeis after graduating from Harvard Law School, wrote to his former professor Felix Frankfurter, "Holmes was skeptical of action and thought but seemed to have faith in the inevitable,—Brandeis is skeptical of power and of human abilities but he does not believe that things are inevitable." Holmes, he added, saw "the actions of others" as "merely the inevitable coming to pass," whereas "Brandeis is not so absolute,—he does not believe that human beings are the prey to unconquerable forces. As you say, he puts his trust in reason."³² More, he put his trust in the democratic process, and argued that law had to be a part of it.

His trust in the democratic process led him to treat the Court as an educational institution. It was as much the Court's function to explain its decisions as to make them; to utilize its opinions so the electorate could understand why what the Court was doing was both wise and correct. Progress was possible only if people with ideas made them available to whatever segment of the electorate was willing to listen. Brandeis viewed public officials, including judges, as teachers with the obligation to make their lessons accessible. One of the functions of a Justice was to write opinions that would educate the legal profession and other members of the intelligentsia;



Dean Acheson (above) clerked for Justice Brandeis from 1918 until 1921. He later had a distinguished career in the State Department, serving as Secretary of State under President Truman from 1949 to 1953.

public education was an important element of judicial civic virtue.

Paul Freund remembered his early clerkship for Brandeis when, after working on one revision after another of a Brandeis opinion, he then heard the Justice ask, "Now I think the opinion is persuasive, but what can we do to make it more instructive?" Brandeis told Dean Acheson, when the latter was clerking for him, "The whole purpose, and the only one, is to educate the country." His other clerks recalled similar sentiments. One was astonished at, and presumably educated by, the sixty changes Brandeis made in a draft opinion of ten pages.³³

Similarly, when the Court erred, it was the duty of a dissenting Justice to explain to both the Justices and the public where the error lay. He dissented frequently when the Court upheld governmental suppression or punishment of speech, and became so disheartened at his colleagues' unwillingness to adopt his position that he told Dean Acheson, "We may be able to fill the people

with shame, after the passion cools, by preserving some of it on the record. The only hope is the people; you cannot educate the Court."³⁴ Although all of Brandeis' opinions lay out his reasoning in detail, his dissents clearly were designed as lessons for the public, or at least that part of it that reads Supreme Court opinions.

Throughout his career, both as a lawyer and as a judge, Brandeis remained "the man of statistics and the master of economics." But the facts he marshalled in such great quantities were sterile unless put to a greater task, harmonizing the law with the reality of life. He argued that the good society had to be based on morality and that its laws could be neither moral nor useful unless they reflected changing social circumstances. As a pragmatic matter, if legislators and the judges who assessed the constitutionality of laws distanced themselves from the realities of felt necessities, the rule of law itself would be threatened. He assumed that the Founding Fathers had shared his views and insisted not only that the Constitution could be utilized to respond to altered social needs but that it had been designed to do so. Lawyers and judges shared the legislators' responsibility to educate themselves about social facts and to base their arguments and judgments upon them. Democracy required no less. Judges were obligated to hand down socially responsive judgments and then to explain and justify their decisions to the public, educating them in the process.

Frankfurter called Brandeis' sociological jurisprudence "an organic constitutional philosophy, which expresses his response to the deepest issues of society."³⁵ It reflected a view of law as both growing out of and affecting an endlessly evolving social reality. A jurisprudence that anchors law in the public will while limiting the public's power to abridge individual rights is quintessentially democratic. By translating his perception into lawyers' briefs and judicial opinions, Brandeis helped democratize the judicial process and permanently altered American jurisprudence.

Endnotes

¹Oliver Wendell Holmes, Jr., "The Path of the Law" in *Collected Legal Papers* (New York: Harcourt, Brace, 1920; New York: Peter Smith, 1952), p. 187.

²Louis Brandeis, "The Practice of the Law," Brandeis Papers, University of Louisville Law Library, File NMF 85-3. See also his advice to a junior colleague, William H. Dunbar, in letters of 2 February 1893 and 19 August 1896, in Melvin I. Urofsky and David W. Levy, eds., *Letters of Louis D. Brandeis* (Albany: State University of New York Press, 1971), 1: 106-09, 124-26.

³See, among others, Roscoe Pound, "Liberty of Contract," 18 *Yale Law Journal* 454 (1909); *The Spirit of the Common Law* (Boston: Marshall Jones, 1921); *The History and System of the Common Law* (New York: Collier, 1939); and *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922). See also David Wigdor, *Roscoe Pound, Philosopher of Law* (Westport, Ct.: Greenwood Press, 1974).

⁴*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821).

⁵Cf. H. N. Hirsch, *A Theory of Liberty: The Constitution and Minorities* (New York: Routledge, 1992).

⁶*Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting). Cf., e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (dissenting), at 567; *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (dissenting), at 277; *Bartels v. Iowa*, 262 U.S. 404 (1923) (dissenting), at 412.

⁷See Samuel J. Konefsky, *The Legacy of Holmes and Brandeis* (New York: Macmillan, 1956), pp. 185-186, 188-189.

⁸See, e.g., *Colegrove v. Green*, 328 U.S. 549, 554, 556 (1946); *Baker v. Carr*, 369 U.S. 186, 267, 270 (1962) (dissenting); cf. Sanford V. Levinson, "The Democratic Faith of Felix Frankfurter," 25 *Stanford Law Review* 430 (1973). Levinson argues persuasively that much of Frankfurter's jurisprudence stemmed from his belief that "the United States is in fact an open polity, and there is therefore no need for an alert and active Court to further the development of greater openness." *Id.* at 430. Cf. Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* (Boston: Twayne, 1991), chs. 4, 5 and 7.

⁹See, e.g., Justice Scalia in *Immigration and Naturalization Service v. Elias Zacharias* (no. 90-1342, January 22, 1992); Robert Bork, "Original Intent and the Constitution," 7 *Humanities* 22 (Feb. 1986).

¹⁰*United States v. Butler*, 297 U.S. 1, 62, 63 (1936).

¹¹See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905).

¹²Louis D. Brandeis, assisted by Josephine Goldmark, *Women in Industry* (New York: The National Consumers' League, n.d.). The case was *Muller v. Oregon*, 208 U.S. 412 (1908). To give credit where it is due, it should be noted that three years earlier, a fact-filled brief was filed on behalf of New York by attorney Julius Mayer in *Lochner*. It was used extensively in Justice Harlan's dissent, 198 U.S. at 70-71, and Brandeis may well have been aware of it.

¹³Brandeis deliberately left the second part of the data out of the brief, but considered it so important a tool in the fight for maximum hours laws that he applauded the Russell Sage Foundation's decision to publish it. See Josephine Goldmark, *Fatigue and Efficiency* (New York: Russell Sage Founda-

tion, 1912).

¹⁴John E. Semonche has noted that the Supreme Court had upheld other statutes limiting hours; see *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* (Westport, Ct.: Greenwood, 1978), pp. 94-95, 106-108, 115-116, 143-144, 165-169, 181-185. *Lochner*, however, raised the possibility that the Court would follow a different route after 1905, and as Semonche notes, *Muller* "was the first wedge hammered into *Lochner*." *Id.* at 221.

¹⁵208 U.S. at 419, 419-20, n.1.

¹⁶See Josephine Goldmark, *Impatient Crusader* (Urbana: University of Illinois Press, 1953), pp. 158-163; *Ritchie v. People*, 155 Ill. 98 (1895); *Ritchie v. Wyman*, 244 Ill. 509 (1910). For Brandeis' defense of the concept of minimum wage laws, see his 1914 argument before the Supreme Court in *Stettler v. O'Hara*, 243 U.S. 629 (1917), published in *Survey*, February 6, 1915, pp. 490-94, 521-24 as "The Constitution and the Minimum Wage."

¹⁷William Hitz to Felix Frankfurter, December 17, 1914, Brandeis Papers, Addendum, Scrapbook 2.

¹⁸Sutherland quoted in Konefsky, *The Legacy of Holmes and Brandeis*, 305 n. 54; Roscoe Pound to Sen. William E. Chilton, 1916, in Felix Frankfurter Papers, Library of Congress, Box 127.

¹⁹Brandeis, "The Living Law" in *Business—A Profession* (Boston: Hale, Cushman & Flint, 1993) 362.

²⁰Brandeis, Statement to Massachusetts Joint Legislative Committee on Liquor Law, 27 Feb. 1891, Brandeis Papers, Scrapbook I.

²¹*Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924); *Di Santo v. Pennsylvania*, 273 U.S. 34, 42, 47 (1927).

²²John Stuart Mill, *Considerations on Representative Government* (New York: The Liberal Arts Press, 1958), 5.

²³257 U.S. 312 (1921), at 376.

²⁴*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

²⁵*Truax v. Corrigan*, 257 U.S. at 356-357; author's interviews with clerks; notes by James Landis for *Myers v. United States*, 272 U.S. 52 (1926), Brandeis Papers, Harvard Law School, 39-10; memorandum by Warren Ege, *id.*, 38-9; Paul A. Freund, "Justice Brandeis: A Law Clerk's Remembrance," 68 *American Jewish History* 7-18, at 9 (1978).

²⁶*New State Ice v. Liebmann*, 285 U.S. 262 (1932). at 287-311, *passim*.

²⁷*Liggett v. Lee*, 288 U.S. 517, 548 (1933) (dissenting).

²⁸*Liggett v. Lee*, at 564-68.

²⁹*Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (dissenting). For Brandeis' use of facts in similar ways, see, e.g., *Truax v. Corrigan*, 257 U.S. 312, 355 (1921) (dissenting); *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 290 (1923) (dissenting); *Frost v. Corporation Comm.*, 278 U.S. 515, 528 (1929) (dissenting); *St. Louis & O'Fallon Railway v. United States*, 279 U.S. 461, 488 (1929), dissenting; *United Railways v. West*, 280 U.S. 234, 255 (1930) (dissenting).

³⁰Felix Frankfurter, "Mr. Justice Brandeis and the Constitution" in Frankfurter, ed., *Mr. Justice Brandeis* (New Haven: Yale University Press, 1932), 47-125, at 124.

³¹Holmes to Brandeis, 20 April 1919, Brandeis Papers, SC 4-2; Holmes to Pollock, 26 May 1919, in Mark DeWolfe Howe, ed., *Holmes-Pollock Letters* (Cambridge: Harvard University Press, 1941), II, 13-14. Holmes sent a very similar account of his and Brandeis' differing views about the importance of facts to Harold Laski on 16 June 1919. Mark De Wolfe Howe, *Holmes-Laski Letters* (Cambridge: Harvard University Press, 1953), I, 212.

³²David Riesman, "Notes for an Essay on Justice Brandeis," sent to Frankfurter, 22 May 1936, Frankfurter Papers, Box 127, pp. 1-2.

³³Paul Freund, "Driven by Passion," in (Boston) *Sunday*

Herald, 11 November 1956, p. 3; although Freund does not name the case, it seems clear from his description that it was *National Surety Company v. Coriell*, 289 U.S. 426 (1933). Dean Acheson, *Morning and Noon* (Boston: Houghton Mifflin, 1965), p. 94; cf. p. 103. Acheson was directed to collect what proved to be fifteen pages of footnotes for a minor case. Other clerks, in interviews with the author, reported similar experiences.

³⁴Acheson, *Morning and Noon*, 94.

³⁵Frankfurter, "Mr. Justice Brandeis and the Constitution," 51.

***Dennis v. United States:* Great Case Or Cold War Relic?**

Michal R. Belknap

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.” Justice Holmes dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904).

“[T]he most important reconciliation of liberty and security in our time,” the *Washington Post* called the decision when the Supreme Court rendered it in 1951.¹ Forty-two years later *Dennis v. United States*² continues to occupy a prominent place in constitutional law casebooks.³ But should it? When the Court decided *Dennis*, the Cold War was at its most frigid, and the anticommunist hysteria known as McCarthyism gripped the country. The decision reflected well the frenzied temper of those times, and it is certainly among the most prominent legal products of the McCarthy era. The Cold War has ended, however, and today the doctrinal significance of *Dennis v. United States* is minimal. Far from the “big case” it once seemed to be, *Dennis* now looks like little more than a legal relic of a bygone era. The time has come to ask whether it is just a twentieth century *Dred Scott* decision,⁴ truly important only to historians and those fascinated by the Supreme Court.

Whatever its current significance, the *Dennis* decision clearly was, as Thomas I. Emerson noted in 1970, “one of the most influential in the post-

war period.”⁵ “Everything,” as Harry Kalven, Jr., has observed, “conspired to make *Dennis* a great moment.”⁶ Reaching the Supreme Court at the height of the country’s preoccupation with domestic communism, the case “involved the criminal prosecution of eleven leaders of the Communist Party,” and was an outgrowth of what Kalven called, without too much exaggeration, “the great American political trial.”⁷

That trial was in turn, as Peter L. Steinberg and I have demonstrated, the product of a blatantly political prosecution.⁸ When the World War II alliance between the United States and the Soviet Union deteriorated into a postwar confrontation over the future of Central and Eastern Europe, President Harry S. Truman sought to rally the



President Harry Truman with Hubert Humphrey (left) on the campaign trail in Fargo, North Dakota in 1948.

American people behind costly international initiatives designed to check Soviet expansionism by characterizing what was essentially a conflict of interest between two powerful nation states as a struggle between communism and democracy. Capitalizing on the traditional American tendency to define international issues in moral terms and playing on traditional American fears of radicalism, Truman managed to enlist bipartisan support for his anti-Soviet foreign policy, but at a high political price. In 1944 some Republican conservatives had attempted to discredit Truman's Democratic party by linking it to communism. Voters had displayed little interest in such charges then, but by 1948, with the aid of some spectacular revelations of Communist espionage during the 1930s and early 1940s, a threatening international situation and the president's inflated rhetoric had made what was once a non-issue into a compelling concern.

It was not a worry of Truman and his advisers, who considered communism an international problem, not a domestic one. The president dismissed the Communist Party of the United

States of America (CPUSA), which had only 60,000 members in 1948, as a "contemptible minority in a land of freedom." Many Americans did not find his position persuasive, for if what menaced America was communism, then surely Republicans were right in claiming that Reds in New York City, and especially in the federal government in Washington, were a threat to national security. By April 1947, sixty-one percent of Americans favored outlawing the CPUSA, a percentage that rose in succeeding months. Led by the House Committee on Un-American Activities (HUAC), Republicans hammered away at the Truman administration for not doing more to combat this Red menace. Endeavoring to protect itself against GOP charges that it was soft on subversion, the administration initiated a loyalty-security program for federal employees. But Republicans and conservative Democrats also demanded to know why the Justice Department was not employing the Smith Act⁹ against the CPUSA. A sedition statute enacted in 1940, that law made it a crime to teach or advocate the violent overthrow of the government, to set up an organization to engage in such teaching and advocacy, or to conspire to do either. It also proscribed membership in any group that provided instruction in or championed violent overthrow. After being grilled by HUAC on February 5, 1948 about his failure to use the Smith Act against the CPUSA, Attorney General Tom Clark launched a prosecution of the party's top leaders on charges of conspiring to violate that law. My 1977 book represents the resulting *Dennis* case as a Democratic response to political pressure from the GOP.¹⁰

While agreeing that partisan motives animated the Truman administration,¹¹ Steinberg, writing seven years later and drawing on documents liberated from the Federal Bureau of Investigation, also pointed an accusing finger at the FBI. According to him, the idea of prosecuting the Communist leaders originated with the Bureau, which viewed such a prosecution as part of a campaign to educate the American people about the dangers of communism.¹² "The FBI," Steinberg contends, "was seeking a precedent which would allow the arrest of large numbers of left-wingers in peacetime and masses of people in wartime."¹³ Pursuing that objective, the Bureau's director, J. Edgar Hoover, suggested to Attorney



J. Edgar Hoover (left) with Justice Hugo Black in 1965. As Director of the FBI, Hoover suggested that the Justice Department use the Smith Act against the CPUSA.



Wives and supporters of the eleven members of the Communist Party governing board on trial for Smith Act violations protest outside the Foley Square court building where the trial was held.

General Clark that he consider using the Smith Act against the CPUSA. After HUAC hammered Clark on February 5, 1948, the FBI quickly supplied the attorney general with a giant "brief" (or investigative summary), that could serve as the basis for such a prosecution. Hoover's organization then orchestrated a campaign to pressure sometimes reluctant Justice Department lawyers into indicting the Communist leaders.¹⁴ Steinberg concludes, "The Bureau's role in securing Smith Act prosecutions. . . was direct, persistent, and persuasive."¹⁵

Students of the FBI concur. Kenneth O'Reilly,¹⁶ Richard Gid Powers,¹⁷ and Athan G. Theoharis and John Stuart Cox¹⁸ all agree with Steinberg that the FBI viewed prosecution of the leaders of the CPUSA under the Smith Act as a way of educating the American people about the dangers of communism and mobilizing public support for a crusade against the Red menace. Powers also supports Steinberg's contention that the FBI hoped to use this as a test case to establish

a precedent that would provide a legal basis for mass arrests in an emergency.¹⁹ Other scholars are a bit less inclined than Steinberg to view Hoover and the FBI as the instigators of the *Dennis* prosecution, but even I have accepted his contention that the Bureau played an important role in the case's inception.²⁰ Perhaps Theoharis and Cox summarize the situation most accurately when they state that "working in tandem," Hoover and the Truman administration "utilized the Smith Act's ban against advocating revolutionary ideas to effect prosecution of the leadership of the Communist party . . ."²¹

The administration and the FBI thereby instigated a political trial. Indicted by a federal grand jury in New York on June 29, 1948,²² eleven members of the Party's governing board spent more than nine months in the Foley Square courtroom of Judge Harold Medina.²³ In form a legal proceeding, their trial was in fact a propaganda battle in the Cold War. Only about ten percent of the prosecution's case had anything directly to do

with the Eleven, and it was obvious from the beginning that the real defendant in this case was the CPUSA.²⁴ Unable to prove that the Party was plotting to overthrow the government, that it had engaged in military activity, or even that it was under the control of the Soviet government,²⁵ federal prosecutors put Communist ideology on trial. The theory underlying their case was that among the central tenets of the Marxist-Leninist philosophy championed by the CPUSA was the overthrow of all capitalist governments, including that of the United States. Consequently, when Communists taught and advocated Marxism-Leninism, they were violating the Smith Act, and in reorganizing the Party in 1945 and recommitting it to Marxism-Leninism, the defendants had transgressed the conspiracy provisions of that law.²⁶ The prosecution's case consisted primarily of Communist literature, much of it published years before the adoption of the Smith Act. Although a number of former party members and FBI informants supplied sometimes dramatic testimony, legally their principal contribution was to satisfy the evidentiary requirements for getting the prosecution's literary evidence before the jury.²⁷ The unimpressive case presented by U.S. Attorney John F.X. McGohey and his associates demonstrated that the *Washington Post* had correctly branded this a prosecution whose objective was "not so much the protection and security of the state as the exploitation of justice for the purpose of propaganda."²⁸

The CPUSA was as guilty as the government of using the trial for propaganda purposes. Some of the defendants favored focusing on the denial of the right to freedom of expression that this prosecution involved.²⁹ Such a legalistic approach, however, conflicted with the "labor defense" strategy the Party had long employed in criminal cases. Believing that members of the working class could expect no justice from capitalist courts, Communists had traditionally relied on mass political action to free class war prisoners from the clutches of the law. Convinced that the fate of accused workers would be decided in the streets, they viewed courtrooms as battlefields on which to fight the class war and as platforms from which to preach their political message.³⁰ The Eleven's approach to the Foley Square trial reflected that outlook. The defense eschewed simple

rebuttal of the prosecution's unimpressive case. It devoted more than a month to a pretrial attack on the political, ethnic, and class composition of grand and petit juries in the Southern District of New York.³¹ During the trial itself defense attorneys paraded defendants and other Communists to the stand to espouse the party's ideology and program and attack American government and society.³² Predictably, with anti-Communist hysteria gripping the country, this approach failed. The mass movement that was supposed to save the defendants never materialized, and on October 14, 1949, as their lawyers had anticipated, the jury convicted all of the accused.³³

Despite their ideological reservations about the American legal system, the Eleven promptly appealed. Their chances of success before the Second Circuit Court of Appeals suffered a severe setback on the day after oral argument ended on June 23, 1950, when Communist North Korea invaded anti-Communist South Korea. President Truman quickly committed United States forces to the Korean conflict under the auspices of the United Nations, and by the time the court announced its decision in *United States v. Dennis*³⁴ on August 1, Americans were dying at the hands of a Communist enemy. "As this is being written," Judge Harrie Brigham Chase observed in a concurring opinion, "Fifth Column activities are aiding the North Koreans in their war against the United Nations."³⁵ With Korea on their minds, Chase and his colleagues, Thomas Swan and Learned Hand, ruled unanimously against the Eleven. Speaking for the court, Hand rejected arguments that Medina had erred in overruling the jury challenge, that the jury had been biased against the defendants, and that the judge had committed numerous errors during the trial.³⁶

More importantly, Hand rejected the contention of the Communist leaders that the Smith Act violated the First Amendment. Doing that required him to modify significantly what had become the governing principle in free speech law: the "clear and present danger" test. Shortly after World War I, Justice Oliver Wendell Holmes, Jr. had declared in *Schenck v. United States* that when the government seeks to punish expression, what determines if its actions violate the First Amendment is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will



Judge Learned Hand served on the Court of Appeals for the Second Circuit from 1924 until his death in 1961. As a member of that court he wrote the opinion upholding the convictions of the Eleven.

bring about the substantive evils that Congress has a right to prevent."³⁷ It is not certain precisely what Holmes meant these words to convey when he wrote them,³⁸ but as interpreted in his dissents in *Abrams v. United States*³⁹ and *Gitlow v. New York*⁴⁰ and in a concurring opinion by Justice Louis Brandeis in *Whitney v. California*⁴¹ in which Holmes joined, the clear and present danger test came to permit punishment of speech only if the words in question produced, or were intended to produce, an imminent danger of some serious evil. As far as Holmes and Brandeis were concerned, this rule applied even when some legislative body had determined that a particular kind of expression posed a grave threat to the interests of society; in the *Whitney* concurrence they rejected the contention of the *Gitlow* majority that judges should generally defer to legislative determinations that a particular kind of speech posed a clear and present danger.⁴² Although refined in minority opinions, the Holmes-Brandeis view eventually won the support of a majority of the Supreme Court, which implemented it in *Herndon v. Lowry* (1937).⁴³ During the early 1940s clear and present danger "emerged as *the* test for the constitutionality of legal measures burdening freedom of

speech."⁴⁴ Throughout the decade the Court repeatedly relied upon it, expanding what had begun as a rule for determining the degree of constitutional protection enjoyed by allegedly seditious expression into a principle for the resolution of a wide variety of First Amendment problems.⁴⁵

Writing in 1950, Hand realized he must use the clear and present danger test to determine the constitutionality of the Smith Act. As a federal district judge during World War I, he had endorsed a very different approach, insisting in *Masses Publishing Co. v. Patten*⁴⁶ that only words of direct incitement should be considered punishable. The *Masses* decision had been overruled, however, and the position Hand articulated in his opinion had failed to win the support of the legal profession. Hence, he now bowed to Supreme Court precedent and applied the clear and present danger test.⁴⁷

Had Hand actually followed the reasoning of Holmes and Brandeis, however, he would have had to reverse the convictions of the Eleven. Judge Medina had rejected a defense request for an instruction that the jury might find the defendants guilty only if Communist teaching and advocacy had created a clear and present danger of violent overthrow of the government. Medina had allowed jurors to vote to convict if they found merely that the CPUSA had used language "reasonably and ordinarily calculated to incite persons to such action" and had done so intending that the principles it taught be regarded as rules of action, provided the jury also determined that the defendants had entered into their conspiracy with the intent "to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."⁴⁸ Following his instructions, the jury could have convicted the Eleven even though Communist teaching and advocacy posed no imminent threat of violent revolution.

Committed to employing the clear and present danger test, but realizing that in the case before him the Smith Act had been applied in a way that did not satisfy its immediacy requirement, Hand reformulated the rule. Three years earlier in an admiralty case called *United States v. Carroll Towing Co.*⁴⁹ he had developed a formula for determining when the owner of a barge that broke loose from its moorings should be considered



(From left) John Gates, Gus Hall, and Carl Winter at the Supreme Court on December 4, 1950, the day the Court heard arguments in their case. The Court upheld their convictions on June 4, 1951.

negligent and required to pay for the damage it had caused. The gravity of the injury was to be multiplied by the probability of it happening, Hand declared, and if the result were greater than the burden of taking precautions to prevent the harm, the defendant was liable.⁵⁰ In *Dennis* Hand resorted to similar reasoning. There is no evidence that he consciously sought to extrapolate his *Carroll Towing* formula into free speech law, let alone that he was attempting to ground First Amendment jurisprudence in anything like modern law-and-economics theories. Although Hand's familiarity with economic analysis was limited, he does seem to have recognized that, like deciding when negligence liability should be imposed, determining when speech ought to be restricted required balancing the benefit of an activity against the harm that it could cause.⁵¹ In *Dennis* he used such cost-benefit analysis to eliminate the troublesome immediacy element from the clear and present danger test. "In each case", Hand wrote, "[courts] must ask whether

the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have," he added, "purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation."⁵² Under Hand's version of the clear and present danger test, if the evil threatened were grave enough, it would be extremely unlikely ever to occur.

In this case the evil imperiling the nation was a conspiracy to overthrow the government, which the defendants would implement as soon as success seemed likely. Such a "thoroughly planned . . . and extensive confederation" might not qualify as a "present danger" under all circumstances, Hand acknowledged, but in the summer of 1948 it certainly did. The reason was the Cold War.⁵³ Hand had a Spenglerian sense of the West as a unique and precious civilization, one he viewed as menaced by the spread of communism.⁵⁴ After reviewing the tense state of Soviet-American relations in 1948, he declared, "We do not under-

stand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities.”⁵⁵ The problem with Hand’s analysis was that the Eleven had been convicted not of conspiring to act as a fifth column for the Cold War enemy but of conspiring to advocate Marxism-Leninism. With impassioned anticommunism gripping the United States, their chances of initiating a revolution by winning converts to their creed were approximately zero. J. Edgar Hoover himself had stated in 1947, “I do not for one moment hold to the opinion that any revolution could be effected by that group [the Communists].”⁵⁶

While most Americans agreed with Hoover’s assessment, they also shared Hand’s conviction that as an internal extension of the external Soviet threat, the CPUSA represented a grave and probable danger to national security.⁵⁷ Certainly the Supreme Court thought so. On June 4, 1951, by a vote of 6-2, it affirmed the decision of the Second Circuit.⁵⁸ The Court’s spokesman was Chief Justice Fred Vinson. For him, according to one of his former clerks, cases involving Communists were “foregone conclusions.”⁵⁹

Yet, so strong was the hold of the clear and present danger doctrine on judicial minds that Vinson too felt compelled to reconcile a decision against the Eleven with that rule.⁶⁰ He shared the prevailing view that “an attempt to overthrow the Government by force, even though doomed from the outset. . . is a sufficient evil for Congress to prevent.”⁶¹ If the authorities were aware that a group bent on revolution was “attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required,” Vinson contended.⁶²

The crucial issue, of course, was whether seeking to prevent violent revolution through use of the Smith Act’s conspiracy provision involved reaching further back before the occurrence of that evil than the clear and present danger test would allow. Vinson thought not. He commended Hand’s reformulation of the Holmes-Brandeis test as “succinct and inclusive.” “We adopt this statement of the rule,” the Chief Justice declared.⁶³ “Likewise, we are in accord with the court below. . . that the requisite danger existed.”⁶⁴ For Vinson, as for Hand, it was the Cold War and the relationship between the CPUSA and

America’s Soviet enemy that constituted the threat. The formation by the Eleven of “a highly organized conspiracy, with rigidly disciplined members subject to call when the [Communist] leaders. . . felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom [they] were in the very least ideologically attuned, convince us that their convictions were justified on this score,” he wrote.⁶⁵ Justice Stanley Reed, who joined Vinson’s opinion, articulated their reasoning even more succinctly when he wrote to his colleague Felix Frankfurter that the “teaching of force and violence by such a group as this, . . . is enough at this period of the world’s history to make the protection of the First Amendment inapplicable.”⁶⁶

Frankfurter was far less convinced of that than was Reed, and he entertained serious doubts about the wisdom of the Smith Act as a method of combating communism.⁶⁷ He was, however, a proponent of judicial self-restraint, who insisted judges should not, in assessing the constitutionality of legislation, substitute their policy views for those of the legislature that enacted it; jurists should instead defer to the peoples’ elected representatives so long as what they had adopted was reasonable.⁶⁸ As far as Frankfurter was concerned, free speech cases were “not an exception to the principle that we are not legislators, that direct policy-making is not our province.”⁶⁹ In a concurring opinion he argued that Congress had already weighed the competing claims of freedom of expression and national security and that in deciding *Dennis* the Supreme Court should accept the balance it had struck between those conflicting interests.⁷⁰ As Emerson later charged,⁷¹ and as Frankfurter essentially acknowledged, his reasoning represented a reversion to that of the *Gitlow* majority.⁷² Frankfurter insisted, however, that the two cases were different, because *Dennis* involved “a substantial threat to national order and security.”⁷³ Like Hand and Vinson, Frankfurter took judicial notice that “the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country.”⁷⁴

Neither he nor Robert Jackson, who also filed a concurring opinion, attempted to employ the

clear and present danger test. Jackson considered it unsuited to cases involving Communists, who could be expected to resort to violent revolution only under certain conditions. Determining whether their conduct created a clear and present danger required judges to prophesy concerning whether and when those circumstances would occur, he believed. Although favoring retention of an unmodified clear and present danger test for use in cases of individual agitators and small groups, Jackson contended that rule had no place in a prosecution of the CPUSA, which he viewed as a nation-wide conspiracy.⁷⁵ "What really is under review here," he argued, "is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy."⁷⁶ No proof of clear and present danger was required in such a case. Indeed, although the essence of conspiring is communication, the Court had consistently rejected the contention that punishing conspiracy infringed upon freedom of speech.⁷⁷

Although Jackson maintained this case did not fall within the purview of the clear and present danger test, Justice Hugo Black insisted in dissent "that the only way to affirm these convictions is to repudiate directly or indirectly the established . . . rule."⁷⁸ Black was perfectly willing to do that. Regarding the traditional test as insufficiently protective of freedom of expression because it permitted suppression of speech on the basis of judicial notions of reasonableness, he advocated a governmental policy of unfettered communication of ideas.⁷⁹

William O. Douglas was not prepared to go quite that far. Although he too dissented, Douglas conceded that "freedom to speak is not absolute."⁸⁰ Speech lost its constitutional immunity, he believed, "[w]hen conditions are so critical that there will be no time to avoid the evil the speech threatens. . . ."⁸¹ The Court should have used the real clear and present danger test, Douglas thought.⁸² He found disturbing the lack of a jury finding that the kind of threat it required existed, as well as the absence from the record of any "evidence whatsoever showing that the acts charged. . . have created any clear and present danger to the Nation."⁸³ While international communism was "no bogeyman, . . . Communism as a political faction or party in this country plainly is."⁸⁴ Douglas simply did not believe that

American Communists were "so potent or so strategically deployed that they must be suppressed for their speech."⁸⁵

His contention that they did not pose a clear and present danger to national security was almost certainly correct,⁸⁶ and since McCarthyism ebbed in the late 1950s, most commentators have joined Douglas and Black in criticizing the *Dennis* decision. The position of conservative historian Herman Belz, who defends it as a sensible compromise, that used liberal legal doctrine to satisfy conservative demands to stop the CPUSA, is definitely a minority one.⁸⁷ British scholar David Cauter condemns the Court's ruling as absurd and faults both the intellectual and legal quality of Vinson's opinion.⁸⁸ Law professor Marc Rohr accuses the majority of adopting "an approach to First Amendment issues. . . that fell notably short of the highest level of vigilance."⁸⁹ Liberal historian Paul Murphy is harsher yet, contending that in *Dennis* the Supreme Court "demonstrated its total ineffectiveness as an agency for defending the liberty of the individual against any government program publicly justified as a response to internal subversion."⁹⁰

This retrospective censure contrasts vividly with the reaction *Dennis* elicited at the time.

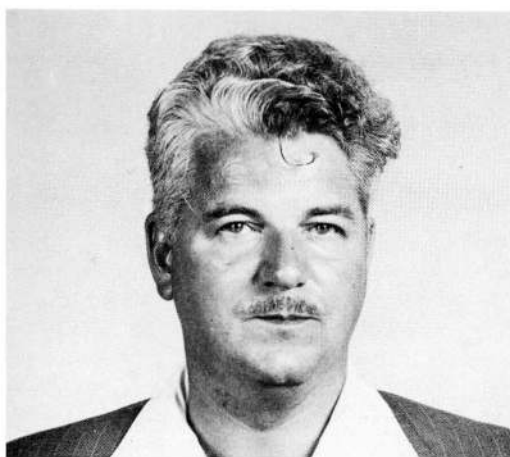


Roger Baldwin (left) with Mr. and Mrs. Leonard Bernstein. The Bernsteins are presenting Baldwin with a portrait of himself. Baldwin, the founder of the American Civil Liberties Union, called the *Dennis* decision "the worst single blow to civil liberties in all our history."

Black was prophetic when he observed, "Public opinion being what it now is, few will protest the conviction of these Communist petitioners."⁹¹ Roger Baldwin of the American Civil Liberties Union did excoriate *Dennis* as "the worst single blow to civil liberties in all our history,"⁹² and practicing attorneys Louis Boudin,⁹³ John A. Gorfinkel, and Julian Mack II,⁹⁴ law professor Chester James Antieau,⁹⁵ and political scientist Robert McCloskey⁹⁶ did publish articles criticizing the decision. The popular press, however, heaped praise upon the Supreme Court for upholding the government in a national security crisis.⁹⁷ "The American people in overwhelming majority will rejoice in this judicial affirmation of the nation's right and power," the *New Orleans Times-Picayune* proclaimed.⁹⁸ In the entire country only five major newspapers criticized *Dennis*.⁹⁹

What the popular press liked best about the decision was that it seemed to sanction all out war on the CPUSA. "We are fighting Communism with blood and money on both sides of the world; now the Supreme Court permits us to fight it at home," the *Los Angeles Times* observed approvingly.¹⁰⁰ *Dennis* owed its popularity to the fact that it incarnated Cold War animosities and anti-Communist paranoia.¹⁰¹ The decision did more than merely reflect the anti-libertarian temper of the times, however; it also fueled the fires of McCarthyism. The use of the Smith Act against the CPUSA at the height of the 1948 campaign had fostered the development of an anticommunist political atmosphere in the United States, and the decision of the Second Circuit increased the general sense of fear in the country.¹⁰² The Supreme Court's ruling, along with subsequent prosecutions of lesser CPUSA leaders, served to deprive American Communists of whatever legitimacy they retained. As a result, "vigilantism against the Left mounted."¹⁰³

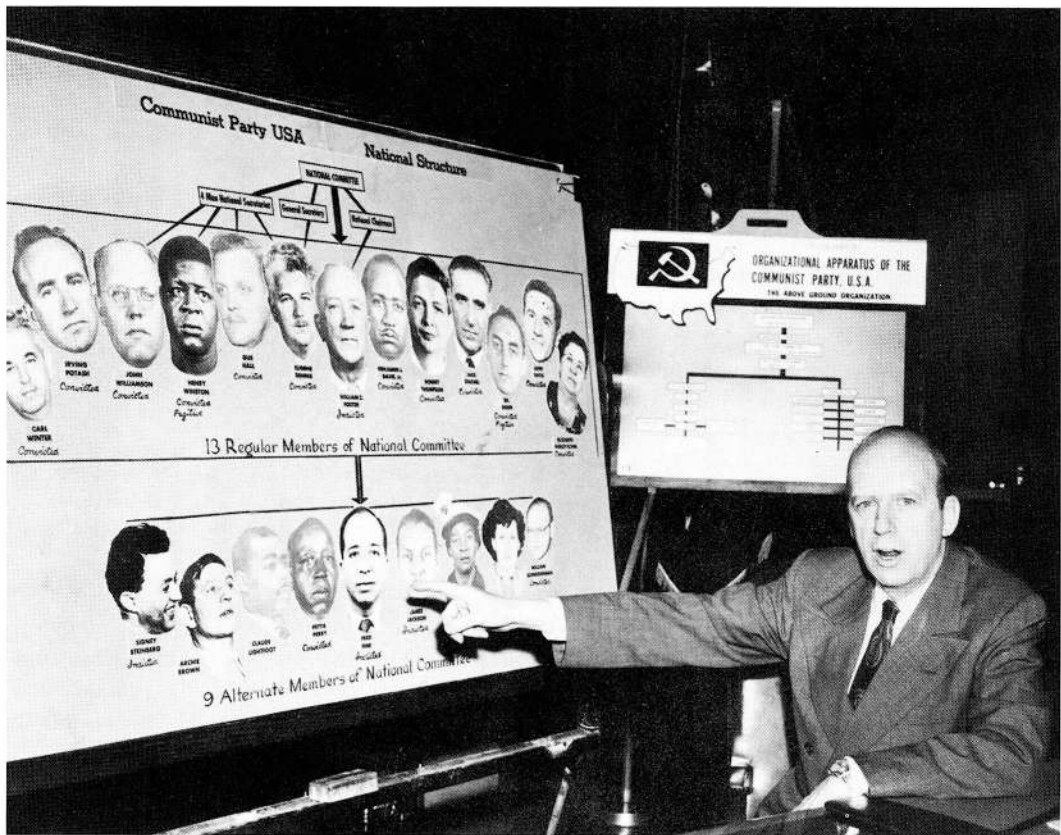
Besides feeding the hysteria that was undermining civil liberties in the United States, *Dennis* dealt a devastating blow to the CPUSA. "As a practical result of the *Dennis* decision, the Department of Justice. . . which had withheld instituting any further prosecutions until the Court had ruled on the constitutionality of the Smith Act, immediately began a series of prosecutions of secondary Communist Party leaders in various parts of the country."¹⁰⁴ The ACLU urged J. Howard McGrath, who had replaced Clark as



Eugene Dennis, the General Secretary of the CPUSA, tried to continue his organizing activities from the federal penitentiary. However heavy censorship of his mail made it difficult for him to continue.

Truman's attorney general, to limit arrests to those individuals against whom there was evidence of personal participation in the illegal conspiracy,¹⁰⁵ and the government did not cast its net as far as it might have.¹⁰⁶ Between 1951 and 1956, though, the Truman and Eisenhower administrations did secure the indictment of 126 prominent Communists on charges of conspiracy to violate the Smith Act and also prosecuted seven "second string" leaders of the CPUSA under that law's membership clause.¹⁰⁷ The defendants in these post-*Dennis* cases repeatedly asserted that their First Amendment rights were being violated because there was no clear and present danger. That argument always failed, for "*Dennis* had virtually settled the issue."¹⁰⁸ Of the 126 conspiracy defendants, only ten won acquittal, and every Communist tried on membership charges was convicted.¹⁰⁹ Until 1957 appellate courts upheld all Smith Act convictions that came before them.¹¹⁰

Besides inflicting a long series of legal defeats on the CPUSA, the *Dennis* case and the post-*Dennis* prosecutions cost the organization an immense amount of money. The bills for the Foley Square trial alone may have run as high as \$500,000.¹¹¹ The Smith Act prosecutions also disrupted party leadership. After being ordered to prison in July 1951, General Secretary Eugene Dennis attempted to continue running the organization from inside the federal penitentiary at Atlanta, Georgia, by passing instructions to his wife in correspondence and during her visits. But



Attorney General Herbert Brownell testified in favor of a bill that would take away citizenship of those convicted of CPUSA activities. His chart demonstrates the success the Justice Department had in prosecuting Smith Act violations.

prison officials heavily, if somewhat erratically, censored his mail, and thereby managed to a considerable extent to isolate Dennis from the rest of the CPUSA. Other imprisoned Communist leaders confronted similar restrictions on their ability to communicate with their comrades.¹¹² By 1953, with nine of its thirteen members in prison, the party's governing body, the national committee was, according to the FBI, "more or less inoperative."¹¹³ Even after Dennis and his codefendant, John Gates, got out of prison, they were forbidden by the terms of their parole to participate in CPUSA activities.¹¹⁴ Lacking firm direction from its top leadership, the party suffered a serious breakdown of internal discipline.¹¹⁵

The Justice Department failed, however, to accomplish its objective of decapitating the CPUSA. The government managed to force three of the Eleven, who were aliens, to accept voluntary deportation when they emerged from prison. By 1960, though, seven of the Foley Square defendants had again participated in a CPUSA

convention. So had Elizabeth Gurley Flynn, chosen in 1948 to serve with them on the national committee, and all but one of the individuals who were alternate members of that body when *Dennis* was decided.¹¹⁶

Although the prosecutions did not decapitate the CPUSA, they did badly damage it. Rohr contends that *Dennis* and its progeny did "irreparable damage. . . to the CPUSA,"¹¹⁷ and I have argued that they fatally wounded the party.¹¹⁸ While criticizing me for pushing that thesis too hard, Steinberg also depicted the legal attack which the federal government launched against the CPUSA as one of the major reasons why that organization collapsed in 1956-1957, when it lost nearly eighty percent of its 17,000 members.¹¹⁹ Other scholars disagree. In a book published in 1992, Harvey Klehr and John Earl Haynes argue that the CPUSA was already politically broken when the prosecutions began in 1948, and consequently that "the governmental attack on the Communist party was more in the nature of

shooting the wounded than an assault on a dangerous foe."¹²⁰ They view the CPUSA as a victim of self-inflicted injuries,¹²¹ an appraisal that echoes the analysis of Joseph Starobin. Starobin, a prominent Communist in the late 1940s and early 1950s, attributes the Party's downfall to its own mistakes, most notably its unwavering support of the Soviet Union, its backing of Henry Wallace's 1948 third-party challenge to Truman, and its creation of an underground apparatus to protect itself from persecution.¹²² The contention of historian David Shannon, on the other hand, is that the CPUSA was a victim of external forces. According to Shannon, the Cold War, prosperity, and popular anticommunism put the party on the ropes, and then two foreign events in 1956, the Soviet Union's brutal repression of the Hungarian Revolution and Nikita Khrushchev's revelations of atrocities committed by his predecessor, Joseph Stalin, finished it off.¹²³

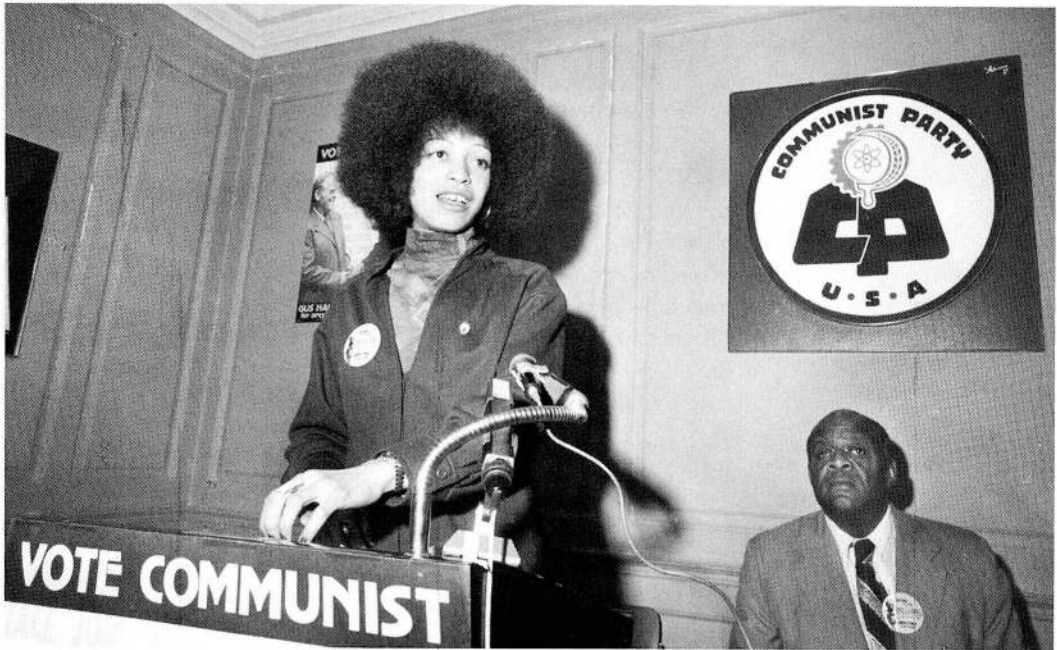


Elizabeth Gurley Flynn was a founder of the ACLU. She joined the CPUSA in 1937 and became a member of the national committee in 1948. After serving two years in prison for Smith Act violations, she returned to CPUSA activities and served as chair from 1961 until her death in 1964.

Although the factors emphasized by Shannon, Starobin, Klehr and Haynes all contributed to the collapse of the Communist Party, the role of the Smith Act prosecutions was crucial. In the first place, as Maurice Isserman notes, "As the Communists by necessity grew preoccupied with courtroom battles, their political organizing suffered accordingly."¹²⁴ In the second place, legal attack drove the CPUSA to adopt self-destructive security measures. After numerous FBI informants, who had operated within its ranks for years, appeared as government witnesses at Foley Square, the party launched a drive to eliminate unreliable members. The result was an internal witch hunt.¹²⁵ To the delight of J. Edgar Hoover, "member after member, completely innocent of the party's charges [was] expelled."¹²⁶ Others were dropped from the rolls for failing to reregister.¹²⁷ Between 1948 and 1953, the membership of the CPUSA declined by fifty percent.¹²⁸ Hoover told a congressional subcommittee, "This drop has been due largely to a housecleaning by the Communists. . . ."¹²⁹

While eliminating some members, the Party sent others underground. Even before the indictment of the *Dennis* defendants, the CPUSA, convinced that the United States would soon succumb to fascism, had begun to create a three level underground structure.¹³⁰ The "specific impetus" for its decision to submerge, however, was the Supreme Court's ruling. Anticipating it would be negative, party leaders began planning to smuggle at least some of the defendants out of the country. After the Court handed down its decision, these plans were implemented; defendants Robert Thompson, Gil Green, Henry Winston, and Gus Hall jumped bail and disappeared. Their disappearance was taken by many ordinary members as a signal to go underground too. They dropped party activity, changed occupations, and even adopted assumed names.¹³¹ Some skulked about the country in disguise, while others went into hiding abroad.¹³²

The whole underground venture was a fiasco. It validated the conspiratorial image of the party that the FBI and the Justice Department were trying to project through the Smith Act trials. The CPUSA became inward looking and secretive, largely abandoning its long struggle for popular acceptance and support. In addition, the "underground foolishness" imposed immense physical



Angela Davis, an African-American philosophy instructor, was one of the most prominent members of the New Left to join the Communist Party. Her 1972 trial on murder charges brought substantial media attention to herself and the Communist Party. She is shown here at a 1976 press conference for the party's presidential and vice presidential candidates.

and especially psychological hardships on the participants.¹³³ It also divided the party's leadership and separated many leaders from ordinary members, thereby creating confusion and exacerbating the deterioration in internal discipline caused by the prosecutions themselves.¹³⁴ Finally, and most importantly, by isolating many of the organization's best and brightest from Communist social life and the hubbub of daily party work, it gave them an opportunity to read, think, and begin to question basic tenets of the party "line." The result was erosion of the iron ideological conformity that had always been the greatest strength of the CPUSA.¹³⁵ As Klehr and Haynes point out, "It took several years for the undermining process to mature, but when the party faced an ideological crisis in 1956-58, the vast majority of members sent underground in the early 1950s left it."¹³⁶ A number who had experienced a similar type of isolation while serving Smith Act prison sentences went with them.¹³⁷

While *Dennis* and the legal assault on American communism that it sanctioned made a substantial contribution to the collapse of the CPUSA in 1956-1958, they did not destroy the party, as my readers and those of Rohr and even Steinberg

might conclude. Although the party limped through the 1960s, battered and generally out of step with the burgeoning New Left, it did play a major role at several gatherings held to unify American radicalism. By the end of the decade the CPUSA had regained legitimacy in radical circles.¹³⁸ "As the New Left waned, some of its disillusioned members joined the Communist party."¹³⁹ The most prominent of these was Angela Davis, an African-American philosophy instructor, whose 1972 murder trial became the focal point of a massive defense campaign, that appealed to women and African-Americans and attracted substantial attention to the party. CPUSA membership, still below 10,000 in the mid-1970s, rose to around 15,000 by 1987 and held at that level until the end of the decade.¹⁴⁰ During the 1980s Communists edged back into mainstream politics, and a few labor leaders, city officials, and even members of Congress began to associate with Communist-aligned organizations. Then Party membership plunged. By early 1992 it was down to 3,000—approximately the level of 1958—and falling rapidly. The reason was events in Eastern Europe. The collapse of communism in the former Soviet empire staggered the CPUSA,

and when Gus Hall, who had displaced Dennis as the party's top leader in 1959, initially supported the abortive 1991 coup against Mikhail Gorbachev, vigorous dissent erupted within the party.¹⁴¹ Hall crushed it, but the dissidents departed.¹⁴² "The Party has survived other rifts, but this one is likely to be fatal," Klehr and Haynes predict.¹⁴³ If they are correct, the crisis triggered by the collapse of communism in Eastern Europe will have accomplished what *Dennis* and the Smith Act prosecutions could not: the destruction of the CPUSA.

Like its impact on the Communist party, the effect of *Dennis v. United States* on American law was spectacular but transitory. Nineteen years after the decision, Emerson proclaimed, "The Hand-Vinson formula. . . has never been used again."¹⁴⁴ The Supreme Court began to back away from *Dennis* as early as 1957 when it decided *Yates v. United States*.¹⁴⁵ By then the Court had three new members, who were quite concerned about the excesses of McCarthyism: Chief Justice Earl Warren and Associate Justices John Marshall Harlan and William Brennan. While Brennan had taken his seat too late to participate in *Yates*, Justice Frankfurter, who had also been shaken by the runaway crusade against domestic communism, and another member of the *Dennis* majority, Harold Burton, joined with Warren, Harlan, Black, and Douglas to overturn the Smith Act conspiracy convictions of fourteen California Communist leaders.¹⁴⁶

Speaking for a 6-1 majority,¹⁴⁷ Harlan took the position that, as the current "Communist Party came into being in 1945," the three-year statute of limitations barred any prosecutions for conspiracy to organize initiated after 1948.¹⁴⁸ Only the Eleven could be properly punished for that offense. In addition, Harlan held that the trial judge had erred in failing to instruct the jury that it could convict the defendants only if they had conspired to promote advocacy designed to inspire deeds rather than merely produce intellectual commitment. What the Smith Act required, he said, was "advocacy of action, not ideas. . . ."¹⁴⁹ "[T]hose to whom the advocacy is addressed, must be urged to *do* something, now or in the future, rather than merely to *believe* in something."¹⁵⁰

The Court did not reverse *Dennis*, a step that would have been politically difficult for it to take.¹⁵¹ Technically *Yates* was a statutory inter-

pretation case, in which the constitutionality of the Smith Act was not even an issue. To Emerson, however, it was obvious that the Court regarded the distinction between advocacy of action and advocacy of ideas as one having constitutional dimensions.¹⁵² Rohr is right to insist that *Yates* was not "a clear retreat from *Dennis*;"¹⁵³ the military euphemism "retrograde operation" might be a more appropriate characterization. Although lacking doctrinal candor, the *Yates* decision did effectively terminate the Smith Act conspiracy prosecutions. Recognizing that the government could not meet the new evidentiary standards set by the Supreme Court, courts of appeals ordered the release of all defendants in four pending conspiracy cases.¹⁵⁴ Although authorized by appellate courts that reversed convictions in six other cases to retry some or all of the accused, the government itself terminated those prosecutions; it also elected not to proceed against two groups of Smith Act defendants who were still awaiting trial when *Yates* was decided.¹⁵⁵

Although that decision devastated the Smith Act war on the Communist party that *Dennis* had unleashed, the Supreme Court did not repudiate its 1951 ruling. In a 1959 opinion upholding the contempt conviction of a HUAC witness who had refused to answer questions about his past or present membership in the CPUSA,¹⁵⁶ "Harlan cited *Dennis*, and used language reminiscent of much that was said in that opinion. . . ."¹⁵⁷ Two years later in *Scales v. United States*¹⁵⁸ the Court affirmed the constitutionality of the Smith Act's membership clause without bothering to consider whether, in light of the greatly diminished size and potency of the CPUSA, the Party continued to pose a grave and probable danger to national security. "[W]ith respect to the [F]irst [A]mendment," Rohr maintains, "*Scales* rested firmly and necessarily on *Dennis*. . . ."¹⁵⁹ By the late 1960s, the increasingly liberal Warren Court had handed down numerous decisions sweeping away legal leftovers from the McCarthy era. But, "Regarding punishable advocacy itself, nothing had changed: *Dennis* was still good law, albeit modified by *Yates*."¹⁶⁰

In a sense it still is, for the Supreme Court has never formally overruled *Dennis*. The Court's 1969 decision in *Brandenburg v. Ohio*,¹⁶¹ however, effectively nullified the 1951 ruling. In the process of overturning the conviction of a Ku

Klux Klansman and voiding the Ohio criminal syndicalism statute under which he had been convicted, the *Brandenburg* Court declared that what the First Amendment prohibited was forbidding or proscribing "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁶² This new rule, announced with remarkable casualness in a per curiam opinion,¹⁶³ revived the imminence requirement that *Dennis* had eliminated from the clear and present danger test and in effect coupled the Holmes-Brandeis formulation of that principle with Hand's insistence in the *Masses* case on treating only expressed words of incitement as unprotected.¹⁶⁴ Remarkably, as its authority, the Court cited *Dennis*. "It was on the theory that the Smith Act . . . embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality," *Brandenburg* asserted.¹⁶⁵ In a magnificent bit of understatement, Martin Redish notes that "the difference in the two decisions' treatments of the imminence requirement rendered it doubtful that *Brandenburg* followed the *Dennis* rationale."¹⁶⁶ "It seems apparent that *Dennis* cannot stand along with *Brandenburg*, though cited therein," Hans A. Linde observes. "If the Smith Act survives, it is in a tightly restricted interpretation that was rejected in *Yates* and *Scales*, and that would not support the convictions in *Dennis*."¹⁶⁷ Although the Court did not formally repudiate its 1951 decision, it recast the *Dennis* holding into something that Vinson and his Cold War colleagues would not have recognized. As Rohr remarks, "If the Supreme Court truly meant. . . its articulation of an 'imminence' requirement in *Brandenburg* to be taken seriously, then the conclusion seems inescapable that *Dennis* has been effectively overruled. . . ."¹⁶⁸

He perhaps goes a little too far when he characterizes *Dennis* as "obsolete,"¹⁶⁹ for its grave and probable danger principle has survived—barely—in one isolated area of First Amendment jurisprudence: cases involving the imposition of contempt sentences for out-of-court statements that allegedly prevent the fair adjudication of a case. Since 1941 the Supreme Court has consistently employed some version of the clear and present danger test in this field.¹⁷⁰ In

*Nebraska Press Association v. Stuart*¹⁷¹ in 1976, it asserted that whether a judge could restrain the news media from publishing or broadcasting accounts of confessions, admissions, and other facts strongly implicating the defendant in a murder case depended on whether the gravity of the evil that would result from such reports, discounted by its improbability, justified the invasion of free speech necessary to prevent it. The Court cited Hand's opinion in *Dennis* to support this conclusion.¹⁷² Two years later in *Landmark Communications, Inc. v. Virginia*¹⁷³, however, it stated that not only the character of the evil arising from a particular utterance, its magnitude, and its likelihood must be considered, but also its "imminence."¹⁷⁴ The Court did not mention *Dennis*, citing instead older cases, such as *Pennekamp v. Florida*¹⁷⁵ and *Bridges v. California*,¹⁷⁶ that had relied on the classic Holmes-Brandeis version of the clear and present danger test.

Thus, although *Dennis* may not be totally obsolete, Kalven's contention that it "has no doctrinal significance in its own right" is at most only a slight overstatement.¹⁷⁷ Since 1951 the Supreme Court has fundamentally altered its approach to speech advocating violence and violation of the law, recasting the analysis in such cases from "an exercise in assessing likely consequences along a continuum, to an exercise in characterizing [a speech-related] act as either 'in' or 'out' of a defined category of unprotected incitements."¹⁷⁸ *Dennis* is a legal museum piece. Its significance, as Kalven recognized, is "as part of the intellectual history of the clear and present danger test. . . . On [this] level, the opinions are a source of endless fascination."¹⁷⁹ But living law, *Dennis* is not.

To be sure, it could rise from the dead. As Rohr points out, "[T]he precedential foundations of the *Brandenburg* 'test' are quite fragile. . . ." and it is not at all clear that the Supreme Court would apply that rule in a genuinely difficult case.¹⁸⁰ Should the United States again confront what most people perceive as a major threat to its national security, should the kind of political hysteria that inundated the country around 1950 again wash over it, and should Americans again come to view the speech of some group or individual as a serious but not immediate threat to the nation's welfare, the Supreme Court might well resuscitate *Dennis v. United States*.¹⁸¹ Even if the

Court did not do that, it might reformulate the *Brandenburg* rule in the spirit of *Dennis*, just as in that case it recast the clear and present danger test to legitimate repression.

For the moment, though, *Dennis* belongs to the historians. It is just another chapter in the grotesque history of McCarthyism. The decision had only a fleeting effect on constitutional law, and even its impact on the Communist party, although devastating, was transitory. *Dennis* served mainly to give the imprimatur of the Supreme Court to an assault upon freedom of expression and association that was the essence of McCarthyism. Rather than upholding what the Court itself has characterized as “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”¹⁸² *Dennis v. United States* sanctioned the banishment of genuinely radical viewpoints from American political discourse. Although substantial achievements, those are hardly laudable ones. “[I]n the end,” as Kalven concluded, “*Dennis* does not prove [to be] a great case. . . .”¹⁸³

Endnotes

¹ *Washington Post*, June 6, 1951, at A 12, cols. 2-3.

² 341 U.S. 494 (1951).

³ See e.g., Gerald Gunther, *Constitutional Law* 1042 (12th ed. 1991); Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, *Constitutional Law* 1055 (2d ed. 1991); William B. Lockhart, Yale Kamisar, Jesse H. Choper & Steven H. Shiffrin, *Constitutional Law: Cases—Comments—Questions* 668 (7th ed. 1991); Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* (4th ed. 1993); David Crump, Eugene Gressman & Steven Alan Reiss, *Cases and Materials on Constitutional Law* 797 (1989).

⁴ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁵ Thomas I. Emerson, *The System of Freedom of Expression* 113 (1970).

⁶ Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* 190 (1988).

⁷ *Id.* The *Dennis* case is also characterized as a political trial in Michal R. Belknap, “Cold War in the Courtroom: The Foley Square Communist Trial,” in *American Political Trials* 210, 228 n. 10 (Michal R. Belknap ed., 1981)(hereinafter cited as Belknap, “Trial”).

⁸ Peter L. Steinberg, *The Great ‘Red Menace’: United States Prosecution of American Communists, 1947-1952* xii-xiv, 89-111 (1984); Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* 35-57 (1977)(hereinafter cited as Belknap, *Cold War*).

⁹ Alien Registration Act of 1940, § 2, 54 Stat. 670, 672(1940)(current version at 18 U.S.C.A. § 2385 (1970))

¹⁰ For my explanation of the origins of the *Dennis* prosecution, as summarized in the two paragraphs above, see Belknap, *Cold War supra* note 8, at 41-48.

¹¹ Steinberg, *supra* note 8, at xii, 104-06.

¹² *Id.* at 96-97.

¹³ *Id.* at 97.

¹⁴ *Id.* at 97-104. Like Steinberg, I make a great deal of the transmission of this brief to Clark’s office immediately after the Attorney General testified before HUAC. Unlike Steinberg, however, I contend that this was done at Clark’s initiative. See, Belknap, *Cold War, supra* note 8, at 47. A leading authority on the FBI, Kenneth O’Reilly, appears to agree with me. See, Kenneth O’Reilly, *Hoover and the Un-Americans: The FBI, HUAC, and the Red Menace* 117 (1983).

¹⁵ Steinberg, *supra* note 8, at 97.

¹⁶ *Supra* note 8, at 117.

¹⁷ Richard Gid Powers, *Secrecy and Power: The Life of J. Edgar Hoover* 293 (1987).

¹⁸ Athan G. Theoharis and John Stuart Cox, *The Boss: J. Edgar Hoover and the Great American Inquisition* 248 (1988).

¹⁹ Powers, *supra* note 17, at 293.

²⁰ In an article published in 1981, written after reading Steinberg’s doctoral dissertation, I mentioned the Bureau’s role. Belknap, “Trial,” *supra* note 7, at 237. Having now read his 1984 book, I am still inclined to think he overstates his case, but in a forthcoming revision of the article, I cite that book and concede more to his position than I did previously. See, Michal R. Belknap, “Cold War in the Courtroom: The Foley Square Communist Trial,” in *American Political Trials* 210, 228 n. 10 (Michal R. Belknap ed., rev. ed. 1994)

²¹ Theoharis & Cox, *supra* note 18, at 248.

²² Belknap, *Cold War, supra* note 8, at 51. The grand jury actually voted to indict on June 29, but in order to keep word of the indictments from getting out until after the Democratic national convention, where they could have caused Truman problems with liberals, John F.X. McGohey, the United States Attorney for the Southern District of New York, prevailed upon the grand jury to delay filing them until July 20. *Id.*

²³ All twelve members of the National Board of the CPUSA were indicted in July 1948. However, the case of the Party’s National Secretary, William Z. Foster, was severed from those of his codefendants because he had a bad heart. Belknap, *Cold War, supra* note 8, at 70. Between the time of the indictments and the date when the trial started, a CPUSA convention changed the name of the board to “National Committee” and added a thirteenth member, Elizabeth Gurley Flynn.

²⁴ *Id.* at 82.

²⁵ This was the conclusion reached by attorney George Kneip of the United States Department of Justice, after reviewing the evidence the FBI had against the Communists. George Kneip, The Communist Party of the United States (unpublished and undated memorandum), box 1, John F.X. McGohey Papers, Harry S. Truman Presidential Library, Independence, Missouri.

²⁶ The American Communist party was founded just after World War I. In 1944, while its leader, Earl Browder was pursuing a policy of accommodation with capitalism, it dissolved itself and reconstituted as the Communist Political Association. At a national convention in July 1945, the

organization ousted Browder from leadership and resumed the name Communist Party, United States of America.

²⁷ Belknap, "Trial," *supra* note 7, at 241-45; Belknap, *Cold War*, *supra* note 8, at 82-83.

²⁸ *Washington Post* July 24, 1948, at A 12, cols. 1-2.

²⁹ Steinberg, *supra* note 8, at 150.

³⁰ Michal R. Belknap, "The Trials of Labor Defense: The *Smith Act* Cases and the Transformation of Communist Party Litigation Strategy," 2 *Nat. J. Crim. Def.* 287, 292-94 (1978). For a classic articulation of the thinking behind the labor defense strategy, see William L. Patterson, "How We Organize," 9 *Lab. Defender* 54 (1933).

³¹ Although the challenge was meritorious, as the court later in effect acknowledged by implementing a number of reforms in its jury selection process designed to correct features criticized by the Communists, the CPUSA undertook it for purposes of propaganda and to delay the trial until the Party could mobilize a mass political movement capable of getting the case "thrown out of court." Belknap, "Trial," *supra* note 7, at 239-41. Judge Medina ultimately overruled the jury challenge. *United States v. Foster*, 83 *F. Supp.* 197 (S.D.N.Y. 1949).

³² Belknap, *Cold War*, *supra* note 8, at 92-107.

³³ *Id.* at 107-08, 111-12; Belknap, "Trial," *supra* note 7, at 250.

³⁴ 183 F.2d 201 (2d Cir. 1950).

³⁵ *Id.* at 236.

³⁶ *Id.* at 226-29.

³⁷ 249 U.S. 47, 52 (1919).

³⁸ Commentators seem agreed that when Holmes wrote his *Schenck* opinion, he probably did not intend to depart from the established "remote bad tendency" test, under which words were punishable if their natural and probable tendency would be to produce illegal conduct. He seems to have abandoned this restrictive position in favor of the more libertarian one for which the phrase "clear and present danger" came to stand during the interval between the *Schenck* and *Abrams* decisions. See, David M. Rabban, "The Emergence of Modern First Amendment Doctrine," 50 *U. Chi. L. Rev.* 1207, 1208-09, 1294-1317 (1983); Fred Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr. and the Clear and Present Danger Test for Free Speech: The First Year, 1919," 58 *J. Am. Hist.* 24 (1971).

³⁹ 250 U.S. 616, 627-28 (1919).

⁴⁰ 268 U.S. 652, 672-73 (1925).

⁴¹ 274 U.S. 357, 373-76 (1927).

⁴² *Compare*, 274 U.S. at 374 with 268 U.S. 652 at 668.

⁴³ 301 U.S. 242, 255-61 (1937).

⁴⁴ Marc Rohr, "Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era," 28 *San Diego L. Rev.* 1, 32 (1991).

⁴⁵ John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 962 (4th ed. 1991).

⁴⁶ 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd* 246 F. 24 (2d Cir 1917).

⁴⁷ Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 *Stan L. Rev.* 719, 721, 729-31, 751-52 (1975); letter from Learned Hand to Felix Frankfurter, (June 8, 1951), box 64, Felix Frankfurter Papers, Manuscript Division, Library of Congress.

⁴⁸ *United States v. Foster*, 9 F.R.D. 367, 391-92 (S.D.N.Y. 1949).

⁴⁹ 159 F.2d 169 (1947).

⁵⁰ *Id.* at 173.

⁵¹ According to Professor Gerald Gunther of the Stanford Law School, who clerked for Judge Hand in 1953-1954 and has just finished writing a biography of him (to be published by Alfred A. Knopf in 1994), "[N]othing in the Hand correspondence suggests that he was consciously using his *Carroll Towing* formula in *Dennis*, nor did he ever say anything to me about it." Professor Gunther continues:

My own guess is simply that the *Carroll Towing* formula came to him naturally, simply because of his somewhat limited familiarity with economic analysis from his classes from Taussig at college; and the "discounting" talk of both *Carroll Towing* and *Dennis* came from the same source, rather than suggesting a conscious copying of one from the other.

Letter from Gerald Gunther to Michal R. Belknap (July 9, 1993) (in the possession of the Author). Professor Gunther adds, "Although I of course write about *Dennis* in the [Hand] book, I have made nothing of the resemblance [between it and *Carroll Towing*]." *Id.* At the urging of my colleagues Marilyn Ireland, Frank Valdes, and Larry Benner, I have elected to be a little less cautious and a bit more speculative than Professor Gunther.

⁵² 183 F.2d at 212.

⁵³ *Id.* at 212-13.

⁵⁴ David Cauter, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* 194 (1978).

⁵⁵ 183 F.2d at 213.

⁵⁶ Quoted in Steinberg, *supra* note 8, at 60.

⁵⁷ *Id.* at 60-61.

⁵⁸ *Dennis v. United States*, 341 U.S. 494 (1951). Tom Clark, appointed by Truman to the Supreme Court in 1949, did not participate in *Dennis*. The Court actually affirmed only part of the Court of Appeals decision. It granted a writ of certiorari limited to two issues: 1) whether sections 2 and 3 of the *Smith Act*, either inherently or as applied in this case, violated the First Amendment; and 2) whether either of those statutory provisions, either on its face or as construed and applied in this case, violated the First and Fifth Amendments because of indefiniteness. *Dennis v. United States*, 340 U.S. 863 (1950). The Court did not even consider most of the issues that the Eleventh had raised before the Second Circuit.

⁵⁹ Interview with Howard J. Trienens (Feb. 27, 1975), Fred M. Vinson Oral History Project, University of Kentucky, Lexington, Kentucky.

⁶⁰ 2 Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development* 571 (7th ed. 1991) (hereinafter cited as Belz, *The American Constitution*).

⁶¹ 341 U.S. at 509.

⁶² *Id.*

⁶³ *Id.* at 510.

⁶⁴ *Id.*

⁶⁵ *Id.* at 511.

⁶⁶ Memorandum from Stanley Reed to Felix Frankfurter (Mar. 13, 1951), Felix Frankfurter Papers, Harvard Law School Library.

⁶⁷ 341 U.S. at 553-56.

⁶⁸ Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* 31-32 (1991).

⁶⁹ 341 U.S. at 539.

⁷⁰ *Id.* at 525-26.

⁷¹ Emerson, *supra* note 5, at 118.

⁷² 341 U.S. at 541-42.

⁷³ *Id.* at 541-42.

⁷⁴ *Id.* at 547.

⁷⁵ *Id.* at 567-70.

⁷⁶ *Id.* at 572.

⁷⁷ *Id.* at 576-77.

⁷⁸ *Id.* at 579-80.

⁷⁹ *Id.* at 580.

⁸⁰ *Id.* at 581.

⁸¹ *Id.* at 585.

⁸² *Id.* at 585-86.

⁸³ *Id.* at 587.

⁸⁴ *Id.* at 588.

⁸⁵ *Id.* at 589.

⁸⁶ Harvey Klehr & John Earl Haynes, *The American Communist Movement: Storming Heaven Itself* 130-31 (1992) (hereinafter cited as Klehr & Haynes, *American Communist Movement*).

⁸⁷ Belz, *The American Constitution* *supra* note 60, at 572.

⁸⁸ Cate, *supra* note 54, at 194-95.

⁸⁹ Rohr, *supra* note 44, at 53.

⁹⁰ Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969* 298 (1972).

⁹¹ *Dennis*, 341 U.S. at 581.

⁹² Quoted in Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 187 (1990).

⁹³ Louis Boudin, "'Seditious Doctrines' and the 'Clear and Present Danger' Rule: Part II," 38 *Va. L. Rev.* 315 (1952).

⁹⁴ John A. Gorfinkel and Julian W. Mack II, "*Dennis v. United States* and the Clear and Present Danger Rule," 39 *Cal. L. Rev.* 475 (1951).

⁹⁵ Chester James Antieau, "*Dennis v. United States*—Precedent, Principle, or Perversion?" 5 *Vand. L. Rev.* 141 (1952).

⁹⁶ Robert McCloskey, "Free Speech, Sedition and the Constitution," 45 *Am. Pol. Sci. Rev.* 662 (1951).

⁹⁷ Herman Belz points out that in using the clear and present danger doctrine to uphold the government in a national security crisis in *Dennis*, the Court was employing it again for the purpose for which it had originally been used in *Schenck*. Belz, *The American Constitution*, *supra* note 60, at 572.

⁹⁸ *New Orleans Times-Picayune*, June 5, 1951, at 8, col. 1.

⁹⁹ Belknap, *Cold War*, *supra* note 8, at 141. Those newspapers were the *New York Post*, *Louisville Courier-Journal*, *Madison (Wisc.) Capital Times*, *New York World*, and *St. Louis Post-Dispatch*. A black weekly, the *Amsterdam News*, also criticized *Dennis*. *Id.*

¹⁰⁰ *Los Angeles Times*, June 6, 1951, at II-4, col. 2.

¹⁰¹ Even legal commentators have noted that the Court's decisions reflected the antilibertarian temper of the McCarthy era. See, Nowak & Rotunda, *supra* note 45, at 963.

¹⁰² Steinberg, *supra* note 8, at 122-23, 131, 198.

¹⁰³ Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective* 95 (1990).

¹⁰⁴ Robert Mollan, "Smith Act Prosecutions: The Effect of the *Dennis* and *Yates* Decisions," 26 *U. Pitt. L. Rev.* 705, 708-09 (1965).

¹⁰⁵ Walker, *supra* note 92, at 187.

¹⁰⁶ Prior to the date upon which the Supreme Court handed down its decision in *Dennis*, the FBI sent reports to the Justice Department's Criminal Division that identified 21,105 individuals as possible subjects for prosecution. The head of the Criminal Division, Acting Assistant Attorney General Raymond P. Whearty, estimated over 12,000 would face indictment if the constitutionality of the Smith Act were upheld. Steinberg, *supra* note 8, at 182.

¹⁰⁷ U.S. Department of Justice, List of Smith Act Cases Involving Communist Party Leaders (undated) (photocopy in possession of the author) (hereinafter cited as Justice, List).

¹⁰⁸ Rohr, *supra* note 44, at 60. "In reiterating the existence of a 'clear and present danger,' as these courts generally did, it was not at all unusual for judges to take their cues from the Supreme Court and advert to current world events." *Id.* at 61.

¹⁰⁹ Justice, List, *supra* note 107.

¹¹⁰ Belknap, "Trial," *supra* note 7, at 255. See, *Frankfeld v. United States*, 198 F.2d 679 (4th Cir. 1952), cert. denied 344 U.S. 922 (1953); *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954), cert. denied 348 U.S. 909 (1955); *Yates v. United States*, 225 F.2d 146 (9th Cir. 1955), rev'd 354 U.S. 298 (1957); *Wellman v. United States*, 227 F.2d 757 (6th Cir. 1955); *United States v. Mesarosh*, 223 F.2d 449 (3rd Cir. 1955); *Scales v. United States*, 227 F.2d 581 (4th Cir. 1955); *United States v. Lightfoot*, 228 F.2d 861 (7th Cir. 1956).

¹¹¹ Belknap, *Cold War*, *supra* note 8, at 188.

¹¹² Belknap, "Trial," *supra* note 7, at 254; Belknap, *Cold War*, *supra* note 8, at 197-98.

¹¹³ *Appropriations for the Departments of State, Justice and Commerce for the Fiscal Year Ending June 30, 1954; Department of Justice: Hearings Before the House Comm. on Appropriations*, 83rd Cong., 1st Sess. 137 (1953) (hereinafter cited as *1954 Appropriations Hearings*) (testimony of J. Edgar Hoover).

¹¹⁴ John Gates, *The Story of an American Communist*, 155-57 (1958).

¹¹⁵ Belknap, "Trial," *supra* note 7, at 254.

¹¹⁶ Belknap, *Cold War*, *supra* note 8, at 189.

¹¹⁷ Rohr, *supra* note 44, at 30.

¹¹⁸ Belknap, *Cold War*, *supra* note 8, at 7, 184, 206.

¹¹⁹ Steinberg, *supra* note 8, at 247, 261, 281, 283.

¹²⁰ Klehr & Haynes, *American Communist Movement*, *supra* note 86, at 130.

¹²¹ *Id.* at 181-82.

¹²² Joseph R. Starobin, *American Communism in Crisis, 1943-1957* 108-14, 186-91, 195, 214-23 (1972).

¹²³ David Shannon, *The Decline of American Communism: A History of the Communist Party of the United States Since 1945* 155-57, 181, 364-74 (1959).

¹²⁴ Maurice Isserman, *If I Had A Hammer...: The Death of the Old Left and the Birth of the New Left* 7 (1987).

¹²⁵ Belknap, *Cold War*, *supra* note 8, at 190-91.

¹²⁶ J. Edgar Hoover, *Masters of Deceit: The Story of Communism in America and How to Fight It* 178 (1958).

¹²⁷ Klehr & Haynes, *American Communist Movement*, *supra* note 86, at 137; Belknap, *Cold War*, *supra* note 8, at 192.

¹²⁸ Belknap, *Cold War*, *supra* note 8, at 190.

¹²⁹ *1954 Appropriations Hearings*, *supra* note 113, at 137.

¹³⁰ Klehr & Haynes, *American Communist Movement*,

supra note 86, at 137; Belknap, *Cold War*, *supra* note 8, at 193.

¹³¹ Steinberg, *supra* note 8, at 212-13, 225-31.

¹³² Klehr & Haynes, *American Communist Movement*, *supra* note 86, at 137.

¹³³ *Id.* at 136, 139-39.

¹³⁴ *Id.* at 137-38; Steinberg, *supra* note 8, at 262; Belknap, *Cold War*, *supra* note 8, at 199-200.

¹³⁵ Belknap, *Cold War*, *supra* note 8, at 200-04; Klehr & Haynes, *supra* note 86, at 139-40.

¹³⁶ Klehr & Haynes, *American Communist Movement*, *supra* note 86, at 140.

¹³⁷ Belknap, *Cold War*, *supra* note 8, at 202-05.

¹³⁸ Klehr & Haynes, *American Communist Movement*, *supra* note 86, at 171-72.

¹³⁹ *Id.* at 173.

¹⁴⁰ *Id.*; "The Party's Shaky Line," *Newsweek*, Nov. 13, 1989, at 48. In late 1989 the CPUSA claimed an active membership of 30,000, while "independent estimates" placed the figure at between 10,000 and 15,000. *Id.*

¹⁴¹ Klehr & Haynes, *American Communist Movement*, *supra* note 86, at 175-76; Harvey Klehr & John Haynes, "The End: the CPUSA Expires," *New Republic*, Mar. 23, 1992, at 12, 13 (Hereinafter cited as Klehr & Haynes, "The End").

¹⁴² Klehr & Haynes, "The End," *supra* note 141, at 13.

¹⁴³ *Id.*

¹⁴⁴ Emerson, *supra* note 5, at 116. Emerson's book was published in 1970.

¹⁴⁵ 354 U.S. 298 (1957).

¹⁴⁶ Belknap, *Cold War*, *supra* note 8, at 237-39, 244-45.

¹⁴⁷ The lone dissenter was Associate Justice Tom Clark, the man who, as attorney general, had initiated the *Dennis* case.

¹⁴⁸ 354 U.S. at 312.

¹⁴⁹ *Id.* at 320.

¹⁵⁰ *Id.* at 325.

¹⁵¹ Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States* 753 (1988).

¹⁵² Emerson, *supra* note 5, at 122.

¹⁵³ Rohr, *supra* note 44, at 69.

¹⁵⁴ *United States v. Silverman*, 248 F.2d 671 (2d Cir. 1957); *Fujimoto v. United States* and *Huff v. United States*, 251 F.2d 342 (9th Cir. 1958); *United States v. Jackson*, 257 F.2d 830 (2d Cir. 1958).

¹⁵⁵ Belknap, *Cold War*, *supra* note 8, at 260-61. A group of defendants who had been convicted in Denver was retried after the Tenth Circuit reversed their conviction. However, following a second conviction, the Court of Appeals again reversed, this time because of the failure of the prosecution to produce a large number of documents relating to one of its witnesses' prior work for the government. Following this reversal, the Justice Department decided not to retry the case. *Id.*

¹⁵⁶ *Barenblatt v. United States*, 360 U.S. 109 (1959).

¹⁵⁷ Rohr, *supra* note 44, at 75.

¹⁵⁸ 367 U.S. 203 (1961).

¹⁵⁹ Rohr, *supra* note 44, at 80.

¹⁶⁰ *Id.* at 96.

¹⁶¹ 395 U.S. 444 (1969).

¹⁶² *Id.* at 447.

¹⁶³ Apparently, the opinion was written by Justice Abe Fortas, who resigned from the Court before the decision was announced. William Cohen & Jonathan D. Varat, *Constitutional Law: Cases and Materials* 1233 n.1 (9th ed. 1993). According to "a reliable source", "[T]he case was regarded as easy in its result, and very little attention was paid to what the opinion said." *Id.* "[T]he Court in *Brandenburg* did not make any serious effort either to sort out the implications of earlier cases or to relate its own approach to general principles governing criminal solicitation." Kent Greenawalt, "Speech and Crime," 1980 *Am. B. Found. Res. J.* 724.

¹⁶⁴ Laurence H. Tribe, *American Constitutional Law* 848-49 (2d ed. 1988). As interpreted in *Hess v. Indiana*, 414 U.S. 105 (1973), the *Brandenburg* "opinion seems to mean that . . . illegal action some hours hence is not imminent." Greenawalt, *supra* note 163, at 651.

¹⁶⁵ 395 U.S. at 447 n.2.

¹⁶⁶ Martin H. Redish, "Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger," 70 *Cal. L. Rev.* 1159, 1175 (1982).

¹⁶⁷ Hans A. Linde, "'Clear and Present Danger' Reexamined: Dissonance in the *Brandenburg* Concerto," 22 *Stan. L. Rev.* 1163, 1186 (1970).

¹⁶⁸ Rohr, *supra* note 44, at 104.

¹⁶⁹ *Id.* Actually, Rohr borrows this characterization from an old edition of a popular constitutional law casebook. See, Edward L. Barrett, Jr. & William Cohen, *Constitutional Law: Cases and Materials* (7th ed. 1985).

¹⁷⁰ Tribe, *supra* note 164, at 856-57. A majority of the Court's members did hold in *Gentile v. State Bar of Nevada*, 111 S. Ct. 2729, 2744-45 (1992) that the "clear and present danger test" does not apply to cases involving speech by lawyers about litigation in which they are representing clients.

¹⁷¹ 427 U.S. 539 (1976).

¹⁷² *Id.* at 562.

¹⁷³ 435 U.S. 829 (1978).

¹⁷⁴ 435 U.S. 829, 844 (1978).

¹⁷⁵ 328 U.S. 331 (1946).

¹⁷⁶ 314 U.S. 252 (1941).

¹⁷⁷ Kalven, *supra* note 6, at 190.

¹⁷⁸ Tribe, *supra*, 164, at 847.

¹⁷⁹ Kalven, *supra* note 6, at 209.

¹⁸⁰ Rohr, *supra* note 44, at 104.

¹⁸¹ Kalven speculates, "Perhaps the Court wanted to preserve *Dennis*, so that it would be available as a precedent in the future should a case arise involving a group possessing the characteristics ascribed to the Communist Party in the 1950s." Kalven, *supra* note 6, at 233. What we know about the origins of *Brandenburg* does not support the contention that this is what the Court was trying to do. See, note 163 *supra*. Even if Kalven is wrong about the reason why the Court did not overrule *Dennis*, however, the fact remains that *Dennis* could be used as a precedent in exactly the way he suggests.

¹⁸² *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁸³ Kalven, *supra* note 6, at 190.

The Appointment Of John McLean To The Supreme Court: Practical Presidential Politics In The Jacksonian Era

Michael A. Kahn

A sitting president whose father had been a leading Northeastern politician is defeated soundly at the polls by a tall and handsome Southerner from a small state which had never before sent a president to Washington. The nation's capital is rife with gossip and intrigue over the new president's cabinet selections, and numerous senators are under consideration for the new administration. The year is 1828 not 1992, and the Democratic president was Andrew Jackson, not Bill Clinton.

The highly charged transitional political environment of 1828-1829 produced the nomination and confirmation of one of the most colorful and dynamic politicians ever to sit on the Supreme Court—John McLean. Indeed McLean, during the thirty-two years he sat on the Supreme Court with such judicial giants as Marshall, Story and Taney, continuously used the Supreme Court as a political perch from which to reach for the presidency. It is entirely fitting that a man who used his Supreme Court Justice position as a political arena should have come to the Court in political circumstances that were unprecedented at the time, but which set important political precedents which are honored to this date.

This is the story of John McLean's appointment to the Court, but it is also the story of John Crittenden's unsuccessful nomination for the same seat; therein lie the precedent-setting events. After it was clear that he had been defeated for reelection, Jackson's predecessor, John Quincy Adams, set about filling a vacancy on the Court that had been created by the death on August 25,

1828 of Justice Robert Trimble of Kentucky. Thus, Adams was following in the footsteps of his famous father who had succeeded in frustrating his successor, Thomas Jefferson, with a series of lame duck appointments. But in 1828 the United States Senate refused to deny Jackson the spoils of his victory and thereby set a precedent which has prevented any president since that date from making a lame duck appointment to the Court.

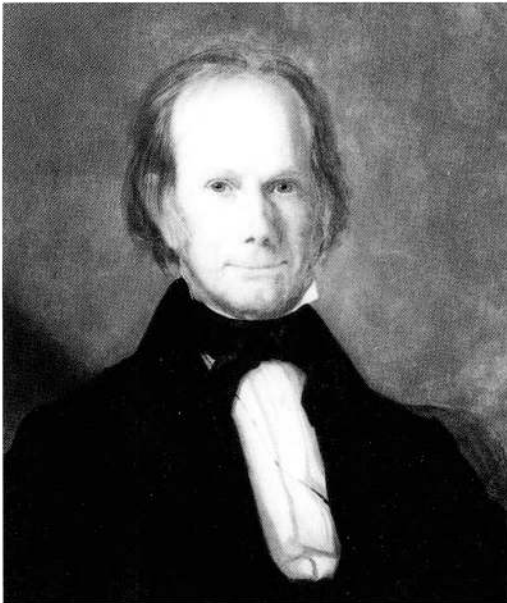
The spoils systems not only defeated the



Associate Justice Robert Trimble of Kentucky died in 1828 after serving only two years on the Bench. He was succeeded on the Court by John McLean, who served for thirty-two years.

Crittenden nomination but also directly led to John McLean's decision to take the nomination for reasons that are certainly unique in American history. McLean did not become a Supreme Court Justice to satisfy a noble ambition to serve on the Court. Rather, he actively sought refuge in the Supreme Court to escape from his obligation as Postmaster General. McLean did not want to fire Adams' sympathizers in the Post Office who he believed would support his own candidacy for president in 1832. McLean accomplished this feat by convincing Jackson, only one day after the inauguration, to nominate William Barry to the office of Postmaster General rather than to reappoint McLean to the post as had been previously announced. By placing Barry in the cabinet, he would be free to nominate McLean on the Court. Thus, the tale of John McLean's historic nomination to the Supreme Court involves the nominations of three men to the Court: first, John C. Crittenden; then, William Barry; and, finally, John McLean.

On August 25, 1828, Supreme Court Justice Robert Trimble¹ of Kentucky died after serving only two years on the Court. President John Quincy Adams was at the tail end of an extremely bitter presidential campaign,² and he delayed



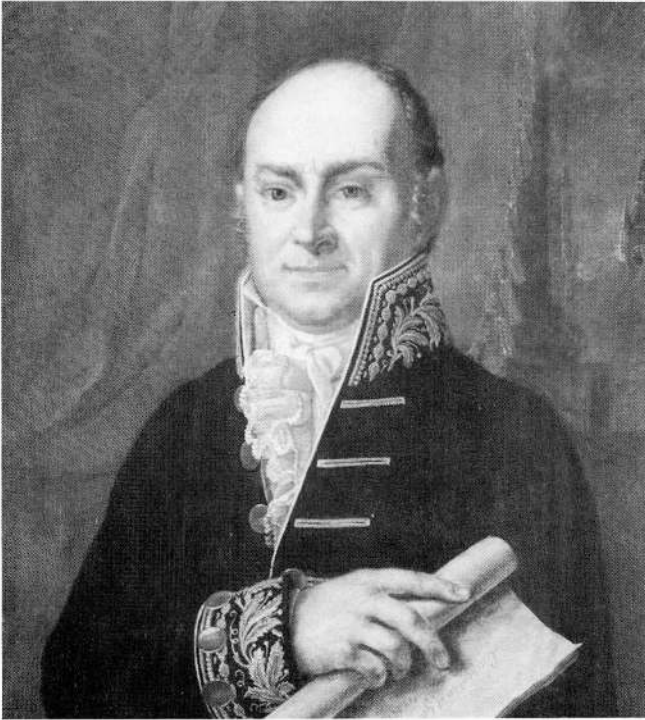
Henry Clay of Kentucky declined the nomination to the Court offered him by President John Quincy Adams. Instead, he urged the selection of former Senator John C. Crittenden, also of Kentucky.

filling the position until after his defeat by Andrew Jackson was confirmed. Adams first offered the post to Charles Hammond, a distinguished Ohio lawyer, and then to Henry Clay, both of whom declined.³ Clay, who had supported Adams over Jackson, urged Adams to select former Senator and then U.S. Attorney John C. Crittenden of Clay's home state, Kentucky. On December 17, 1828, Adams sent Crittenden's name to the Senate.

The nomination created a firestorm in the Senate giving rise to two crucial questions which will remain forever unanswered: why did Adams delay three and one-half months before sending his choice to the Senate, and could Adams have avoided or at least mitigated the lame duck claim, so strikingly analogous to his father's actions, by filling the vacancy in early October? Perhaps Adams was reluctant to fill the seat when Congress was out of session. Much was made of Adams' delay in the Senate debates over the Crittenden nomination. Jacksonians first criticized the delay and subsequently relied on it as a justification for their own delay in acting on the nomination.⁴

The Senate debate over Crittenden was split over the political question of which president had the right to fill the vacancy. Those sympathetic to Adams and his party shared the opinion of Chief Justice Marshall who stated, "His successor will, of course, be designated by Mr. Adams because he will be required to perform the most important duties of his office, before a change of administration can take place."⁵ However, it soon became apparent that the Democrats, or more explicitly, those who laid claim to Jackson's patronage, were going to attempt to block the nomination. Two elements of the rejection are of particular historical significance: (1) Crittenden's personal campaign to be confirmed and (2) the Senate's rationale for rejecting Crittenden.

Crittenden was an "old court" Kentucky conservative who aligned himself with Henry Clay. In 1828, he declined the gubernatorial nomination, but he did mount a losing bid for the state legislature. When he first learned of his nomination, he wrote Clay and observed with evident pride that he had not sought the nomination, and he indicated that he would not actively seek the office at this time.⁶ But as his biographer notes, Crittenden was soon bitten by the bug and began seeking support for his nomination.⁷ On Decem-



President John Quincy Adams was largely unsuccessful in getting nominees through the Senate after his loss to Andrew Jackson in 1828. After leaving the White House, he served in the House of Representatives from 1831 until his death in 1848.

ber 27, Crittenden wrote to Clay that he felt he must act in his own self-defense, because it was clear that the decision was to be purely political. He sent to Clay, who served as his out-of-Senate campaign manager (John Chambers was his in-Senate manager), a packet of letters to be delivered to various congressmen.⁸ Crittenden was first misled to believe that he would be confirmed unless a motion to table all Adams' appointments, an unusual tactic, passed.⁹ His strategy was to apply pressure directly upon senators, soliciting votes through Chambers, Clay and others. While implementing this plan, he complained to Clay and Chambers that he was being ignored and let down by his friends, noting a lack of correspondence from Washington.¹⁰ Clay tried to relieve Crittenden's anxiety on that point but was blunt about his allies' chances; "the policy of the Jackson party will be delay, and ultimately to postpone it altogether."¹¹ Senator Chambers summarized the feeling of the Adams party when he referred to the entire affair as pervaded by "disgraceful and degrading party feeling."¹²

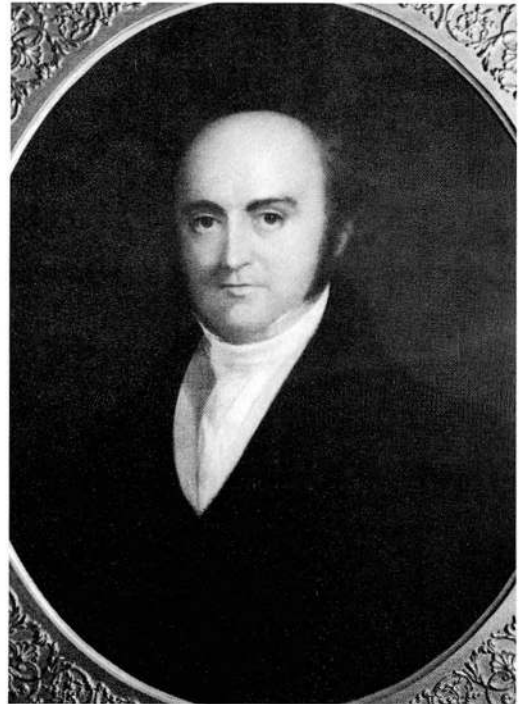
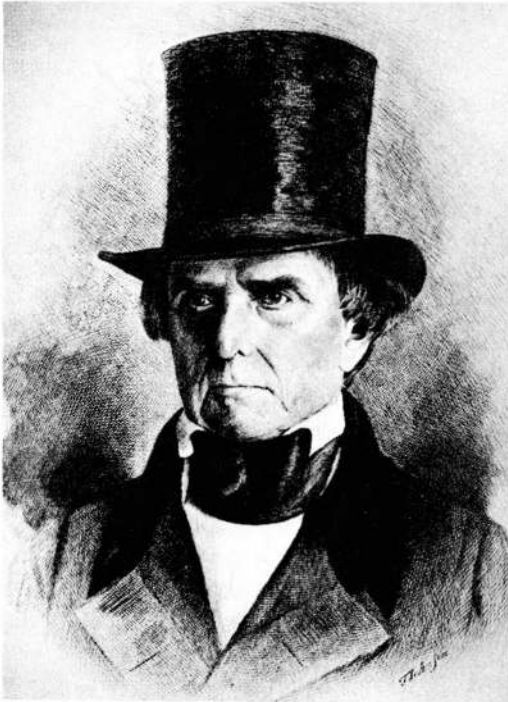
Adams and Clay believed that the ultimate

rejection of Crittenden was a pure political maneuver based on the philosophy that to the victors belong the spoils. Crittenden, Clay and Chambers perceived the problem as a purely political one, and they directed all of their efforts toward persuading Federalist and neutral senators to purge political bias from the debate. Crittenden himself, his views and the views of his friends (at least on judicial matters) were never really at issue during the Senate debate. Nevertheless, Crittenden took the debate's results bitterly, remarking in a letter to Clay that "there is a taste of dishonor which my nature revolts at."¹³ Realistically, the entire Crittenden campaign was a futile effort, doomed in advance and sealed with the reference of the nomination to the judiciary committee by a vote of the Senate; the Adams-Clay forces simply did not have the votes, and he and Clay knew it.¹⁴ Indeed, with one puzzling

exception, every nomination to office submitted by Adams during this session of Congress was rejected or delayed indefinitely.

The nomination was sent to the Senate on December 18, 1828, and on that day, it was referred by a motion to the judiciary committee. Though a seemingly ordinary and innocuous move today, such a motion was extraordinary at that time, and indeed the Adams' forces had blocked such a motion two years earlier during the Trimble confirmation fight. At first, as Chambers reports, the Adams' senators were not anxious to have the nomination reported to the committee because of the unavailability of Daniel Webster and other sympathizers.¹⁵

However, on January 26, 1829, the judiciary committee reported two resolutions. The first resolved that it was not expedient to take up the nomination at that time. The second resolved that the decision be delayed until the judiciary committee reported on the latest version of the judiciary act. Chambers then offered an alternative resolution, demanding immediate action on the nomination. On February 12, 1829, Chambers'



Daniel Webster (left) and Levi Woodbury (right) were colleagues in the United States Senate during the Crittenden nomination and debates. Webster supported the nomination and Woodbury opposed it. Woodbury would later join the Supreme Court and served for five years with John McLean, the person who ultimately filled Trimble's seat after Crittenden's nomination failed.

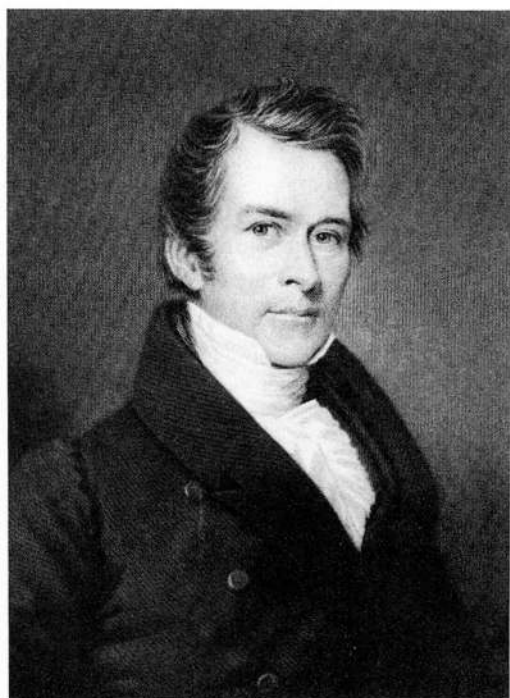
motion was rejected by a vote of twenty-four to seventeen after the Senate debates, which took place on February 2 through February 5 and February 9 and February 12. Voting for the motion were old Federalists and others including, notably, Daniel Webster. Those voting against the motion included Senators Branch and John Eaton (both of whom were named to Jackson's cabinet three weeks later) and Senators Tazewell, Hayne, Woodbury and White, who were prominently mentioned for the cabinet at that time.

The vote of Senator Johnson of Kentucky is illustrative of the political environment. On Christmas Day 1828, Johnson wrote Crittenden wishing him well and indicating that he was in favor of the nomination, but under heavy party pressure to vote against it.¹⁶ Johnson, who had an eye on the cabinet or Court himself, voted against Chambers' amendment on February 12. Subsequently, Johnson did not cast a vote, because minutes later, by a vote of twenty-three to seventeen, the Senate resolved "[t]hat it is not expedient to act upon the nomination of John J. [sic]

Crittenden, as a Justice of the Supreme Court of the United States, during the present session of Congress." Similarly, Clay wrote Crittenden that he had personally seen Senators Tyler and Smith (South Carolina), and each senator had indicated his support for Crittenden. In fact, Smith voted against Crittenden, and Tyler's vote was not recorded.¹⁷

The debate itself is a fascinating record of the vitality of Congress at that time. Chambers stressed two points: it was an unconstitutional usurpation of presidential power to take the choice away from Adams, and "the public will and must believe that this Mr. Crittenden is postponed and virtually rejected for no other earthly reason than that he was not in favor of General Jackson for President."¹⁸

John Berrien of Georgia, the chairman of the judiciary committee led the fight with Senators Hayne and Eaton. These senators argued that the will of the people would be circumvented by allowing Adams to select Trimble's successor; some of them (Senator Holmes especially) suggested that lame duck appointments should never



Senator John Berrien of Georgia was chair of the Senate Judiciary Committee during the Crittenden nomination. He later joined the Jackson cabinet as Attorney General.

be approved.

It is notable that the Senate refused to fill the seat despite threats that since only four of the authorized Justices were present in Washington (the Second Circuit Justice was ill, the Southern Circuit Justice was delayed by an accident in the Carolinas, and the vacancy was from the Seventh), the entire Supreme Court session might be lost. Moreover, the Senate rejected Crittenden without ever discussing his qualifications or his views. The Senate simply acted out the political philosophy that the majority may rule with naked power, not even bothering to offer any viable justifications. The record is remarkable for its insensitivity to Crittenden the man or to the political precedent that the senators were setting.

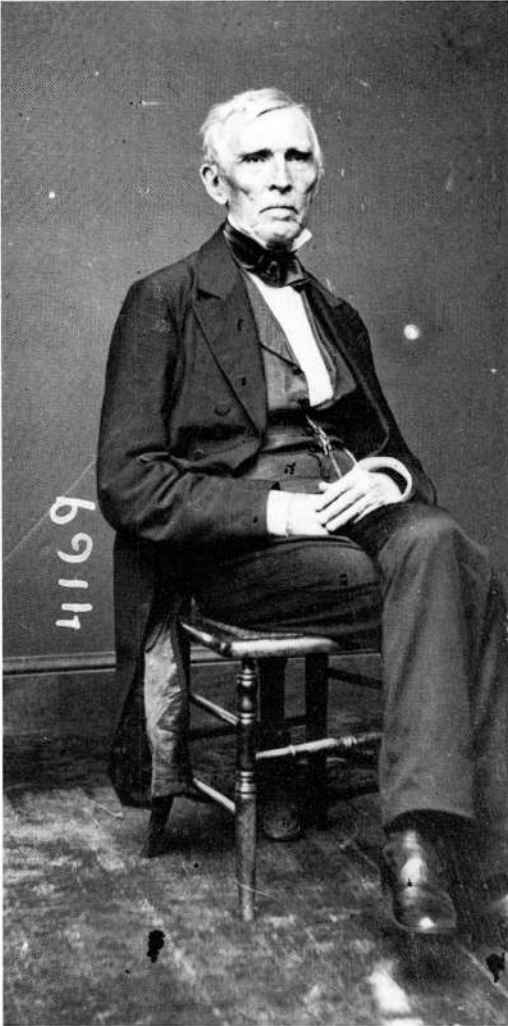
Crittenden's defeat was neither his last experience with the spoils system nor as a candidate for the Supreme Court. In 1829, Crittenden suffered the further indignity of being removed as U.S. Attorney for Kentucky (despite having two years left of his term) in favor of a Jackson sympathizer. During the next thirty-two years, Crittenden had an extremely distinguished career as a lawyer and a politician. He argued

several significant cases before the Supreme Court, served as Attorney General under Harrison and Fillmore, and returned to the United States Senate. The final ironic episode of his political career occurred in March 1861, when he was seventy-four years old. Lincoln actively considered appointing him to the Supreme Court, because he was from a border state which was not yet committed to secession.¹⁹ Once again, opposition to his nomination developed in the Senate—this time because his position on slavery was too mild for the radicals and too extreme for the Southern sympathizers—and once again his candidacy for the Court failed before it even reached the Senate floor.

Returning to February 1829, after Crittenden was disposed of, speculation began about whom President-Elect Jackson would nominate to the Supreme Court. Since Trimble (and Crittenden and Todd for that matter) were from Kentucky, it was assumed that his replacement probably would be from Kentucky, though candidates from both Ohio and Tennessee emerged.

The leading Jacksonians in Kentucky were Kentucky Supreme Court Justice Bledsoe, George Bibb, John Rowan, Amos Kendall, Francis Blair and William Barry. These men at various times held almost every important office in Kentucky; in addition, Kendall, who wanted to be Attorney General and who later replaced Barry as Postmaster General, was the leader of the radical party in Kentucky and was the editor of the radical newspaper, *Argus*. Barry had been the Chief Judge of the "new court" (Bibb and Blair were also on that Court), and in 1828, he ran as the Jacksonian candidate in the August gubernatorial race. Henry Clay's candidate, Metcalfe, defeated Barry. However, later in 1828, Andrew Jackson narrowly carried Kentucky over Adams, garnering the most votes where Barry had run the strongest. Barry, thus, became a martyr to the Jacksonian cause.

Barry had served in the Kentucky legislature as the lieutenant governor of Kentucky and as the state secretary. He was known as an eloquent speaker and had a reputation as a legal scholar from his days as a law professor at Transylvania University. Long before he slated Barry for the Supreme Court, Jackson gave some reasons for selecting him when he wrote in 1822 to Andrew Donelson; "Barry and Bledsoe are both men of



John Crittenden's defeat in 1829 was not his final bid to join the Supreme Court. He was considered for the Court by President Lincoln in 1861. However, his views on slavery were too conservative for radicals in the Senate and too extreme for Southern sympathizers.

talent, it is true they both have been taken with the bank. . . . But as lawyers unconnected with Politicks [sic], they are both men of great talents."²⁰

Certain facts emerge from the letters and other original documents of this period (December, February, 1829), despite the confusion and rumor that engulfed the period: (1) the Kentucky Jacksonian party was a strong force to be considered in selecting a nominee for the Court; (2) Jackson owed Barry a political debt for his activities in 1828; (3) with Barry's potential rivals, Bibb and Rowan in the Senate, former Senator White not desiring the position, and other key

politicians with no superior claim or ability, William Barry was a strong candidate with a need for the office and many friends; and, (4) there were enormous pressures from Jacksonians in every region of the country to receive a share of the spoils of victory.

Thus, in one move, Andrew Jackson could discharge a number of political debts at a low cost to himself when measured against the price to him of his cabinet appointments. There is no evidence that Barry's judicial philosophy was considered by Jackson, or by anyone else. The decision to nominate William Barry to the Supreme Court was paramountly a political decision that someone who ardently supported Andrew Jackson in 1828 would be rewarded with a place on the Court. To that extent, the goals of the senators who defeated John Crittenden were completely realized.

Not everyone agreed on Barry's competence and role in Kentucky politics. John Pope, who considered himself a top candidate for the bench and the cabinet, wrote to Jackson that Barry "is not fit for any station which requires great intellectual force or moral firmness, but he is a gentleman in his deportment and amiable in his private relations."²¹ Pope also charged Barry with losing the statehouse for the Democrats and jeopardizing Jackson's chances in the state, not aiding them. He suggested a minor post for Barry, for example, the governorship of Arkansas. Jackson obviously did not agree with Pope's evaluation of himself or of Barry, for Barry was selected to fill the vacancy left by Justice Trimble's death and Pope was sent to Arkansas.

Barry (who became Postmaster General Barry, not Justice Barry) remained in Jackson's cabinet even after the rest of the original members split with him. Jackson wrote in 1831 that he could always confide in Barry under any circumstances.²² Nevertheless, by 1835, Barry had justifiably gained a reputation for irresponsibility and lack of principle in running the Post Office, and Jackson was forced to replace him, thus ignobly ending his career in the Jackson administration.²³

John McLean's political career stretched over fifty years. He was, in turn, a congressman, a Supreme Court Judge in Ohio, an unsuccessful senatorial candidate, a commissioner of the Public Land Office, the United States Postmaster



William Barry served as Postmaster General from 1829 until 1835. His candidacy for the Supreme Court fell apart after John McLean set his sights on the Bench. He was nominated Postmaster General instead.

General under three presidents, a Supreme Court Justice for thirty-two years and a perennial candidate for the presidency.²⁴ Clay was McLean's political enemy, and he complained that McLean's Machiavellian personality prevented Clay from finding a basis for firing him from the Adams administration. McLean's complex and mercurial personality allowed him to be identified politically and personally with Madison, Monroe and Adams, and later with Jackson and Calhoun. To try to characterize McLean politically would be to do what his contemporaries could not. He was a controversial figure, because no faction could be sure of his allegiances but virtually every political party was seduced by his talents. As a result, he was a prominent, if unsuccessful, candidate for president for one national party or the other (ranging from the Jacksonian Democrats in 1832 to the Whigs in 1844 to the Lincoln Republicans in 1860) during his entire thirty-two year tenure on the court.²⁵

From 1823 to 1829, McLean was an excellent Postmaster General. Adams later commented that he performed his duties better than any other Postmaster General to date. McLean greatly ex-

panded the Post Office and the value of his position in the government during the country's formative years.²⁶ McLean was very popular in Ohio and later in Pennsylvania, and among his fellow Methodists. Though he was an able administrator and a competent lawyer, he was first, last and always an ambitious politician.

McLean's most brilliant political performance was given when he was Adams' Postmaster General in 1827 and 1828. McLean sensed correctly that Adams was in deep political trouble and that aggressive political support of the Clay-Adams forces would make political enemies whose power could crush him in 1829.²⁷ However, McLean also realized that open sympathy with the Jackson forces could cost him his job as well as his political perch. So, in 1827 and 1828, in every letter he wrote and in every duty he performed, McLean made an arduous and obvious effort to maintain his neutrality. He wrote his friend James Monroe²⁸ and other friends and supporters, including Jackson himself, letters preaching and defending neutrality.²⁹ For example, in 1827, he wrote Jackson that, "It appears to me that election of the President is the business of the people, and that officers of government should carefully abstain from any intervention with it."³⁰ During the election, McLean continued to pledge his support



James Monroe received many letters from Postmaster General John McLean preaching the importance of neutrality in the Adams-Jackson race.

to the Adams administration, but he also remained on good terms with Calhoun, Jackson and other administration foes.

Not surprisingly, McLean's posture infuriated Adams' most ardent supporters, including Henry Clay. They interpreted McLean's neutrality as pro-Jackson, and many of the General's supporters agreed.³¹ In the House of Representatives, Congressmen Clarke, Litchen and Buckner and, in the cabinet, Secretary of War James Barbour and his replacement Peter Porter opposed McLean and urged his dismissal. Henry Clay vociferously advocated McLean's removal and is rumored to have vetoed even the thought of elevating McLean to the Court in 1826 when Justice Todd died.

During the election, McLean was being pulled by both sides to do one thing or another. Richardson, from the Jackson camp, urged him as late as October 1828 to resign his position and help Jackson in Ohio, because after the election, Clay and Adams will, "prostrate you in the nation."³² McLean responded that he would not resign nor interfere in any way in the election and that he would rely on the people to vindicate him. He did, in fact, steer a neutral course according to his biographer "with Machiavellian adroitness."

Nevertheless, many of his contemporaries considered him a Jacksonian sympathizer and a traitor to Adams. One post-election commentator remarked, "If Mr. Adams had dismissed John McLean eighteen months ago the result would have been different in Ohio."³³

The reason for the foregoing political reaction is that in 1828, in the midst of a turbulent political campaign, neutrality was thought impossible. In this bitter election, a politician was either for Adams or for Jackson, and no middle course was tolerated. In substantive action and word, McLean was neutral, but his neutrality as Postmaster General was a blatant omission as far as Adams' supporters were concerned. By not mobilizing the Post Office behind Adams, and not organizing support for him in his other areas of influence, McLean was abdicating his political responsibility to Adams. However, Adams could not discharge McLean without identifying any wrongdoing as an excuse because to do so would have been an admission that an explicit duty of McLean's office was political support. Later, in April of 1829, Adams wrote Barbour



James Barbour, brother of Justice Philip Barbour, served as Secretary of War under President John Quincy Adams and opposed McLean and urged his dismissal as Postmaster General.

and acknowledged that McLean may have acted as a political neutral, but he intimates his dissatisfaction with this role.³⁴ Though Adams was suspicious of McLean during his administration—always looking for evidence of duplicity—he apparently held no grudge against him; for on March 14, 1829, he wrote that he was very pleased by the appointment of McLean to the Court.³⁵

After Jackson's election, there was a consensus about a number of political "facts": (1) Jackson would not seek a second term; (2) the persons selected for the cabinet would be in the best position for election in 1832;³⁶ (3) Calhoun, Van Buren and McLean were the most popular and powerful politicians in this new party; and, (4) Calhoun, Van Buren and McLean would be the top candidates for the presidency in four years.³⁷

From McLean's perspective, the record is scarce as to his activities from December 1828 until March 1829. Three aspects of his behavior during the interregnum are clear. First, McLean aspired to a higher position in Jackson's government than he had under the Adams administration, preferably Secretary of War or Navy. McLean, however, did not believe he had a commitment on the part of Jackson, for on the last day of 1828, he wrote "I know not what may be my fate under the new administration."³⁸ Second,



Rachel Jackson died only one month after her husband was elected president. Her untimely death dampened the victorious spirit of the Jacksonians and slowed down the procession of prospective office holders.

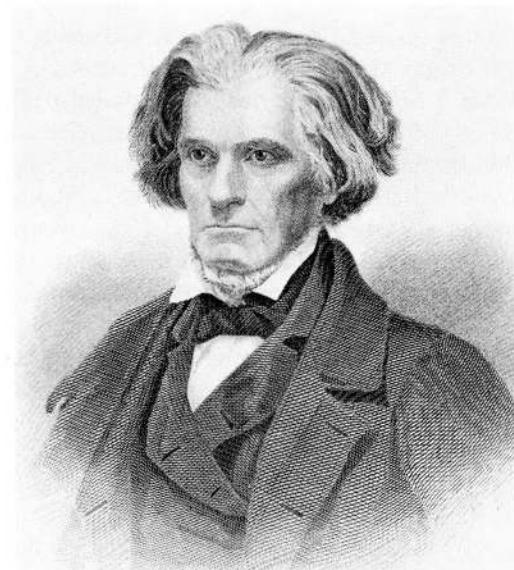
McLean was probably asked by Jackson to remain as Postmaster General in early February, and he agreed to do so if the position were given cabinet rank (and therefore, more prestige, a little more power and more money). Third, before March 1828, McLean did not seek nor did he want a seat on the Supreme Court; rather, he wanted to place himself in a position from which the 1832 presidential seat would be accessible.

Jackson did not explain why he asked McLean to remain as Postmaster General, but there is no doubt that several factors greatly influenced the decision. McLean was known to be extremely friendly with Calhoun, Jackson's new vice president and new political ally, and including McLean in the cabinet gave Jackson an opportunity to reward this faction of his new and fragile coalition. Additionally, McLean was very popular in the West, and his selection gave that region of the country representation in the cabinet. Of course, McLean's ability as an administrator and his fine record as Postmaster General aided the decision. Finally, McLean's neutrality during the election, which worked to the advantage of Jackson, was perceived to be a debt which had to be repaid. On

this subject, history leaves no doubt: McLean's position in the Adams administration did not hurt him; McLean figures prominently in all of the post-election speculation about the cabinet; and, his retention as Postmaster General surprised no one.³⁹

The election of 1828 was bitterly contested, and the results of it were not entirely clear to Jackson until the second week in December. Then triumph met tragedy on December 28, 1828, when Jackson's beloved wife Rachel died. For a month thereafter, Jackson's correspondence was dominated by references to his grief.⁴⁰ The usual procedure during this era was for the state legislative members of the victor's party to approach the soon-to-be president with a list of nominations and for individuals to solicit appointments on their own and others' behalf. After the 1828 election, potential candidates were placed in an awkward and uncomfortable position. For approximately the first three weeks in December, Jackson received the usual congratulatory letters with infrequent solicitations for office. Those requests were presumably to follow shortly. But on the death of Jackson's wife, such correspondence was improper and impolite.

Nevertheless, by February 1829 (like January 1993), Washington was, as Everett described it,



John Calhoun was Vice President during President Jackson's first term. Jackson asked McLean, a political ally of Calhoun's, to remain as Postmaster General to strengthen Calhoun's ties to Jackson.



Martin Van Buren was appointed Secretary of State by Jackson in February 1829. He held the position until 1831 when he resigned in support of President Jackson in the Peggy Eaton affair. He was elected Vice President in 1832 and President in 1836.

“thronged, and General Jackson besieged with office hunters. He is perpetually surrounded by a coterie of personal friends.”⁴¹ Included in this small group that insulated Jackson were Senator John Eaton, James Hamilton, Senator White and William Berkeley Lewis. Early in February, Van Buren was asked to be Secretary of State, though this decision as well as Eaton’s selection for the War Department was made in early December.⁴² Calhoun opposed the former and favored Tazewell who was later appointed minister to England, but Van Buren’s faction won this internal battle. Jackson had a difficult task trying to balance the Calhoun and Van Buren factions of his new party, as each faction was pushing an entire slate of candidates.⁴³

By the middle of February, it was clear that Van Buren would be Secretary of State; Eaton would be Secretary of War; and, McLean would be Postmaster General with the other cabinet slots still open. McLean had consented to remaining

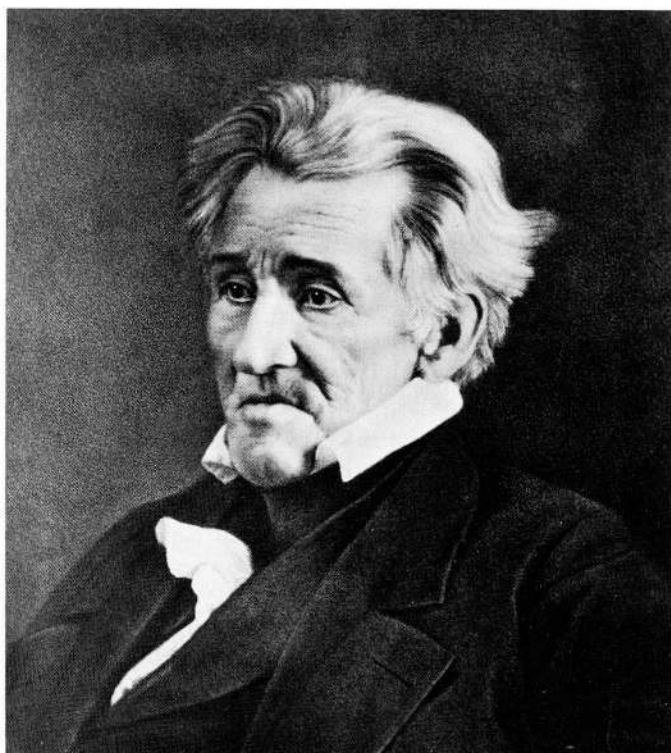
under the assumption that he was to retain control over the department, and there would be no unjustified purges.⁴⁴ But rumors and finally, an article in the *Telegraph* (February 26) indicated that the department had been brought into the cabinet for the purpose of facilitating proscription.

McLean was facing a personal crisis. The entire basis of his political future lay in the loyal Post Office worker force, which he had painstakingly courted for five years. He simply could not afford to fire even a portion of these people and replace them with Jackson supporters. Nevertheless, he needed a high political office to keep him in a position to compete for the presidency in 1832.

McLean conceived of a clever solution to his problem. He went to Secretary of War designate Eaton and suggested a switch in their appointments. Eaton agreed on the condition that Jackson sustain the action, and at first, the General did so. However, Jackson later regretted this decision, and an envoy relayed the message to McLean.

McLean then went to Jackson to seek his assurance that widespread replacement of Adams supporters with Jackson supporters would not occur in the Post Office Department. During this meeting, Jackson personally, and thereafter through aides, made efforts to encourage McLean to remain in the cabinet; however, Jackson refused to give a firm commitment not to purge Adams’ supporters from the Post Office. Events were proceeding rapidly as February closed and inauguration day approached. On February 26, William Barry was formally selected for the vacant Court seat. The rest of the cabinet was also filled in short order with Samuel Ingham for Treasury, Berrien as Attorney General, and John Branch as Secretary of the Navy. It was observed at the time that, “In this important work by President Jackson, no thought appeared to be given to the fitness of the persons for their places.”⁴⁵ It appears that all of Jackson’s selections were made on the basis of political allegiance, not skill, and the appointments were criticized widely later.

McLean’s options were now narrowing significantly. He could remain in the cabinet and destroy his political base; he could resign from the cabinet and destroy his political platform and make enemies of the newly empowered Jacksonians; or, he could contrive a solution



Andrew Jackson served two terms as president, filling five Supreme Court vacancies in the process. John McLean was the first and served longer than any of Jackson's other nominees except James Moore Wayne.

acceptable to Jackson. McLean made a fateful decision. On March 5, 1829, the day after the inauguration, according to James Hamilton, a close advisor of Jackson, "The day before the nomination was made, Ingham, at McLean's instance, called upon the President and told him that the Postmaster General would like to take the office of Judge." According to Amos Kendall, a prominent Kentucky politician, this action was "merely as a temporary withdrawal."⁴⁶ Bell, another Kentucky politician, spoke about McLean's motivations, commenting that "he prudently yielded to circumstances" and that he was "kicked upstairs" for his recalcitrance over proscription.⁴⁷ There was unanimous agreement that the issue over which McLean left the cabinet was the firing of Postmasters for political purposes. McLean remarked a week later, "I was induced to indicate a preference for the bench because. . . I was apprehensive that my course in the department might not altogether harmonize with some of the other branches of government."⁴⁸

The President solicited the opinion of Hamilton

on this switch, who encouraged it; and, if the Kentucky delegation in Congress acquiesced, the deal would be made. Senator Bibb was sent for and he was agreeable and promised to seek out support. After Lewis refused to act as an intermediary, Hamilton went to T.P. Moore, a Kentucky Congressman, who expressed hesitation about McLean's political activity as a judge. It was agreed that McLean would be appointed if a promise to remain apolitical from the bench were exacted from him. Jackson then called for McLean, outlined his feeling that a judge should not be involved in politics and then told him that he would be nominated. The next day, March 6, McLean was nominated for the Court in the Senate by Jackson.

On March 9, McLean sent his resignation as Postmaster General to Jackson, and on the same day, Barry's name was sent to the Senate for that position. The nomination hit the Senate like a "thunder-clap." Calhoun and any of the senators were stunned by the appointment which would remove a potentially influential political figure from the heart of the government.⁴⁹

Proscriptionists such as Green were pleased to be rid of the obstinate McLean and get the malleable Barry in his place. But Branch, Eaton and Berrien within the cabinet were against the switch for they felt, correctly, that it would weaken the cabinet.⁵⁰ Moore, who had facilitated the action by convincing the Kentucky delegation of its value, was disappointed for he had wanted to be appointed Postmaster General (leaving Barry out), and instead he was sent to Colombia as the Minister. Lewis and Van Buren were pleased by this turn of events for it eliminated a potential enemy—so they thought.

The decision was a politically expedient one. It was not initiated nor really considered thoroughly by Jackson. It did not differ substantially from the cabinet appointments in that the primary consideration was the mitigation of the intense personal and political pressure exerted on all



John McLean served on the Supreme Court for thirty-two years. In all that time, he never gave up his presidential ambitions, flirting with the nomination of the anti-Masons, the Whigs, and the Republicans throughout his career.

sides; the philosophy and competence of the individuals considered were not scrutinized, if evaluated at all. To allege that this appointment reflects any particular viewpoint about the Court either by Jackson or his cohorts would be baseless speculation. McLean went to the Court because there was an opening in his circuit, and he was seeking to find a place in the government in which he could serve and yet not violate his political goals. Jackson appointed him because this action allowed Jackson to displease the least number of people and please the widest range of factions with his appointments. The decision was made within twenty-four hours without any prior contemplation by Jackson about John McLean as a Supreme Court Justice.

John McLean, thus, became a Justice of the Supreme Court because in doing so he thought he could further his goal of becoming President. But, McLean's career did not develop as he had hoped. Rather than becoming President or returning officially to political life in any manner, McLean sat

on the Court for thirty-two years, occasionally writing opinions and diligently riding circuit. McLean's most prominent judicial legacies are found in the six volumes of circuit opinions he left behind, in a half-dozen prominent opinions he wrote for the Court and in his controversial dissent in the *Dred Scott* case.⁵¹

But, if McLean did not meet his own political expectations, he certainly did not meet Jackson's either. While on the bench, McLean continued his interest in the Post Office, constantly (and justifiably) criticizing Barry's performance and Jackson's policies in relation to it. As noted earlier, McLean's disenchantment with Jackson took root before the administration even began; Everett reports that McLean, only days before the inauguration, had told him personally that he would continue to resist proscription.⁵² This is one promise that he kept.⁵³ Politically, his alignment with the Jacksonians (if ever real) was transient; as early as June 16, 1829, Duff Green was accusing McLean of being a traitor to Calhoun and "playing for Clay's party."⁵⁴ McLean never contemplated leaving political life, but he wanted to serve the nation and the new administration on his own terms.⁵⁵

McLean also never ceased running for president. In 1832, the anti-Masons offered him the nomination (he later declined it and it was given to William Wirt after neither Clay nor Marshall wanted it); in 1836, he was an active candidate though he pulled out early when his chances dimmed; and, in 1844, 1848, 1856 and 1860, he was a frequently mentioned candidate, all while he sat on the Supreme Court.⁵⁶ McLean was labeled a Jeffersonian-Republican, a Whig, a Jacksonian Democrat, and an anti-Mason during his career, and he represented himself as agreeing at one time or another with every important leader of the time.

John McLean's path to the Supreme Court, his reason for seeking out a position on the Court and his behavior on the Court, if not entirely unique, were unconventional and extraordinary. However, to the extent that his appointment to the Court was a supremely political event, his story is as familiar as yesterday's newspaper.

Endnotes

¹ Trimble was only the second Justice to fill the new seat on the Court created on February 24, 1807, when Congress passed the act establishing the Seventh Judicial Circuit including Tennessee, Ohio and Kentucky. Thomas Todd of Kentucky held that seat from 1807 until his death in 1826. Trimble was confirmed on May 9, 1826, by a vote of twenty-seven to five, after his nomination created a minor controversy in the Senate.

² See D. Nevin, "To The President, Peggy Eaton Was Chaste Indeed", *Smithsonian Magazine* 85, Vol. 23, No. 2 (May 1992).

³ C. Warren, *The Supreme Court In U.S. History*, Volume One, Rev. Ed., 700-701 (1932); H. Abraham, *Justices and Presidents* 85 (1974).

⁴ One of the major contentions of Crittenden's supporters was that further delay was harmful and unjustified. Jacksonians countered that Adams had delayed so long already that the additional time was inconsequential. In Adams' only other appointment to the bench, he also waited almost three months before filling the vacancy.

⁵ Letter from Marshall to Clay of 11/28/28, quoted in full in C. Warren, *supra*, Note 3 at 701.

⁶ Letter from Crittenden to Clay of 12/3/28. Unless otherwise cited, all letters were found in The Presidential Papers Microfilm Series, Library of Congress.

⁷ A. Kirwan, *John J. Crittenden* 84 (1962).

⁸ Letter from Crittenden to Clay of 12/27/28.

⁹ Letter from Johnson to Crittenden of 12/25/28.

¹⁰ Letter from Clay to Crittenden of 1/27/29.

¹¹ Letter from Clay to Crittenden of 1/6/29.

¹² Letter from Chambers to Crittenden of 12/29/28.

¹³ Letter from Crittenden to Clay of 1/6/29.

¹⁴ The letters referenced earlier, especially the last one cited, are filled with pessimistic comments, as the defeat seemed inevitable to Clay and Crittenden.

¹⁵ *Supra*, note 12.

¹⁶ *Supra*, note 10.

¹⁷ *Supra*, note 13; February 12, 1829, 5 *Congressional Debates* 81 (1830).

¹⁸ February 2, 1829, 5 *Congressional Debates* 88 (1830).

¹⁹ Lincoln even had outgoing Attorney General Stanton draw up papers nominating Crittenden to the court. C. Swisher, *The Oliver Wendell Holmes Devise History Of The Supreme Court Of The United States: The Taney Period 1836-64* 811 (1974).

²⁰ Letter from Jackson to Donelson of 10/11/22 in 3 J. Bassett and J.F. Jameson, *Correspondence of Andrew Jackson* 156 (1926-35).

²¹ Letter from Pope to Jackson of 2/19/29. The original is in the microfilm series, but it is mercifully reprinted in 4 J. Bassett, *supra*, at 6-8.

²² Letter from Jackson to Van Buren of 9/5/31 in 4 J. Bassett, *supra*.

²³ C. Swisher, *supra*, note 19 at 158-159.

²⁴ C. Swisher, *supra*, note 19 at 46-48; F. Weisenburger, *The Life Of John McLean* (1937); C. Fairman, *The Oliver Wendell Holmes Devise History Of The Supreme Court Of The United States, Reconstruction And Reunion 1864-88, Part One* 23 (1971).

²⁵ Letter from McLean to Reed of 11/2/46, "I was identified with the administrations of Madison and Monroe,

being appointed Postmaster General by the latter." By the end of his career, notes F. Weisenburger, *supra*, note 24 at 229, he had also had flirtations with the Whigs, Free Soilers, Know-Nothings and Republicans in addition to the parties mentioned in the paper.

²⁶ F. Weisenburger, *supra*, note 24 at 31-47.

²⁷ See *infra*, note 33.

²⁸ Letter from McLean to Monroe of 2/1/27, urges Monroe to remain neutral in the election and claims that this is the course he will take. See F. Weisenburger *supra*, note 24 at 56 for an interpretation of this letter that asserts that it was motivated by a desire to aid Jackson.

²⁹ Letter from McLean to friend of 8/19/27; Letter from McLean to Richardson of 10/16/28.

³⁰ Letter from McLean to Jackson of 9/22/27.

³¹ Letter from Ficklin to McLean of 2/26/29, "It is generally admitted that if you had yielded to the course accepted by other heads of department that the election in November would have been very doubtful, at any rate the contest would have been more violent." F. Weisenburger, *supra*, note 24, reports the events and the actions taken by McLean in Chapter IV, 48-65 and he interprets them, despite their ambiguity, as indicating support for Jackson. Letter from Everett to Everett of 12/2/28, "Perhaps I do wrong to call the latter (McLean) a Jacksonian; he rather regards himself as a neutral—his own man."

³² Letter from Richardson to McLean of 10/4/28.

³³ Letter from Vance to McArthur of 11/19/28; Vance was a Congressman from Ohio.

³⁴ Letter from Adams to Barbour of 4/?/29. In this letter, Adams also relates the story of the McLean-Barry switch to Barbour who was serving as Minister to England.

³⁵ C. Warren, *supra*, note 3 at 706-707; note 2, Adams letter of March 14, 1829 is quoted.

³⁶ Letter from Bell to Plumer of 1/1/29, "Whenever the cabinet is formed, the candidate for the next president will be immediately brought forward and a new organization of parties take place."

³⁷ Letter from Everett to Everett of 12/1/28; Letter from Everett to Everett of 12/2/28; Letter from Trall to McLean of 12/25/28; Letter from Agg to McLean of 12/25/28; Letter from Gazlay to McLean of 2/21/29; Letter from Smith to Barbour of 3/17/29. McLean, as Everett notes, was "... taking strength on all sides, by establishing the reputation of an energetic, laborious, faithful, public officer and meets with considerable success." On the last point, Everett remarked to his brother in early December 1828 that, with Jackson's disinclination to seek re-election in 1832, the three main candidates were Van Buren, Calhoun and McLean.

³⁸ Letter from McLean to Trall of 12/31/28.

³⁹ Letter from Bell to Plumer of 1/1/29; Letter from Barbour to Barbour of 1/27/29; Letter from Everett to Everett of 2/15/29; Letter from Smoot to McLean of 2/27/29 and in the Ficklin letter cited above, direct references are made to McLean changing department, presumably to War.

⁴⁰ Letter from Bledsoe to Jackson of 12/27/28. This is an interesting letter, because it is the first one for a couple of days and the last one for a month to speak to Jackson about appointments. Bledsoe apparently was unaware that Jackson's wife had died five days earlier. The letters during this period are fascinating in their pervasive and detailed discussions of

the religious explanations of her death.

⁴¹ Letter from Everett to Everett of 2/15/29.

⁴² J. Hamilton, *Reminiscences* 89 (1869). Apparently, Jackson wanted either Van Buren or Clinton for State, but the latter died making the selection easy.

⁴³ *Id.* at 91.

⁴⁴ There are many accounts of the events that occurred, but the most detailed and seemingly accurate are those of Kendall, W. Stickney, editor, *Autobiography Of Amos Kendall* 304 (1872). Everett (in a letter to his brother, 3/8/29), and Hamilton (who was there) J. Hamilton, *supra*, note 44 at 91. There are some conflicts over the facts, but the same story is generally told by all three.

⁴⁵ J. Hamilton, *supra*, note 44 at 96.

⁴⁶ W. Stickney, *supra*, note 44.

⁴⁷ Letter from Bell to Plumer of 3/10/29. Dexter wrote to Russell, in a letter dated February 6th, that McLean and Barry were to switch. He refers to "President" Jackson and the fact that two members of the cabinet, Van Buren and Ingham, had been nominated in the Senate. From this and other references to events in the letter, I am convinced that Dexter mistakenly wrote February instead of March, the actual date. The events

he refers to did not transpire until a month after his letter is allegedly written, and there is no way for him to have predicted with such detail. The letter is interesting as it reveals apprehension on the part of "reformers" that McLean would not "toe the mark" and satisfaction over the transfer.

⁴⁸ Letter from McLean to Force of 3/10/29.

⁴⁹ J. Hamilton, *supra*, note 44 at 100 in an oft-quoted page reports that the nomination hit the Senate "like a thunder-clap."

⁵⁰ J. Bassett, *Life Of Andrew Jackson*, 419 (1911).

⁵¹ C. Swisher, *supra*, note 19 at 46.

⁵² Letter from Everett to Butchelder of 3/5/29.

⁵³ Slade urged McLean to make these views public on March 23rd, as he was sure that McLean opposed the Jackson policy. It should be clarified that, though Jackson is known for his removal policy, in actuality only one-sixth of all government officials were removed during his tenure.

⁵⁴ Letter from Duff Green to (?) of 6/16/29 in F. Weisenburger, *supra*, note 24 at 69.

⁵⁵ W. Stickney, *supra*, note 44 at 304.

⁵⁶ See generally F. Weisenburger, *supra*, note 24.

Suits Against States: Diversity Of Opinion In The 1790s

Maeva Marcus and Natalie Wexler¹

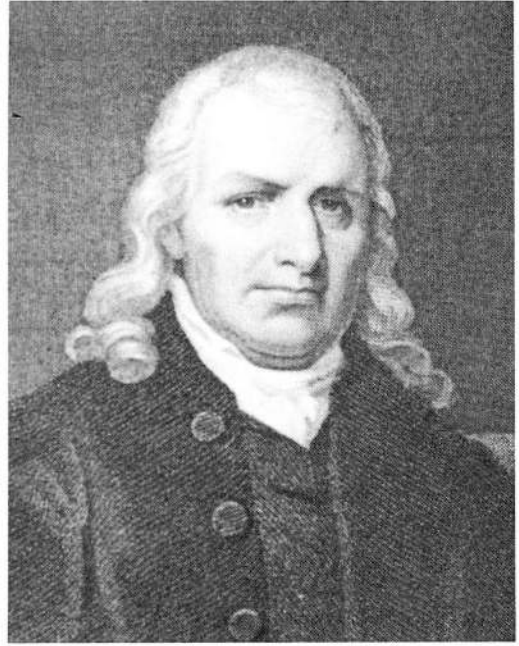
The Eleventh Amendment to the Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Following the 1890 decision of the Supreme Court in *Hans v. Louisiana*,² scholars have assumed that the amendment was a product of universal outrage against the Supreme Court’s 1793 decision in *Chisholm v. Georgia*,³ which held that such suits could be maintained. In a statement typical of the prevailing view, Charles Warren wrote that the “decision fell upon the country with a profound shock.”⁴

While it is true that many were outraged by *Chisholm*—and that the states of Georgia, South Carolina, Virginia and Massachusetts refused any submission to the jurisdiction of the Court when they were sued by individuals⁵—opinion on the subject was far from unanimous. Few today realize that in cases brought in the Supreme Court prior to *Chisholm*, two states—Maryland and New York—complied with subpoenas issued against them and entered appearances. Maryland settled out of court; the case against New York went to trial, a jury rendered a verdict for the plaintiff, and the state appropriated funds to satisfy the judgment. Even Georgia was uncertain as to how to react to *Chisholm*’s suit. And that state, along with South Carolina, although refusing to assume the role of defendant, tried to invoke the jurisdiction of the federal courts as plaintiff, thus giving rise to perceptions of unfairness. Such perceptions were a factor in the arguments of a relatively small but vocal

group of pro-*Chisholm* commentators, who contended forcefully that state amenability to suit was a necessary bulwark against tyranny and despotism.

The first case to appear on the Supreme Court’s docket, *Van Staphorst v. Maryland*, was a suit against a state.⁶ In 1782, an agent for the state of Maryland had negotiated a loan from two Dutch brothers, Nicolaas and Jacob van Staphorst. When the Maryland legislature was apprised of the terms of the agreement, it found them objectionable. For the next seven years, the van Staphorsts and the state attempted to resolve their differences, until at last the van Staphorsts decided to take advantage of the recently constituted federal judicial system and filed suit in the Supreme Court of the United States.⁷

In November of 1790, the governor and council of Maryland were served with a summons ordering the state to appear in court in Philadelphia the following February to respond. Perhaps because of the novelty of the situation, neither the governor nor the legislature, to which he referred the matter, raised any protest against the jurisdiction of the Court at this juncture. On the contrary, a committee of the House of Delegates reported in December that it was “of opinion the state should immediately appear to the action of Messieurs Vanstaphorst.” In accordance with this recommendation, the legislature passed a resolution directing the governor and council “to take measures for entering an appearance to and defending the suit brought against this state by Messieurs Vanstaphorst, and that they may have power to employ such attorneys, counsel and agents, as they think proper.”⁸



Luther Martin (left) was Maryland's attorney general at the time of the *Van Staphorst* case. Samuel Chase (right) advised Martin before his appearance at the Supreme Court. The case was discontinued in 1792 with the consent of both parties.

When the Supreme Court convened for its February term, Maryland not only appeared, it was represented by a complement of three attorneys. Luther Martin, the state's attorney general, later recalled that the governor and council had "requested me to give my particular Attention to the [van Staphorst] Suit; and assured me they considered it a matter of Consequence that I should personally appear at the Supreme Court of the United States." Martin was assisted by John Caldwell, a Philadelphia lawyer, and the state had also retained Samuel Chase, later to become a Supreme Court Justice, to act as an adviser to Martin.⁹

For some reason, Martin entered an appearance—or rather, instructed Caldwell to enter an appearance¹⁰—but not a plea. The Court, however, ordered the state to plead within two months or face a default judgment. The state complied and, although no copy of the plea is extant, a contemporary source indicates that it went to the merits rather than to the question of jurisdiction: the plea was "filed to the action in common form, that the state never promised."¹¹

In fact, Maryland appears to have sensed no danger to its sovereignty until observers from outside the state began to comment on the case.

Shortly after the state entered an appearance in the Supreme Court, an anonymous writer in Boston's *Independent Chronicle* raised the alarm. The question in *Van Staphorst*, he wrote, was nothing less than whether "the several States, have relinquished all their SOVEREIGNTIES, and have become mere *corporations*, upon the establishment of the General Government"—a popular argument against state suability.¹²

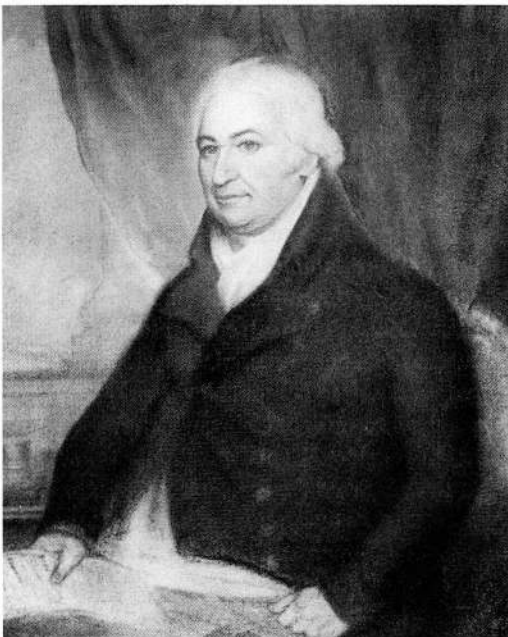
Perhaps even more influential with the state was the lengthy and widely circulated pamphlet, *Observations upon the Government of the United States of America*, written by the attorney general of Massachusetts, James Sullivan, and published in July of 1791. Apologizing to the state of Maryland for attempting to "intermeddle with their business," Sullivan noted that the implications of the *Van Staphorst* suit went far beyond the rights of a single state; he may well have been thinking of the claim against his own state that later became *Vassall v. Massachusetts*, filed in the Supreme Court in 1793. Sullivan argued that there was no provision in federal law for service of process on a state, nor could there be any workable method of enforcing a judgment against a state. Furthermore, the most reasonable construction of the constitutional provision that au-

thorized jurisdiction over “Controversies. . . between a State and Citizens of another State” — Article III, section 2—was that it permitted the federal courts to hear suits brought *by* states and suits brought against *individuals* acting as state agents, but not against states themselves. Sullivan maintained that the states were immune from suit by virtue of their sovereign powers before the Revolution, and that the ratification of the Constitution had not stripped them of that aspect of their sovereignty: “The United States may as well attempt to coerce, by their authority, the province of Nova-Scotia as either of the states in the Union,” he wrote.¹³

Possibly spurred by this outcry, the Maryland legislature decided, while depositions in *Van Staphorst* were being taken, that the safest course of action would be to settle the dispute in order to avoid a legal precedent upholding the exercise of jurisdiction over a defendant state. In December 1791, a committee of the Maryland House of Delegates reported that “it would be advisable rather to propose reasonable offers of compromise, than to permit a precedent to be established, by which any individual foreigner may endanger the political and private rights of this

state and her citizens.”¹⁴ The legislature passed a statute implementing this recommendation, and the van Staphorsts accepted the legislature’s offer in satisfaction of their claim. At the August 1792 term of the Supreme Court, the case was discontinued with the consent of both parties.¹⁵ Although Maryland ultimately ratified the Eleventh Amendment in 1794, signs of ambivalence were evident at least through 1793. In December of that year, the Senate declined to take up a House resolution calling for a constitutional amendment to bar suits against states, remarking that it was “an important question, which has occasioned great diversity of opinion among men of the first abilities.”¹⁶

The state of New York responded somewhat differently to a suit against it by a private citizen. Advised by one of its attorneys after several years of litigation to settle the dispute out of court, New York’s attorney general in 1795 chose to bring the cause to trial, no doubt because of political imperatives.¹⁷ Between 1791, when the suit was instituted, and 1795, when it was concluded, Federalists and Republicans (or perhaps more accurately, opponents and supporters of Governor George Clinton) fought over many issues in



Governor George Clinton (left) and Eleazer Oswald (right) of New York were both well known for holding Antifederalist views. In 1791, Oswald sued the state of New York in the Supreme Court of the United States over unpaid salary due the estate of John Holt. Governor Clinton referred the summons to the state legislature. It was not until 1793 that a plea was filed before the Court on behalf of New York.

In PROVINCIAL CONGRESS,
New-York, July 7th, 1775.

WHEREAS this Congress on the 4th Day of July Instant, published a Resolution, ordering that the Arms belonging to the Corporation of this City be returned to Messrs. Abraham Walton, and Isaac Sears, who are appointed a Committee to receive them: And whereas few of those Arms have as yet been returned; and it is essentially necessary for the public Service, that a Compliance with such Order be no longer delayed,

Resolved, That every Person to whom such Arms were originally delivered, or who is now possessed of any of them, who does not, on or before *Friday* the fourteenth Day of July Instant, deliver the same to the Committee aforesaid, or to their Order, at the upper Barracks, shall be deemed and treated as any Enemy to his Country.

A true Copy from the Minutes.

ROBERT BENSON, Sec^{ry}.

Printed by JOHN HOLT, in Water-Street, near the Coffee-House.

John Holt served as a printer for the State of New York during the American Revolution. He printed broadsides like the one above from his Water Street shop. After his death, his estate sued the state of New York for back pay.

New York; the constitutionality of states appearing as defendants in federal court was one of them.¹⁸ And political power in the state changed hands during that time.

The case of *Oswald v. New York* arose from a claim made by the administrators of John Holt's estate for back salary owed to Mr. Holt for his years of service as printer for the state during the American Revolution. Not receiving satisfaction from New York state's legislature, Eleazer Oswald, who had been an outspoken Antifederalist,¹⁹ sued New York in the Supreme Court of the United States.²⁰

A writ issued by the Court directed the federal marshal to summon "the State of New York" to appear before the Supreme Court on August 1, 1791. But the marshal, who had been out of the country, did not serve process on Governor Clinton until August 1, and the writ was not returned to the Court until after its August term had ended, so no mention of the case was made in Court records.²¹ Governor Clinton, widely known for his

Antifederalist views, sent a copy of the summons to the New York legislature at the beginning of its session in January 1792. The lower house, called the Assembly, appointed a committee to consider what response should be given, but the committee never reported. The Senate appears to have taken no notice of the summons whatsoever.²²

Thus, when the Supreme Court convened in February 1792, no counsel represented New York, and no plea had been entered. Oswald's attorney moved for a writ to compel New York's appearance at the next term of Court, which the Justices agreed to consider.²³ This was the first time that they squarely faced the issue of their authority to order a state to defend a suit instituted by a private citizen in the Supreme Court; in *Van Staphorst*, there had been no occasion to do so, because Maryland had not questioned the Court's jurisdiction.

Because of a series of procedural problems, however, the Court did not have to answer the question until the February 1793 term,²⁴ and by

that time Chisholm had brought his suit against Georgia. Having heard full argument, at least by the plaintiff's counsel, on the jurisdictional issue in that case, the Justices delivered their opinions, startling to many, affirming that the Supreme Court could hear suits by individuals against states and ordered Georgia to "appear or shew cause to the Contrary" by the first day of the next term or suffer judgment by default.²⁵ Emboldened by the decision in *Chisholm*, Oswald's counsel, noting that once again New York had not responded to the Court's summons, moved that a default judgment be entered against that state as well, unless it also appeared by the first day of the August 1793 term. The Court granted the motion.²⁶

Governor Clinton and Nathaniel Lawrence, New York's attorney general, received notice of the Court's show cause order in June 1793.²⁷ Aware that the legislature would not be meeting before the Court's August session, Clinton and Lawrence apparently employed counsel on their own authority. On August 5, 1793, Jared Ingersoll, representing New York, filed a plea to the jurisdiction claiming that New York was "a free, sovereign and independent State," and could not "nor ought to be drawn or compelled" to defend against Oswald's suit.²⁸ No further action oc-

curred at this Court session, which lasted a mere two days.²⁹

Between August 1793 and the February 1794 Court term, however, a session of the New York legislature intervened. After a recent election both houses contained sizable Federalist majorities that were determined to end the political dominance of George Clinton, and the issue of state suability presented a fertile field of battle. Governor Clinton wanted the legislature to enact resolutions similar to the ones being circulated by Massachusetts and Virginia advocating a constitutional amendment to overturn the Court's decision in *Chisholm*.³⁰ But the Assembly rejected the proposal,³¹ and the Senate, while indicating its support, took no action.³²

Attorney General Lawrence took advantage of the legislature's meeting to inform the Assembly in greater detail of the Supreme Court's show cause order in Oswald's suit. With a default judgment threatening the state, Lawrence wanted the legislature's advice as to how to proceed.³³ The day after receiving Lawrence's letter, on January 15, 1794, the Federalist party leader in the Assembly, Josiah Ogden Hoffman, introduced a motion requiring the attorney general "to defend the rights and interest" of New York in all



Jared Ingersoll (left) represented the state of New York before the Supreme Court in *Oswald v. New York*. Josiah Ogden Hoffman (right) was a Federalist party leader in the New York Assembly. He introduced a motion in the Assembly to require the attorney general to defend the "rights and interest" of New York in all suits in which it was a party.

suits in which it was a party. The Assembly and the Senate, when it later received the resolution, argued about the wording of the motion,³⁴ but the result was consistent with Hoffman's intent: the legislature clearly instructed the attorney general to defend the Oswald suit.

Once he knew that New York must answer the suit, Attorney General Lawrence began to prepare, with the cooperation of plaintiff's counsel, for a trial. The Court granted the parties continuances in February and August 1794, and in February 1795 the case of *Oswald v. New York* was tried by jury in the Supreme Court.³⁵ Oddly enough, Jared Ingersoll, who handled the trial for New York in the Supreme Court, had advised Lawrence that New York would lose and that the case should be settled out of court.³⁶ Given the history of New York's decision to appear in the suit and the legislature's specific instructions to him, however, perhaps the attorney general believed he had no choice but to bring the case to a conclusion in full view of the public in the Supreme Court.

As predicted by Ingersoll, the jury brought in a verdict in favor of Oswald, awarding him \$5,315 in damages and \$.06 for costs—not all that Oswald had asked, but an amount that represented the salary owing to Holt with interest.³⁷ Oswald promptly wrote to Governor Clinton demanding payment, and Clinton quickly referred the request to the legislature with the further admonition that members seeking additional information should contact the attorney general rather than the governor.³⁸ On April 9, 1795, the legislature authorized the state treasurer to pay Oswald the full amount of the jury's award.³⁹ No evidence exists to indicate that anyone suggested that New York should resist compliance with the Supreme Court's order.

In *Chisholm v. Georgia*, the most well known of the suits against states, Georgia's reaction has been perceived as outraged and intemperate. Upon closer examination, however, its response appears to have been more measured than modern

scholarship has indicated. The dispute that precipitated the constitutional holding in *Chisholm* concerned a revolutionary war debt that the Georgia legislature, until the 1790s, was unwilling to settle. Alexander Chisholm, the executor of Robert Farquhar, to whom the debt had been owing, sued the state of Georgia in the United States Circuit Court after receiving no satisfaction from the legislature. The Court issued a summons requiring those involved in the government of Georgia or their attorney to appear in Court on April 25, 1791, and the summons was served on Governor Edward Telfair on March 21. The unprecedented nature of the case led the governor to inform the legislature of his receipt of the summons and also to consult Georgia's solicitor general, John Y. Noel, about how the state should respond. Telfair indicated that

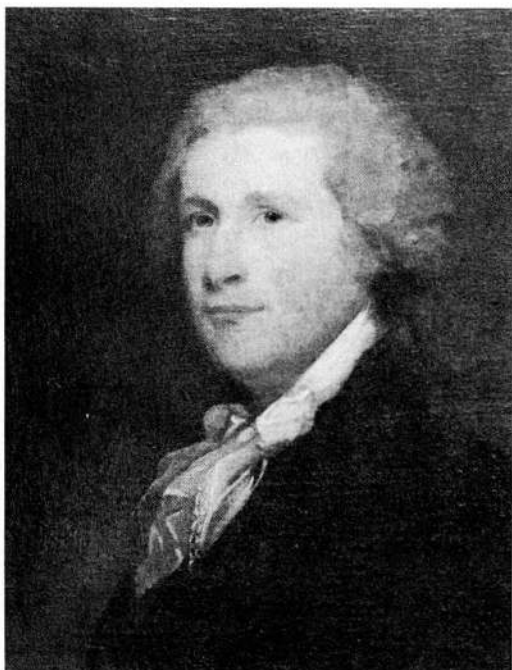
Chisholm had neglected to follow the procedure spelled out in Georgia's judiciary act for a plaintiff against the state.⁴⁰

Noel and Thomas P. Carnes, the state's attorney general, jointly advised the governor.

The framers of the Constitution, they wrote, surely never meant that states would be sued in federal court without their consent. Moreover, the Judiciary Act of 1789 had not conferred such a jurisdiction except on the occasions when states were plaintiffs.⁴¹ Carnes and Noel promised that they would not allow any breach of Georgia's sovereignty and urged Telfair to do so as well: "Nothing, with due deference to your Excellency, ought to appear on the records of the executive department which can possibly be construed into a recognition of the jurisdiction of the Federal Courts in such Cases."⁴²

The case of *Farquhar v. Georgia* came up for argument during the October 1791 term of the circuit court. By then, Governor Telfair had decided to plead to the jurisdiction and in papers filed with the court stated that, as no court of law or equity had jurisdiction over a suit against Georgia without the state's consent, he expected the court not to consider the case. He asked the

According to Georgia's top legal officials, the framers of the Constitution surely never meant that states would be sued in federal courts without their consent.



Alexander Dallas served as the first Supreme Court reporter from 1791-1800. In addition he continued his legal practice, representing the state of Georgia in a number of cases including, in its later stages, *Chisholm v. Georgia*.

court to quash Chisholm's writ and award costs to Georgia.⁴³ Most surprising, in view of the position Georgia took when it was sued in the Supreme Court, is the participation of Carnes and Noel in the circuit court argument. Chisholm's lawyers tried to convince the judges that the presence in court of counsel for the state should be interpreted as an admission of jurisdiction, but the judges did not agree.⁴⁴ In fact, the judges rejected Chisholm's jurisdictional arguments and concluded that the circuit court could "exercise no jurisdiction in the case now before it."⁴⁵

Chisholm pursued his case by instituting a new suit within the original jurisdiction of the Supreme Court. The Court issued a summons dated February 8, 1792—not served on the governor and attorney general of Georgia until July 11—requiring the state to appear on the first day of the August 1792 term. Given the shortness of time between the service of summons and the meeting of the Court, perhaps it is not so surprising that Georgia was unrepresented. Alexander Dallas, counsel for Georgia in a different case before the Court, suggested to the Justices that Chisholm's case be continued to the following

term to allow Georgia to decide "whether she would submit to the jurisdiction and try the cause, or insist on the right of not being sued." The Court acceded to the suggestion with the consent of plaintiff's counsel.⁴⁶

Georgia's actions upon hearing of the Supreme Court suit deserve mention. Governor Telfair informed the legislature at the commencement of its November 1792 session of his concern about the court proceedings. "This case," he wrote, "involves matters of two [*sic*] great importance to be considered as coming within the Executive powers, without a Legislative sense in the premises."⁴⁷ The Georgia House of Representatives considered the issue and passed a resolution affirming its belief that Article III of the Constitution did not authorize suits against states by citizens of other states in the Supreme Court and declaring that Georgia would treat any judgment resulting from such a case as unconstitutional.⁴⁸ When the Senate received notice of the House's action, the resolution was read and consideration of it postponed. The Senate did not take it up again.⁴⁹ Having received no clear guidance from the legislature, Governor Telfair merely sent a copy of the Georgia House's resolution to the state's agent, John Wreath, in Philadelphia.⁵⁰

Thus, when *Chisholm v. Georgia* came up for argument at the February 1793 term of the Supreme Court, no counsel appeared for Georgia.⁵¹ Alexander Dallas and Jared Ingersoll presented to the Court the Georgia House of Representatives' resolution, and it was read aloud, but they declined to participate in the oral argument because Georgia had not requested that they do so.⁵²

After the Supreme Court's much publicized jurisdictional decision, however, when the Court had issued a show cause order to Georgia to appear by the first day of the August 1793 term on pain of suffering a default judgment, Dallas and Ingersoll did indeed represent Georgia before the Court "[b]y virtue of an Authority from the State."⁵³ Dallas promptly moved for a postponement of the argument until the next term, which was granted with the consent of plaintiff's counsel.⁵⁴

Before the Court's February 1794 term, another meeting of the Georgia legislature took place. In his opening address, Governor Telfair urged the legislature to instruct Georgia's congressional delegation to seek a constitutional

amendment, for that seemed to him the only remedy that would allow the states to retain their sovereignty, and to inform the other states of this action.⁵⁵ But the most noteworthy piece of legislation to come from this session was a bill passed only by the House of Representatives which made it a felony punishable by death for any person to attempt execution of a federal court judgment in the *Chisholm* case. The Georgia Senate took no action in connection with the suit.⁵⁶

Dallas and Ingersoll argued in the Supreme Court in February 1794 that judgment should not be entered against Georgia, but the Justices disagreed and ruled in favor of the plaintiff. The Court awarded a writ of inquiry to determine the damages sustained by Chisholm as a result of Georgia's "breach of promise and other defaults."⁵⁷ No inquiry took place the next term, however. The Court ordered a jury to be summoned in February 1795 and notice to be given to the governor and attorney general of Georgia three months in advance of that hearing.⁵⁸ In February 1795 and in every term thereafter until the ratification of the Eleventh Amendment was announced, plaintiff's counsel moved for a continu-

ance.⁵⁹ It appears that Chisholm did not actively prosecute his suit after August 1794 because, in December of that year, the Georgia legislature settled the Farquhar claim.⁶⁰

Why, after so many years, did Georgia choose December 1794 to settle the claim? Although no documentary evidence exists to provide an answer, it may be that the legislature wanted to avoid a Supreme Court judgment that the state would have to honor or ignore. If the state was in as defiant a mood as historians and legal scholars have depicted, ignoring a judgment of a federal court might have been precisely the action it needed to take to demonstrate its anger—to the federal government and to the other states. But, in fact, Georgia, chose not to take this course. Certainly the state bridled at being called into federal court as a defendant, but its leaders still retained a respect for the national government and a willingness to work within the system to which it had committed itself by ratifying the Constitution. Furthermore, not complying with a default judgment would be an embarrassment for Georgia because, during the very years it was fighting the *Chisholm* suit, the state was seeking the Supreme Court's intervention in its favor in another case, *Georgia v. Brailsford*.⁶¹

Georgia v. Brailsford began as a private diversity suit between Samuel Brailsford and his partners and James Spalding and his partners in the United States Circuit Court for the Georgia district. The case concerned a debt contracted in 1774 by Spalding, a citizen of Georgia, and owed to Brailsford, an English subject living in South Carolina. The state of Georgia claimed the money in dispute by virtue of the confiscation act it had promulgated in 1782.⁶² Brailsford sued Spalding in 1790. The defendant admitted the debt but pled that Georgia, not Brailsford, was the rightful claimant under the 1782 act. Oral argument took place in circuit court on April 28, 1792, and a decision in favor of the plaintiffs was announced on May 2.

According to Justice James Iredell, who presided at the circuit court, the decision was flawed because the state of Georgia had not been able to come before the court to prove her claim to the debt. As Iredell explained in a letter to President Washington, Georgia had attempted to join in the defense, but Spalding's counsel would not allow it, so Georgia applied to the Court to interplead.

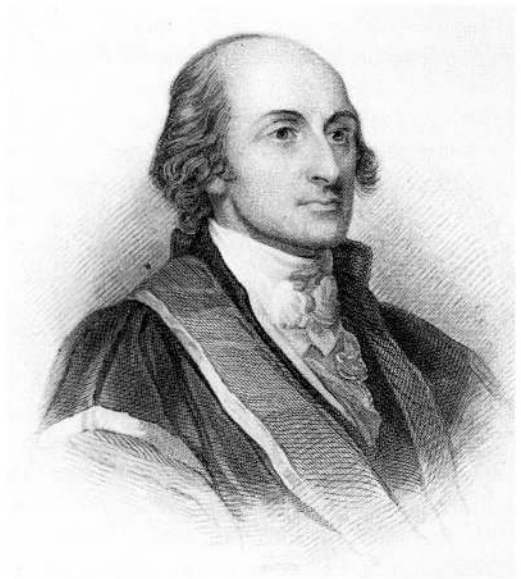


Associate Justice James Iredell of North Carolina presided over the circuit court trial of *Georgia v. Brailsford*. He believed that the decision was flawed because Georgia had not had the opportunity to come before the Court to prove her claim to the debt.

Iredell thought the state should be permitted to do so, because Georgia was materially interested in the outcome of the case and because the legal questions inherent in it—whether the state was entitled to Spalding’s debt under its confiscation act and whether the Treaty of Peace of 1783 with Great Britain affected the application of that act to debts owed by Georgians to British subjects—had ramifications throughout the nation and needed to be settled. But Iredell observed that the court had to deny Georgia’s request to interplead because it was legally impermissible: The court could find no instance of such a motion being granted except where the defendant had asked for it, let alone where the defense had opposed it. Moreover, even if such a precedent had existed, Iredell believed that the Constitution would have presented an obstacle to Georgia’s participation: the state would then have become “a Party, though collaterally to the principal action,” he explained, and the Constitution provided that such cases must originate in the Supreme Court.⁶³

Believing itself aggrieved, Georgia did seek relief in the Supreme Court at its next term, August 1792, the very term in which Georgia had been summoned to appear to answer Chisholm’s suit and did not. Filing a bill in equity against Brailsford and Spalding, which set out the reasons why the state was entitled to the money, Georgia moved for an injunction to stay further proceedings in the circuit court and to prevent the marshal of the Georgia district from turning over to Brailsford any money the marshal may have obtained in execution of the judgment handed down in May 1792.⁶⁴ The Supreme Court granted the motion, and an injunction was issued to keep the money in the hands of the court until such time as Georgia had received a legal adjudication of the question of to whom the debt should be paid.⁶⁵

At the following Supreme Court term in February 1793, when Georgia had not yet instituted legal proceedings, the defendants moved for the injunction to be dissolved, and counsel for the state had to appear to contest the motion the day after *Chisholm* was argued.⁶⁶ Whether the incongruity inherent in Georgia’s position—refusing to be a defendant while claiming the right to invoke the Court’s jurisdiction as plaintiff—bothered Georgia was not at all evident. But this juxtaposition led Chief Justice John Jay to re-



Chief Justice John Jay noted in the opinion upholding the Court’s jurisdiction in *Chisholm* that the state of Georgia wanted to be able to sue the citizens of other states but did not want to be the defendant in suits filed by citizens of other states.

mark, in his opinion upholding the Court’s jurisdiction in *Chisholm*, “That rule is said to be a bad one, which does not work both ways; the citizens of *Georgia* are content with a right of suing citizens of other States; but are not content that citizens of other States should have a right to sue them.”⁶⁷ Nevertheless, on February 20, the day following issuance of the Court’s show cause order in *Chisholm*, the Court ruled in Georgia’s favor and continued the injunction to give the state more time to pursue an action at law.⁶⁸

The trial of *Georgia v. Brailsford* took place in the Supreme Court during the February 1794 term.⁶⁹ After four days of argument, the jury brought in a verdict for the defendants.⁷⁰ One week later, on the same day that counsel for Georgia made an unsuccessful attempt to contest the show cause order in *Chisholm* and a default judgment was entered against the state, the Court ordered the injunction in *Brailsford* dissolved with costs and judgment to be entered against the state in that case as well.⁷¹

One other state, South Carolina, while vigorously maintaining its immunity from suit as a defendant, tried to take advantage of the federal judicial system to resolve a dispute in which it was involved. Finding itself the defendant in *Cutting v. South Carolina*, the state attempted to recast the

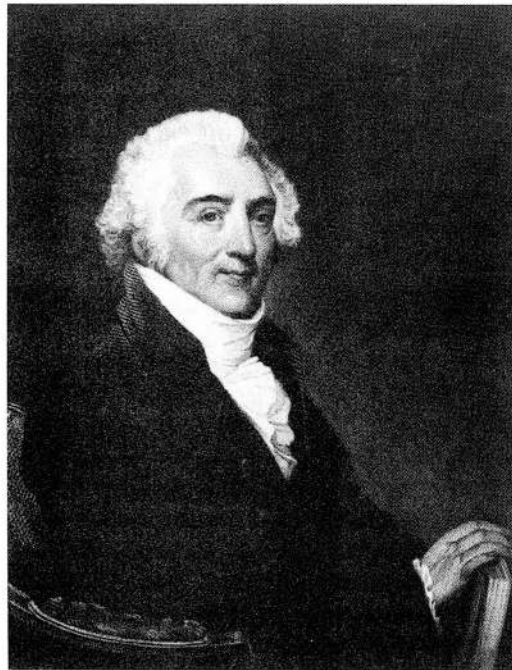
dispute—which it very much wanted to have judicially resolved—so as to appear in the role of plaintiff. The suit, filed in the Supreme Court in 1795, involved a claim brought against the state by agents of the Prince of Luxembourg, who had leased a ship to the South Carolina navy during the revolutionary war. In 1785 the legislature was on the verge of paying the debt when a new claimant stepped forward—the king of France, who had actually owned the ship and leased it to the Prince of Luxembourg.⁷²

The state thus found itself, as a resolution of the legislature later put it, “in the situation of a Stake Holder,”⁷³ ready and willing to pay its debt, but unsure of the rightful creditor. The obvious method of resolving this dilemma would have been to file a bill of interpleader against the two contending claimants, forcing a judicial determination of the dispute. But for some reason the legislature determined on a more indirect course of action: in 1794 it paid 1000 pounds of the debt to the Prince’s representative, John Brown Cutting, “as a means of putting the business in a legal train of investigation.”⁷⁴ Apparently, the legislature expected the French government to take up the gauntlet and sue Cutting for the money.

The French, however, still in the throes of their revolution, were unable to locate sufficient documentation to support their claim in court, and as a result did nothing. Tired of waiting for his money, Cutting took the bold step of filing suit against South Carolina in the Supreme Court in August 1795. The governor—who had been anticipating a lawsuit, but not one in which the state was named as defendant—refused to accept service of process. Interestingly, he did not do so simply on the basis of a blanket assertion of sovereign immunity. Rather, he argued “that it was derogatory to the credit and honor of the State, to permit a suit to be brought against it” for a debt which the state did not dispute. Furthermore, he told the legislature, the state attorney general doubted that a judgment in an action solely between Cutting and the state could be legally binding on the French Republic—so a determination in favor of Cutting might not insulate the state from a later claim brought by France.⁷⁵

Now facing the prospect of a default judgment, the legislature at last directed the state’s attorney general to file a bill of interpleader in the

Supreme Court—along with “a Declaration against the Exercise of any Jurisdiction by the supreme Court of the United States, coercive on the State. And a Protest against this Example being drawn into precedent.”⁷⁶ For some reason the attorney general delayed almost eight months before implementing this directive, and when he finally acted, on August 9, 1797, it was almost too late. The day before, a jury had returned a verdict in Cutting’s favor in the amount of \$55,002.84. But the Court, perhaps out of regard for the delicacy of the situation, docketed a new case, *South Carolina v. the French Republic and John Brown Cutting*, and entered an injunction staying the execution of the judgment in *Cutting v. South Carolina* on condition that the state deposit the disputed amount in court. The legislature balked, refusing to deposit any money until the Court ruled on the bill of interpleader itself. There matters stood until February 1798, when—on the same day that it dismissed three suits against states on the grounds that they were barred by the recently ratified Eleventh Amendment—the Court continued *South Carolina v. Cutting* by consent



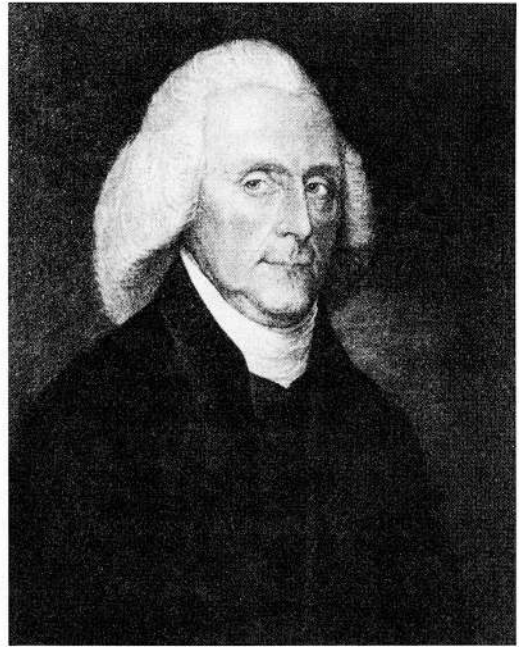
James Sullivan, attorney general of Massachusetts and later governor, published a pamphlet in 1791 in response to *Van Staphorst*. His pamphlet arguing against the suability of states was widely circulated and spurred pro-suability responses.

of the parties. Technically, it seems, the case is still on the docket.

As Chief Justice Jay had observed in *Chisholm*, the spectacle of states invoking the Court's jurisdiction as plaintiffs while resisting it as defendants smacked of unfairness.⁷⁷ Jay was not the only one who took this view. The anonymous author of a pamphlet published in response to James Sullivan's *Observations* commented, "It is an odious doctrine, that a state can compel justice from the citizens of a neighbouring state; but may withhold it from them during her pleasure."⁷⁸ Another anonymous writer, who published a series of five pro-suability "letters" in the New York newspaper *American Minerva*, agreed: "these . . . states all claim and exercise the right of compelling individuals to render Justice. Why should not the right be *mutual*? Is that man *legally free*, who can be *forced* to pay the last penny he owes to a state; while the state may owe him a fortune, and he cannot compel the payment of a shilling?"⁷⁹

The lack of mutuality in the states' interpretation of Article III was only one of many arguments put forward by commentators who argued against the ratification of the Eleventh Amendment. Most of the contemporary commentary on the Amendment that has come down to us is in favor of its ratification, but it is difficult to gauge how representative of public opinion that commentary really is. Certainly, as Edmund Pendleton wrote to his nephew Nathaniel, "some respectable Opinions were in the Affirmative" on the question of state suability,⁸⁰ and they were every bit as vigorous in defending their interpretation of the Constitution as were those partisans on the other side of the issue.

The pro-suability writers often took as their starting point Article III of the Constitution. Some relied on the opinions of the four Supreme Court Justices who had upheld the exercise of the Court's jurisdiction in *Chisholm*, protesting the lack of publicity these writings had received (Chief Justice Jay's was the only one of the opinions to be published in a newspaper). One correspondent sent a copy of Justice William Cushing's opinion to the *Columbian Centinel* of Boston, praising the author as "a Man, whose abilities, integrity, republican virtue, and unshaken independence are known and acknowledged by every citizen." Another lamented, erroneously, to Philadelphia's



Edmund Pendleton (above) was president of the Virginia Supreme Court of Appeals from 1779 until his death in 1802. He wrote his nephew Nathaniel 1792 on the issue of state suability and noted there were respectable opinions in favor of it.

National Gazette that the widespread dissemination of "[s]o just, so wise, so important a decision" had been prevented by the claimed copyright of an expensive pamphlet edition.⁸¹

Others, writing in response to James Sullivan's *Observations* before the opinions in *Chisholm* were announced, offered their own expositions of the Constitution. An anonymous author in the *Columbian Centinel* argued simply that "the most natural construction of the terms" of Article III was that the people had established "a new tribunal . . . with a jurisdiction fully competent" to hear suits brought by an individual against a state.⁸² Another anonymous writer went beyond the words of the Constitution—whose meaning he declared was plain to anyone "but a metaphysician"—to its spirit. "The great principle that runs through our Constitution," he wrote, was that "the *states*, as well as the *people*, are made the subjects of *federal legislation*." Making a frequently heard argument,⁸³ the author declared that the judicial power of the United States must be coextensive with the legislative: "What the one commands, the other must decree the obedience of, and the executive must enforce it." Moreover, the Constitution itself was full of interdictions on

the states, which could not be effectively vindicated—as Sullivan had suggested they could—by sanctions imposed only on their individual citizens.⁸⁴ To the objection that never before in history had a sovereign power been subject to legal process against its will, these writers replied—in essence—so what? Rather than seeking precedents from the past to bolster their arguments, they reveled in the very break with a tradition they associated with “the haughty sovereignties of Europe.”⁸⁵

The pro-suability writers also responded to the practical objections Sullivan and others raised. They easily dismissed the argument that suits against states could not go forward because there was no prescribed method of serving process on a state: Congress could simply enact legislation supplying such a method.⁸⁶ Harder to answer was the objection that it would be difficult or impossible to enforce a judgment against a recalcitrant state. Congress might pass a law sequestering state revenues, they suggested, or levy a tax directly on the state’s citizens, or perhaps order the state’s vacant lands publicly sold. But the commentators clearly preferred not to dwell on this unpleasant question. “The constitution supposes compliance, and not resistance,” one wrote, dismissing as “wild and unconstitutional” the very suggestion that a state would defy an order of the Supreme Court.⁸⁷

While some pro-suability commentators argued that states could be trusted to comply with court orders against them, however, others exhibited a deep suspicion of state governments, maintaining that only the threat of legal action would ensure against their degeneration into tyranny and despotism. A “fraudulent state,” they argued—“for such we know there are”—should be held to the same standard as a fraudulent individual.⁸⁸ Even the Delaware Senate adopted the view that states should be “as compellable to pay their Debts as Individuals are.”⁸⁹

The anonymous correspondent who wrote a series of letters to the *American Minerva* argued

that states were to be trusted even less than individuals: “a state is composed of numbers, and wherever an injury is done by a multitude, the responsibility is divided. . . . Hence a public body never feels guilt, though every individual will separately disapprove of the measure which does the injury. This circumstance strongly enforces the necessity of some provision for compelling justice from such public bodies.”⁹⁰ The “pitiable remedy”⁹¹ of petitioning the legislature—the standard recourse for those with a claim against the state—was inadequate for “matters of contract [and] specific rights.”⁹²

These voices, of course, were in the minority, perhaps in part because in many instances those who petitioned the legislature succeeded in obtaining some relief.⁹³ The cases that found their

way into the courts were those in which the system for some reason had broken down: in at least seven of the eight suits against states that appeared on the Supreme Court’s docket before the ratification of the Eleventh Amendment, the plaintiffs had petitioned or memorialized the legislature before filing

“[W]herever an injury is done by a multitude, the responsibility is divided. . . . Hence a public body never feels guilt. . . .”

suit—in some cases more than once—but had received little or no satisfaction.⁹⁴ The pages of state legislative journals from the period, however, indicate that these were the exceptions rather than the rule. To the modern eye, it is astounding, first, how much time eighteenth century legislatures devoted to the consideration of private petitions, and, second, how frequently they seemed to grant them. It was perhaps the states’ general willingness to live up to their obligations that made possible the ratification of the Eleventh Amendment.

Things were to change, however, and soon. Even before the official ratification of the Eleventh Amendment—but after it had received the requisite number of ratification votes⁹⁵—a scandal broke that was to shake the faith of many Americans in the trustworthiness of state governments. The Georgia legislature had, in 1795, sold a vast, undeveloped tract of land known as the



In 1796, a year after the Yazoo Land Act had been passed, the Georgia legislature repealed it. According to traditional accounts, the lawmakers declared that no ordinary fire should be used to burn the Yazoo Act. Instead a magnifying glass focused the sun's rays to start the fire, symbolizing fire from heaven destroying the Act.

Yazoo territory to four companies of land speculators in a deal universally acknowledged to have been riddled with corruption. A year later—one week after North Carolina became the twelfth state to ratify the Eleventh Amendment—a new, reform-minded Georgia legislature repealed the act of sale. By the time of the repeal, the original purchasers had divided up the land into small lots and sold it to hundreds of investors, many of them prominent and most of them located in New England. These investors thus found themselves with substantial claims against a mercurial state government to which they had only recently granted immunity from suit.

Would things have turned out differently if the sequence of events had been reversed—if the Yazoo scandal had emerged *before* the ratification of the Eleventh Amendment? We can only speculate, but at least one member of the Connecticut legislature thought they would: “There are so many of our people concerned in the Georgia purchase,” he wrote, “and so many oth-

ers who have such exalted Ideas of the General Government, that if the amendment to our Constitution some time since adopted—taking away the suability of a State; was now to be tryed I am confident it would not be agreed to by this State—tho’ it passed a few years ago by almost a unanimous vote of the Legislature.”⁹⁶ The uproar was sufficiently loud that one apologist for the Eleventh Amendment felt compelled to answer those who argued that the Yazoo scandal provided a justification for the amendment’s defeat.⁹⁷

If nothing else, the reaction to the Yazoo scandal illustrates the fundamentally political nature of the Eleventh Amendment debate. The ratification of the amendment was at least in part an effort to appease those who saw the federal government overreaching itself; supporters of a strong federal government may have viewed the measure as a relatively painless way of allowing their opponents a modest victory.⁹⁸ As one anonymous correspondent wrote to a member of the New York Assembly in 1794, the decision in

Chisholm appeared worthy of support when weighed “in the scales of pure republicanism,” but political realities counseled otherwise: “as this phantom of state suability is now the only plausible basis of antifederal opposition, (as a measure of policy) it may perhaps be well to amend the constitution in that particular: For of two evils choose the least.”⁹⁹ Had this author been writing two years later amidst the fallout from the Yazoo scandal, perhaps the choice would not have been so clear.

The passage of the Eleventh Amendment was thus not the inevitable outcome of the argument over state suability that began during the constitutional ratification debates of 1787 and 1788. The uncertain reactions of the first two states to be sued under the Constitution indicate that the battle lines were not yet clearly drawn in the early 1790s. Admittedly, the anti-suability forces soon rallied and carried public opinion with them. But those few who raised their voices in opposition, preaching in the wilderness, might well have had a more favorable reception had the American people realized a few years—or perhaps even a few weeks—earlier that the good faith of the state legislatures was an uncertain foundation on which to rest their legal rights.

Whether because of the Yazoo scandal or other factors, as yet unknown, the outcry that greeted the Supreme Court’s 1793 ruling in *Chisholm* had largely dissipated by the middle of the decade. Although the requisite number of state legislatures had ratified the Eleventh Amendment by February of 1795—less than a year after Congress sent it to the states—four of those legislatures simply neglected to inform the federal government of their actions.¹⁰⁰ Surely, if the states had continued to consider their suability a burning issue, they would have taken the necessary steps to have their votes recorded. Even more remarkable, no one in the federal government

appears to have noticed the sudden disappearance of the amendment until January of 1797, when a senator—probably Henry Tazewell of Virginia, who had been prompted by his state legislature—moved for an investigation. (As it turned out, Virginia itself was one of the states that had failed to notify the federal government of its ratification.) An additional year elapsed before the secretary of state received all the notifications and the president announced the official adoption of the amendment.¹⁰¹ During the three years between the actual and official ratifications of the Eleventh Amendment, the Supreme Court continued to entertain suits against states.¹⁰²

Further evidence of a shift in the national mood can be found in the cool reception given to the Virginia and Kentucky Resolutions in 1798 and 1799. These resolutions, passed by the Virginia and Kentucky legislatures in late 1798, were prompted by the unpopular Alien and Sedition Acts, and declared the right of each state to decide for itself the constitutionality of federal legislation. Not only did other states fail to support these resolutions, but several passed their own resolutions specifically rejecting the doctrine that Kentucky and Virginia had endorsed.¹⁰³ While the doctrine of state nullification of federal statutes is radically different from that of state immunity from suit, the failure of the Kentucky and Virginia Resolutions clearly suggests that the states were turning away from an emphasis on state rights and prerogatives.

Viewed in this light, the surge of public opinion that produced the Eleventh Amendment begins to appear as, if not a flash in the pan, then certainly less deeply rooted than scholars have believed. It is ironic that an amendment that was nearly forgotten a year after its promulgation by Congress has cast such a long shadow over the course of American constitutional jurisprudence.

Endnotes

¹The authors wish to acknowledge their fellow editors of *The Documentary History of the Supreme Court of the United States, 1789-1800*, James C. Brandow, Robert P. Frankel, Jr., and Stephen L. Tull, for their major contribution to this essay. The research on which the paper relies was done by all the editors, and discussion of the contents of volume 5 of *The Documentary History* series gave rise to many of the ideas expressed here.

We would also like to thank Akhil R. Amar, Richard A. Baker, James A. Feldman, William A. Fletcher and Daniel Marcus for their perceptive comments on an earlier draft of this article.

²134 U.S. 1 (1890).

³2 U.S. (Dall.) 419 (1793).

⁴Charles Warren, *The Supreme Court in United States History*, Vol. 1 (Boston: 1923), p. 96.

⁵In *Hollingsworth v. Virginia*, the state did not appear in the Supreme Court before the case was struck from the docket in 1798. What is interesting to note, however, is that Virginia, although resisting the jurisdiction of the Court, by February 1797 had instructed its counsel to enter an appearance if that should be necessary. See James Wood to John Marshall, February 1, 1797, in Charles T. Cullen, ed., *The Papers of John Marshall*, vol. 3 (Chapel Hill, North Carolina: 1979), pp. 67-68. For further correspondence on this point, see Charles Lee to James Wood, February 18, 1797, in Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 5 (New York: Columbia, 1994) (forthcoming).

⁶Maeva Marcus and James R. Perry, eds., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia, 1985), vol. 1, p. 484. The case is essentially unreported: Dallas devotes only a few lines to it, and they relate to a minor procedural matter. 2 U.S. (Dall.) 401.

⁷See Introduction to *Van Staphorst v. Maryland* in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁸*Votes and Proceedings of the House of Delegates of the State of Maryland. November Session, 1790* ([Annapolis: Frederick Green, 1791]) pp. 44, 87, 97, 98., 101; *Votes and Proceedings of the Senate of the State of Maryland. November Session, 1790* ([Annapolis: Frederick Green, 1791]), pp. 16, 35, 43-44, 45.

⁹Introduction to *Van Staphorst v. Maryland*, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

¹⁰Under the then-existing division of labor in the Supreme Court, Martin, as a "counsellor," was responsible for arguing cases before the Court but could not file motions; only an "attorney," which was Caldwell's designation, could do that. Introduction to *Van Staphorst v. Maryland*, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

¹¹"Observations upon the Government of the United States of America" by James Sullivan July 7, 1791, in *ibid.*

¹²"Letter from an Anonymous Correspondent," [between February 13 and 19, 1791], in *ibid.*

¹³"Observations upon the Government of the United States of America" by James Sullivan July 7, 1791, in *ibid.*

¹⁴Report of the Committee of Ways and Means, Maryland House of Delegates, December 13, 1791, in *Votes and Proceedings of the House of Delegates of the State of*

Maryland. November Session, 1791, ([Annapolis: Frederick Green, 1792]), p. 89.

¹⁵Introduction to *Van Staphorst v. Maryland* in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

¹⁶*Votes and Proceedings of the Senate of the State of Maryland. November Session, 1793* ([Annapolis: 1794]), p. 44.

¹⁷See Jared Ingersoll to Nathaniel Lawrence, February 8, 1795, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

¹⁸See introduction to *Oswald v. New York* in *ibid.*

¹⁹John P. Kaminski and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution*, vol. 9 (Madison, Wisconsin: 1990), pp. 812-13.

²⁰As recorded in the first summons, Oswald sought, in addition to \$3,458.35 owed for Holt's salary, \$8,000 for "Work and Labour" and "materials and things used," as well as \$20,000 in damages. Summons, February 8, 1791, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

²¹Docket of the Supreme Court in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 486. The Court's August term lasted only three days. Minutes of the Supreme Court in *ibid.*, pp. 191-96.

²²*Journal of the Assembly of the State of New York* (New York: 1792), p. 9. *Journal of the Senate of the State of New York* (New York: 1792).

²³Minutes of the Supreme Court, February 11, 1792, in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 198.

²⁴See introduction to *Oswald v. New York*, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming) and Minutes and Docket of the Supreme Court, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 200, 201, 202, 355, 486, 491.

²⁵Minutes of the Supreme Court, February 18 and 19, 1793, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 214-15.

²⁶Minutes of the Supreme Court, February 20, 1793, in *ibid.*, pp. 216-17.

²⁷Return of Service, July 20, 1793, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

²⁸Plea to the Jurisdiction, August 5, 1793, in *ibid.*

²⁹The Court's minutes reveal only that, on motion of plaintiff's counsel, the case was continued to the next term. Minutes of the Supreme Court, August 6, 1793, in Marcus and Perry, eds., *Documentary History*, Vol. 1., p. 218. The Court's term may have been curtailed because of an outbreak of yellow fever. *Ibid.*, p. 219n.

³⁰Clinton reminded the members that when the Constitution had been ratified by the New York convention in 1788, the question of its breaching the state's sovereign immunity had been raised and "supposedly expressly guarded against." See introduction to *Oswald v. New York*, in Marcus, ed., *Documentary History*, Vol 5 (forthcoming).

³¹*Journal of the Assembly, of the State of New-York* (Albany: 1794), p. 39.

³²*Journal of the Senate, of the State of New-York* (Albany: 1794), p. 8.

³³*Journal of the Assembly, of the State of New-York* (Albany: 1794), p. 15.

³⁴*Ibid.*, pp. 16-18 or Proceedings of the New York

Assembly, January 15, 1794, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming). See also Proceedings of the New York Senate, January 17, 1794, and Proceedings of the New York Assembly, January 18, 1794, in *ibid.*

³⁵Docket of the Supreme Court, in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 491.

³⁶Jared Ingersoll to Nathaniel Lawrence, February 8, 1795, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

³⁷Minutes of the Supreme Court, February 6, 1795, in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 234.

³⁸George Clinton to the New York Assembly, February 20, 1795, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

³⁹See "An Act for the Payment of Certain Officers of Government and Other Contingent Expenses," April 9, 1795, in *ibid.*

⁴⁰See introduction to *Chisholm v. Georgia*, in *ibid.*

⁴¹Judiciary Act of 1789, section 13, *U.S. Statutes at Large*, vol. 1, p. 80.

⁴²Thomas P. Carnes and John Y. Noel to Edward Telfair, March 31, 1791, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁴³See Plea to the Jurisdiction, October 17, 1791, and Joinder in Demurrer, October 19, 1791, in *ibid.*

⁴⁴There must have been enough credibility to this interpretation, however, to keep Georgia's counsel out of the Supreme Court. See discussion surrounding notes 23 and 24 in introduction to *Chisholm v. Georgia*, in *ibid.*

⁴⁵James Iredell's Circuit Court Opinion, October 21, 1791, in *ibid.* The other judge, Nathaniel Pendleton, agreed with the result although not with the rationale Iredell used to reach it. See the conclusion of Iredell's opinion in *ibid.*

⁴⁶See John Wreath to Edward Telfair, August 13 and 14, 1792, in *ibid.*, and Minutes of the Supreme Court in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 205.

⁴⁷Edward Telfair to the President of the Senate and Speaker of the House of Representatives, November 5, 1792, in *Augusta Chronicle*, November 10, 1792.

⁴⁸See Resolution of the Georgia House of Representatives, December 14, 1792, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁴⁹Journal of the Georgia Senate, December 15 and 17, 1792, in William S. Jenkins, comp., *Early State Records* microfilm, DLC.

⁵⁰Journal of Proceedings of the Executive Department of Georgia, January 2, 1793, in *ibid.*

⁵¹Minutes of the Supreme Court, February 5, 1793, in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 209.

⁵²2 U.S. (Dall.) 419.

⁵³Minutes of the Supreme Court, August 5, 1793, in Marcus and Perry, eds., *Documentary History*, vol. 1, p. 217.

⁵⁴*Ibid.*, p. 218.

⁵⁵See Edward Telfair's Address to the Georgia General Assembly, November 4, 1793, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁵⁶The House adopted a committee report recommending that an act be passed regarding the state's sovereignty and an address be made to the legislatures of the other states asking their cooperation in proposing a constitutional amendment. No evidence exists that the address to the other states ever was written or sent. See Proceedings of the Georgia House of Representatives, under dates of November 9 and 19, 1793, in

ibid.

⁵⁷Minutes of the Supreme Court, February 13 and 14, 1794, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 226, 226-27.

⁵⁸Minutes of the Supreme Court, August 5, 1794, in *ibid.*, pp. 230, 381.

⁵⁹Minutes of the Supreme Court, February 2, 1795; Docket of the Supreme Court, August 1795, March 14, 1796, August 1796, February 1797, and August 1797, in *ibid.*, pp. 231, 488, 2 U.S. (Dall.) 480.

⁶⁰For the facts behind the settlement see Doyle Mathis, "Chisholm v. Georgia: Background and Settlement," 54 *Journal of American History* (1967); pp. 27-29.

⁶¹2 U.S. (Dall.) 402 (1792); *ibid.*, p. 415 (1793); 3 U.S. (Dall.) 1 (1794).

⁶²*Ibid.*, pp. 402-404.

⁶³James Iredell to George Washington, February 23, 1792, in Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 2 (New York: 1988), pp. 241-42.

⁶⁴2 U.S. (Dall.) 402-405.

⁶⁵*Ibid.*, pp. 405-409. Minutes of the Supreme Court, August 11, 1792, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 205-206.

⁶⁶Minutes of the Supreme Court, February 4, 5, 6, 7, 8, and 9, 1793, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 206-211.

⁶⁷2 U.S. (Dall.), at 473.

⁶⁸Minutes of the Supreme Court, February 19 and 20, 1793, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 215, 216; 2 U.S. (Dall.) 415-19. The Court gave Georgia until the next term to file its action at law.

⁶⁹Complying with the Court's ruling of February 20, 1793, Georgia filed its papers before the next term, but in August 1793, perhaps because of the yellow fever epidemic threatening Philadelphia, the Court continued the case with the consent of both parties. Docket of the Supreme Court, in *ibid.*, p. 492.

⁷⁰Minutes of the Supreme Court, February 4, 5, 6, and 7, 1794, in *ibid.*, pp. 220-23.

⁷¹Minutes of the Supreme Court, February 14, 1794, in Marcus and Perry, eds., *Documentary History*, vol. 1, pp. 226-27.

⁷²Introduction to *Cutting v. South Carolina*, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁷³Proceedings of the South Carolina General Assembly, December 19, 1796, in *ibid.*

⁷⁴Proceedings of the South Carolina Senate, December 19, 1794, in *ibid.*

⁷⁵Arnoldus Vanderhorst to the South Carolina General Assembly, December 2, 1796, in *ibid.*

⁷⁶Proceedings of the South Carolina General Assembly, December 19, 1796, in *ibid.*

⁷⁷See text at footnote 67.

⁷⁸"An Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States, in their Political Capacity being an Answer to Observations upon the Government of the United States of America: by James Sullivan, Esq. Attorney General of the State of Massachusetts," April 12, 1792, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁷⁹Letter from an Anonymous Correspondent, February 4, 1794, in *ibid.*

⁸⁰Edmund Pendleton to Nathaniel Pendleton, May 21, 1792, in *ibid.*

⁸¹"Veritas," *Columbian Centinel*, July 17, 1793; and "A Citizen of the United States," *National Gazette*, in *ibid.* See also "Letter from an Anonymous Correspondent," *American Minerva*, February 10, 1794, in *ibid.*: "Never did the judges of that court deliver an opinion so perfectly republican, so perfectly recognizing the *equal rights of men*, so perfectly hostile to the proud domineering spirit of *arbitrary will and pleasure*, as when they pronounced the states to be *compelable* to answer the demands of individuals."

The *Chisholm* opinions were published in two pamphlet editions: in Boston by Adams and Larkin, and in Philadelphia by Thomas Dobson.

⁸²*Columbian Centinel*, September 7, 1791, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming).

⁸³See G. Edward White, "Recovering Coterminal Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases," in Maeva Marcus, ed., *Origins of the Federal Judiciary* (New York: Oxford, 1992), pp. 66-105 and Akhil Reed Amar, "Jurisdiction Stripping and the Judiciary Act of 1789," in *ibid.*, pp. 46-47, 61. See also, Akhil Reed Amar, "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction," *Boston University Law Review* (1985) 65:231-34, 250-52 and sources cited therein..

⁸⁴The remarks are from the same anonymous writer quoted at note 78, the author of *Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States*.

⁸⁵Letter from an Anonymous Correspondent, February 5, 1794, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming). See also *Columbian Centinel*, September 7, 1791, in *ibid.*

⁸⁶*Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States*; Letter from an Anonymous Correspondent, February 15, 1794; and [Philip John] Schuyler to Rufus King, January 31, 1794, in *ibid.*

⁸⁷*Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States*, and Letter from an Anonymous Correspondent, February 15, 1794, in *ibid.*

⁸⁸"A Citizen of the United States," *National Gazette*, August 3, 1793, in *ibid.* See also "Crito," *Salem Gazette*, July 29, 1793, in *ibid.*

⁸⁹Proceedings of the Delaware Senate, January 10, 1794, in *ibid.*

⁹⁰Letter from an Anonymous Correspondent, February 4, 1794, in *ibid.*

⁹¹*Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States*, April 12, 1792, in *ibid.*

⁹²Letter from an Anonymous Correspondent, *American*

Minerva, February 5, 1794, in *ibid.*

⁹³In an impressionistic survey of the proceedings of the state legislatures of South Carolina and Georgia during the 1790s, it appeared to the authors of this paper that many more petitions were granted than rejected. For a more rigorous study of petitioning in Virginia that seems to agree with our conclusion, see Raymond C. Bailey, *Popular Influence upon Public Policy: Petitioning in Eighteenth-Century Virginia* (Westport, Connecticut: 1979), pp. 166-74.

⁹⁴See Introductions to *Van Staphorst v. Maryland*, *Oswald v. New York*, *Chisholm v. Georgia*, *Hollingsworth v. Virginia*, *Vassall v. Massachusetts*, *Cutting v. South Carolina*, and *Moultrie v. Georgia*, in Marcus, ed., *Documentary History*, vol. 5 (forthcoming). In *Brailsford v. Georgia*, a short-lived case that the editors of the *Documentary History* do not treat in detail, it is not clear whether the plaintiff ever filed a petition with the Georgia legislature.

⁹⁵The Eleventh Amendment received the necessary number of state ratifications by February 7, 1795, but because some states neglected to report their ratifications to the federal government, the amendment did not become effective until January 8, 1798. See Introduction to Eleventh Amendment in *ibid.*

⁹⁶Silvester Gilbert to Samuel Peters, September 1, 1796, in *ibid.*

⁹⁷"A True Federalist," *Independent Chronicle*, March 2, 1797, in *ibid.*

⁹⁸Governor Thomas Mifflin of Pennsylvania, for example, suggested that "the harmony of the Union," among other considerations, might require the abolition of state suability. *Journal of the First Session of the Fourth House of Representatives of the Commonwealth of Pennsylvania*, (Philadelphia: 1793) p. 13.

⁹⁹Extract of a Letter from an Anonymous Correspondent to a Member of the New York Assembly, *Farmers' Library*, March 6, 1794, in *ibid.*

¹⁰⁰The four states, all of which had ratified the amendment in 1794, were Virginia, Connecticut, Maryland, and Kentucky. See Introduction to Eleventh Amendment in *ibid.*

¹⁰¹See Introduction to Eleventh Amendment; Resolution to Determine Whether Certain States Had Ratified the Eleventh Amendment, March 2, 1797; Timothy Pickering to the Governors of Eight States, August 2, 1797; John Adams to the United States Congress, January 8, 1798, in *ibid.*

¹⁰²In fact, a new suit against Georgia was filed just a week before the Court recognized the eleventh amendment. See *Brailsford v. Georgia* in Minutes of the Supreme Court, February 7, 1798, in Marcus and Perry, eds., *The Documentary History*, vol. 1, p. 301.

¹⁰³See Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800* (New York: Columbia, 1990), vol. 3, pp. 237-38.

The Judicial Bookshelf

D. Grier Stephenson, Jr.

Recognized as a democratic principle binding on governors and the governed alike, respect for the law and the courts is “essential to the effective and equitable operation of popular government.”¹ Justice Arthur T. Vanderbilt of the New Jersey Supreme Court insisted nearly four decades ago:

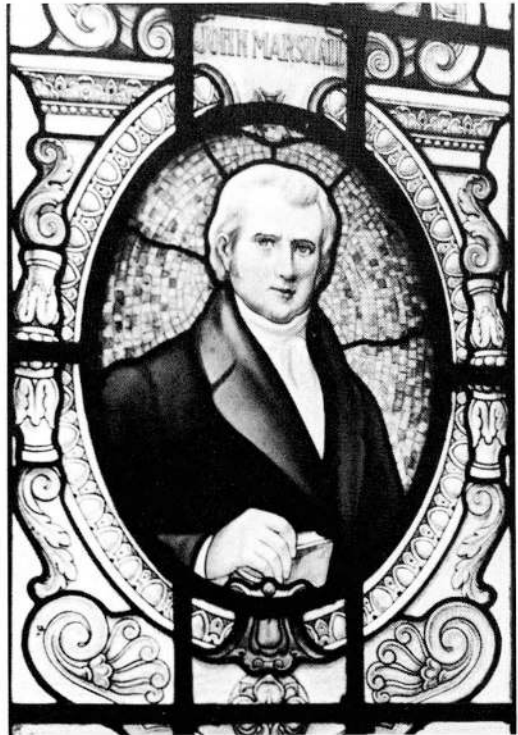
It is [in] the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.²

Maintaining this respect is a challenge for any political system. Where courts possess the power of judicial review, as in the United States, the challenge is intensified. Judges of constitutional courts enforce fundamental norms against policies preferred by other officials who are usually popularly elected or accountable in some way to those who are. Thus, an antinomy abides: the fair and even administration of justice versus the political dimension of justice.

Law and Politics in the Supreme Court

On the one hand there is the goal of “a government of laws and not of men.”³ “Courts are the mere instruments of the law, and can will nothing,”⁴ wrote Chief Justice John Marshall in a self-

effacing denial. On the other hand there is an acknowledgment of judicial volition: that judges are not mere oracles and that courts affect the allocation of power. “We are under a Constitution, but the Constitution is what the judges say it is. . . .”⁵ asserted Charles Evans Hughes while governor of New York. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” declared Oliver Wendell Holmes, Jr., while a justice on the



Chief Justice John Marshall wrote “Courts are the mere instruments of the law, and can will nothing.”

Supreme Judicial Court of Massachusetts.⁶ “In law, also, men make a difference. . . . There is no inevitability in history except as men make it,”⁷ avowed Felix Frankfurter in the year before his appointment as Associate Justice.

The American court system, and in particular the Supreme Court, is an agency of government while it is an institution of the law.⁸ The quandary for judges lies in adroitly combining the constraints that law imposes with the responsibilities that governing requires. One task or the other is hardly daunting. As judicial biographer Carl Brent Swisher observed on the eve of the second, and more activist, half of the Warren Court, a court “determines the facts involved in particular controversies brought before it, relates the facts to the relevant law, settles the controversies in terms of the law, and more or less incidentally makes new law through the process of decision.” Complexity arises, however, because the process decrees “a mode of informing the minds of the responsible officers—in this instance the judges—which is unique and which must be kept in sharp focus in any attempt to estimate the capacity of a judiciary to perform competitively in the gray areas which lie between it and institutions which are primarily legislative or executive.”⁹ It is in these “gray areas” that the Supreme Court and the rest of the judiciary acquire a political tint.

Judicial scholars may routinely apply the adjective “political” to the Court, but for some people the pairing is unseemly. This is because Americans frequently use the word “political” to refer to “partisan politics” (the struggle between political parties to control public offices and the nation’s destiny) or to decisions that result from illegal or otherwise improper influences. In both senses of the word “political” (partisan combat and corruption), Americans properly expect the federal courts to be “above politics.” (In states with elected judiciaries, by contrast, judges are frequently thrust into fund-raising and partisan combat by necessity.)

Yet the Supreme Court is nevertheless “political” in a different sense: the Justices help to shape public policy. Seen in this light, the Court has been political from practically the beginning. Manifestly, the Court is part of the political process in at least five respects.

The first is what the Court does: its decisions. Decisions in turn affect the political process in at

least three ways. They may affect the electoral process directly, as has occurred when the Court rules on legislative apportionment and voter discrimination disputes. Other decisions determine the substance of policy, as happens in school segregation and abortion cases. In these instances, a litigant typically challenges what government has done—the policy or objective the government has pursued. From time to time, decisions also clarify the boundaries of political authority in conflicts arising from the separation and sharing of powers the Constitution mandates. The *Steel Seizure* case¹⁰ of 1952, for example, turned not on whether government could cope with labor disruptions but on whether the president’s actions had intruded into Congress’ domain. The *Legislative Veto* case¹¹ of 1983 did not question government’s authority to deport a particular individual but instead challenged the device Congress had employed to order deportation.



Capitol police restrain a man who identified himself as Dred Scott after he ignited an American flag on the steps of the Capitol on October 30, 1989. After Court rulings in 1989 and 1990 on flag burning, critics of the rulings tried unsuccessfully to overturn the decisions via constitutional amendment.

Responses to the Court's decisions also tie the Court to the political process. In some presidential elections, especially in the twentieth century, the Court and its decisions have been a campaign issue. Nearly as highly visible are those occasions when hostility in Congress to the Court's rulings has led to Court-curbing bills and even to calls for amending the Constitution to "correct" the Court. Following the Court's flag-burning rulings in 1989 and 1990,¹² for example, critics in Congress mounted an effort, ultimately unsuccessful, to overturn the decisions by constitutional amendment. The Court may also be used as a scapegoat by members of Congress seeking a repository of blame for various ills besetting the nation. Pro-defendant decisions in criminal justice cases in the 1960s, for example, opened the Court to charges that it was to blame for the rise in violent street crime. Judicial decisions may be politically significant as well when interest groups use them to galvanize members and potential members, or when interest groups attempt to influence public policy through litigation. Influence also extends beyond the opposing parties in a case through the media of *amicus curiae* briefs and law review articles that attempt to mold legal doctrine.

Judicial selection illustrates a third respect in which the Supreme Court remains tied to the political process. Not only have presidents been acutely aware of the importance of appointments to the High Court but some have made some appointments to maintain or to reverse certain decisions. Even the prospect of a judicial vacancy can become part of an election campaign as candidates promise to select the "right" persons for the bench.

Perhaps the most obvious way that the Court may become entangled in the political process is through certain extra-curiam activities by the Justices. Some Justices have been confidants to presidents. Others have occasionally taken public positions on issues, outside the context of deciding cases, although rarely without arousing controversy. Even more controversial have been the few (most of them in the nineteenth century) who pursued, or who were perceived as pursuing, the presidency or vice-presidency while still on the bench. Extra-curiam activities also include presidential assignments, as happened when Justice Roberts took part in an inquiry on the naval

disaster at Pearl Harbor. While ordinarily not regarded as "political" in the partisan sense, off-the-bench duties nearly always raise questions of propriety and Court efficiency and may generate further debate if the subject of the assignment becomes embroiled in strife.¹³

Finally, even organization and jurisdiction have clear political implications. Of all the federal courts, the Constitution requires only the Supreme Court. Article III left the creation of other ("inferior") courts to the discretion of Congress. Ever since, political factors, not mere housekeeping considerations, have infused debates over the number and types of courts and the kinds of cases they would decide.¹⁴ Moreover, the number of Justices allotted for the Supreme Court has been driven by more than the practical needs of a growing country. Between 1789 and 1869, Congress changed the number of Justices from six to five, five to six, six to seven, seven to nine, nine to ten, ten to seven, and seven to nine—always with an eye to influencing the Court's constitutional jurisprudence.

So, the Supreme Court is political, and in most respects unavoidably so. Recent books about the Court reflect to varying degrees all five manifestations of the institution's political dimension.¹⁵

Decisions

Three volumes relate specifically to the Court's decisions. Considered in the order of lesser to greater inclusiveness, one examines a single case, the second traces the development of a doctrine through a series of cases, and the third is cyclopedic in scope.

Whatever else it contains, a course in American constitutional law should include *Cohens v. Virginia*.¹⁶ The decision remains well-known because in it Chief Justice Marshall delivered one of his most nationalistic opinions in which he expounded on the Court's authority to review decisions of a state court and rejected a narrowing interpretation of the Eleventh Amendment. The case also occasioned the last major debate on the nature of the Constitution by the generation that wrote and ratified the document. This litigation, which in essence pitted the Commonwealth of Virginia against the United States Supreme Court, is the subject of W. Ray Luce's *Cohens v. Virginia (1821)*, a surprisingly readable doctoral

dissertation recently published in book form with a new preface.¹⁷

Luce's contribution to scholarship is political and social, not jurisprudential. He assumes familiarity with Marshall's opinion. It is, after all, well-tilled ground to which further cultivation would probably bring forth little new growth. Constitutional analysis is therefore secondary. In its place is a skillful rendering of the case's historical context. The result is a volume that fills a gap in the literature and that should be read alongside studies of other noteworthy decisions of the Marshall Court.¹⁸

Although *Cohens* is remembered as a test of federal jurisdiction, Luce reminds the reader that the litigation might never have progressed in the form it did without the intersection of several significant forces. First among these was the development of the lottery as a major device for the accumulation of capital. Recall that the case arose when Philip and Mendez Cohen, managers of a Maryland lottery company's branch office in Norfolk, were fined \$100 by a Virginia court for selling tickets in the congressionally authorized Grand National Lottery for the District of Columbia in violation of a state statute banning the sale of all lottery tickets not approved by the state assembly. The Cohens' parent company was one of the largest lottery firms in the United States; it engaged in an extensive mail order business and offered a wide range of financial services.¹⁹

The second force was the Panic of 1819. Its economic dislocations were especially pronounced in Virginia and largely accounted for passage in 1819 of the anti-lottery statute. Legislators justified the law as a means of halting the export of capital to finance improvements in other states at a time of financial exigencies at home.

A third force was the scapegoat for the Panic of 1819: the Second Bank of the United States. Hardships the Panic wrought coincided with the Supreme Court's decision in *McCulloch v. Maryland*,²⁰ upholding Congress' authority to charter the bank and denying Maryland's authority to tax it. The decision "helped unite those individuals opposing the Bank. . . as the cause of their economic problems with those who had long been suspicious of national power, directing both against national power in general and the Supreme Court in particular."²¹ Thus, timing and

context combined to produce a landmark case.

Luce enriches understanding of the case in several other ways as well. For instance, he believes that the case was arranged.

Perhaps the most telling evidence. . . comes from the speed with which it was appealed. The appeal happened so fast that the Supreme Court agreed to hear the case before it came to trial in the borough court [in Norfolk]. The form sent to the borough court requesting a record of the case for the February Supreme Court session is dated the first Monday in August. . . the day of the Supreme Court's summer session. By that time the Grand Jury had met, but the borough court would not meet until August 29, 1820. The Supreme Court's request form clearly indicates that it thought the case had been decided and all possible appeals rejected.²²

Second, he concludes that the wide-ranging debates in Virginia over the case (perhaps the largest outpouring of constitutional discourse since the controversy over the Alien and Sedition Acts of 1798) greatly shaped Marshall's decision. The Cohens pair had argued that congressional laws for the District of Columbia made conflicting state laws inoperable. The response in Virginia was so belligerent that Marshall may well have been deterred from relying on that theory to resolve the case, short of an express congressional grant of immunity. Moreover, since the debates in Virginia focused on the authority of the Supreme Court even to hear the case, hostility to the Court soon overshadowed the merits of the case. Indeed, Marshall's opinion in *Cohens* is principally a jurisdictional reply to those who denied the High Court's prerogative.²³

Finally, Luce explores the ineffectiveness of the negative reaction to the Court's opinion. "The agitation over the *Cohens* decision brought to the surface widespread popular discontent but state rights Virginians were not able to channel that discontent into action."²⁴ Efforts to overturn the ruling by constitutional amendment and to establish a new tribunal to hear disputes between the states and the central government came to naught.



Henry Wheaton was the Supreme Court's third reporter, a position he held from 1816 until 1827. He published a series of newspaper articles defending the Marshall Court decision in *Cohens v. Virginia*.

To a degree Marshall himself defused the opposition. The Court, after all, had ruled for Virginia on the merits three days after ruling for itself on the jurisdictional dispute. Whether by coincidence or design, the holdings came down just as Congress and the Virginia General Assembly adjourned, thus temporarily forestalling any official countermeasures. Moreover, Luce believes that Marshall may have influenced a series of newspaper articles by Henry Wheaton defending the decision. "Perhaps Marshall's constitutional view was best for America," Luce writes, "but it was not the only valid interpretation available. Perhaps in the end John Marshall was just the better politician."²⁵

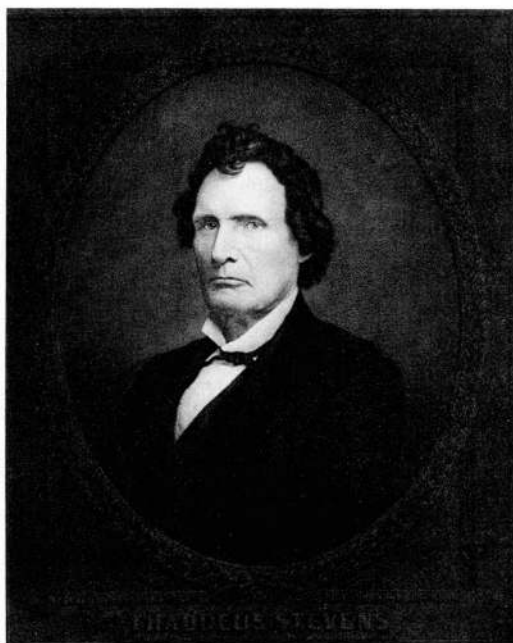
Central to what did not happen was the contrast between the political situation after *Cohens* and Virginia's role in the election of 1800 after the controversy over the Alien and Sedition Acts. The parallel to 1798-1800 did not materialize. Unlike the earlier assault on Federalist policies, Virginia strategists were unable to coordinate their attacks with potential allies in other states. Opposition to the Court did not become a national factor in the presidential election of 1820. The Kentucky and Virginia Resolutions had stressed

the rights of states in defense of individual liberty. *Cohens* was different. *Cohens* was more easily opposed in defense of sectional interests, not personal freedom. If the political process had worked for opponents of central power in 1800, it did not work now. Advocates of the rights of states as states would have to look for new solutions that "would not be found in the political arena and ultimately had to be settled on another kind of battlefield."²⁶ And the battlefields of the Civil War offered graphic proof that some differences are not amenable to partisan or judicial solutions.

Reverberations from that national crisis continue to energize the controversy Andrew Kull traces in *The Color-Blind Constitution*.²⁷ Whatever may be true in other lands, political thought and constitutional theory go hand in hand in America. Just as one cannot fully appreciate the American political tradition without reference to constitutional interpretation, one's understanding of constitutional interpretation is deficient without knowledge of the development of political ideas. While law is frequently the instrument of social change, only rarely is it the originator of the ideas for change. Instead, the legal system is an arena where ideas contend for acceptance.

Readers will find a clear demonstration of this process in Kull's study of the origins and development of the non-discrimination principle in American constitutional law—the view that the Constitution should prohibit all racial classifications by government. The principle is far-reaching: it brings within its sweep not only invidious racial classifications but benign and ameliorative ones as well. Yet the author denies any pretense that his book "decides" the current debate on affirmative action.

Short of a demonstration that the Fourteenth Amendment was intended by its framers to require color blindness on the part of government—and the evidence I adduce tends strongly to refute any such contention—it is difficult to imagine how one could hope, by an analysis of what was thought and argued in the past, to conclude the profoundly political question of what we should do *now*; and I shall not attempt to do so.²⁸



Thaddeus Stevens (above) was a Whig and later a Republican member of Congress from Pennsylvania. Along with Wendell Phillips, he spearheaded the effort to make the non-discrimination principle part of the Fourteenth Amendment.

Instead, he modestly promises “to tell a story” that traces the history, both inside and outside the Supreme Court, of a powerful idea. His disclaimer is as refreshing as the promise is well kept.

Most students of the Court associate the phrase that the United States Constitution is “color-blind” with the first Justice Harlan’s majestic dissent in *Plessy v. Ferguson*.²⁹ Kull demonstrates that Harlan drew on a well-established tradition; debates on the non-discrimination principle occurred in Massachusetts as early as the 1840s. Better known and dominant in Harlan’s day was its antithesis: even under a precept of “equal treatment,” government was empowered to make “reasonable” and “appropriate” distinctions based on race, however reasonableness and appropriateness might be defined in a given era. A portent of the continuing struggle between these competing ideas appeared in the efforts by Wendell Phillips and Thaddeus Stevens in the Thirty-ninth Congress immediately after the Civil War to make the non-discrimination principle part of the soon-to-be Fourteenth Amendment. Kull lays out the usually neglected Phillips-Stevens position alongside the successful version pushed

by John Brigham that incorporated the familiar phrases “privileges and immunities,” “due process of law,” and “equal protection of the laws.”

While the Brigham amendment did not bar the non-discrimination principle, neither did the Brigham amendment require it. The amendment reflected optimism: “that legislators, subject to the oversight of wise judges, may be trusted to govern in accordance with standards of equality, reasonableness, and justice.” In contrast, the non-discrimination rule reflected skepticism. “Because neither legislators nor judges may be trusted to choose wisely in this vexed area, . . . our only safety lies in foreclosing altogether a power of government we cannot trust ourselves to use for good.”³⁰ Thus, Phillips-Stevens failed because it was too radical. By its own terms it would have ruled out of bounds too much public policy then considered desirable. For the same reason, Kull believes, the principle fell out of official favor in the mid-1960s: by accepting it, legislators and judges realized that they jettisoned discretion and hence power.

Nonetheless, for about 125 years non-discrimination was the “ultimate legal objective of the American civil rights movement.”³¹ Nowhere were legal victories more important than the Supreme Court of the United States. Kull notes in particular the efforts of Charles Evans Hughes, first as an Associate Justice and later as Chief Justice, to go one step beyond the Thirty-ninth Congress by fastening non-discrimination onto the Fourteenth Amendment.

In *McCabe v. Atchison, T. & S. F. Ry.*,³² Hughes wrote an opinion for the Court that suggested for the first time that state-mandated segregated railway accommodations violated *Plessy*’s requirement of equal facilities. The Oklahoma statute in question obliged the railroad to provide separate coaches or compartments “equal in all points of comfort and convenience.” That much *Plessy* would seem to allow. But the statute also excused the railroad from hauling separate sleeping, parlor, or dining cars since the demand by African-Americans for such accommodations was so low as to be financially burdensome for the carrier.

The court below had dismissed the complaint because of defective pleading, and the Supreme Court unanimously affirmed the dismissal on that ground. Yet, Hughes, writing for five of the nine

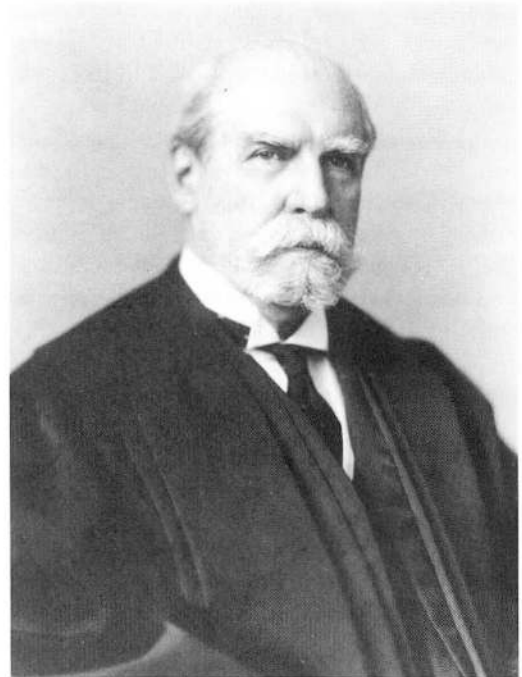
Justices, went out of his way to address the merits. "The fact that the Supreme Court said anything at all about the constitutionality of racial segregation in *McCabe* was the result of a judicial tour de force by . . . Hughes."³³ Although the second part of the statute was arguably just as acceptable under *Plessy* as the first, Hughes thought otherwise.

This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. . . . [I]f facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.³⁴

Kull finds in *McCabe* the strong implication that, despite *Plessy*, laws requiring segregation "were constitutionally disfavored." This was so because a certain "reasonableness" underlay the denial of accommodations in the Oklahoma case just as reasonableness lay at the heart of the approval of segregation in *Plessy*. Yet Hughes did not say that the denial of first-class services in *McCabe* was unreasonable but rather that the denial amounted to an invasion of "constitutional privilege." "To some greater but unspecified degree, the antidiscrimination principle was already part of our constitutional law by 1914—although Hughes' bare liberal majority thought it wiser not to acknowledge the fact." Yet, within three years, the Court unanimously relied on that principle in setting aside a residential segregation ordinance in *Buchanan v. Warley*,³⁵ which "contains more antidiscrimination theory than *Brown v. Board of Education*. . . ."³⁶

As Chief Justice, Hughes wrote for the Court in *Missouri ex rel. Gaines v. Canada*³⁷ twenty-four years after he wrote *McCabe*. The state had no law school for African-Americans and denied Gaines admission to the law school operated for whites. Instead, the state offered him tuition payments to attend law school out of state. "That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination," maintained Hughes.³⁸

Judged by *Plessy's* rule of reasonableness, Missouri had seemingly done less harm than Oklahoma. At least some provision was made for legal education for African-Americans, whereas in the earlier case they were denied the better rail accommodations entirely. However, helped by hindsight, Kull believes that Hughes' message in *Gaines* was the same as his message in *McCabe*: *Plessy* would be used to strike down, not to uphold, segregated arrangements. Legally mandated segregation would be constitutionally acceptable only if it "could satisfy the strictest test of 'equality' the Court could devise. The possi-



As both an Associate Justice and as Chief Justice, Charles Evans Hughes used *Plessy* to strike down segregated arrangements for not meeting the strict equality standard set by the Court.

bility that the Court would ever again find 'equality' in segregated facilities was by this time wholly illusory."³⁹

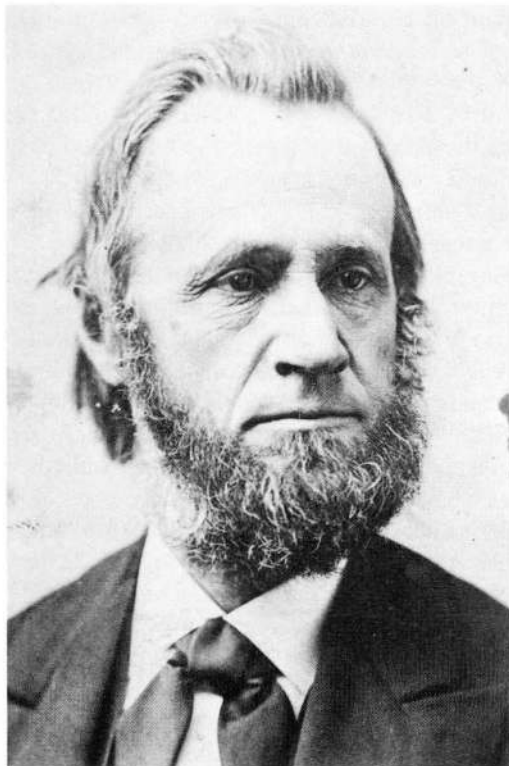
The ingenious contribution of Charles Evans Hughes. . . was a judicial method by which a rule of 'separate but equal' might be turned against itself, and the legal shield of segregation made the chief weapon against it. But the device involved the Court in a fundamental duplicity that repeated use made increasingly difficult to renounce. . . . One consequence is that when the Court was finally prepared to declare that 'racial segregation as such' was unconstitutional [in *Brown v. Board of Education*], it found itself incapable of explaining why.⁴⁰

Kull dates the non-discrimination principle's fall from official favor from the enactment of the 1964 Civil Rights Act. The ban on race-based distinctions in the statute and in Supreme Court decisions from *Gaines* into the 1960s "revealed a harsh truth that the long struggle for civil rights had tended to obscure: the fact that guarantees of legal equality would be inadequate to redress the inequality of condition afflicting black Americans as a group." As the civil rights movement succeeded in altering the political balance of power in its favor, race-conscious measures thus seemed the logical next response. "An argument designed to restrict the power of government to harm one's client loses its attraction when one's client begins to govern."⁴¹

Gaines, *Cohens*, but not *McCabe*, are entries in *The Oxford Companion to the Supreme Court of the United States*,⁴² a massive and ambitious reference work in one volume. It joins, but does not wholly replace, a shelf of other research books on the Court and the American judiciary published since 1985.⁴³ Authored by more than 300 contributors, entries run alphabetically from "*Abington School District v. Schempp*" to "*Zurcher v. The Stanford Daily*." They range in length from a bare mention (e.g., the five lines allowed "In Camera") to article length (e.g., the thirty-two pages devoted to "History of the Court"). Coordination, oversight, and no small amount of the writing fell to Editor in Chief

Kermit L. Hall and Editors James W. Ely, Jr., Joel B. Grosman, and William M. Wiecek.

The largest group of entries (more than 400) consists of Supreme Court decisions. Next are individuals. All members of the Court through Justice Thomas are included, although space allotments vary greatly. (Henry Baldwin and John H. Clarke receive barely half a page; John Marshall and Earl Warren each consume nearly four.) There is also room for unconfirmed nominees such as Edward King and George Woodward, commentators like Thomas M. Cooley, Edward S. Corwin, and Alexander M. Bickel, some reporters of decisions, and a few presidents. (John Tyler merits his own entry, perhaps because of the unusual difficulty he had in convincing the Senate to accept his nominees; Benjamin Harrison does not, even though he appointed four Justices.) A third category of entries contains Court offices, practices, and procedures (such as "Dissent" and "Computer Room"). Remaining categories encompass substantive areas of the law ("Police Power" and "Prisoners' Rights of Speech"), tech-



Thomas M. Cooley is one of the commentators on the Supreme Court included in the new *Oxford Companion to the Supreme Court*.

nical terms ("Justiciability"), and historical references ("Four Horsemen" and "Brown's Indian Queen Hotel").

An enterprise of this scope should score well on at least three related counts: inclusiveness, quality, and usefulness. So assessed, the book succeeds. On the first, there are few important omissions, one being Robert Yates who receives not even a mention in the index. Yates was one of three delegates sent to the Philadelphia Convention by the state of New York and who, along with John Lansing, abandoned Alexander Hamilton in July of 1787. It was Yates writing as "Brutus" on the power of the proposed Supreme Court who compelled Hamilton to reply in *Federalist* No. 78.

As for quality, a spot check suggests that most entries are well written and as comprehensive as space constraints allow. One might have expected more detail on congressional maneuvers in the "Court Packing Plan." Senators Joseph Robinson and Burton Wheeler, two key players on opposite sides, are not mentioned at all. The entry on *Roe v. Wade*⁴⁴ properly discusses the political reverberations of the decision. The entries for *Watkins v. United States*⁴⁵ and *Miranda v. Arizona*⁴⁶ should have, but did not. At least one entry ("Habeas Corpus"), while strong on historical detail, was out of date at least four years before the *Companion* was published.

Usefulness is a difficult criterion to meet because, if possible, the volume should be serviceable to novices and scholars alike. Yet the editors have compiled a volume that both experts and laypersons will find valuable. The former will have frequent recourse to check on unfamiliar cases, biographical details, and Court minutia. Nonetheless, especially for extensive information about the more obscure Justices and others who have not been subjects of biographies, serious students of the Court will still need to consult the now venerable five-volume set, *The Justices of the United States Supreme Court*.⁴⁷

Lay users will benefit from writing that is clear, jargon-free, and succinct. Particularly helpful as well is the carefully designed system of "direct" and "internal" cross-referencing. For example, someone curious about "School Attendance" finds no essay at that location but is sent instead to the essays on "Education" and "*Wisconsin v. Yoder*." Direct cross-referencing breaks

down in at least one spot, however. The "Bricker Amendment" listing immediately points the reader to "Constitutional Amending Process." Alas, as thorough as it is, that entry contains no mention of the Bricker Amendment; indeed "Bricker Amendment" is nowhere to be found in the index.

As an illustration of the help offered by internal cross-referencing, someone curious about the Supreme Court and school prayer, but knowing not so much as the name of a single landmark case on the subject, will find a one-page essay entitled "School Prayer and Bible Reading." Within the essay appear asterisks by terms and cases which invite the user to turn to ten additional entries. Strangely absent in the essay on school prayer, however, is a cross-reference to the much longer essay on "Religion." This is doubly unfortunate because the school prayer essay mentions the establishment and free exercise clauses but does not explain them; rather, those clauses are explained in "Religion." Similarly, both "Establishment Clause" and "Free Exercise Clause" are directly referenced to "Religion," but no asterisk appears by those terms in the school prayer essay which would eventually steer the novice to the more comprehensive "Religion" article.

These, however, are minor quibbles that do not detract from the overall worth of the *Companion*. The editors and contributors have produced a "must-have" resource of the first rank.

Responses

Two recent books discuss responses to the Court's decisions from different perspectives. One examines the Court's changing "agenda," or docket; the other considers the impact of legal arguments on the Court's decisions.

In *The Transformation of the Supreme Court's Agenda*, Richard L. Pacelle, Jr., reveals the Court's propensity to engage certain issues more than others from one period to the next. He achieves this objective through a classification by subject matter of all 7,688 opinions at least one page in length that the Court decided in cases between the 1933 and 1987 terms, inclusive.

Pacelle advances understanding of the Court in two principal ways. First, he demonstrates the Court's gradual shift from a preoccupation with some areas of the law to others. It is already widely known that the Court was not deciding the

same types of cases in the 1960s, for instance, as it had in the 1930s. Of the 160 decisions in the 1935 term, only two concerned nonproperty issues in civil liberties and civil rights. Of the 120 decisions in the 1960 term, the number increased to fifty-four.⁴⁸ Rather, Pacelle's contribution is that he documents the shift in detail.

Data appear in tables and graphs by subject area and sometimes by sub-area. Subject areas (large groupings) include economic, ordinary economic, state regulation, internal revenue, federalism, U.S. regulation, civil liberties, due process, substantive rights, and equality. ("Ordinary economic" cases are those that "had few long-term consequences and little impact on similarly based litigants."⁴⁹ Prominent before 1925, ordinary economic cases declined sharply after *Erie Railroad v. Tompkins*.)⁵⁰ There is further division of some areas into sub-areas (small groupings). Thus, one can follow the presence of regulation cases generally or in any one of nine categories (bankruptcy, patents/copyrights, commerce, energy, workers, antitrust, labor relations, securities, and environment). For example, representing about twenty percent of the Court's decisions in 1933-1937, regulation cases peaked above forty percent in the 1940s, and have fallen back to under fifteen percent in recent years. Commerce questions were the subject of opinions eight times more frequently in 1933-1937 than in 1983-1987.

The book, however, is more than an inventory of cases and a compendium of tables and charts. Pacelle's second contribution is theoretical. He proposes a "neoinstitutional"⁵¹ way to organize the data conceptually. Rather than viewing the choices the Court makes as "merely the collective expression of the individual preferences of its members," he prefers to see them as "a function of a complex interaction of individual preferences and institutional structures and rules."⁵² That is a jargon-laden way of saying that considerations other than the likes and dislikes of individual Justices shape the types of cases the Court decides. Pacelle's research differs from at least two recent studies which have analyzed the Court's selection of cases from the perspective of the individual Justice.⁵³

Central to the author's analysis are the concepts of "agenda setting," "agenda building," "exigent agenda," "volitional agenda," and "policy window." Agenda building occurs when an

agency (whether a bureaucratic agency, a legislature, or a court) culls through a universe of possible issues (the "agenda setting") and selects those that will occupy its attention. Thus he terms the shifting emphases among various legal topics during the forty-four year period "the apportionment of agenda space by policy area."⁵⁴ "Exigent" and "volitional" agendas suggest different factors at work as the Justices choose the cases they will decide. The former refers to issues that "virtually require some attention to settle questions and resolve lower court disputes. Thus, institutional rules and norms structure the process of agenda building." Other cases make up the "volitional" agenda, meaning that Justices prefer to accept or reject cases "that fulfill the policy designs or goals of its members."⁵⁵

Pacelle then explains "agenda change" (or shifting emphases on issues) in terms of "the Court's need to balance the two components of its institutional agenda." To increase emphasis on regulation and civil liberties cases, for example, "the Court had to pare its exigent agenda, which had a strong Economic component." Pacelle attempts to show "the systematic processes by which the Court transferred issues from one portion of the agenda to the others . . . as well as the tools used to reduce the exigent agenda . . . and to expand the volitional agenda. . . ."⁵⁶

The presence of a "policy window" (defined as "a propitious opportunity for action") eases the shift from one set of issues to another. The window

opens as a result of a change in a political stream or because a problem reaches prominence. Changes in the political stream might include changes in the Court's membership or different strategies by repeat player litigants, particularly the solicitor general. Problems may reach prominence due to increased attention by lower courts, specialized publics in the legal community, or other governmental agencies.⁵⁷

The phenomenon of "policy window" may pose the most intriguing question arising from the book: how issues are wrapped in the garb of litigation to become eligible for agenda building. Before the Court may give more attention to

certain areas of the law, there must be sufficient litigation that presents questions clearly and in a judicially appealing way. By definition, this activity takes place outside the Supreme Court, and literally hundreds of people are involved: interest group attorneys, private litigants, prosecutors, legislators, bureaucrats, as well as state and federal judges at the trial and appellate levels. This is perhaps what Pacelle means by the "confluence of factors."⁵⁸ Robert McCloskey noted over two decades ago the galvanizing effect on civil liberties litigation caused by *United States v. Carolene Products Co.*,⁵⁹ with its Footnote Four, and several cases of the early 1940s.⁶⁰ While this question does not escape his attention,⁶¹ it would take Pacelle another study and perhaps a series of limited case studies to explain more fully how "agenda building" by the Justices contributes to "agenda setting" which is the handiwork of other people.

Pacelle's book gives reason to believe that the Court's agenda remains fluid. Another shift may be underway. High Court appointments and decisions since 1986 suggest movement to "the post-New Deal Supreme Court,"⁶² where federalism and regulatory cases claim more of the Justices' time.

Transformation of the Court's agenda goes hand-in-hand with doctrinal innovation. Whether judicially directed evolution in the meaning of the Constitution was part of the Framers' design, it has been a fact. Virtually everyone who has ever written about the Supreme Court has acknowledged this fact, approvingly or not.

Accounting for change in the meaning of the Constitution is the challenge Lee Epstein and Joseph F. Kobylka undertake in *The Supreme Court and Legal Change: Abortion and the Death Penalty*.⁶³ The authors do more than simply chronicle the changes which have occurred in those two salient fields of constitutional law, although the volume accomplishes that task handily. Rather, in laying out the obvious contrasts among major death penalty cases such as *Furman v. Georgia* in 1972, *Gregg v. Georgia* in 1976, and *McCleskey v. Kemp*⁶⁴ in 1987, and between the leading abortion cases of *Roe v. Wade* in 1973 and *Webster v. Reproductive Health Services, Inc.*,⁶⁵ in 1989, they seek to explain why legal change, which they define as "doctrinal alteration,"⁶⁶ happens in the Supreme Court.



Tabea Manke protests a vote in the New York Assembly to reintroduce the death penalty in the state in 1989. *The Supreme Court and Legal Change* chronicles the changes in constitutional law relating to the death penalty.

At the outset Epstein and Kobylka acknowledge that Justices are not merely political actors who pursue policy objectives in juridical disguise.⁶⁷ They observe that scholars traditionally have explained legal change through reference to a series of factors including the appointment of new Justices, the political environment (including public opinion), development of legal theory, and "lobbying" of the courts through litigation sponsored by organized interest groups. While the authors confess that the "phenomenon of legal change is hydra-headed"⁶⁸ and do not deny the importance of these factors, they believe that collectively they fall short in accounting for the abrupt doctrinal changes that have occurred, at least with respect to abortion and the death penalty.

In particular, they believe that previous studies have given too much credit to group litigation.



The photographs above show pro-life protesters in front of the White House (left) in 1979 and a pro-choice demonstration (right) in New York City in 1970. Epstein and Kobyłka highlight how legal argument and strategy have influenced the abortion debate over the past twenty-years.

“Past studies have largely assumed their conclusion—that group litigation leads to legal change in the direction sought by the group.”⁶⁹ The influence of group litigation appeared strong especially during the 1940s and 1950s in combating racial discrimination largely because litigating groups were generally only on one side. But at least since the 1960s, “the pressure group environment surrounding the judiciary has changed markedly . . . , with the most prominent alteration being the ever increasing numbers of organizations turning to the courts.”⁷⁰ With so many more groups with litigating skill and with groups now routinely opposing each other in litigation, every case results in victory for some group. A decision, therefore, cannot be explained by group participation. Groups may partly set the agenda for the Court, but their presence alone no longer accounts for what the Justices decide.

“If not by their sheer numbers,” Epstein and Kobyłka ask, “how do groups influence legal outcomes? The abortion and death penalty examples both point in the same direction: by their choices of which arguments to tender and which to ignore.”⁷¹ The arguments “seem to have a life of their own,” and may be especially influential with the more moderate or “less ideologically driven justices.” With a twist of the famous observation by Oliver Wendell Holmes, Jr., that the “life of the law has not been logic: it has been experience,” they conclude, “the life of the law is experience, but it is not experience in the absence of logic; rather it is experience filtered through logic. To ignore this is to ignore much of the dynamics of legal change, and much of what

separates it from other paths of policy alteration.”⁷²

Even though legal arguments may well have accounted for constitutional changes on abortion and the death penalty, one should keep two important qualifications in mind. First, conceding the decisive role of legal argument in the cases they study does not preclude the effects other factors might have in a different area of the law. One recent study, for instance, has emphasized the influence of the Justices’ political values.⁷³ Second, Epstein and Kobyłka are not the first to highlight legal argument and strategy. Several works in legal history, which focus on the late nineteenth and early twentieth centuries and which the authors do not cite, make a similar point, if less dramatically and systematically.⁷⁴ Even accounts of the NAACP’s attack on racial segregation, which the authors do cite, hardly overlooks the force of argument.⁷⁵ Instead, the real contribution of *The Supreme Court and Legal Change* is two-fold: it is a thorough study of the probable impact of argument alongside other plausible factors affecting decision-making in the Supreme Court, and it forecloses the possibility that any serious research on doctrinal innovation should proceed without a thorough analysis of the choices and reasoning legal advocacy makes available to the Justices.

Judicial Selection

More than two centuries after the Court’s first session, the total roster of 107 Justices only slightly exceeds the present number of United States senators. Understandably, therefore, the litera-

ture on the Supreme Court has traditionally been marked by an emphasis on individuals. Recent books are no exception. Two focus on a single Justice; with different breadths, three examine the politics of judicial nominations; one is a pictorial and biographical reference.

In 1982 Douglas biographer James F. Simon⁷⁶ delivered a lecture entitled "The Judge as Folk Hero."⁷⁷ His thesis was that, at least among twentieth century Justices, only Oliver Wendell Holmes, Jr., and William O. Douglas qualified as folk heroes, even if they did so in dissimilar ways. Were someone delivering the same lecture in the 1990s, Thurgood Marshall would doubtless be added to the list.

Marshall occupies a unique place in Supreme Court history. Not only was he the first African-American Justice, the second African-American person⁷⁸ appointed to the federal appeals bench, and the first African-American Solicitor General, but in a way unequalled by most he shaped constitutional law off the Court as well as on the bench. Indeed, his appointment to the Supreme Court by

President Lyndon Johnson in 1967 was as much recognition of what he had accomplished as it was an expectation of what he would do as a Justice. From 1938 until his appointment by President Kennedy in 1961 to the Court of Appeals for the Second Circuit, he was one of the leaders in efforts by the Legal Defense Fund (a corporate offshoot of the National Association for the Advancement of Colored People) to use the judiciary as a vehicle to combat racial discrimination. He won twenty-nine of the thirty-two cases he argued before the Supreme Court, including *Brown v. Board of Education of Topeka*.⁷⁹ He had assisted when Charles Houston argued and won *Missouri ex rel. Gaines v. Canada* in 1938; his last oral argument before the Supreme Court was in *Boynston v. Virginia*⁸⁰ in 1960. As a Justice until 1991, he remained a tenacious and outspoken advocate of civil rights and a defender of those on whom the hand of official authority weighed most heavily.

Marshall is the subject of two books which were published after his retirement from the bench



(From left) William T. Coleman, a protege of Marshall's at the NAACP, Grafton Gaines, Marshall's messenger at the Supreme Court, and two Supreme Court Police Officers look on as Thurgood Marshall announces his retirement from the Supreme Court after twenty-four years.

but before his death in January 1993. For this reason, neither volume contains any citations or references to Justice Marshall's papers at the Library of Congress and so are not part of the controversy generated by release of those papers in May 1993.⁸¹ Admiring, informative, and insightful, neither volume pretends to be a scholarly biography, yet both will be required reading for the first person who writes that book. *Thurgood Marshall*⁸² by Michael D. Davis and Hunter R. Clark is anecdotal and journalistic; *Thurgood Marshall*⁸³ by Roger Goldman, with David Gallen, is anthological and jurisprudential. Both supplement Randall Bland's study of Marshall published two decades ago.⁸⁴

The Goldman volume is really three small books in one. The first part consists of a series of recollections of Marshall by persons who knew him professionally, including several law clerks and Justice William J. Brennan, Jr. There is also a passage reprinted from the Bland biography. The second part is an article-length study of Marshall's constitutional jurisprudence by Goldman, which emphasizes the Justice's posi-

tions on First and Fourth Amendment issues, education, poverty, and other equal protection questions, and the death penalty. Part three contains excerpts from fifteen of Marshall's opinions "to illustrate [his] compassion, intensity, and fair-mindedness."⁸⁵ The advantage of the book's design is that it concisely conveys a sense of Marshall the man, Marshall the advocate, and Marshall the jurist.

In contrast, Davis and Clark weave one story from the events of all but the final months of Marshall's life. Befitting the expanse of his career, the authors assign about seventy percent of their book to Marshall's life before 1967 and roughly forty percent to his leadership role in the Legal Defense Fund. Perhaps on the premise that Marshall's service on the Supreme Court is well known, discussion of his judicial opinions is sparse.

For those whose memories of Thurgood Marshall consist mainly of the adulation heaped on him from virtually all quarters immediately following his retirement from the bench or the nearly worshipful testimonials that attended his death, Davis and Clark's book may come as a shock. One episode in particular illustrates the point that Marshall did not enter the service of the United States with the chorus of praise that accompanied his departure.

After the Democratic victory in the election of 1960, Marshall wanted a seat on the Court of Appeals for the Second Circuit. To the new Kennedy administration, however, he represented something of a political risk. In 1961, racial equality was the most divisive issue in American politics. It was by no means clear what form the civil rights revolution would take in the coming years: whether efforts at reform would stay peaceful or turn violent. Far-reaching civil rights and voting rights legislation still lay in the future. Even Supreme Court victories such as *Brown* remained largely unimplemented in many locales. Moreover, Marshall was a symbol of what *Brown* represented, and much political and legal energy had been expended opposing his courtroom assaults on discrimination. One might better understand the Kennedy administration's hesitation seven years after *Brown* by imagining the controversy that would have ensued had the Carter administration in 1980 named to an appeals court an attorney responsible for directing



Michael D. Davis and Hunter R. Clark devote forty percent of their study of Thurgood Marshall to his years with the NAACP Legal Defense Fund.



Robert Kennedy (left) served as Attorney General during his brother John's presidency. He originally offered Thurgood Marshall an appointment to a district court within the Second Circuit. After making an agreement with James O. Eastland (right), the Chairman of the Senate Judiciary Committee, to nominate Eastland's choice to a court in Mississippi, President Kennedy nominated Thurgood Marshall to the Second Circuit.

the litigation that culminated in *Roe v. Wade* in 1973. (Of course, the situations are not completely analogous; Kennedy was in the first year of his presidency, a time when presidents frequently enjoy a "honeymoon." In 1980, Carter was in the fourth year of his term, and in political difficulties as well, and so might have encountered even fiercer resistance.)

The Kennedy administration was therefore prepared to offer Marshall at most an appointment to a district court within the Second Circuit. When Robert Kennedy, the Attorney General, told him, "You don't seem to understand. It's this or nothing," Marshall replied, "I do understand. The trouble is that you are different from me. You don't know what it means, but all I've had in my life is nothing. It's not new to me. So goodbye."⁸⁶ Marshall then walked out the door.

The authors do not explain exactly what led to the administration's change of mind except to say that Marshall's appointment to the Second Circuit would "send a better message to the president's black supporters. . . ." Yet, "[w]hat stood between the president and Marshall's appointment was a Mississippi senator, James O. Eastland."⁸⁷ Eastland chaired the Senate Judiciary Committee

at a time when Senate rules and customs allowed committee heads far more power over the fates of nominees than is true today. To deflect anticipated opposition from Eastland, the administration made a "devil's pact." If Kennedy would name Eastland's choice to a district court vacancy in Mississippi—someone who was the antithesis to Marshall on civil rights—Eastland would allow Marshall's name to pass.

Even with the deal so made, securing Marshall's approval was rough. Kennedy formally sent Marshall's name to the Senate on September 23, 1961, but Eastland's committee did not vote on the nomination for almost a year (Marshall enjoyed a recess appointment in the interim). Hearings dragged on for six days spread over May, July, and August of 1962. (The authors do not say, but six days of hearings for an appeals court nomination must have been virtually unprecedented at the time.) Marshall had to endure charges of ethical and professional impropriety as well as accusations that he lacked judicial temperament. Not until September 11, 1962, did the full Senate confirm him, fifty-four to sixteen, after the Judiciary Committee referred the nomination to the floor without recommendation.

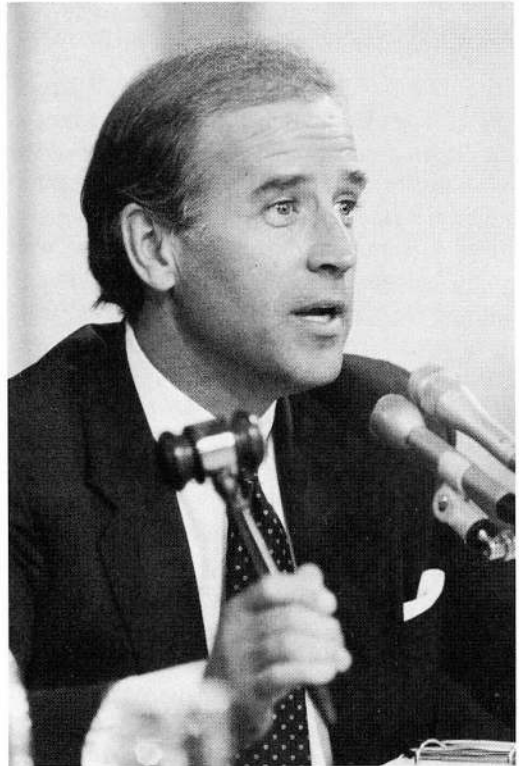
Marshall's nomination was contentious in 1961 and 1962 partly because African-Americans lacked the vote, and hence political power, in many jurisdictions despite Marshall-orchestrated victories in cases such as *Smith v. Allwright*.⁸⁸ Although it had invalidated the "white primary," *Allwright* and similar decisions did not come close to ending racial discrimination at the ballot box, as the need for voting rights legislation in the 1960s (two decades after *Allwright*) made clear. However, as both books indicate, by the late 1940s Marshall and the Legal Defense Fund redirected the focus of the drive for civil rights to segregated education almost exclusively. This decision represented a departure from the earlier policy which divided resources between securing the vote and combating the multifarious forms of segregation. Yet neither book offers an evaluation of this shift. It is not a question of second-guessing at this late date but rather a matter of understanding the minds and plans of those who devised the strategy.⁸⁹ Perhaps the extent of opposition that developed in the wake of *Brown* was simply never fully anticipated.⁹⁰ Nevertheless, had access to the ballot box been assured, implementation of *Brown* would probably have met fewer obstacles, and the hostility that Marshall encountered in the Senate in 1961-1962 might well have softened long before it did. At least the question is worth exploring, and there seems to be a no more appropriate place for that exploration than in a book about Thurgood Marshall.

If the Davis and Clark and the Goldman volumes portray the work of a man who served on the Supreme Court, Mark Gitenstein's *Matters of Principle*⁹¹ recounts the struggle of the campaign that denied a seat on the Court to another: Robert Bork. Gitenstein's book is at least the fourth in as many years to appear on an episode which will surely taint judicial selection and the politics of confirmation well into the twenty-first century.⁹² The final chapters also briefly review the nominations of Justices Kennedy, Souter, and Thomas.⁹³

Gitenstein writes from the perspective of "insider," as both participant and observer. At the time that Bork's name was before the Senate in 1987, the author was chief counsel to the Senate's Judiciary Committee. His book, therefore, does not pretend to be detached, but rather is a defense both of the efforts he helped to coordinate to defeat Bork and of Senator Joseph Biden's role as

chairman of the committee. The book "makes the case that *we* undertook, as honestly as we could, to educate the American people as to the consequences of Robert Bork's jurisprudence on the Court and our country."⁹⁴ Use of the first-person plural pronoun "we" is purposeful: Gitenstein has written a "we/they" book, and "we won."⁹⁵ For those who study Congress, the volume is further evidence of the increasing difficulty encountered in separating the influence of lawmakers from the influence of their staffs.⁹⁶

Matters of Principle is full of drama and rich with anecdotes. It is written in the style of someone just returned from the trenches, thankful not only that he prevailed but confident that he prevailed rightly. While Gitenstein uses published sources, he draws more heavily from personal observations and interviews with activists on both sides of the battle, ranging from White House assistant Tom Griscom to Bork opponent Ralph Neas. There is, for instance, a vivid account of the planning and execution of "practice hearings" during which Senator Biden asked ques-



Senator Joseph Biden at the end of the September 22, 1987 confirmation hearing for Robert Bork.



Robert Bork (left) with President Ronald Reagan on July 1, 1987. President Reagan announced he was nominating Bork to fill the seat of Justice Lewis F. Powell, Jr. who retired. Once Bork's confirmation was in doubt, the White House was slow to regroup behind him.

tions of Professor Laurence Tribe who played the role of Judge Bork. Rehearsal was necessary so that Biden could move "beyond mastery of the substance to crafting and polishing the central public message of the hearings. Biden was determined to communicate, not only to those who would be present in the hearing room but to average Americans who needed to know, what was at stake." This meant having carefully drafted "opening lines of questions" as well as "follow-up" questions to responses Bork was expected to give. "Larry Tribe was a much better Robert Bork than Robert Bork,"⁹⁷ according to committee staff member Jeff Peck.

The title accurately conveys the author's interpretation of the episode that the struggle over Bork was a fight over principle. And the "principle" was the presence or absence of unenumerated rights "in" the Constitution. "Bork was not simply taking on the Warren Court and Joe Biden, but a half-century of Constitutional law." The battle "was over . . . an enlightened and expansive notion of liberty."⁹⁸ The outcome of the battle meant far more than denying Bork a seat on the Court. Gitenstein

believes that for the foreseeable future the Senate will confirm no person to the Supreme Court who does not distance himself from the jurisprudence Bork espoused.

Any book about the fate of a presidential nomination explicitly or implicitly raises a question of causation. In Bork's case, there are several possible explanations. First, the timing was bad. There was the unavoidable partisan difference between a Republican President Reagan and a Senate in the hands of Democrats. Moreover, the Administration had been weakened and distracted by disclosures from the Iran-contra affair, and Attorney General Meese was preoccupied with conflict-of-interest accusations. Writers such as Ethan Bronner⁹⁹ have placed blame on two additional factors: presidential mismanagement and distortion of Bork's views by opponents. Bork and his supporters had lost the offensive by the time the hearings began. Bork himself ascribes to this view: "It is important to understand," he explained later, "the degree to which the charges leveled against me during the confirmation battle were false and known to be so by those who made

them."¹⁰⁰ Bork may also have sensed that once confirmation was in doubt, efforts by the President to regroup were both too little and too late.¹⁰¹

Gitenstein acknowledges distortion but adds that it was present on both sides: "Granted there were many times during those 115 days when we were troubled by the tactics and distortions that characterized both the pro- and anti-Bork efforts."¹⁰² He also thinks Bork was served badly by the Administration.¹⁰³ Nonetheless, even with superb management of the nomination, he is convinced his side would have triumphed. Because he thinks the hearings conveyed the real Robert Bork to the public, Gitenstein asserts that the nomination failed because the people rejected what they saw and heard: "Americans made a serious, principled decision in rejecting Bork's jurisprudence that summer. . . ."¹⁰⁴

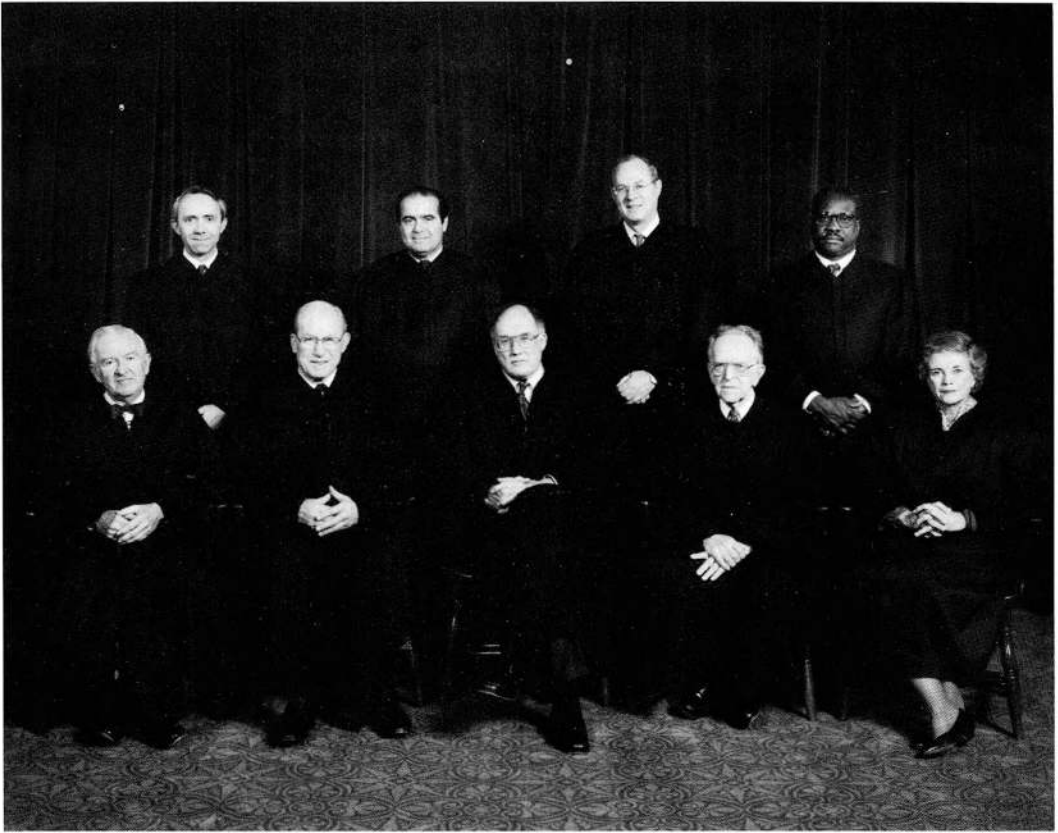
The nomination of Robert Bork consumes a chapter in *Turning Right* by David G. Savage.¹⁰⁵ The thesis of the book is hardly novel: Presidents Reagan and Bush shared both the same goal of altering the course of the Court's constitutional jurisprudence that had prevailed since Chief Justice Earl Warren's day, as well as the same means to realize that goal: purposeful judicial selection. Thus, Reagan and Bush fell within a long-standing tradition in American politics. Most presidents have wanted a judiciary supportive of their policies and have acted accordingly when vacancies occurred. Even George Washington, in making the very first appointments to the Supreme Court, imposed a "litmus test:" fealty to the values of the new Constitution. (More than two centuries later, Washington's condition seems minimal. However, as recently as ten months before New York's Chancellor Robert Livingston administered the oath of office to Washington on April 30, 1789, the people of the United States were engaged in heated debate over whether there would even be a new Constitution.)

Savage's account is good journalism: balanced, informed, readable, and even entertaining. Organized chronologically in seven parts (one for each of the terms from 1986-1987 through 1990-1991, plus two parts on the summers of 1986 and 1987), the twelve chapters blend discussion of judicial selection with the impact of changing personnel on the Court's decisions. In particular, his account of Chief Justice Burger's retirement in 1986 and the subsequent decision by Reagan to

offer Associate Justice Rehnquist the opportunity to be Chief Justice contains detail not previously published. Alone, that chapter ("The Changing of the Guard") is worth the price of the book. An epilogue reviews the nomination of Clarence Thomas and presents the author's conclusion: a transformed Supreme Court.

By 1991, the "five-decade-long consensus on the role of the Supreme Court had reached an end. . . . The transformed Court no longer sees itself as the special protector of individual liberties and civil rights for minorities," Savage writes.¹⁰⁶ He likens the Court's redirection in recent years to the remarkable events of the 1930s when the Court abandoned supervision of economic policy to Congress and the White House and focused its concern on non-property dimensions of individual rights. While Savage does not foresee a return to the pro-business rulings that dominated constitutional law between 1895 and 1937, he envisions a regression in human liberty as the Court defers to state and federal officials. "Rehnquist wants schools run by school officials, prisons run by prison administrators, and capital punishment administered by state prosecutors and state judges, not by the federal judiciary."¹⁰⁷

Without doubt, there has been significant change at the Court; one would expect as much unless those guiding judicial selection at the White House were totally inept. But Savage's conclusion is an overstatement. Certainly the statement on the inside of the book's dust jacket (presumably written or at least approved by the author) that the Court has become "the most conservative Supreme Court in the last half century" goes too far. That statement would be accurate only if one could point to a series of landmark civil liberties rulings from the 1940s that the Rehnquist Court has pushed aside. That of course has not happened. Surely few people believe that there are five votes to unincorporate most provisions of the Bill of Rights from the Fourteenth Amendment, for example. Indeed, some of the issues that occupy Savage's attention (such as affirmative action, privacy, and abortion) involve issues that had not even developed as serious constitutional questions a half century ago. This is one of the reasons presidents have had less than total success in "packing" the bench: questions sooner or later arise that they did not anticipate when making their nominations.



The Rehnquist Court in 1992. David Savage in *Turning Right* discusses the evolution of the Court in the years since William H. Rehnquist became Chief Justice.

Even with the hyperbole, *Turning Right* ranks among the best journalistic books about the Court. Through the years, some of these have served the public well;¹⁰⁸ others have not.¹⁰⁹ Savage succeeds because he takes the time necessary for careful study of the Court's work. In what is good advice to editors and reporters alike, he explains, "The Supreme Court cannot be covered well as an occasional, part-time job. There is simply too much to read, and no good short-cut to spending countless hours at the Court reading."¹¹⁰

"Reading" may go far toward lessening what is probably an inevitable tension between the press and the Court. Journalists thrive on access to public officials and on gathering and disseminating information about what they do. Justices demand insulation from the spotlights of publicity. A paradox thus arises: the Court is simultaneously one of the most open and least accessible agencies in Washington. While briefs, oral argument, and the decisions of the Court are public, the judicial process nevertheless assumes confi-

dentiality. Supreme Court Justices stand in contrast to the many high-ranking officials in Washington who employ public relations experts and who appear open to reporters in the hopes of cultivating "good press." Even interviews with a Justice are so rare that they make the headlines when they occur. While the Court has a Public Information Office that distributes opinions and announcements to the press, its staff tenders no interpretation of what the Justices do. Unlike Savage, some journalists fail to grasp why the Court is different.¹¹¹ "[T]here is drama aplenty in the cases that come before the Supreme Court. And despite the penchant for secrecy," he acknowledges, "the Court and its decision-making are not truly mysterious."¹¹²

Both the Court and the American people have an interest in the quality of judicial reporting because journalists are the primary medium through which the Supreme Court communicates with the general public. Lawyers and legal scholars as well as some political scientists and histo-

rians read the *United States Reports*, follow Court-related developments in Congress, and pay close attention to the law reviews. But most political leaders and informed citizens do not. Only occasionally do scholarly books about the Court reach the ranks of the best sellers.¹¹³ Rather, the general public acquires impressions of, and knowledge about, the Court from people social scientists call “opinion leaders”: journalists and others who follow the judiciary closely and who pass along what they know to less informed “followers.” The task of a reporter assigned to cover the Supreme Court is thus two-fold: to make the Court’s decisions and its processes intelligible to readers and viewers and, in so doing, to impart an understanding of those boundaries within which the Court operates which distinguish it from other parts of government.

The “transformation” that so fully occupies *Turning Right* is more muted in the third edition of Henry J. Abraham’s classic, *Justices and Presidents*.¹¹⁴ First published in 1974, the book has become the standard treatise on judicial selection.

From Washington’s appointment of John Jay in 1789 to Bush’s selection of David Souter in 1990,¹¹⁵ Abraham traces the politics of presidential efforts to fill the Supreme Bench. What criteria have presidents employed in selecting justices? To what degree have presidential expectations for nominees been realized in their decisions? The questions are important because they have acutely concerned almost every president. “[F]ar more than any other nominations to the federal bench, those to the highest tribunal in the land are not only theoretically, but by and large actually, made with a considerable degree of *scienter* by the chief executive.”¹¹⁶

Regarding the first question, Abraham identifies “a quartet of steadily occurring criteria” including merit, personal friendship, balance or representation on the bench, and political and ideological acceptability. While most appointments have involved more than one of these factors, the last has most frequently been overriding. One might add “luck” as well, as did Justice O’Connor: “that decision from the nominee’s viewpoint is probably a classic example of being the right person in the right spot at the right time.”¹¹⁷

As for fulfilling presidential expectations, Abraham finds that the record is mixed. The



Justice David H. Souter on the front steps of the Supreme Court Building the day he joined the Court. Henry Abraham concludes the third edition of *Justices and Presidents* with the nomination of Justice Souter.

roster of Justices contains more than a few “surprises,” as the book demonstrates. As Senator Biden opined during the hearings on the O’Connor nomination in 1981, “[O]nce a Justice dons that robe and walks into that sanctum across the way, we have no control. . . . [A]ll bets are off.”¹¹⁸

Aside from examining expectations and their fulfillment, Abraham wades into the murky waters of merit. Are there standards sufficiently clear to separate good appointments from bad ones? Nominations to the Court almost always generate positive and negative reactions that most frequently derive from partisan or ideological views, but does the historical record suggest objective criteria which can be used to judge merit? Furthermore, are there similar criteria by which to rate on-bench performance? Abraham believes that such criteria exist and prefers the combination advanced by Albert Blaustein and Roy Mersky:

Scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity and impartiality; diligence and industry; the ability to express oneself orally with

clarity, logic, and compelling force; openness to change; courage to take unpopular positions; dedication to the Court as an institution and to the office of Supreme Court justice; ability to carry a proportionate share of the Court's responsibility in opinion writing; and finally, the quality of statesmanship.¹¹⁹

For Abraham, "'greatness' is not quantifiable." Yet "the evidence is persuasive that the term or concept is not only a meaningful one in the eyes of qualified observers . . . , but that there is something closely akin to consensus among them—observers who represent the gamut of the sociopolitical and professional spectrum."¹²⁰ This consensus in turn means that presidents and their advisers are in a position to "opt for merit" while presumably not overlooking other considerations which may fairly enter into the politics of selection. From this vantage, the author proceeds to offer a triple assessment of presidential motive, realization of presidential expectations, and (for all but the most recent nominees) merit: a judgment on the "selectee's performance in this author's eyes."¹²¹

The only obvious omissions from Abraham's book are photographic illustrations. These are generously supplied by *The Supreme Court of the United States: Its Beginnings & Its Justices 1790-1991*, originally published by the Commission on the Bicentennial of the United States Constitution and more recently reprinted for wider distribution by the Supreme Court Historical Society. Indeed, because *The Supreme Court of the United States* is primarily a collection of color illustrations, it is an appropriate and handsome companion to *Justices and Presidents*.

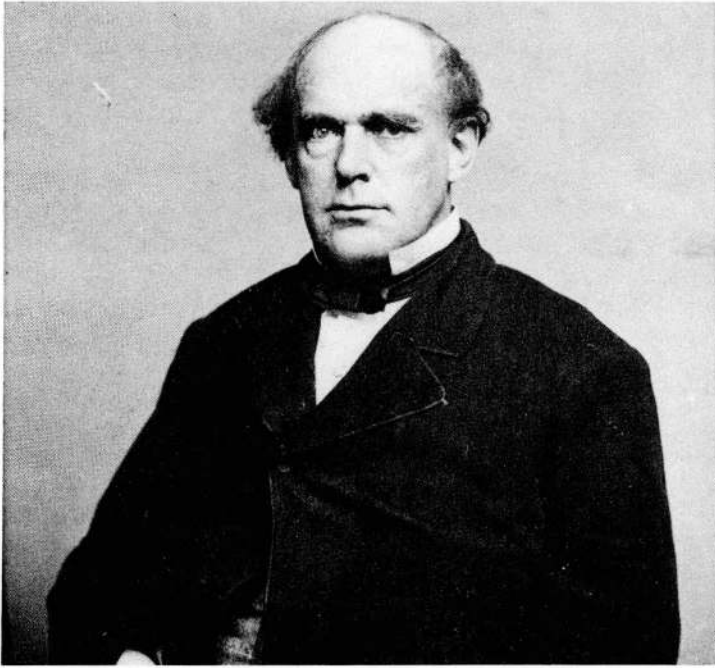
The volume has five sections, the first of which is an introductory essay by retired Chief Justice Warren Burger on the Court's institutional development. (Burger also chaired the Bicentennial Commission between 1985 and 1992, a position of such responsibility that he relinquished the Chief Justiceship in 1986 rather than divide his energies between the two.) The second section is the largest and contains a full-color reproduction of each Justice's portrait. The Chief Justices are arrayed first, from John Jay to William Rehnquist; they are followed by the Associ-

ate Justices in the order in which each took the judicial oath, from James Wilson to Clarence Thomas. A page-length biographical summary accompanies each portrait. Of those early Justices who sat for their portraits in judicial garb, one notices that the last one to wear the scarlet and black gown most frequently associated with Chief Justice Jay was Alfred Moore whom President John Adams appointed in 1800.

Entitled "Homes of the Court," the third section contains photographs and brief descriptions of the buildings where the Court has sat as well as some interior views. The next section reprints the remarks delivered at the Court on January 16, 1990, to commemorate the 200th anniversary of the Court's first session on February 1, 1790. Participants included Chief Justice Burger, former Solicitor General Rex Lee, Solicitor General Kenneth Starr, and Chief Justice Rehnquist. The last section is an appendix and displays information about the Justices in tabular form and in a time chart. There is also a brief bibliography of materials on the Court generally, followed by helpful bibliographic entries arranged alphabetically by Justice, from Henry Baldwin and Philip P. Barbour to Levi Woodbury and William B. Woods.

Extra-Curiam Activities

At first glance, *Grand Inquests*¹²² by William H. Rehnquist would seem situated in the wrong part of this essay. The book, after all, concerns the congressional power of impeachment, specifically the only trials in the Senate the nation has witnessed of a Supreme Court Justice and a President. Closer reflection, however, suggests that the book is properly placed: the first trial resulted in part from some off-the-bench partisan activities (as well as some that were on the bench) by a Federalist Justice that angered Thomas Jefferson and his Republican followers. The second trial marked the only occasion when the Chief Justice of the United States has occupied the other position prescribed by the Constitution for that office: as presiding officer in the Senate when the President is on trial.¹²³ Ironically, the author of *Grand Inquests* was named an Associate Justice of the Supreme Court in 1971 by the only President other than Johnson against whom a House committee has approved articles of impeachment.



This photo of Chief Justice Salmon Chase by the Matthew Brady studio was taken in 1864, the year he joined the Supreme Court. His conduct in presiding over the impeachment trial of President Andrew Johnson has added to his reputation and stature among the Chief Justices.

By chance, both trials involved the two Justices to date named Chase: Samuel, the last of Washington's appointments to the Court, and Salmon, Lincoln's choice to succeed Chief Justice Roger Brooke Taney. Their reputations, however, have not fared equally. Samuel Chase's trial, though ending in acquittal, never ensconced him as a model of prudent judicial conduct. In Charles Warren's assessment, if he was "not a Jeffries . . . neither was he a Marshall."¹²⁴ In contrast, Salmon Chase's role in Johnson's trial added considerably to his stature among the Chief Justices.

In the impeachment power the framers of the Constitution came closest to legislative supremacy. In a design for government otherwise replete with checks and balances, there are hardly any for this device aside from the political check of the ballot box,¹²⁵ the functional division of indictment and trial between the House and the Senate, the stipulation for an extraordinary majority for conviction in the upper house, and, in cases of presidential trials, the presence of the Chief Justice. Whereas Congress can work its will against a presidential veto only by marshalling a two-thirds vote in both houses, in an impeachment proceed-

ing the Constitution imposes a two-thirds rule only on the Senate. Moreover, for an overridden veto, there is also the possibility that the judiciary may halt what the president could not.

Aside from being both an engaging and thoughtful narrative, the book is important because each trial was a defining event in shaping what we think of today as the American Constitution in its larger sense—that is, not merely the words of the document with their judicial gloss but the political practices and customs which time has endowed with paramount authority. Had the Senate convicted Chase and/or Johnson, the American political system might well have evolved along a different

path. In the United States as in Great Britain, the nineteenth century was preeminently a time of legislative government.¹²⁶ By most scholarly appraisals, only a handful of chief executives from that era rank high in terms of leadership and influence.¹²⁷

Rehnquist believes that Senate convictions of Chase and later Johnson would have established the precedent of ideologically driven removals from coordinate branches by Congress. The result could perhaps have been an undoing of the concept of separate institutions sharing some powers and a moving toward a different model: a judiciary and president both subservient to Congress. While the articles of impeachment against Chase had not been phrased in terms of ideological differences (in fact, each charged a departure from the law in several rulings Chase had made at trial), the danger would have come from the precedent of having removed him at a time of sharp partisan differences. Even "so astute a jurist as John Marshall was very troubled during the proceedings against Chase as to what their impact might be on the Supreme Court."¹²⁸ Marshall's concern was so great that he shared in a letter to a colleague his willingness to allow



Andrew Johnson is the only president in American history to have an impeachment trial. The seven Managers of the House of Representatives of the Impeachment (above) were charged with rallying support in the Senate to convict Johnson. Chief Justice Rehnquist chronicles this in his new book *Grand Inquests*.

Congress the authority to overturn Supreme Court decisions of which it disapproved in exchange for abandoning impeachment as a method of disciplining judges who made the “wrong” rulings.

Rehnquist’s book is important for a second reason as well. He is the Chief Justice of the United States. This book may offer insight into the author’s thinking on the separation-of-powers issues that have increasingly come before the Court in the past two decades. Moreover, no other person has written books—this is Rehnquist’s second one—specifically about the Court or its Justices while holding the nation’s highest judicial office. John Marshall’s biography of George Washington explained Federalist principles of government.¹²⁹ William Howard Taft authored a book about the president and published a volume of essays on government before President Harding

named him to the Court.¹³⁰ As Chief, Taft expounded in at least one book on the nature of American constitutional government.¹³¹ The lectures of Charles Evans Hughes on the Court remain a classic well over six decades after publication, yet the book appeared twelve years after his resignation as Associate Justice and two years before his appointment as Chief.¹³² Chief Justice Stone left an abundance of papers to scholars, but no book. Chief Justice Warren’s short volume on democratic government appeared after his retirement, as did his memoirs.¹³³ Chief Justice Burger made a large number of addresses (many of them published as articles), but authored no book on the Court in general. As with Rehnquist’s first book in 1987, *The Supreme Court; How It Was, How It Is, Grand Inquests* is thus of instant interest because of its author.

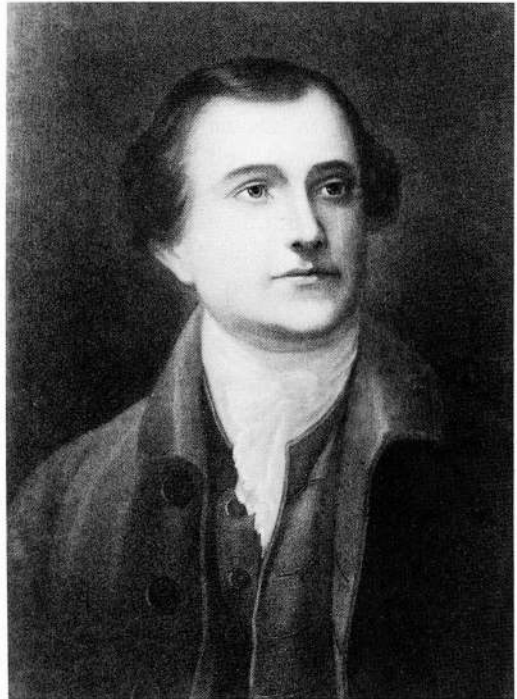
Organization and Jurisdiction

Even though the Senate's trial of Justice Chase was a formative event in American constitutional development, it fell just after the time scholars usually regard as the founding era of the Supreme Court and the federal judiciary: the eleven years from passage of the Judiciary Act of 1789 until the appointment of John Marshall as Chief Justice in early 1801. Long the least known decade of America's judicial past, this is the era depicted in mushrooming detail in *The Documentary History of the Supreme Court of the United States, 1789-1800*. Through the work of a team of editors headed by Maeva Marcus, volume four has now been published—*Organizing the Federal Judiciary: Legislation and Commentaries*.¹³⁴ Thanks to this project, supported in part by the Supreme Court Historical Society, years once only dimly understood are yielding fresh insight.

Drawing from about 800 repositories, this fourth volume contains two principal sections of approximately equal length. The first consists of legislation as well as explanatory text provided by the editors, organized in a series of six subsections, each corresponding to one of the first six Congresses (the Sixth Congress concluded its work in early 1801, prior to Thomas Jefferson's inauguration). Primary attention is accorded some eighteen acts and bills the editors view "as having had major significance in the creation of the federal judiciary during this decade. . . ."¹³⁵ This "major legislation" the editors treat in detail. Other judiciary-related bills and acts are deemed "minor legislation," and while their provisions are described, the editors declined to reprint the actual text. (Their reluctance is understandable; even with editorial selectivity, this volume is nearly 800 pages long.) Thus the ill-fated Judiciary Act of 1801, one of the last actions of the Sixth Congress, accounts for forty-nine pages,¹³⁶ including the essay by the editors and the text of the act. "An Act concerning the District of Columbia," of February 27, 1801, which set in motion the magisterial appointments soon to be at issue in *Marbury v. Madison*,¹³⁷ is by contrast only briefly described.¹³⁸ The second section consists mainly of newspaper articles and correspondence, with some of the latter appearing in print for the first time.

Combing both sections, one senses some of the concerns that weighed heavily on the minds of political leaders of that day. "It is much to be regretted [*sic*]," Attorney General Edmund Randolph wrote President Washington,

that the judiciary, in spite of their apparent firmness in Annulling the pension-law, are not, what some time hence they will be, a recourse against the infractions of the constitution, On [*sic*] the one hand, and a steady asserter of the federal rights, on the other. So crude is our judiciary System, so jealous are state-judges of their authority, so ambiguous is the language of the constitution, that the most probable quarter, from which an alarming discontent may proceed, is the rivalry of those two orders of judges. The mere superiority of talents in the federal judges, (if indeed it



Edmund Randolph was Attorney General during the first four years of President George Washington's administration. He succeeded Thomas Jefferson as Secretary of State in 1794 and served there for a year before resigning when he was accused of soliciting money from the French to oppose the Jay Treaty.

were admitted) cannot be presumed to counterbalance the real talents, and full popularity of their competitors.¹³⁹

It is also of interest to observe what is not present. In congressional deliberation on the landmark Judiciary Act of 1789¹⁴⁰ and in most correspondence, the subject of the suability of states is absent.¹⁴¹ Within four years of the act's passage, the Supreme Court decided *Chisholm v. Georgia*,¹⁴² allowing a citizen of one state to bring suit against another of the states of the Union. The holding was plainly contrary to assurances made by the Constitution's supporters during debates over its ratification. Reaction to *Chisholm* was severe and swift, even in a day when news could travel only as fast as the fastest horse or sailing vessel. Congress proposed a corrective amendment (the Eleventh) on March 4, 1794, with ratification completed in eleven months, as compared to the twenty-seven months for the Bill of Rights. It may even be that American constitutional law begins with *Chisholm*. Congress' prompt resort to the formal amending process to reverse a Supreme Court decision is both a testimonial to the stature of the judiciary and perhaps an indication that Congress had already begun to equate the Court's interpretation of the Constitution with the document itself.

Surprises, defined as highly unexpected developments, are to politics what miracles, defined as phenomena inexplicable by current knowledge, are to religion: both may mark turning points and convey meaning. The "surprise" portrayed in *Organizing the Federal Judiciary* is that a system of federal courts below the Supreme Court emerged practically at the onset of government under the Constitution. After all, only eleven years and nine months elapsed between approval of the Articles of Confederation by the Continental Congress and enactment of the Judiciary Act of 1789. There is an immense contrast in the status of central authority represented by those two events. Indeed, had those important first steps in 1789 and in the 1790s not been taken—had establishment of national courts been delayed for a few years—it is probable that the federal judiciary would have evolved differently. Had action been delayed, the idea of a national judiciary might have been swallowed by debates over federalism in the pre-Civil War decades of

the 1800s. In Richard Pacelle's terminology, the "policy window" of the 1790s might well have closed.

Chief Justice Jay understood the precarious state of the new federal judicial enterprise.

A judicial Controul, general & final, was indispensable. The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of no little Intricacy. The Expediency of carrying Justice as it were to every Man's Door, was obvious; but how to do it in an expedient Manner was far from being apparent. To provide against Discord between national & State Jurisdictions, to render them auxiliary instead of hostile to each other; and so to connect both as to leave each sufficiently independent, and yet sufficiently combined, was and will be arduous.¹⁴³

In contrast, the federal judiciary rests on secure footing today. No one seems compelled, as was Jay, to offer an almost apologetic justification. "Questions of no little Intricacy" remain, however. These questions, many of them profoundly political, pervade the books surveyed here and are testimony to the handiwork of the statesmen of that formative decade.

The books surveyed in this article are listed alphabetically by author below.

ABRAHAM, HENRY J., *Justices and Presidents: A Political History of Appointments to the Supreme Court* 3d ed. (New York: Oxford University Press, 1992). Pp. xiv, 467.

DAVIS, MICHAEL D., and HUNTER R. CLARK, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* (New York: Birch Lane Press, 1992). Pp. x, 400.

EPSTEIN, LEE, and JOSEPH F. KOBYLKA, *The Supreme Court and Legal Change: Abor-*

tion and the Death Penalty (Chapel Hill: University of North Carolina Press, 1992). Pp. xv, 417.

GITENSTEIN, MARK, *Matters of Principle: An Insider's Account of America's Rejection of Robert Bork's Nomination to the Supreme Court* (New York: Simon & Schuster, 1992). Pp. 368.

GOLDMAN, ROGER, with DAVID GALLEN, *Thurgood Marshall: Justice for All* (New York: Carroll & Graf, 1992). Pp. 509.

HALL, KERMIT L., et al., eds., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992). Pp. xx, 1032.

KULL, ANDREW, *The Color-Blind Constitution* (Cambridge, Mass.: Harvard University Press, 1992). Pp. x, 301.

LUCE, W. RAY., *Cohens v. Virginia (1821): The Supreme Court and State Rights, a Reevaluation of Influences and Impacts* (New York: Garland, 1990). Pp. xvi, 264.

MARCUS, MAEVA, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800. Volume Four. Organizing the Federal Judiciary: Legislation and Commentaries* (New York: Columbia University Press, 1992). Pp. xlv, 800.

PACELLE, RICHARD L., JR., *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration* (Boulder, Colo.: Westview Press, 1991). Pp. xv, 264.

REHNQUIST, WILLIAM H., *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: William Morrow and Co., 1992). Pp. 303.

SAVAGE, DAVID G., *Turning Right: The Making of the Rehnquist Supreme Court* (New York: John Wiley & Sons, 1992). Pp. 473.

The Supreme Court of the United States: Its Beginnings & Its Justices 1790-1991 (Washing-

ton, D.C.: Commission on the Bicentennial of the United States Constitution, 1992). Pp. 300.

Endnotes

- ¹ H. Abraham, *The Judicial Process* 3 (6th ed. 1993).
- ² A. Vanderbilt, *The Challenge of Law Reform* 4-5 (1955).
- ³ This phrase was popularized by John Adams shortly before the Revolutionary War. It appears in Article XXX of the Massachusetts Constitution, the oldest of the American state constitutions still in force.
- ⁴ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheaton) 738, 866 (1824).
- ⁵ Speech at Elmira, New York, May 3, 1907, in C. Hughes, *Addresses of Charles Evans Hughes* 185 (2d ed. 1916).
- ⁶ O. Holmes, Jr., "The Path of the Law," 10 *Harvard Law Review* 457, 461 (1897).
- ⁷ F. Frankfurter, *Mr. Justice Holmes and the Supreme Court* 9 (1938).
- ⁸ M. Shapiro, *Law and Politics in the Supreme Court* 6-7 (1964); R. Seddig, "Toward a Political Jurisprudence," 17 *American Journal of Political Science* 441 (1973).
- ⁹ C. Swisher, Presidential Address, delivered before the American Political Science Association, New York, N.Y., September 8, 1960. Reprinted in 54 *American Political Science Review* 879-880 (1960).
- ¹⁰ *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).
- ¹¹ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).
- ¹² *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).
- ¹³ For example, with respect to criticism of Justice Roberts, see E. Layton, "And I Was There": *Pearl Harbor and Midway—Breaking the Secrets* 336-337, 350 (1985).
- ¹⁴ F. Frankfurter and J. Landis, *The Business of the Supreme Court* (1928).
- ¹⁵ Books are listed with full bibliographic citation just before the endnotes.
- ¹⁶ 19 U.S. (6 Wheaton) 264 (1821). Strangely, some law school casebooks devote barely a single page to the case. See G. Gunther, *Constitutional Law* 35 (12th ed., 1991), and W. Lockhart, Y. Kamisar, J. Choper, and S. Shiffrin, *The American Constitution* 24 (7th ed., 1991). Casebooks designed for political science courses in constitutional law routinely assign more space to the case. See S. Goldman, *Constitutional Law* 331-334 (2d ed., 1991), and M. Shapiro and R. Tresolini, *American Constitutional Law* 132-137 (6th ed., 1983).
- ¹⁷ W. Luce, *Cohens v. Virginia (1821): The Supreme Court and State Rights, a Reevaluation of Influences and Impacts* (1990) (hereinafter cited as Luce).
- ¹⁸ For example, see C. Magrath, *Yazoo—Law and Politics in the New Republic* (1966).
- ¹⁹ The firm name was the Jacob I. Cohen Jr. and Brother Lottery Office. One of its lotteries raised most of the funds for the Washington Monument, located in the middle of Charles Street in Baltimore, next to the Peabody Conservatory.
- ²⁰ 17 U.S. (4 Wheaton) 316 (1819).
- ²¹ Luce, at 38.
- ²² *Id.*, 80-81.

- ²³ *Id.*, 78.
- ²⁴ *Id.*, 233.
- ²⁵ *Id.*, 248.
- ²⁶ *Id.* at 246.
- ²⁷ A. Kull, *The Color-Blind Constitution* (1992) (hereinafter cited as Kull).
- ²⁸ Kull, vii.
- ²⁹ 163 U.S. 537 (1896).
- ³⁰ Kull, 5.
- ³¹ *Id.*, 1.
- ³² 235 U.S. 151 (1914).
- ³³ Kull, 135.
- ³⁴ 235 U.S. at 161-162. Chief Justice White, and Justices Holmes, Lamar, and McReynolds concurred in the result (dismissal of the complaint) only.
- ³⁵ 245 U.S. 60 (1917). Widespread use of racially restrictive covenants allowed communities to enforce racial segregation in housing anyway. The Court did not invalidate official enforcement of this practice until *Shelley v. Kraemer*, 334 U.S. 1 (1948).
- ³⁶ Kull, 141.
- ³⁷ 305 U.S. 337 (1938).
- ³⁸ Kull, 350.
- ³⁹ Kull, 143.
- ⁴⁰ *Id.*, 150.
- ⁴¹ *Id.*, 2, 6.
- ⁴² K. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (1992).
- ⁴³ J. Johnson, ed., *Historic U.S. Court Cases 1690-1990: An Encyclopedia* (New York: Garland, 1992) contains essays on colonial, state and federal litigation; E. Witt, ed., *Guide to the U.S. Supreme Court* (2d ed., 1990) contains biographical summaries of the Justices, topical essays, a review of major decisions by decade, and source materials; R. Janosik, ed., *Encyclopedia of the American Judicial System*, 3 vols. (1987) features lengthy and inclusive essays on a variety of legal topics; S. Elliott, ed., *A Reference Guide to the United States Supreme Court* (1986) is similar in organization to the more recently published *Oxford Companion* but is shorter.
- ⁴⁴ 410 U.S. 113 (1973).
- ⁴⁵ 354 U.S. 178 (1957).
- ⁴⁶ 384 U.S. 436 (1966).
- ⁴⁷ L. Friedman and F. Israel, eds. *The Justices of the United States Supreme Court*, 5 vols. (1969, 1978). The fifth volume was edited by Friedman alone.
- ⁴⁸ A. Mason and D. Stephenson, *American Constitutional Law* 326 (10th ed., 1993).
- ⁴⁹ Pacelle, 62.
- ⁵⁰ 304 U.S. 64 (1938).
- ⁵¹ Pacelle, 13.
- ⁵² *Id.*, 13-14.
- ⁵³ D. Provine, *Case Selection in the United States Supreme Court* (1980); H. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1991).
- ⁵⁴ Pacelle, 12.
- ⁵⁵ *Id.*, 28.
- ⁵⁶ *Id.*, 29.
- ⁵⁷ *Id.*, 40.
- ⁵⁸ *Id.*, 175.
- ⁵⁹ 304 U.S. 144 (1938).
- ⁶⁰ R. McCloskey, *The Modern Supreme Court* 7 (1972).
- ⁶¹ Pacelle, 170.
- ⁶² *Id.*, 206. Pacelle completed his book before the 1992 presidential election.
- ⁶³ L. Epstein and J. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (1992) (cited hereinafter as Epstein and Kobylka).
- ⁶⁴ 408 U.S. 238 (1972); 428 U.S. 153 (1976); 481 U.S. 279 (1987).
- ⁶⁵ 410 U.S. 113 (1973); 492 U.S. 490 (1989).
- ⁶⁶ Epstein and Kobylka, 32.
- ⁶⁷ *Id.*, xiii-xiv.
- ⁶⁸ *Id.*, 33, 5.
- ⁶⁹ *Id.*, 28.
- ⁷⁰ *Id.*, 30.
- ⁷¹ *Id.*, 307.
- ⁷² *Id.*, 310.
- ⁷³ J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model* (1993).
- ⁷⁴ For example, see S. Wood, *Constitutional Politics in the Progressive Era* (1968); A. Paul, *Conservative Crisis and the Rule of Law* (1960); C. Jacobs, *Law Writers and the Courts* (1954); B. Twiss, *Lawyers and the Constitution* (1942).
- ⁷⁵ M. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (1987); R. Kluger, *Simple Justice* (1976).
- ⁷⁶ J. Simon, *Independent Journey: The Life of William O. Douglas* (1980).
- ⁷⁷ J. Simon, "The Judge as Folk Hero," public lecture at Franklin and Marshall College, November 11, 1982.
- ⁷⁸ The first was William H. Hastie, four years Marshall's senior, named by President Truman in 1949 to the United States Court of Appeals for the Third Circuit. In March 1962 President Kennedy reportedly considered putting Hastie on the Supreme Court but decided that move was "just too early." J. MacKenzie, "Thurgood Marshall," in 4 Friedman and Israel, *The Justices of the United States Supreme Court* 3077.
- ⁷⁹ 347 U.S. 483 (1954).
- ⁸⁰ 364 U.S. 454 (1960). In this case, the Supreme Court on commerce grounds struck down application of Virginia's trespass law to a African-American interstate bus patron who had refused to leave the whites-only section of a bus station restaurant in Richmond.
- ⁸¹ For example, see N. Lewis, "Chief Justice Assails Library on Release of Marshall Papers," *New York Times*, May 26, 1993, p. A1.
- ⁸² M. Davis and H. Clark, *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* (1992) (hereinafter cited as Davis and Clark).
- ⁸³ R. Goldman with D. Gallen, *Thurgood Marshall: Justice for All* (1992) (hereinafter cited as Goldman).
- ⁸⁴ R. Bland, *Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall* (1973).
- ⁸⁵ Goldman, 10.
- ⁸⁶ The account of the conversation is Marshall's. Davis and Clark, 223-224.
- ⁸⁷ *Id.*, 234-235.
- ⁸⁸ 321 U.S. 649 (1944).
- ⁸⁹ See my discussion of this question in Book Review, 13 *Houston Law Review* 1081, 1090-1094 (1976).
- ⁹⁰ See, for example, Marshall's own predictions in the wake of his victory in *Brown*, as quoted in news stories. *New York Times*, May 18, 1954, pp. 14, 16.

⁹¹ M. Gitenstein, *Matters of Principle* (1992) (hereinafter cited as Gitenstein).

⁹² Readers in search of a balanced account of the Bork nomination should consult Ethan Bronner's excellent study, *Battle for Justice* (1989). Other books on the Bork nomination include P. McGuigan and D. Weyrich, *Ninth Justice: The Fight for Bork* (1990), and M. Pertschuk and W. Schaetzel, *The People Rising* (1989). The former includes extensive information not widely reported elsewhere about the strategies of conservatives in connection with the nomination. The latter presents an analysis from a liberal ideological perspective.

⁹³ Gitenstein, 312-346.

⁹⁴ *Id.*, 15.

⁹⁵ *Id.*, 17.

⁹⁶ For example, see M. Bisnow, *In the Shadow of the Dome* (1990).

⁹⁷ Gitenstein, 208, 209, 212.

⁹⁸ *Id.*, 16, 345.

⁹⁹ See note 92.

¹⁰⁰ R. Bork, *The Tempting of America* 323 (1990).

¹⁰¹ Gitenstein, 12, 308-309.

¹⁰² *Id.*, 15.

¹⁰³ *Id.*, 306.

¹⁰⁴ *Id.*, 15.

¹⁰⁵ D. Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992) (hereinafter cited as Savage).

¹⁰⁶ *Id.*, 453.

¹⁰⁷ *Id.*, 455.

¹⁰⁸ J. Alsop, *The 168 Days* (1938); F. Graham, *Self-Inflicted Wound* (1970); A. Lewis, *Gideon's Trumpet* (1964); J. Simon, *In His Own Image* (1973); F. Friendly, *Minnesota Rag* (1981); Simon is both journalist and academician, having been a legal reporter prior to becoming a law professor and dean.

¹⁰⁹ D. Pearson and R. Allen, *The Nine Old Men* (1936); B. Woodward and S. Armstrong, *The Brethren* (1979).

¹¹⁰ Savage, "Preface" (unnumbered). *Turning Right* features a superbly arranged index, more helpful and thorough than that found in any of the other books surveyed here, with the exception of the newest volume of *The Documentary History of the Supreme Court of the United States, 1789-1800*, discussed later in this essay.

¹¹¹ For example, see the story filed by Aaron Epstein for the Knight-Ridder News Service, published as "In Media Age, Supreme Court Still Cloaked in Secrecy," *Denver Post* (May 22, 1993), p. 19A, and "High Court Tradition: Secrecy," *Miami Herald* (May 24, 1993), p. 5A.

¹¹² Savage, "Preface" (unnumbered).

¹¹³ One that did was A. Mason, *Brandeis: A Free Man's Life* (1946), which was a Book-of-the-Month Club selection and went through at least four large printings.

¹¹⁴ H. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (3d ed., 1992) (hereinafter cited as Abraham). Previous editions appeared in 1985 and 1974.

¹¹⁵ Bush announced the nomination of Clarence Thomas just as the book was going to press, so the third edition contains no discussion of the Thomas confirmation proceedings and no evaluation of Thomas' early service on the Court.

¹¹⁶ Abraham, 7.

¹¹⁷ Remarks of May 19, 1983, quoted in *Id.*

¹¹⁸ Quoted in A. Mason and D. Stephenson, *American Constitutional Law* 10 (8th ed., 1987).

¹¹⁹ A. Blaustein and R. Mersky, *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* 50-51, n. 11 (1978).

¹²⁰ Abraham, 11.

¹²¹ *Id.*, viii.

¹²² W. Rehnquist, *Grand Inquests* (1992) (hereinafter cited as Rehnquist).

¹²³ The framers called for the presence of the Chief Justice probably to avoid the appearance of a conflict of interest were the President of the Senate (i.e., the Vice President) to preside in presidential trials.

¹²⁴ I C. Warren, *The Supreme Court in United States History* 281 (1923).

¹²⁵ Both trials covered in *Grand Inquests* occurred before the Seventeenth Amendment converted the Senate into a popularly elected body. Previously, as had been the case for members of the Congress under the Articles of Confederation, senators were chosen by state legislators.

¹²⁶ W. Wilson, *Congressional Government* (1885); E. Barker, *Essays on Government* 56-85 (2d ed., 1951).

¹²⁷ R. Neustadt, *Presidential Power* (1960).

¹²⁸ Rehnquist, 126.

¹²⁹ *The Life of George Washington*, 5 vols. (1804-1807).

¹³⁰ *Our Chief Magistrate and His Powers* (1916); *Popular Government* (1913).

¹³¹ *Liberty Under Law* (1922).

¹³² *The Supreme Court of the United States* (1928).

¹³³ *A Republic, If You Can Keep It* (1972); *The Memoirs of Earl Warren* (1977).

¹³⁴ M. Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789-1800. Volume Four. Organizing the Federal Judiciary: Legislation and Commentaries* (1992) (hereinafter cited as Marcus).

¹³⁵ *Id.*, xxv.

¹³⁶ *Id.*, 284-332.

¹³⁷ 5 U.S. (1 Cranch) 137 (1803).

¹³⁸ Marcus, 294, 360.

¹³⁹ Letter of August 5, 1792, in Marcus, 584. The editors follow the original spelling and punctuation. I have inserted "sic" to mark those places where departures from contemporary usage occur in the original. The reference to the pension law case was to the decision in April of 1792 by the Circuit Court for the district of Pennsylvania in *Hayburn's Case*. See M. Marcus and R. Teir, "Hayburn's Case: A Misinterpretation of Precedent," 1988 *Wisconsin Law Review* 527 (1988).

¹⁴⁰ Anyone interested in the legislative beginnings of the federal court system should also consult M. Marcus, ed., *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (1992).

¹⁴¹ The exception is a letter from William Bradford, Jr., to Elias Boudinot, June 28, 1789, after the former had received a copy of the proposed legislation. Marcus, 424-425. Bradford, Boudinot's son-in-law, was Attorney General of Pennsylvania.

¹⁴² 2 U.S. (2 Dallas) 419 (1793).

¹⁴³ Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790, in 2 *Documentary History of the Supreme Court of the United States, 1789-1800* 27-28 (1988).

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