Editorial Introduction

Melvin I. Urofsky
Chair, Board of Editors

This has been a year of great satisfaction for those of us involved in the ***Journal***. We have received a number of favorable comments about the 1993 issue, and we hope that you will enjoy this and future issues as well.

In this issue we are introducing two new features. Grier Stephenson will continue to do the "Judicial Bookshelf," as he has for so many years; the ***Journal*** would not be the same without it. But when we receive books that we think are of exceptional importance, we will now have separate essay reviews. Two of them appear in this issue, concerning biographies of Learned Hand ("the greatest judge never appointed to the Supreme Court") and Lewis F. Powell, Jr.

A second feature is the introduction of a student prize essay. For many years the Society has awarded two Hughes-Gossett awards to the best articles in each issue. Now we will give one award to the best article, and we are holding an annual competition in which students may submit papers they have done. The winner will be published in the next issue of the ***Journal*** and will receive the other prize. This issue carries the first such winning essay, the one on the Chinese in the Delta, the subject of the famous *Gong Lum* case, by Jeannie Rhee, who graduated last June from Yale.

You will also have by now received a special issue of the ***Journal***, "The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas," edited by Jennifer M. Lowe. This will be the first in what we anticipate will be an annual publication based on the spring lecture series sponsored by the Society. The "Jewish Justices" series took place in 1993; the 1994 series on the Civil War will appear later this year as the second special issue. The Society is now getting ready for the 1995 series on "The Supreme Court and World War II."

We here at the Society are excited at the opportunities we have to expand our publications and thus better serve our members. We hope your repsonse is equally as positive.

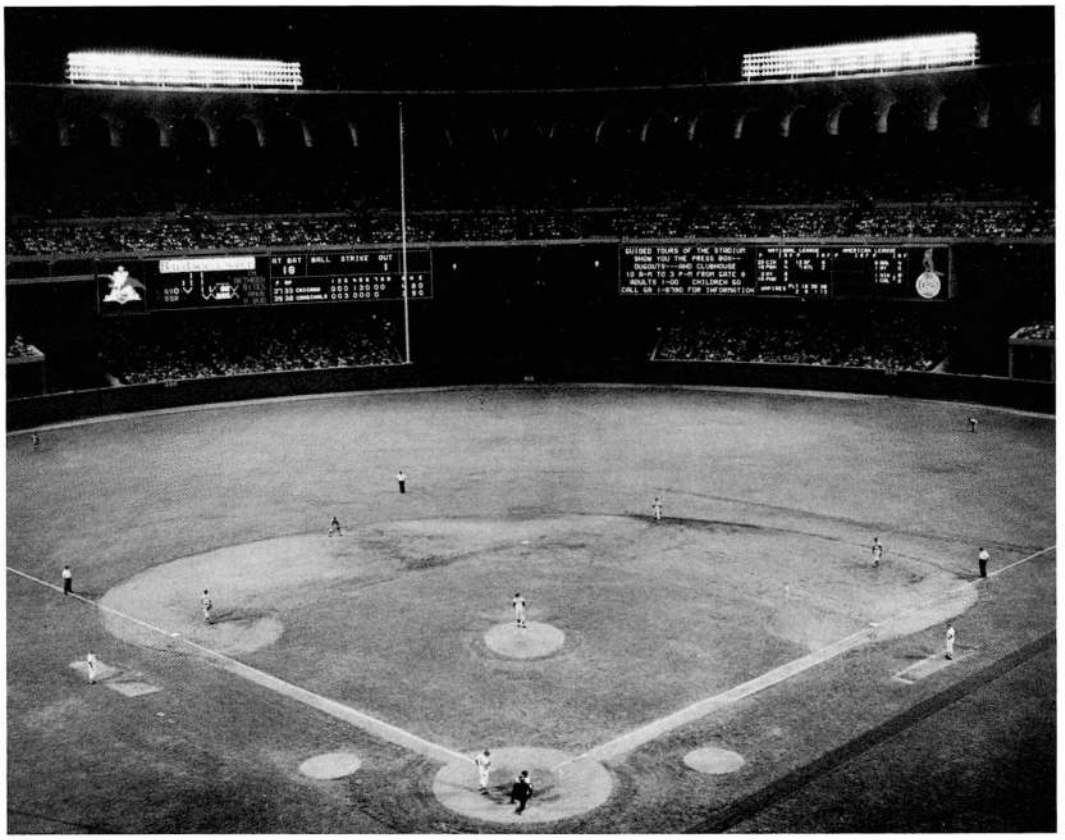
A Tribute To Harry A. Blackmun

William H. Rehnquist

Harry Blackmun is a son of the upper Mississippi Valley. He was born in Nashville, Illinois, in 1908, and grew up in St. Paul, Minnesota. His appointment to the Supreme Court by President Nixon on June 9, 1970 filled one of the most storied seats on the Supreme Court, one previously occupied by the likes of Joseph Story, Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Felix Frankfurter. Although he often joked about being "old number three," the appointment was a deserved one, for then-Judge Blackmun's forty year career as a lawyer and jurist was exemplary.

After graduating with honors from the Harvard Law School in 1932, he clerked for Judge

Harry A. Blackmun with Minnesota senators Walter Mondale (left) and Eugene McCarthy (right) during the Senate Judiciary hearings on his nomination to the Supreme Court.



Curt Flood played in the outfield for the St. Louis Cardinals for twelve seasons, including four in the new Busch Stadium opened in 1966 (above). Flood, one of the premier outfielders and batters of his time, challenged Major League Baseball's antitrust exemption, after the Cardinals attempted to trade him to the Philadelphia Phillies. The Court upheld the exemption in *Flood v. Kuhn*, an opinion written by Justice Blackmun that highlighted his love for the game of baseball.

John B. Sanborn at the Court of Appeals for the Eighth Circuit. He then practiced law with the firm of Dorsey, Colman, Barker, Scott and Barber in Minneapolis until 1950, when he became General Counsel to the Mayo Clinic. President Eisenhower appointed him to be a judge of the Court of Appeals for the Eighth Circuit in 1959, where he served until his appointment to the Supreme Court.

Justice Blackmun will surely be remembered most for his opinion for the Court in *Roe v. Wade*.[1] That opinion has received so much notoriety that it is easy to forget that during his nearly twenty-five years on the Court he has authored more than three hundred majority opinions. As a result, his jurisprudential legacy includes not only the right of privacy embodied in *Roe* v. *Wade*, but opinions covering other areas of the law as well.

In *Complete Auto Transit* v. *Brady*,[2] he succinctly enunciated the modern rule that the Commerce Clause of the Constitution does not prevent interstate commerce from being required to bear its fair share of state taxation. His legacy includes *Flood v. Kuhn*,[3] which sustained baseball's antitrust exemption and demonstrated the Justice's knowledge of, and love for, baseball.

Justice Blackmun was cautious, studious and meticulous in his opinions, always willing to view a case from every angle and to consider each argument made by the parties. His many writings on the meaning of the Fourth Amendment are illustrative. In *Wyman v. James*,[4] his first majority opinion, Justice Blackmun rejected a Fourth Amendment challenge to a New York law conditioning welfare benefits on in-home visits by caseworkers. Non-adversarial visits, he concluded, were minimally intrusive and were designed to benefit dependent children. "The dependent child's needs are paramount, and only

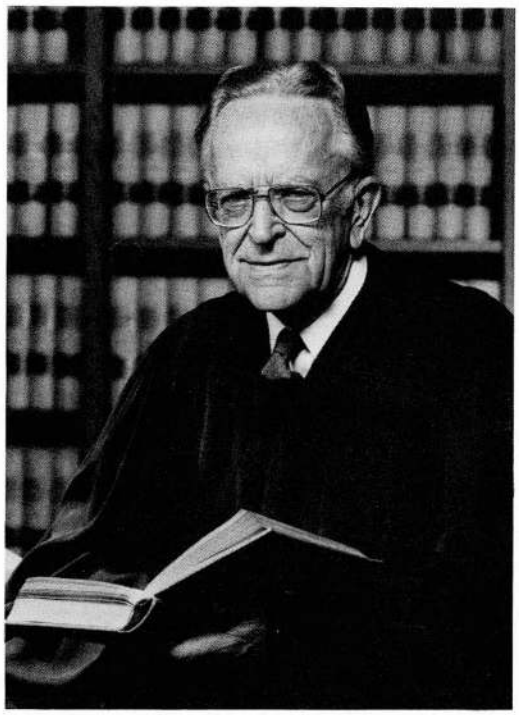
with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights."[5]

Justice Blackmun's 1987 opinion in *New York v. Burger*,[6] rejecting a Fourth Amendment challenge to New York's law authorizing warrantless inspections of junkyards, was similarly practical. With an eye toward overall reasonableness, Justice Blackmun concluded that the warrantless searches were permissible because (1) junkyards have reduced expectations of privacy, (2) government has a strong interest in combatting car theft, (3) inspections are necessary to uncover quickly disposable stolen parts, (4) the regulatory scheme provided an adequate substitute for warrants, and (5) inspections were carefully limited.

Four years later, in *California v. Acevedo*[7] Justice Blackmun ruled for the Court that police may search a bag found in an automobile without a warrant. Because of the practical difficulties associated with distinguishing a search targeting a car (which required no warrant) from one directed at baggage in a car (which after *United States v. Ross*[8] still required a warrant), Justice Blackmun's majority opinion dispensed with the distinction. He concluded that *Ross* tended to "confuse courts and police officers and impede effective law enforcement."[9]

Justice Blackmun's structural opinions exhibit similar practical traits. In *Mistretta v. United States*,[10] for example, his majority opinion sustained the design of the United States Sentencing Commission. Taking a "pragmatic, flexible view of differentiated governmental power,"[11] Justice Blackmun's opinion concluded that the delegation of power to the Commission, the inclusion of federal judges in its membership, and the formal location of the Commission within the Judicial Branch, did not offend separation of powers. As a functional matter, Justice Blackmun observed, the Commission was really no different than any other independent agency.

Justice Blackmun's 1991 decision in *Freytag v. Commissioner of Internal Revenue*[12] sustained the authority of the Chief Judge of the United States Tax Court, an Article I tribunal, to appoint special trial judges. Justice Blackmun concluded that although the Tax Court was not a "department," it was a "court of law," and thus could appoint "inferior" officers of the United States. A contrary holding, he explained, would "undermine longstanding practice."[13]



Justice Harry A. Blackmun served on the Supreme Court for twenty-four years. His modesty and devotion to his work earned him the description as the "shy person's Justice."

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,[14] Justice Blackmun wrote to uphold the application of federal minimum wage and hour laws to local governmental employees. Taking care to explain his departure from precedent, Justice Blackmun's majority opinion held that under the special circumstances of the case it was best to overrule prior case law and leave it to Congress and the political system the role of accommodating the interests of federalism.

Justice Blackmun's opinions convey only part of his legacy; he will also be remembered for the personal qualities he brought to the Court during his twenty-four years of service. His friend, Garrison Keillor, in his book *Lake Wobegon Days*, describes a small, fictional community in Minnesota nestled against a blue-green lake, with "one traffic light, which is almost always green."[15] Just like the town itself, the motto inscribed on the town's crest is modest—"sumus quod sumus," (We are what we are).[16] Harry Blackmun has much in common

with the people who populate Lake Wobegon. He is genuinely self-effacing and modest; Keillor described him as the "shy person's Justice." Those of us who have served with him on the Court will miss his legal learning, his devotion to his craft, and his many contributions to our deliberations in Conference.

Endnotes

[1] 410 U.S. 113 (1973).
[2] 430 U.S. 274 (1977).
[3] 407 U.S. 258 (1972).
[4] 400 U.S. 309 (1971).
[5] *Id.* at 318.
[6] 482 U.S. 691 (1987).
[7] 111 S.Ct. 1982 (1991).
[8] 456 U.S. 798 (1982).
[9] 111 S.Ct. at 1989.
[10] 488 U.S. 361 (1989).
[11] *Id.* at 381.
[12] 111 S.Ct. 2631 (1991).
[13] *Id.* at 2645.
[14] 469 U.S. 528 (1985).
[15] Garrison Keillor, ***Lake Wobegon Days*** 1 (1985).
[16] *Id.* at 6.

The Justice Who Grew

Harold Hongju Koh

As times have changed, Justices have changed. People take a second look.[1]

When Harry Blackmun stepped down from the Supreme Court, he completed what is surely one of the most remarkable odysseys in American public life. When he joined the Supreme Court in 1970, Justice Blackmun was dismissed as a conservative nonentity. He leaves a liberal champion, hailed by President Clinton as a Justice "who has earned the respect and the gratitude of every one of his fellow countrymen and women."[2] Who changed, the Justice or the Court?

The answer: a little of both. The Court Harry Blackmun joined ranked among the most liberal in history; the Court he leaves stands among the most conservative. In 1970, Blackmun, Warren Burger, and the second Justice Harlan formed the right wing of a Court that included Hugo Black, William Brennan, William O. Douglas, and Thurgood Marshall and centrists Potter Stewart and Byron White. The "conservative" Blackmun of those days would have sat at the center of any Court that included Justices Rehnquist, Scalia, and Thomas.

Yet even as the Court moved beneath him, in some areas, Blackmun remained strikingly consistent. Asked in 1970 at his confirmation hearing about his "views of the Supreme Court as the protector of our most basic liberties," Blackmun answered that "my record and the opinions that I

Justice Harry A. Blackmun joined the Supreme Court in 1970 after eleven years on the U.S. Court of Appeals for the Eighth Circuit.

Professor Harold Hongju Koh clerked for Harry A. Blackmun (shown here with his wife, Dottie Blackmun) in the 1981 Term.

have written . . . will show, particularly in the civil rights area and in the labor area and in the treatment of little people, what I hope is a sensitivity to their problems."[3] In 1971, he authored a unanimous opinion calling aliens a "discrete and insular minority" deserving special judicial protection.[4] In his penultimate term, he stood alone in protesting the forced return of Haitian refugees.[5] As an appeals court judge in 1968, he outlawed the use of the strap in prisons as offensive to "decency and human dignity."[6] In his last months as an active Justice, he echoed that thought when he vowed "no longer [to] tinker with the machinery of death" in capital cases.[7]

Even so, there can be little doubt that Blackmun changed.

Few would mistake the cautious novice who partly based *Roe v. Wade* on the rights of doctors with the decisive man who recalls that case as a necessary step "down the road toward the full emancipation of women."[8] The Blackmun who stubbornly upheld filing fees for bankrupts[9] looks little like the passionate dissenter who supported "Poor Joshua," an abused child, against an indifferent state welfare agency.[10]

What transformed the "Minnesota Twin" into the conscience of the Court? When Justice Blackmun came to Washington in 1970, he seemed the classic insider. A professional lifetime spent at Harvard College and Law School, the elite Dorsey law firm of Minneapolis, the Mayo Clinic, and the Eighth Circuit imbued him with an idealistic, almost naive, faith in governmental institutions and professionals. Dismissed as a "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs,"[11] he seemed likely to defer to governmental authority and to lose touch with common problems.

But Blackmun took his job seriously and did his own work. The Court's sprawling docket exposed him to a broader and more brutal slice of life than he had ever known. The relentless cascade of arguments, briefs, prisoner petitions, death sentences and daily mail—all of which he read—painted a less tranquil picture: an America of antagonistic classes, racial conflict, governmental errors, and intense personal suffering. From the Court, he wrote, "[o]ne sees what people . . . are litigating about . . . . One gets a sense of their desires and their frustrations, of their hopes

and their disappointments, of their profound personal concerns, and of what they regard as important and as crucial. . . . We see . . . a constant, seething, economic, domestic, and ethical struggle."[12]

Cases like *Roe v. Wade*[13] and *Furman v. Georgia* subjected him to "an excruciating agony of the spirit."[14] *Roe*, in particular, earned him steadfast admiration and vicious harassment. "Think of any name," he once recalled, "I've been called it . . .: Butcher of Dachau, murderer, Pontius Pilate, Adolph Hitler."[15] In public places, he was picketed and embraced, threatened and celebrated, and once literally fired upon, while sitting with his wife in his own living room. That searing experience taught him that Justices must take sides, and bear the consequences. He began to realize that all social institutions are not equally responsible, and that in the face of institutional abuse, judicial deference can amount to abdication. He began to take a second look.

Paradoxically, by donning High Court robes, Justice Blackmun became *less* isolated from the everyday world and more aware of the human faces behind the cases. "There is another world 'out there,'" he wrote in the 1977 abortion funding cases, that the Court "either chooses to ignore or fears to recognize."[16] Defying advice, he declared that "compassion need not be exiled from the province of judging."[17] The insider came to defend outsiders. Duty made a shy man bold. The conservative follower became a liberal leader. Most touching, to protect a zone of privacy for others, he sacrificed his own.

Detractors call Justice Blackmun undisciplined—too willing to subordinate law to his feelings. But it was precisely his discipline, his extraordinary work ethic, that enabled him to harness his compassion, humility, real-world sensitivity and open-mindedness to the service of the law.

When Justice Blackmun stepped down, he had broken new ground in many areas: commercial speech, state taxation,[18] public trials,[19] immigration and international law,[20] the First Amendment,[21] federalism,[22] separation of powers,[23] capital punishment,[24] law and medicine,[25] the right to privacy[26] and other areas of individual rights.[27] But what he will be remembered for most is his human face, his determination to keep compassion in the province of judging.[28] That compassion led him to give his voice to the concerns of the powerless, the outsiders, the dispossessed. That humanness won him a place in the hearts of ordinary Americans.

To a degree unmatched by other nations, our constitutional system entrusts the job of adapting the Constitution to changing times to unelected federal judges. A single Justice wields not only *de facto* power to amend the Constitution, but also the literal power of life and death. We must entrust this power cautiously, not to closed-minded judges who make up their minds once and for all, but to those with the humility to "recognize now and forever that there is no room in the law for arrogance."[29] "Judgment, judgment, judgment," Blackmun once wrote, "It grows by experience and it grows by learning."[30] Justice Blackmun will be remembered as a judge without arrogance, who grew by experience and grew by learning.

"[I]n law," he once said ". . . there is constant movement. We should be aware of this, anticipate it, and not resent it."[31] Starting at age sixty-one, after three prior careers in the law, he practiced what he preached. During his nearly quarter-century on the Court, this man not only changed, but grew, in influence, sensitivity, and historical stature. How many of us have the capacity—or the courage—to do the same?

Endnotes

[1] ***Hearing Before the Committee on the Judiciary, United States Senate on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States***, 91st Cong., 2d Sess., 43 (1970) (statement of Judge Blackmun) [hereafter ***Confirmation Hearing***].

[2] "Statements by Blackmun and Clinton on Retiring," ***N.Y. Times***, April 7, 1994 at A24 (remarks of President Bill Clinton).

[3] ***Confirmation Hearing***, *supra* note 1, at 37.

[4] *Graham v. Richardson*, 403 U.S. 365 (1971). For a lengthier discussion of *Graham* and its progeny, see Koh, "Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens, "8 ***Hamline L. Rev.*** 51 (1985).

[5] *Sale v. Haitian Centers Council*, 113 S.Ct. 2549 (1993).

[6] *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968)(Blackmun, J.)

[7] *Callins v. Collins*, 114 S.Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari).

[8] "Statements by Blackmun and Clinton on Retiring," ***N.Y. Times***, April 7, 1994 at A24 ("I think [*Roe*] was right in 1973, and I think it was right today. I think it's a step that had to be taken as we go down the road toward the full emancipation of women."). I have elsewhere traced the evolution of Justice Blackmun's thinking in the medical privacy cases. *See* Koh, "Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine," 13 ***Am. J. Law & Med.*** 315

(1987).

[9]*United States v. Kras*, 409 U.S. 434 (1973).

[10]*DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

[11]Waltz, "The Burger/Blackmun Court," ***N.Y. Times***, Dec. 6, 1970, § 6 (Magazine), at 61.

[12]Blackmun, "Remarks at the Commencement Exercises of Mayo Medical School," 55 ***Mayo Clinic Proc.*** 573, 573-74 (1980).

[13]410 U.S. 113 (1973).

[14]*Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

[15]John Jenkins, "A Candid Talk With Justice Blackmun," ***N.Y. Times***, Feb 20, 1983, at § 6 (Magazine), 20, 26 (quoting Justice Blackmun).

[16]*Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

[17]*DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

[18]*See* Karen Nelson Moore, "Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples," 8 ***Hamline L. Rev.*** 29 (1985).

[19]*See* William A. McDaniel, Jr., "Public Trials," 8 ***Hamline L. Rev.*** 127 (1985).

[20]*See* Koh, *supra* note 4; Koh, "Justice Blackmun and the 'World Out There,'" 104 ***Yale L.J.*** 23 (1994) (discussing Justice Blackmun's contributions to international law).

[21]*See* Moore, *supra* note 18; Randall P. Bezanson, "Fault, Falsity and Reputation in Public Defamation Law: An Essay on *Bose Corporation v. Consumers Union*," 8 ***Hamline L. Rev.*** 105 (1985); Mark C. Rahdert, "Preserving the Archives of Freedom: Justice Blackmun and First Amendment Protections for Libraries," 97 ***Dick. L. Rev.*** 437 (1993).

[22]*See* Dan T. Coenen, "Justice Blackmun, Federalism and Separation of Powers," 97 ***Dick. L. Rev.*** 541 (1993); Karen Nelson Moore, "Justice Blackmun and Preclusion in the State-Federal Context, "97 ***Dick. L. Rev.*** 465 (1993); Joseph Kobylka, "The Court, Justice Blackmun, and Federalism: A Subtle Movement with Potentially Great Ramifications," 19 ***Creighton L. Rev.*** 9 (1985).

[23]*See* Coenen, *supra* note 22.

[24]*See* Lynn E. Blais, "Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas and Justice Blackmun's Capital Punishment Jurisprudence, "97 ***Dick. L. Rev.*** 513 (1993).

[25]*See* Koh, *supra* note 8; Alan Stone, "Justice Blackmun: A Survey of His Decisions in Psychiatry and Law," 13 ***Am. J. L. & Med.*** 291 (1987).

[26]*See* Randall P. Bezanson, "Emancipation as Freedom in *Roe v. Wade*," 97 ***Dick. L. Rev.*** 485 (1993).

[27]*See* Diane P. Wood, "Justice Blackmun and Individual Rights, "97 ***Dick. L. Rev.*** 421 (1993).

[28]*See* Koh, *supra* note 4; Pamela S. Karlan, "Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders, 97 ***Dick. L. Rev.*** 527 (1993).

[29]Pressman, "Blackmun Calls for Faith During Tumultuous Times," ***L.A. Daily J.***, Jan. 29, 1980, at 1 col. 6 & 9 (quoting Blackmun, J.).

[30]Blackmun, "Some Goals for Legal Education," 1 ***Ohio N.L. Rev.*** 403, 408 (1974).

[31]Blackmun, "Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases," 43 F.R.D. 343, 359 (1967).

Writing Supreme Court Biography:
A Single Lens View Of A Nine-Sided Image

Stephen J. Wermiel

"Is yours a judicial biography?" people inquire about my biography-in-progress of U.S. Supreme Court Justice William J. Brennan, Jr. There is a strange aura about "judicial biography"—a mix of curiosity and awe that is more often reserved for sightings of rare birds or triple plays. For reasons I may never fully understand, much of the mystery quickly fades when I respond that my hope is to cover Justice Brennan's entire life, not merely his seven years as a judge in New Jersey and his thirty-four years as a Justice on the Supreme Court of the United States.

Chief Justice William Rehnquist warmly greeted Justice and Mrs. William J. Brennan, Jr., at the unveiling ceremony of Justice Brennan's portrait.

There have been myriad reactions during the eight years that I have worked part-time on the authorized biography of Justice Brennan. Some have barely been able to disguise their feelings. "I hope you aren't going to write a hagiography," said Harvard Law School Professor Charles Fried when informed of my project during his tenure as Solicitor General of the United States. Others, although no less disparaging than Fried of Justice Brennan's constitutional view, have seemed more gracious; Chief Justice William Rehnquist on one occasion threw an arm around my shoulder and another around Justice Brennan's and remarked, "If it isn't Boswell and his subject."

Most inquirers have simply been fascinated by the process of writing a biography of a Supreme Court Justice and by the difficulties and problems that one encounters. That pro-

Chief Justice Earl Warren often lunched at Milton Kronheim's luncheon club and was joined by other Justices including William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall. Justice Brennan's influence on and close relationship with Chief Justice Warren afforded Brennan many opportunities to influence events in a way beyond his standing as one of nine Justices.

cess is the subject of this essay.

Staying In Focus

One of the most difficult problems in writing Supreme Court biography is deciding what the focus of the book will be and keeping it constant. Is the biography to be simply an account of a particular era in Supreme Court history, or is it to be something more? What makes it biography, not simply Supreme Court history?

The answers to these questions may seem self-evident, but their resolution is not always handled with success or dispatch. It is not uncommon to find biographers in other fields very much absorbed with a broader picture than the life they are chronicling. David McCullough, author of ***Truman***,[1] explained his goal, "I'm trying to look deeper into the heart of America by looking into the life and times of this one man."[2]

Supreme Court biographers, however, have sometimes been accused of looking too deeply into the heart of the Court. Reviewers criticized Professor Bernard Schwartz and his massive volume, ***Super Chief,***[3] for offering too much detail about the Court under Chief Justice Earl Warren, and too little insight into Warren as a Justice and leader. Among the many reviews was one by Judge Ruggero Aldisert of the U.S. Court of Appeals for the Third Circuit, who wrote:

> A biography is a history of an individual's life told by another, and both the book's title and size suggest a detailed examination of Warren's life as Chief Justice. But after you work through the pages, you realize that this book does not qualify as an account of Warren's

> life. . . Rather, what emerges from the author's prodigious research is only a summary: a summary of court calendars that strains the reader's attention as much as studying an outdated railroad timetable . . . the book's most glaring disappointment is its failure to inquire into how Warren functioned as a judge: how he decided cases.[4]

Professor John Jeffries has addressed this concern in the preface to his new biography of Justice Lewis Powell.[5] While Jeffries, like Schwartz, provides extensive narrative of the behind-the-scenes evolution of important cases, he explains that "the decisions in these areas are especially revealing of the individual beneath the judicial robes. Here the link between private man and public figure can be clearly seen, and the surprising impact of one Supreme Court Justice on the nation's history can be correctly gauged."[6] Jeffries' use of detailed give-and-take among the Justices is more focused on the points he seeks to make about Justice Powell.

I have followed a path closer to Jeffries than to Schwartz, trying never to lose sight of the goal of elucidating Justice Brennan and his contribution to modern American constitutional and statutory law. If I am interested, as of course I am, in the impact of the Court under Chief Justice Warren on the country and on different facets of law, it is because of the role Justice Brennan played in shaping history, not because of a general desire to explicate the significance of the Warren Court.

Take, for example, *Cooper v. Aaron*,[7] the Little Rock, Ark., schools case. The details are of great interest to me, not so much for the history of desegregation, but because Chief Justice Warren relied on Justice Brennan to write most of the Court's *per curiam* decision. I find this reliance extraordinary when one considers the importance of the case and that Justice Brennan had been on the Court for only two years. Looking at the evolution of this decision sheds light on the very close relationship that developed between Warren and Brennan and that afforded Brennan countless significant opportunities to influence events and shape decisions far beyond his own standing as one of nine Justices.

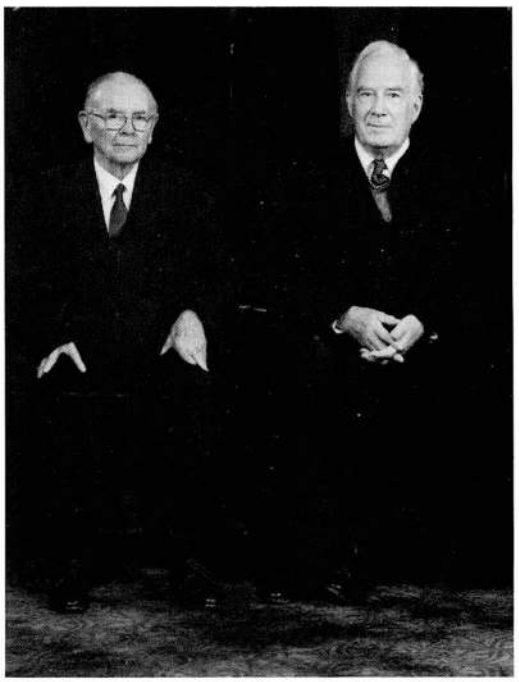
Mythology In a Nonagon

Any biography of a Supreme Court Justice faces the difficult problem of accurately assessing that individual's influence over eight others. In writing about Justice Brennan, that problem may be more acute than with others, since a major part of the story is his uncanny ability not only to get and hold his own Court majorities, spanning thirty-four years, but also to influence decisions that appear under the authorship of other Justices.

This task has been made more difficult by the mythology about Justice Brennan, which exceeds even his prodigious reputation for influence on the bench. Ever since the publication of ***The Brethren***,[8] there has been an image extant of Justice Brennan as the Tip O'Neill[9] of the Supreme Court—the jaunty, happy Irishman roaming the corridors, slapping colleagues on the back and asking for their vote. This image is perpetuated by the network of law clerks, many of whom recall Justice Brennan waiting in the halls to walk to the Court's weekly, closed-door conferences arm-in-arm with Justice Powell, Justice Harry Blackmun or others with whom he sat.

This mythology, perhaps more than any other factor, has shaped the reaction of people when I tell them about my biography. Typically, people say the book must be easy and fun because Justice Brennan has so many wonderful stories to tell.

It is true that Justice Brennan is an extraordinarily warm and friendly man who has the uncommon ability of making every person he meets feel like his best friend. There the confluence of reality and mythology stops. He is not a wonderful storyteller, certainly not in the style of Justice Thurgood Marshall, or of Tip O'Neill. He has no shortage of stories to tell, but he does not proffer them with the ease and lack of prompting that the myth suggests. While Justice Brennan has been remarkably generous and patient with me with his time, his enthusiastic support, access to his records and files and introductions to others who may be able to help, I have had to extract details of



Chief Justice Warren Burger served with Justice William J. Brennan, Jr., for seventeen years and for eleven of those years Brennan was the senior Associate Justice. Chief Justice Burger has called Brennan one of the most persuasive individuals he had met and suggested he could sell refrigerators to Eskimos in Alaska.

his life with the same persistence that marks most historical research.

I have concluded that the same problems exist in the mythical image of his power and influence. I do not mean to suggest that his influence and success were any less immense and impressive than the myth, but simply to take issue with the means. Justice Brennan's ability to forge majorities and to effect the outcome of cases came not from cajoling other votes like a congressional whip. It came, substantively, from a consistency of constitutional vision that, over a very long period, attracted others, and, pragmatically, from an unusual receptivity to suggestions from other Justices for changes in opinions, especially when those changes left the bottom line unaltered.

Like his colleagues, and contrary to the mythology, Justice Brennan did most of this accommodation in written exchange of memoranda with other Justices and far less of it in face-to-face conversation.

How, then, do I assess Justice Brennan's impact? The answer is with great care and caution. It would be easy to make sweeping generalizations about how he provided the legal know-how for Chief Justice Warren, won over Justice Blackmun, and swayed Justice Powell. But all such relationships are far more complex, and observations about Justice Brennan's contacts with others on the Court hold meaning only to the extent that his influence can be documented.

Finding this documentation is difficult. Occasionally, a Justice's case file will include a letter to the author of an opinion, saying, "I voted the other way at Conference, but your fine opinion has persuaded me." These overt references to the influence of one Justice on another are rare. The notes that the Justices take at Conference are often subjective and unreliable. Justice Brennan's notes often record next to Justice Thurgood Marshall's name that he "agreed with me." It is a big leap to conclude from that kind of notation that Justice Brennan had a major influence on Justice Marshall.

Personal interviews are only marginally more helpful, since few Justices have the humility that would be required to admit that their constitutional view was attributable to another, even if that were clearly the case. In my interviews with Justices Powell and Blackmun, neither would concede much influence from Justice Brennan, although conventional wisdom would argue that he left his mark on both men. Retired Chief Justice Warren Burger, in contrast, remarked that Justice Brennan was one of the most persuasive individuals he had ever encountered and suggested that Justice Brennan might be able to sell refrigerators to Eskimos in Alaska.

This issue of influence in a nine-person body is seen most clearly in the Court's 5-4 decisions. Is there a play maker who should be credited with forging this delicate majority, or does the real influence rest with the swing or fifth vote? Jeffries and I will differ in our accounts of some cases. He credits Justice Powell, who was very often the pivotal fifth vote in the late 1970s to mid-1980s and says Justice Powell influenced the outcomes of cases because of the fragile nature of his vote. I will argue, instead, that it was Justice Brennan

who jumped through hoops to get and keep the majority in some of the same cases.

Tapping the Sources

I have spent substantial amounts of time agonizing over what may be considered legitimate and reliable sources of information for a biography of a contemporary Supreme Court Justice. Some of the more obvious sources of the great biographies of the past do not exist in this instance. It appears, for example, that the era of legendary letter writers is long past. Justice Brennan's files have no contemporaneous collection of letters to rival those of Justice Felix Frankfurter, who bared his innermost soul, and his most petty jealousies, in prolific correspondence with dozens of friends. There are letters in Justice Brennan's files, but their insights are generally more mundane.

Justice Brennan's files do contain a remarkable resource, however, one seemingly unparalleled in Supreme Court history. Each summer, for about thirty of his thirty-four years on the Supreme Court, Justice Brennan had his law clerks prepare a narrative, printed account of the behind-the-scenes discussions and exchanges among the Justices in the major cases of the Court Term. Some of them read like a dry play-by-play for a tedious sporting event, but some of them convey the genuine suspense of good mystery novels.

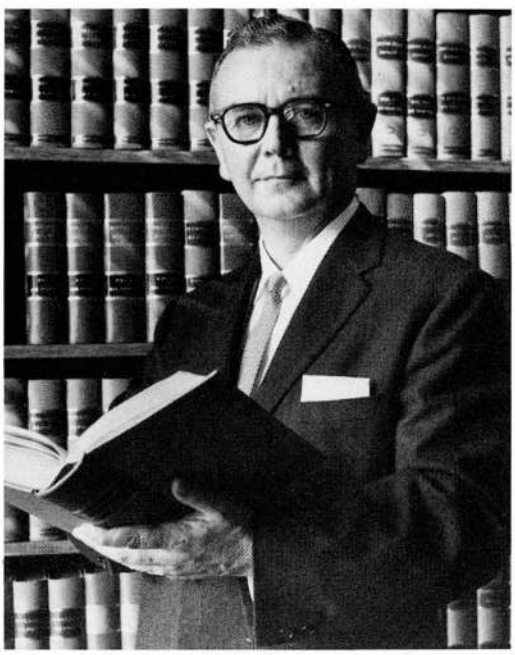
What use should I make of these "case histories," as they are called? Isn't it obvious, one might say, that these are an unsurpassed treasure to be used liberally throughout the biography? The answer is not so obvious. The histories are a wealth of anecdotes, of documentation of dates of face-to-face meetings, and of other details.

However, they are also replete with what must be at best gossip along the clerks' network. A case description might recount how Justice Brennan learned from his law clerk assigned to a case that Justice John Paul Stevens' law clerk had heard from Justice Byron White's law clerk that Justice White was thinking about writing a separate concurring opinion. In my judgment, neither history nor biography is served by passing on such unreliable detail. Where Justice Brennan or his law clerk was a direct participant in the event being described, clearly the reliability of the remembrance is far more trustworthy. But even some of the hearsay serves a useful purpose; it provides good insight into how the world looked to Justice Brennan and his clerks, a valuable perspective for a biography.

What of former law clerks as sources? It has become fashionable in the last decade to criticize the reliability of law clerks as sources. In his review of ***Super Chief***, [10] Professor Eugene Gressman, the expert on Supreme Court practice, criticized Schwartz for his reliance on law clerk memories:

> At most, a law clerk can observe the whole of the collegial process only through the eyes and mouth of the one Justice for whom he works; what the Justice does not tell him, or what he is not otherwise privy to, the clerk knoweth not. The law clerk, in short, is not a very reliable witness to decisional motivations of the Justices.[11]

For intimate observation of a Justice, in-



Justice William J. Brennan, Jr., in his Supreme Court chambers, shortly after joining the Court. Fabled for his memory, Justice Brennan could pull down the U.S. Reports and open them to the case discussed only a moment earlier.

stead of demonstrative evidence of a Justice's influence, the law clerks are a valuable resource. I have interviewed all but four of the more than 105 law clerks who worked for Justice Brennan on the U.S. Supreme Court. I reject the common admonition that the law clerks are a poor source because they think they are more important than they really were. I do not find it that difficult to sort through the very useful interviews and to make some threshold decision about when the topics being discussed are beyond the clerk's memory or expertise.

For me, there has been no greater resource than Justice Brennan himself. I have tape-recorded and transcribed sixty-six hours of interviews with Justice Brennan, and have spent hundreds more hours watching him with others, listening and learning. I have seen for myself the fabled memory—the way he could swivel in his desk chair to face the bookcase behind him, reach up for the correct volume of U.S. Reports, and open to the case we had just mentioned. He allowed me on several occasions to sit in for his ritualistic "morning coffee" with his law clerks, the informal daily get-together to talk over the events of the Court and of the world. He allowed me to observe some of his preparation sessions for oral argument—a lengthy review with his law clerks of the issues and arguments in the cases to be argued in an upcoming two-week argument session. Sometimes in these meetings he would express a tentative position, and he and the clerk assigned to the case would contemplate how other Justices might see the issues. All of these opportunities provided additional dimensions of the picture I am trying to paint.

William J. Brennan, Sr., was a labor leader in Newark, New Jersey and later became the Director of Police and Public Safety there.

Court Papers

The most extensive resource is the papers of the Justices, a controversial source after the furor created by the ***Washington Post's*** series on the papers of Justice Marshall.[12] I have examined all or parts of the papers of eleven Justices, some held by the Manuscript Division of the Library of Congress, others held by university and law school libraries scattered around the country.

Typically, a Justice's papers include different kinds of files. First, there are case files which contain drafts of opinions and copies of correspondence circulated among the nine chambers. It is possible through these files to trace some of the evolution of a decision to its final form, looking at changes from one draft to the next and examining the requests for alterations by other Justices. Second, there are conference notes, in which each Justice records the initial comments made about a case by the other members of the Court.

I have found the case files particularly useful. Justice Brennan was a very active player in the process of sending memos to other Justices suggesting minor changes or major modifications in their draft opinions. The case files enable me to try to document when and how he made a difference, and how he worked with others or others with him. The conference notes are of more questionable utility to me. They do not purport to be a verbatim account of what other Justices said, regardless of which Justice's papers you use. Inevitably, I am seeing what Justice Brennan thought others said at conference, or what others

thought he said. Neither situation is as reliable as the paper trail of case files.

Some Justices' papers also include correspondence files, and these can be helpful. Justice Brennan's correspondence has not yet been turned over to the Library of Congress, where his case files are. The more than a dozen file drawers filled with correspondence provide a variety of useful detail about a man's life. There are letters from people who say they remember him as a boy or a young man growing up in Newark. I have tried to follow up on many of those leads to piece together his early years. There are other letters talking about places, events, visits, activities, mutual acquaintances, speeches, cases and the other pieces of a puzzle. To the extent that a biographer is a detective, these are my clues.

The Thrill of Discovery

Following these leads, using these clues may take countless hours of patience and persistence. Sometimes it ends in frustration, but often there are rewards. Recently, at the Newark Public Library I came across a previously unavailable treasure trove of information about Justice Brennan's father, William J. Brennan, Sr., a labor leader and later police and public safety commissioner in Newark in the 1920s. Some years ago, I tracked down a former classmate and rooming housemate of Justice Brennan's in the Harvard Law School Class of 1931 and found that he had kept a diary of some of their mutual activities. Recently, I also located a research paper about Justice Brennan's path to the Supreme Court written in 1958 by a young Yale Law School student; the student had interviewed a number of people who died long before I began work on the biography.

Not all of the detective work is successful. On more than one occasion, I have picked up the ***New York Times*** obituary section and read about someone whose whereabouts I had just discovered the day before or whose importance as a potential interview subject I had just come to understand.

Then there was my follow-up on a letter to Justice Brennan from a woman in her eighties who said he might not remember her but they had danced together at the Barringer High School prom about two-thirds of a century earlier. I called her to see what she could tell me about that debonair high school senior, William J. Brennan, Jr. But, perhaps influenced by the trend in modern biography, she took my call as a muckraking mission, insisted that they had been good kids who did not get into any trouble, and hung up.

Some discoveries have happened by accident. One day I decided to take a break while working in the papers of Justice John Marshall Harlan II at the Seeley Mudd Library at Princeton University. For a diversion, I decided to see what other collections of papers were available. While browsing through the lists and catalogues, I came across the papers of former ***New York Times*** columnist Arthur Krock. Being a former Supreme Court correspondent for the ***Wall Street Journal***, myself, I thought Krock's papers might be interesting.

One of my favorite pastimes while working on the biography has been to see if I could find any evidence that President Eisenhower, who appointed Justice Brennan in 1956, had later said of Justice Brennan and Chief Justice Warren, "My two worst mistakes are both sitting on the Supreme Court." This quote has been attributed to Eisenhower thousands of times, but never with any source or documentation. At Princeton, in the Arthur Krock papers, I stumbled across a memo the columnist had written to himself after meeting with Eisenhower at the White House in 1960. Krock wrote, "It was clear that the President has been disappointed in the far Leftist trend of Chief Justice Warren, and has been equally astounded at the conformity to this of Justice Brennan." I was thrilled at this discovery.

Some searches have proved futile. I was convinced for the longest time that if I kept looking, I would be able to pinpoint the precise moment at which Justice Brennan's name was first suggested for the U.S. Supreme Court, and by whom. After years of searching, I have given up that quest. The Deputy Attorney General in 1956, William P. Rogers,[13] insists that he suggested Justice Brennan's name to Attorney General Herbert Brownell, and there appears to be no written record to prove it or to

show when or how it happened.

Capturing the Justice

The most difficult task for a Supreme Court biographer is, without question, trying to capture the legal essence of the Justice and trying to determine its roots and origins. Professor Philip Kurland has chided:

> Although the biography of a judge ought to concern ideas rather than deeds, intellectual biography is a difficult literary form to manage well. Ideas are fleeting and difficult to capture, however well documented in legal opinions they may seem. And few judicial biographers successfully elucidate the ideological foundations of their subjects' actions.[14]

Some would say the legal essence of Justice Brennan cannot be captured because he had no jurisprudential philosophy during his Supreme Court tenure. Justice Brennan might even agree that he cannot be conveniently pigeonholed into a single school of thought or encapsulated in a word or phrase.

I have concluded that it is possible to ascribe a judicial philosophy of sorts to Justice Brennan and to trace its origins to the progressive household in which he was raised. It took me a long time to feel that this was legitimate, that I did not need to feel embarrassed because I could not describe him as a legal realist, a strict constructionist or an interpretivist or as an heir to some specific school of constitutional thought. Moreover, I could not get him to describe himself in these or other philosophical terms, and for the longest time I thought that was essential. I no longer think so.

The hallmark of Justice Brennan's judicial approach was an abiding belief that law must be dedicated to preserving the essential human dignity of every individual. This must be achieved by reading the values of compassion and fairness into the law. He believed deeply that government must be accountable to the people in court, even to the point of paying damages where necessary to correct wrongs brought about by government actions. These views, although they took decades to evolve, may be traced in part to Justice Brennan's childhood and to a father who had a progressive, populist view of the role of government. Indeed, the senior Brennan became involved in government only because he believed it was meeting the needs of big business and the wealthy while ignoring the needs of individuals, particularly workers.

Although it undoubtedly follows from the same tradition, it is more difficult to trace the origins of Justice Brennan's view of constitutional interpretation. He described this view best in a 1986 speech at Georgetown University Law School, where he said, "[We] current Justices read the Constitution in the only way we can: as twentieth-century Americans. . . the ultimate question must be, what do the words of the text mean in our time."[15]

Justice Brennan adhered consistently to the approach that the words of the Constitution must be continually adapted to the meaning and understanding of our time, not locked in a literal interpretation of the meaning of those phrases for 1787 when the Constitution was drafted or 1789 when the Bill of Rights was proposed. It has been difficult to find specific influences or contributing factors for this view, and Justice Brennan can shed little light on this question, himself. He has said that his constitutional approach is simply his own, one that has evolved from his own experiences. I have tried to trace it to any influence at Harvard Law School, in law practice or on the New Jersey bench. No such roots appear on the radar screen.

Having felt the thrill of discovery and the excitement of history, I am still searching.

Confronting Other Judgments

There are other issues to be decided. For some reason, it seems obvious that well-versed readers of biographies of Presidents of the United States, Speakers of the House or captains of industry will want to read every detail, every facet of the early lives of their subjects. It is less obvious that readers are interested in the same degree of detail about Supreme Court

Justices, in part because many Justices are less visible as public figures before or during their tenure on the Court or in some instances are virtually unknown to the public.

I have chosen a full-length biography of Justice Brennan because he is something of an enigma to many people. Americans are somewhat familiar with Justice Brennan's very liberal record on the Court, and perhaps with the debate over whether the Warren and Burger Courts were appropriately protective or overly protective of constitutional rights and liberties. But few people know anything about Justice Brennan's background, origins and activities and views before 1956. The few that may have heard something about him include those who think he was a conservative who became liberal once on the High Court, explaining Eisenhower's oft-quoted surprise at how Justice Brennan developed.

My premise is that a full-length biography, not simply a judicial one, is necessary to explain that the Justice Brennan of the Supreme Court was really the same man who was known to his friends in New Jersey as a liberal and progressive lawyer and judge, who cared deeply even in the 1940s and early 1950s about fairness and justice.

There is the question of how much detail to include about Justice Brennan's life off the bench, both before and during his tenure on the Supreme Court. The answer is that a certain amount of that detail is essential to capturing the man and the influences on his life. With Supreme Court Justices, I think, since they are often so insulated from the rest of the world, it is particularly interesting to have a sense of what they saw and how the world appeared to them. It is insightful to explore Justice Brennan's relationship to the Catholic Church hierarchy in Washington, D.C., during and after the 1960s school prayer cases which prohibited state-written or compelled prayer in public schools.[16] It is useful to think about the time Justice Brennan spent with liberal, progressive friends like Judges David Bazelon and Skelly Wright of the U.S. Court of Appeals for the District of Columbia and with other friends during nearly two decades of living in Georgetown.

There is also the question of a chronological biography versus a thematic approach, or a combination of both as Professor Jeffries has employed in his Powell biography.[17] I have opted for chronology for a simple and very unprofound reason: it is easier.

Conclusion

Supreme Court biography presents myriad problems and challenges, many of them unique to this form of biography. In the end, while one aspires to capture the life of a subject, one cannot help nor should one avoid capturing the life of the Court as well. The standards in the field are high, and the stakes no less so. The high expectations were recently described with eloquence by Judge John Noonan of the U.S. Court of Appeals for the Ninth Circuit in praise of Professor Gerald Gunther's new biography of Judge Learned Hand.[18] Judge Noonan wrote, "To write good judicial biography requires a lawyer's grasp of the law, a historian's exactness and circumspection, and a biographer's empathy and balance."[19]

Endnotes

[1] David McCullough, ***Truman*** (New York, 1992).

[2] David McCullough, "The Unexpected Harry Truman," in William Zinsser, editor, ***Extraordinary Lives: The Art and Craft of American Biography***, (New York, 1986).

[3] Bernard Schwartz, ***Super Chief: Earl Warren and His Supreme Court-A Judicial Biography*** (New York, 1983).

[4] Ruggero J. Aldisert, "Book Review of Super Chief: Earl Warren and His Supreme Court A Judicial Biography," 72 ***Calif. L. Rev.*** 275, 276 (1984).

[5] John C. Jeffries, Jr., ***Justice Lewis F. Powell, Jr.*** (New York, 1994).

[6] *Id., xi-xii.*

[7] 358 U.S. 1 (1958).

[8] Bob Woodward and Scott Armstong, ***The Brethern*** (New York, 1979).

[9] Thomas P. O'Neill, Jr. was a Democratic congressman from Cambridge, Massachusetts who served as Majority Leader in the 1970s and Speaker of the House of Representatives from 1977-1987. He was renowned as a storyteller, political dealmaker and cajoler of votes, the epitome of a disappearing breed of Irish politician.

[10] Note 3, *supra.*

[11] Eugene Gressman, "Book Review Super Chief: Earl Warren and His Supreme Court," 52 ***Fordham L. Rev.*** 711, 714 (1984).

[12] In February 1993, after Justice Marshall's death, the Library of Congress opened his papers to researchers, according to the terms of his letter donating the papers. Within a few months, the ***Washington Post*** learned of the avail-

ability of the Marshall papers and sent a team of reporters to prepare a lengthy series on major cases that were chronicled in the papers. This brought an outcry from Chief Justice Rehnquist, members of Justice Marshall's family, and some others in the Supreme Court community that the papers should have been kept confidential for a longer period. The Library maintained that it was bound by the terms of Justice Marshall's gift letter and that he had been aware during his lifetime that the papers would be opened upon his death.

[13] William P. Rogers later became Attorney General in the Eisenhower Administration and Secretary of State in the Nixon Administration.

[14] Philip B. Kurland, "Book Review Earl Warren: Master of the Revels," 96 ***Harv. L. Rev.*** 331 (1982), reviewing G. Edward White, ***Earl Warren: A Public Life*** (New York, 1982).

[15] This speech has been reprinted in a number of law reviews. One version is: Justice William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," 27 ***S. Tex. L. J.*** 433 (1986).

[16] *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963). Justice Brennan set out his own views in a lengthy concurring opinion in *Schempp* at 374 U.S. 230.

[17] Note 5, *supra.*

[18] Gerald Gunther, ***Learned Hand: The Man and the Judge*** (New York, 1994).

[19] John T. Noonan, Jr., "Master of Restraint," ***New York Times*** May 1, 1994, Sec. 7, p. 7, at 9.

Freedom of Speech, 1919 and 1994:
Justice Holmes After Seventy-Five Years

Richard Polenberg

Something about Oliver Wendell Holmes, Jr., led acquaintances to speak about him with an awe bordering on reverence. Walter Lippmann called him "a sage with the bearing of a cavalier. . . . He wears wisdom like a gorgeous plume."[1] Learned Hand referred to Holmes as "the premier knight of his time." Benjamin Cardozo, who was named to Holmes' seat on the Supreme Court in 1932, termed his predecessor "the great overlord of the law and its philosophy." Felix Frankfurter, who eventually replaced Cardozo, once said, "to quote from Mr. Justice Holmes' opinions is to string pearls." Another devoted admirer, Dean Acheson, recalled: "His presence entered a room with him as a pervading force; and left with him, too, like a strong light put out."[2]

Even now, sixty years after his death, Holmes remains a fascinating figure, the most written-about of all Supreme Court Justices. Since 1989 there have been four major biographies of Holmes (by Gary J. Aichele, Sheldon Novick, Liva Baker, and G. Edward White), two full-length studies of his views on free speech (by Jeremy Cohen and H.L. Pohlman), an important book of essays on his legacy (edited by Robert W. Gordon), and a collection of his writings with an introduction (by Richard Posner), not to mention dozens of law review articles and discussions in general works, such as the chapter on "The Place of Justice Holmes in American Legal Thought" in ***The Transformation of American Law, 1870-1960*** by Morton J. Horwitz.[3]

The recent interest in Holmes is largely a product of the opening of his private papers for research. When Holmes died in 1935, Felix Frankfurter, then a professor at Harvard Law

Justice Oliver Wendell Holmes, Jr., has been the subject of seven major books on his life and judicial opinions since 1989—more than one hundred fifty years after his birth.

School, was given exclusive control of Holmes' correspondence so he could write the authorized biography. After his appointment to the Supreme Court in 1939, Frankfurter turned the task and the correspondence over to Mark DeWolfe Howe, a former student who had clerked for Holmes. Howe died in 1967 having published two volumes of a biography which carried Holmes only to the age of forty. So Holmes' new literary executor, Harvard law professor Paul Freund, selected Grant Gilmore of Yale Law School to complete the authorized biography and transferred the correspondence to him. Gilmore died in 1982 without having written more of the work. In 1985 Harvard Law School finally opened Holmes' papers to general research; soon, a complete seventy-two reel microfilm edition appeared, available to any library or scholar.

The resulting scholarly literature has only whetted the reading public's appetite, especially for information about Holmes' most distinctive contribution on the Supreme Court, his two landmark decisions regarding freedom of speech: *Schenck v. United States*, decided in March 1919, in which Holmes, writing for a unanimous Court, first proposed the "clear and present danger" standard; and *Abrams v. United States*, handed down in November 1919, in which Holmes (and Louis D. Brandeis) dissented from a decision upholding a conviction under the wartime Sedition Act on the grounds that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

After three quarters of a century, Holmes' views remain at the core of First Amendment jurisprudence, and remain, therefore, highly controversial. His *Abrams* dissent is commonly cited by those who wish to defend freedom of speech. In 1988, for example, the Supreme Court unanimously rejected Reverend Jerry Falwell's contention that the publication of an offensive cartoon in ***Hustler*** magazine entitled him to damages for the intentional infliction of emotional distress; Chief Justice William Rehnquist's opinion quoted Holmes' belief in "free trade in ideas" and in the need for government neutrality in the "market place of ideas."[4] On the other hand, those who favor a more restrictive policy take direct aim at Holmes' formulation. Among the sharpest critics are feminists who wish to make pornography illegal, critical race theorists who wish to outlaw hate speech, and legal scholars who find the marketplace analogy deeply flawed.

In what follows I will examine the way Holmes' view of free speech changed between *Schenck* and *Abrams*, suggest possible reasons for the change, and explain why Holmes' revised position has remained compelling despite its shortcomings. I will also indicate how modern-day critics of traditional free speech jurisprudence have reacted to the views Holmes expressed in 1919 and why a rejection of those views is central to the more restrictive approach they favor in the 1990s.

Holmes proposed the clear and present danger test in *Schenck v. United States*, a case, ironically, in which the facts pointed to a danger that was merely vague and remote. In August 1917, four months after the United States entered World War I, the Socialist Party of Philadelphia mailed a leaflet opposing conscription to men whose names were listed in the newspapers as having passed their draft board physical examinations. The leaflet, printed on both sides, said that conscription was a repudiation of the freedom guaranteed by the Constitution and represented "tyrannical power in its worst form." The party's general secretary, Charles T. Schenck and four other members—Dr. Elizabeth Baer, William J. Higgins, Charles Sehl, and Jacob H. Root—were arrested and charged with conspiring to "obstruct the recruiting and enlistment services of the United States" in violation of the Espionage Act of 1917. The trial was held in December 1917. The judge, J. Whitaker Thompson, directed the jury to acquit Higgins, Sehl, and Root for lack of evidence. Schenck and Baer were found guilty.[5]

Holmes' opinion for a unanimous Court emphasized that the leaflets had, in fact, been selectively sent to men who were about to enter the armed forces. The Socialists must have intended the leaflet to have had an effect, he said, "and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." In peacetime such a leaflet would have constitutional protection, Holmes admitted. Then he offered his famous analogy: "But the character of

every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case 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 bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[6]

If that indeed were the question, the convictions should have been overturned. The Socialists had been distributing one side of the leaflet, entitled "LONG LIVE THE CONSTITUTION," for some time, and the authorities did not consider it exceptional. It merely called for change through the orderly processes of government. Readers were urged to support the Socialist Party's campaign for repeal of the conscription act: "Write to your congressman and tell him you want the law repealed. . . . Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party . . . and sign a petition . . . ." Even Holmes conceded that this side of the leaflet "in form at least confined itself to peaceful measures such as a petition for the repeal of the act."

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . ."

It was the other side of the leaflet, entitled "ASSERT YOUR RIGHTS!", which was new and, according to the United States Attorney, contained "an appeal to violate the provisions of the conscription law." Yet the only "appeal" in it is this: "Do not forget your right to elect officials who are opposed to conscription." For the most part, the leaflet consists of rhetorical questions designed to make conscription look bad: "Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts?" "Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent?" "Do you know that patriotism means a love for your country and not hate for others?" "Where do you stand? Are you with the forces of liberty and light or war and darkness?"[7]

As many as 15,000 copies of the leaflet may have been printed, but not all were mailed and the post office impounded many that were. According to the trial record, few inductees received the leaflet and none who did and who testified were influenced by it. The prosecution produced eleven men to whom the circulars had been addressed. Eight had never even received them but testified that the leaflets would not have led them to violate the draft law. Only three government witnesses had received the leaflets in the mail in August. Each of them had indignantly alerted law enforcement officials.

If all this were so, why did Holmes decide that the leaflets posed a clear and present danger? The answer is that he still adhered to the prevailing view that speech could be punished if it had a "bad tendency." Holmes eventually came to view clear and present danger as an alternative standard, more highly speech-protective than the bad tendency test, but this was not yet the case in March 1919. As G. Edward White explains: "Holmes treated the facts of *Schenck* as an attempt to violate the Espionage Act, analogous to an attempt at criminal law. Under the criminal-attempt analogy, speech was just another act whose legality was to be judged by the intentions of the actor and the act's tendency to bring about a legislatively prohibited evil . . . . Under orthodox analysis, then, 'intent' and 'bad tendency' both had been found." In Holmes' view of the law of criminal attempts, White concludes, "prohibitions on speech did not need to be closely tied to the imminence of success of the attempt."[8]

Further evidence that this was indeed Holmes' outlook at the time is provided by two other decisions, *Frohwerk* and *Debs* handed down on March 10, 1919, a week after *Schenck*.

Eugene V. Debs was sent to prison for delivering an anti-war speech to a Socialist Party gathering in Canton, Ohio on June 16, 1918. He was convicted of attempting to cause insubordination in the armed forces and to obstruct recruitment. He was sentenced to ten years in prison.

Jacob Frohwerk had published articles in a German-language newspaper in Missouri from July to December 1917 which denounced United States entry into the war, praised the spirit of the German people, and asked, rhetorically, whether American draftees could be blamed for following "the first impulse of nature: self-preservation." He was convicted under the Espionage Act and sentenced to ten years in prison.

Unlike Schenck, Holmes acknowledged, Frohwerk had not made "any special effort to reach men who were subject to the draft." Nevertheless, Holmes went on, "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." Although Frohwerk had explicitly condemned the use of violence, Holmes suspected that his language "might be taken to convey an innuendo of a different sort." Resorting again to the law of attempts analogy, Holmes concluded that the First Amendment did not protect "every possible use of language," since no one could suppose "that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech."[9]

In *Frohwerk* Holmes had protested, "We do not lose our right to condemn either measures or men because the Country is at war." But his decision for the Court in that case and in *Debs* suggested otherwise. Eugene V. Debs was convicted for making a speech to a Socialist Party gathering in Canton, Ohio in June 1918. As Holmes noted, "the main theme of the speech was socialism, its growth, and a prophecy of its ultimate success," but in the course of his re-

marks Debs also attacked capitalist wars, claimed that the working class bore the brunt of the casualties, and praised Socialists who had been jailed by the government. Debs was convicted of attempting to cause insubordination in the armed forces and to obstruct recruitment, and he was sentenced to ten years in prison.

Holmes based his opinion not only on the Canton speech, but also on two additional pieces of evidence he considered germane to the issue of Debs' intent: his statement to the jury which asserted, "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war;" and his support for the Socialist party platform adopted in April 1917 which called for opposition to the war. Holmes did not even mention the clear and present danger standard, but noted that the jury had been instructed not to find Debs guilty "unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind." That Holmes could so easily substitute "natural tendency" and "reasonably probable effect" for "clear and present danger" suggests that he did not see much difference between them.[10]

As late as the spring of 1919, Holmes, as Gerald Gunther has written, was "quite insensitive to any claim for special judicial protection of free speech."[11] Holmes' views were generally consistent with those he had expressed in the past. He had never had any patience with the "squashy sentimentality" of pacifists and people like them. A nation at war would treat "the act of speech" as it would "any other overt act" it thought dangerous, he said. It would protect itself against the expression of dangerous opinions as readily as it would against the spread of smallpox. "Free speech stands no differently than freedom from vaccination," he had written to federal district judge Learned Hand in the summer of 1918. "The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong."[12]

One of Oliver Wendell Holmes' most remarkable traits, however, was his willingness, at the age of nearly eighty, to rethink views he had held all his life. This is exactly what he did with respect to freedom of speech in the months following the Espionage Act cases decided in March 1919. By October when the Supreme Court heard oral argument in the *Abrams* case, certainly by November, when Holmes issued his dissenting opinion, he had come to a considerably more speech-protective understanding of the First Amendment. Without ever saying so, he proceeded to transform clear and present danger from a restrictive version of bad tendency into a new standard capable of protecting the rights of political dissenters.[13]

Holmes changed his mind for a number of reasons. He was affected by the criticisms of *Schenck* and especially *Debs* voiced by Judge Learned Hand and others. Hand, who had been corresponding with Holmes for some time about the subject of "Tolerance," suggested to him after the March decisions that speech could only be punished "when the words were directly an incitement." Although Holmes was not persuaded, he evidently began to reexamine the

Oliver Wendell Holmes, Jr., conducted lengthy correspondences with many people including Harold Laski (above).

premises underlying his decisions. He was further influenced by the views of Ernst Freund, a legal scholar at the University of Chicago. Writing in ***The New Republic*** of May 3, Freund attacked Holmes' free speech rulings because they made punishment "subject to a jury's guessing at motive, tendency and possible effect." The "shout of Fire! in a crowded theatre," Freund wrote, was a "manifestly inappropriate" analogy.[14]

Freund's essay troubled Holmes, sufficiently much that he composed a letter to Herbert Croly, the editor of ***The New Republic*** (a letter which, after further consideration, he sent not to the journal but to a friend, Harold Laski). Holmes still maintained that "when people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—by persuasion any more than by force." But he added that he "hated to have to write" the Espionage Act decisions, did "not see the wisdom of pressing the cases, especially when the fighting was over," and generally favored "aeration of all effervescing convictions—there is no way so quick for letting them get flat." To others, Holmes expressed the fear that federal judges "have got hysterical about the war" and the hope, considerably less well-founded, that President Woodrow Wilson "might do some pardoning" of those jailed for criticizing the war.

It was in this unsettled frame of mind that Holmes read Zechariah Chafee's "Freedom of Speech in War Time" in the June issue of ***The Harvard Law Review***. A professor of law at Harvard, Chafee chided Holmes, although less severely than Freund, for the way he applied the clear and present danger standard in *Schenck* and *Debs*. At the same time, Chafee suggested that Holmes' formula, properly construed, provided exactly the "rational principle" needed to decide "where the line runs" between speech that is protected and speech that is not. Speech should be unrestricted, Chafee argued, "unless it is clearly liable to cause direct and dangerous interference with the conduct of the war;" the line should be drawn "close to the point where words will give rise to unlawful acts." Such a construction would protect the "social interest in the attainment of truth," Chafee said, and make it

Jacob Abrams, Mollie Steimer, Hyman Lachowsky and Samuel Lipman were convicted of violating the Sedition Act. A fifth defendant, Jacob Schwartz, died in prison before the trial began—possibly as a result of police beatings.

impossible to punish speech merely for its "bad tendency."[15]

Not only did Holmes read the article, but he also met Chafee during the summer of 1919 at Harold Laski's home. In his invitation to Chafee, Laski said he was much taken by the article. "We must fight on it," he wrote: "I've read it twice, and I'll go to the stake for every word."[16] There is no doubt that free speech was one of the topics of conversation that afternoon. Chafee's recollection of the meeting was that he and Holmes had discussed his ***Harvard Law Review*** article but that the Justice was still "inclined to allow a very wide latitude to Congressional discretion in the carrying on of the war." Yet while Holmes had not yet accepted Chafee's view of free speech in general, he did make it clear to the professor that "if he had been on the jury in the Debs case he would have voted for acquittal."[17]

The libertarian views expressed by Hand, Freund, and Chafee were reinforced by Holmes' reading in the fields of history and political philosophy. His "Blackbook" for 1919, listing the books he read and the dates on which he read them, indicate that his interests during the spring and summer centered to an unusual degree on the issues posed by the Espionage Act cases. Much of his reading emphasized the importance of free speech in finding the truth (however elusive it

might be), the value of experimentation, and the need to treat dissenters mercifully. One such work was Harold Laski's ***Authority in the Modern State***, which the author, then a young instructor at Harvard, sent to the Justice. Laski asserted that the authority of the state should not extend over the minds of its citizens, and also emphasized "the saving grace of experiment" in the ongoing quest for truth: "The discovery of right is, on all fundamental questions, a search upon which the separate members of the state must individually engage."[18]

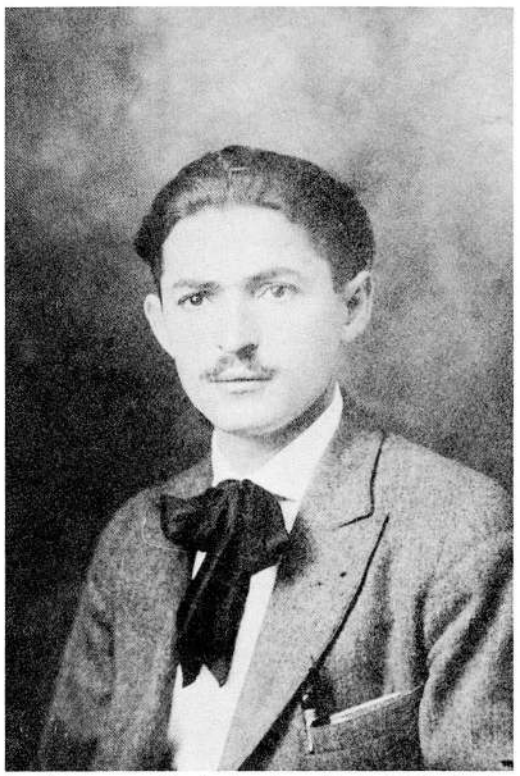
The *Abrams* case provided a perfect vehicle for Holmes to set forth a revised, more libertarian version of clear and present danger than he had in *Schenck*. Although both cases raised the issue of freedom of speech in wartime, they did so in different ways and in different contexts. In addition, the *Abrams* case witnessed forms of cruelty and injustice that were entirely absent from *Schenck*. Those unsavory aspects of the case played a role in his reformulation of free speech jurisprudence, as is evident, I believe, from a reading of his dissenting opinion.

Unlike Schenck and his fellow Socialists, who opposed United States involvement in the war and sent their anticonscription leaflets directly to potential enlistees, most of the defendants in the *Abrams* case were anarchists who opposed Wilson's decision to send American forces to intervene in the Russian Revolution. Jacob Abrams, Mollie Steimer, Hyman Lachowsky, Jacob Schwartz, and Samuel Lipman (the only Socialist of the five) distributed two leaflets in New York City, one in English and one in Yiddish, calling for a general strike to prevent the sending of arms to the troops in Soviet Russia. The prosecution argued successfully that a general strike would necessarily have interfered with the war against Germany, even if that was not the defendants' express purpose. But Holmes was always most sensitive to attempts to interfere with the actual process of raising troops, and Abrams and his friends had not tried to do that. Indeed, they distributed their leaflets in August 1918 and were not tried until October, a month before the armistice was signed.

Schenck was convicted of violating the Espionage Act, passed in June 1917 which made it a crime to willfully attempt to cause insubordination in the armed forces, or willfully obstruct the recruitment of troops. Abrams was convicted under amendments to the Espionage Act, enacted in May 1918, and usually known as the Sedition Act, which also made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the form of government, the Constitution, the military or naval forces or their uniforms, or the flag; or to use any language designed to bring any of these sundry things "into contempt, scorn, contumely, or disrepute." The act also forbade anyone to willfully "urge, incite, or advocate any curtailment of production" of any thing "necessary or essential to the prosecution of the war" with intent to hinder its prosecution.[19] So not only did Abrams' purpose and intended audience differ from Schenck's, but he was convicted under a considerably more restrictive law.

Schenck and his comrades were never abused or mistreated by the police, or denied any rights. To the contrary, the federal agents who arrested them informed the Philadelphia Socialists they were entitled to call a lawyer, as they immedi-

Judge Henry DeLamar Clayton presided over the *Abrams* trial. He failed to hide his negative opinion of the defendants and their political beliefs—Abrams was an anarchist and Lipman a socialist.



Jacob Abrams, a Russian immigrant to the United States, appealed his conviction under the Sedition Act to the Supreme Court. The Court upheld his conviction 7-2 on November 10, 1919.

ately did. By contrast, some of the defendants in the *Abrams* case were given the third degree. The police punched, kicked, and otherwise roughed up Lipman, Lachowsky, and Schwartz (who died in prison just before the trial began, possibly because the beating he received aggravated a heart condition). At the trial, their lawyer, Harry Weinberger, attempted to show his clients had been subjected to the third degree, while the police, of course, denied any wrongdoing.

From all appearances, the *Schenck* trial was scrupulously fair. Judge J. Whitaker Thompson instructed the jury to dismiss charges against three of the defendants for lack of evidence. His behavior from the bench was thoroughly impartial. In his instructions to the jury, he pointed out that "all citizens have a right to speak and write and urge other people to speak and write in order to obtain the repeal of any law." The only question was whether Schenck and Baer, "in the exercise of their right of free speech," violated the Espionage Act by "having the purpose in mind" not merely of getting people to call for repeal of conscription but also of causing insubordination or obstructing enlistment.[20]

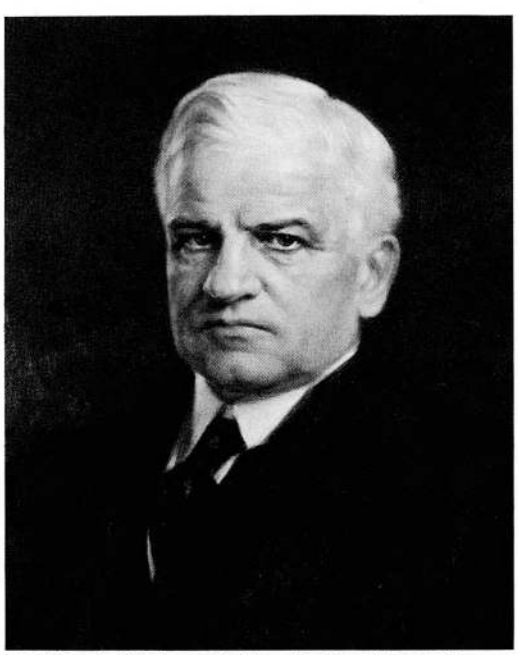
Judge Henry DeLamar Clayton, who presided at the *Abrams* trial, was an unabashed nativist who barely tried to conceal his hostility toward the radical immigrants before him. He made prejudicial remarks about the defendants and their "puny, sickly, distorted views." When Jacob Abrams said that, as an anarchist, he did not believe in government, Clayton snapped, "why don't you go back to Russia." When Abrams, seeking to show that the United States was itself built on revolution, began, "when our forefathers of the American revolution . . . ." Clayton interrupted him: "Your what? . . . Do you mean to refer to the fathers of this nation as your forefathers?" An editorial in ***The Nation*** condemned Clayton's "total lack of dignity and judicial poise."[21]

The sentences handed down differed dramatically in their severity, with Schenck receiving six months and Baer ninety days, while Abrams, Lachowsky, and Lipman got twenty years and Steimer fifteen. The judges may have heeded the advice of the respective prosecuting attorneys. Francis Gordon Caffey, United States Attorney for the Southern District of New York, was indisposed to mercy. He even opposed setting any bail for the Abrams group after their conviction on the grounds that "it would be a calamity and a menace to the City of New York, and also to our army abroad, if these defendants were let loose to spread similar seditious utterances and literature."[22] Francis Fisher Kane, United States Attorney for the Eastern District of Pennsylvania, was considerably more fair-minded. In January 1920 he would resign to show his disapproval of Attorney General A. Mitchell Palmer's "wholesale raiding of aliens" which, Kane thought, "would lead to an entirely unnecessary repression of free speech and interference with the liberties of the press."[23]

By the fall of 1919 the wave of anti-radical hysteria that Kane dreaded was well underway. A number of bomb scares accompanied by several deadly explosions in April, May, and June had triggered nationwide fears which led, in turn, to raids on radical headquarters, heightened surveillance of suspected subversives, and some brutal acts of vigilantism. Holmes was

himself the planned recipient of a bomb sent through the mails, but the post office fortunately intercepted the parcel and disarmed it. On October 26, 1919 Holmes wrote to a friend that it was "one of the ironies that I, who probably take the extremest [sic] view in favor of free speech . . . should have been selected for blowing up."[24] Five days later the Supreme Court took up the *Abrams* case, which would afford Holmes the opportunity to explain just how extremist his view had become.

On November 10 the Supreme Court upheld the convictions of Abrams and his fellow defendants by a vote of seven to two. The majority opinion was written not by one of the more reactionary Justices, from among whom there were many to choose, but rather by John Hessin Clarke, a Wilson appointee and a noted progressive. Clarke simply applied the clear and present danger standard as Holmes had defined it in *Schenck*. He observed that the Abrams group had distributed the leaflets "at the supreme crisis of the war" in "an attempt to defeat the war plans of the Government . . . by bringing upon the country the paralysis of a general strike." Even if their motive was to aid Soviet Russia, not Germany, the requirement of "Intent" to impede the war was met so long as they knew, as they surely did, "the effects which their acts were likely to produce." The leaflets, in fact, were "circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas."[25]



John Hessin Clarke wrote the majority opinion in *Abrams*, applying the clear and present danger standard to the case that Holmes had defined in *Schneck*.

If Clarke accepted the clear and present danger standard as originally formulated, Holmes, in dissent, engaged in a subtle and, to his fellow-Justices, surprising process of reformulation. Holmes' *Abrams* dissent—joined by Louis D. Brandeis, who wrote on the copy Holmes circulated, "I join you heartily & gratefully. This is fine—very"—was immediately regarded as an extraordinarily eloquent statement in behalf of individual freedom.[26] To Harold Laski, the dissenting opinion was a "landmark of noble courage;" to Dean Roscoe Pound of Harvard Law School, it was "a document of human liberty" worthy of a Socrates, a Milton, or a John Stuart Mill; to Zechariah Chafee, it seemed to provide a "magnificent exposition of the philosophic basis" of the First Amendment.[27] In relatively few words, Holmes asserted five key propositions.

First, he subtly modified the clear and present danger standard by altering its wording and thereby made it considerably more speech protective. The leaflets distributed by Abrams and his group merited constitutional protection, Holmes said, because they did not create a "clear and imminent danger" of producing certain results "forthwith." As if the words "imminent" and "forthwith" were not sufficient, Holmes introduced the concept of immediacy, arguing that only "the present danger of immediate evil" or an "immediate danger" could justify restrictions, for speech must be unimpeded unless "an immediate check is required to save the country." And to immediacy he attached the notion of emergency: "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"

Second, Holmes suggested that the word "intent" as used in Sedition Act cases had a specific

meaning, quite apart from the one given it in Clarke's majority opinion. Conceding that "the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue," Holmes now insisted that "when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed." The statute, he said, should "be taken to use its words in a strict and accurate sense." Intent, therefore, should be construed literally, as wanting a particular result. One intends a particular consequence only if "the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind."

Third, Holmes trivialized the anarchists and their beliefs. He denigrated Abrams, Steimer, Lipman, Lachowsky, and Schwartz as "poor and puny anonymities." He scoffed at their "creed of ignorance and immaturity." He talked about a "silly leaflet by an unknown man," and caricatured the flyer, which, he said, was filled with the usual tall talk and "pronunciamentos." He paraphrased the leaflets or quoted them selectively so as to make them sound bombastic, if not preposterous. He implied that they could safely be allowed to circulate because no one could take them seriously.

Fourth, Holmes declared that the sentences imposed on the anarchists were indefensible. For such a crime as theirs, even assuming it was a crime, only "the most nominal punishment seems to me all that could possibly be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court." Holmes said outright what Supreme Court Justices in that era rarely even hinted at: that radical immigrants were being punished not for what they said but for what they thought—indeed, for who they were.

Fifth, Holmes offered a rhapsodic defense of freedom of speech, a defense grounded in the connection between the search for truth and the value of experimentation:

> . . . when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[28]

Universally hailed by liberals, Holmes' dissent was condemned by conservatives—for all the wrong reasons. They argued that Holmes' viewpoint posed "a positive menace to society and this Government" because "legal toleration pushed to its ultimate conclusion becomes impotence, self-destruction." If Holmes' view had been accepted by the Court, one of his critics said, it "would have ended by our letting soldiers die helpless in France."[29] But the difficulty with Holmes' marketplace analogy was not that it granted too much protection to dissenters. The problem, rather, was that it did not provide a fully persuasive case for granting that protection.

There is little reason to believe that "truth" will triumph in the marketplace. It is much more likely that victory in the marketplace will go to whatever view the majority favors at the moment. This is especially so because there never has been, and probably never can be, the "free trade in ideas" Holmes envisioned since the marketplace is structured, controlled, and limited by those same majoritarian preferences. So even when men have realized that time has upset many fighting faiths, they may not come to believe that truth should be left to the workings of the marketplace: they may conclude instead that truth is merely relative to time and place, that it is just another name for what the majority happens to find congenial.

Despite these objections, Holmes' argument remains alive and well after seventy-five years, and is frequently cited whenever anyone wishes to defend freedom of speech. The *Abrams* dissent has endured, in part, simply because it came from the pen of Oliver Wendell Holmes, Jr., who, as

Morton J. Horwitz has observed, has served as "something of a cult figure for two generations of liberal thinkers."[30] Beyond its provenance, however, there are at least three other reasons for the staying power of the *Abrams* dissent.

In its reconfigured form the clear and present danger standard was—and still is—spectacularly speech-protective. Holmes' requirement that there be proof of literal intent, his stern rebuke to those who would persecute ideas for their own sake, and his emphasis on imminence, immediacy, and emergency—all dramatically expanded the rights of dissenters. While Holmes conceded that the government's power to restrict speech would be broader in wartime because of the special dangers involved, he pointedly affirmed that even during wartime "the principle of the right to free speech is always the same." The more commonly accepted view was considerably less permissive. In wartime, wrote Dean John H. Wigmore of Northwestern University Law School, freedom of speech should be suspended; in such an emergency, all rights "become subordinated to the national right in the struggle for national life."[31]

Then too, Holmes' language enchanted, even mesmerized many readers. Scholars have suggested that Holmes' concerns were literary as well as jurisprudential, that he was concerned to express his views in "vivid and memorable forms of words."[32] Viewing the *Abrams* dissent more as a metaphorical than a legal statement, Holmes was less interested in doctrinal consistency than in letting words have their way. As Robert A. Ferguson points out, when Holmes wrote, "I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States," he knew exactly how impressive his words were.[33] Holmes' felicitous style, particularly in the passages dealing with the broader aspects of free speech theory, gives the dissent much of its vitality.

Finally, Holmes' justification for free speech incorporates an image of competition, a model of conflict, and an acceptance of force which many Americans find attractive. In 1913, Holmes said that "law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action."[34] In his 1919 dissent, he referred to the marketplace rather than the battlefield, but the premise was similar. As Peter Gibian has pointed out, "The *Abrams* dissent defines 'free trade in ideas' as the 'best test of truth' because it too involves conflict based on power: 'the power of the thought to get itself accepted in the competition of the market.'"[35]

The inadequacy of Holmes' justification of free speech has, consequently, mattered less than its utility, eloquence, and comportment with national values. In 1969, when the Supreme Court further expanded the kinds of speech entitled to constitutional protection, the Justices reflexively drew on Holmes' formulation. In *Brandenburg v. Ohio*, the Court substituted a direct incitement test for the clear and present danger standard. First Amendment guarantees, the Justices held in a unanimous *per curiam* opinion, "do not permit a State to forbid or proscribe 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." The ruling went considerably beyond the *Abrams* dissent, yet the emphasis on the need to prove both intent and imminence incorporated important elements of Holmes' reasoning. In a concurrence, Justice William O. Douglas quoted Holmes' view that "only the present danger of immediate evil or an intent to bring it about" warranted the limiting of speech.[36]

Current doctrine, therefore, holds that it is permissible to incite violence if it is not imminent, and even to incite imminent violence if it is not likely. This doctrine, however, is not without its critics, many of them law professors who believe it is overly speech-protective. This is profoundly ironical. In 1919 two law professors, Ernst Freund and Zechariah Chafee, Jr., helped point Holmes in a more libertarian direction. In 1994 a number of law professors want to move the Supreme Court in the opposite direction. A critique of Holmes' *Abrams* dissent figures crucially in their analyses.

In ***Only Words*** (1993), Professor Catharine A. MacKinnon asserts that pornography, defined as "graphic sexually explicit materials that subordinate women through pictures or words," should not be entitled to First Amendment protection for it is not speech at all but sexual abuse. The trouble is that pornography is accorded

protection, largely because Americans accept a fallacious "litany" about the First Amendment: "There is a faith that truth will prevail if left alone, often expressed in an openly competitive laissez-faire model taken from bourgeois economics and applied to the expressive marketplace: the 'marketplace of ideas' metaphor. The origin of this notion appears to be" Holmes' *Abrams* dissent. MacKinnon favors a "new model for freedom of expression in which the free speech position no longer supports social dominance, as it does now; in which free speech does not most readily protect the activities of Nazis, Klansmen, and pornographers, while doing nothing for their victims, as it does now."[37]

The four authors of ***Words That Wound*** (1993), a manifesto of critical race theory, agree with much of MacKinnon's reasoning. Professors Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw favor laws that would outlaw "racist hate messages," speech that is persecutory, hateful, and degrading and is directed against historically oppressed groups. To those who would counter with Holmes' marketplace metaphor, Lawrence replies: "Blacks and other people of color are equally skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance. Our experience tells us the opposite. . . . The American marketplace of ideas was founded with the idea of the racial inferiority of nonwhites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade."[38]

A somewhat different although related critique of Holmes is offered by Professor Stanley Fish in ***There's No Such Thing as Free Speech and It's a Good Thing, Too*** (1994). Fish maintains that no one favors free speech as an end in itself but rather as a means for achieving something, such as the discovery of truth. If speech does not serve that end, there is no reason to allow it. Consequently, "any understanding of free speech will be political" in the sense that one always cares about results. But Holmes' *Abrams* dissent obscures all this, Fish maintains, "for that famous opinion at once concisely states the modern First Amendment position and illustrates what I consider to be its difficulties, if not its contradictions." The difficulties are of two sorts: the marketplace of ideas "will be structured by the same political considerations it was designed to hold at bay; and therefore, the workings of the marketplace will not be free in the sense required, that is, be uninflected by governmental action;" and if the marketplace is open to radically evil messages then "we are being asked to court our own destruction for the sake of an abstraction that may doom us rather than save us."[39]

These modern-day critics have little use for the line of libertarian decisions that followed the *Abrams* dissent: Louis D. Brandeis' concurrence in *Whitney v. California*, (1927); William J. Brennan's opinion in *New York Times v. Sullivan*, (1964); or William O. Douglas' concurrence in *Brandenburg v. Ohio*, (1969). Instead they have exhumed a rival constitutional tradition, stretching from *Beauharnais v. Illinois* (1952), in which the Supreme Court, in a decision by Felix Frankfurter, upheld a group libel law, to *United States v. Dennis*, (1950), in which circuit court judge Learned Hand upheld the conviction of Communist leaders under the Smith Act by accepting a balancing test (asking whether "the gravity of the 'evil' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger"),[40] to *Paris Adult Theatre I v. Slaton* (1973), in which Chief Justice Warren Burger spoke of the right of the nation and states "to maintain a decent society."[41]

Holmes' critics take issue with him on three key points. They deny that the marketplace is free in the sense of being an open or neutral forum; rather, they say, it "privileges" the already powerful. An index entry under "marketplace of ideas" in Fish's book reads: "is not free."[42] They also reject the distinction Holmes drew between speech and action, which allowed him to regard speech as a separate category, deserving a higher level of protection. MacKinnon, for example, writes: "Speech acts . . . Acts speak."[43] Or as Lawrence puts it: "Racism is both 100 percent speech and 100 percent conduct."[44] Finally, they challenge Holmes' emphasis on literal intent, which required the speaker to have a specific aim in mind. MacKinnon would not require that purveyors of pornography actually "intend" to harm anyone as a requirement for banning it. Critical race theorists simply assume

that hate speech intrinsically has an intent to cause harm.

None of the modern critics are concerned, as Holmes was, with the security of the state or with limiting the government's power to suppress dissent. To the contrary, they believe that a chief problem with First Amendment jurisprudence is that it was forged in the "crucible" of protecting radicals. They want to employ the government's power to change the social system, to eradicate what they perceive to be its ingrained sexism and racism. None of them, in my view, have satisfactorily answered an all-too-obvious question: if powerful interests which benefit from racial and sexual inequality control the marketplace, why would those same interests adopt speech restrictive policies that would undermine their privilege?

What is ultimately so fascinating about Holmes' view of the First Amendment is that his clear and present danger standard, as reformulated in the *Abrams* dissent, remains central to the contemporary debate. No other statement issued by any Justice seventy-five years ago retains such current vitality. Holmes, of course, would have been delighted. His 1919 opinions on freedom of speech accomplished all of the goals he set for himself after his appointment to the Supreme Court: "The thing I have wanted to do," he wrote to Canon Patrick Sheehan in 1912, "has been to put as many new ideas into the law as I can, to show how particular solutions involve general theory, and to do it with style."[45]

Endnotes

[1] Cited in Sheldon M. Novick, ***Honorable Justice*** (Boston, 1989), p. 319.

[2] All are cited in Robert A. Ferguson, "Mr. Justice Holmes and the Judicial Figure," in Robert W. Gordon (ed.), ***The Legacy of Oliver Wendell Holmes, Jr.*** (Stanford, Cal., 1992), pp. 163-164.

[3] Gary J. Aichele, ***Oliver Wendell Holmes Jr.***, (Boston, 1989); Novick, ***Honorable Justice***, Liva Baker, ***The Justice from Beacon Hill*** (New York, 1991); G. Edward White, ***Justice Oliver Wendell Holmes*** (New York, 1993); Jeremy Cohen, ***Congress Shall Make No Law*** (Ames, Iowa, (1989); H.L. Pohlman, ***Justice Oliver Wendell Holmes*** (New York, 1991); Gordon (ed.), ***Legacy***; Richard A. Posner, ***The Essential Holmes*** (Chicago, 1992); Morton J. Horwitz, ***The Transformation of American Law, 1870-1960*** (New York, 1992).

[4] *Hustler Magazine v. Falwell* 485 U.S. 46 (1988).

[5] This account of the *Schenck* case is based on Richard Polenberg, ***Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech*** (New York, 1987), pp. 212-216.

[6] *Schenck v. United States*, 249 U.S. 47, 51-52 (1919).

[7] The leaflets may be found in the documentation accompanying *United States v. Schenck, et al.*, in Records of the District Court, Eastern District, Pennsylvania (National Archives).

[8] White, ***Justice Oliver Wendell Holmes***, pp. 417-418.

[9] *Frohwerk v. United States*, 249 U. S. 204 (1919).

[10] *Debs v. United States*, 249 U.S. 211 (1919).

[11] Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 ***Stanford Law Review***, 720 (1975).

[12] Holmes to Hand, June 24, 1918, in *ibid.*

[13] I find unconvincing the argument advanced by Sheldon Novick, first in his biography of Holmes and later in 'The Unrevised Holmes and Freedom of Expression," ***The Supreme Court Review*** (Chicago, 1991), pp. 303-390, that Holmes' view of free speech underwent no change but remained "stubbornly consistent." See G. Edward White, "Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension," 80 ***California Law Review*** 391-467 (1992), and Gerald Gunther, ***Learned Hand*** (New York, 1994), pp. 166-167.

[14] This account of Holmes' transformation is based on Polenberg, ***Fighting Faiths***, pp. 218-224.

[15] Zechariah Chafee, "Freedom of Speech in War Time," 32 ***Harvard Law Review***, 932-973 (1991).

[16] Cited in Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," 58 ***Journal of American History***, 43 (1971).

[17] Cited in Donald L. Smith, ***Zechariah Chafee, Jr.*** (Cambridge, 1986), p. 30.

[18] Harold J. Laski, ***Authority in the Modern State*** (New Haven, 1919), pp. 55-56, 78-79.

[19] 40 ***Stat.*** 553-554 (1919).

[20] Trial transcript, *United States v. Schenck*, pp. 278-288.

[21] Cited in Polenberg, ***Fighting Faiths***, pp. 118-119, 147.

[22] Cited in *ibid*, p. 148.

[23] Francis Fisher Kane to Woodrow Wilson, January 12, 1920, in ***Charges of Illegal Practices of the Department of Justice***, Hearings before a Subcommittee of the Committee on the Judiciary, 66th Congress, 3rd Session (Washington, 1921), pp. 346-347.

[24] Mark DeWolfe Howe (ed.), 2 ***Holmes-Pollock Letters***, 11, 29 (Cambridge, 1941).

[25] *Abrams v. United States*, 250 U. S. 616 (1919).

[26] Cited in Polenberg, ***Fighting Faiths***, p. 236.

[27] Cited in *ibid.*, p. 241.

[28] *Abrams et al. v. United States* 250 U.S. 616, 625-630 (1919).

[29] Cited in Polenberg, ***Fighting Faiths***, pp. 248, 254.

[30] Horwitz, ***Transformation of American Law***, p. 110.

[31] Cited in Polenberg, ***Fighting Faiths***, p. 254.

[32] White, ***Justice Oliver Wendell Holmes***, p. 454.

[33] Ferguson, "Holmes and the Judicial Figure," in Gordon, ***Legacy***, p. 181.

[34] Oliver Wendell Holmes, "Law and the Court," in ***Collected Legal Papers***, (New York, 1920), p. 294.

[35] Peter Gibian, "Opening and Closing the Conversation," in Gordon, ***Legacy***, p. 212.

[36] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[37] Catharine A. MacKinnon, ***Only Words*** (Cambridge, 1993), pp. 22, 75, 109.

[38] Charles R. Lawrence, III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," in Mari J. Matsuda, Charles R. Lawrence, III, Richard Delgado, and Kimberlè Williams Crenshaw, ***Words That Wound*** (Boulder, 1993), p. 77.

[39] Stanley Fish, ***There's No Such Thing as Free Speech and It's a Good Thing, Too*** (New York, 1994), pp. 118-119.

[40] 183 F.2d 201 (1950).

[41] 413 U.S. 49 (1973).

[42] Fish, ***There's No Such Thing***, p. 327.

[43] MacKinnon, ***Only Words***, p. 30.

[44] Lawrence, "If He Hollers," in Matsuda *et al.*, ***Words That Wound***, p. 62.

[45] Cited in White, ***Justice Oliver Wendell Holmes***, p. 451.

The Dissenting Opinion

Antonin Scalia

Editor's Note: *Justice Scalia delivered this address as the Society's Annual Lecture on June 13, 1994.*

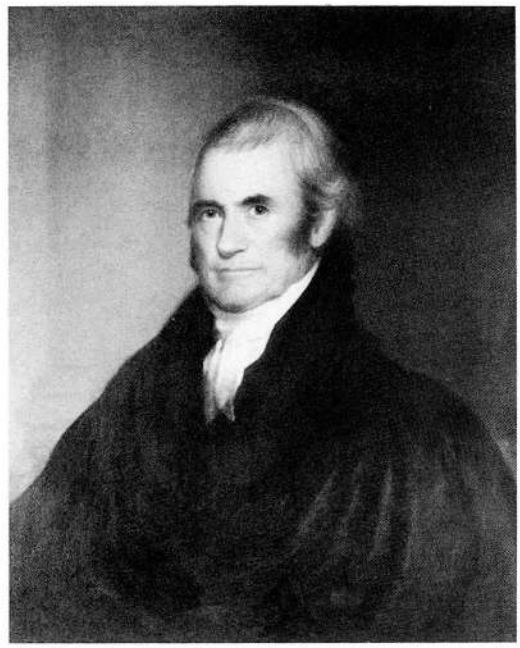
I have chosen to speak this afternoon about the dissenting opinion. It is not a subject I aspire to become an expert on—but it is one, I think, of some interest and importance.

First of all, some definitions of terms: In speaking of dissenting opinions, I mean to address opinions that disagree with the Court's *reasoning*. Some such opinions, when they happen to reach the same disposition as the majority (that is, affirmance or reversal of the judgment below) are technically concurrences rather than dissents. To my mind, there is little difference between the two, insofar as the desirability of a separate opinion is concerned. Legal opinions are important, after all, for the reasons they give, not the results they announce; results can be announced in judgment orders without opinion. An opinion that gets the *reasons* wrong gets *everything* wrong which it is the function of an opinion to produce. There is a couplet spoken by Thomas à Becket in T.S. Eliot's ***Murder in the Cathedral***, in which the saint, tempted by the devil to stay in Canterbury and resist Henry II in order to achieve the fame and glory of martyrdom, rebuffs him with the words "That would be the greatest treason, to do the right deed for the wrong reason." Of course the same principle applies to judicial opinions: to get the reasons wrong is to get it all wrong, and that is worth a dissent, even if the dissent is called a concurrence.

But though I include in my topic concurrences, I include only *genuine* concurrences, by which I mean separate writings that disagree with the grounds upon which the court has rested its decision, or that disagree with the court's omission of a ground which the concurring judge considers central. I do not refer to and I do not approve of, separate concurrences that are written only to say the same thing better than the court has done, or, worse still, to display the intensity of the concurring judge's feeling on the issue before the court. I regard such separate opinions as an abuse, and their existence as one of the arguments against allowing any separate opinions at all.

As you know, dissents and concurrences are commonplace in the practice of the United States Supreme Court. That has not always been so. During the first decade of the Court's existence, there was not a single dissent—for the simple reason that, in significant cases at least, there was no opinion of the Court from which to dissent.

Whenever more that a mere memorandum judgment was called for, we followed the custom of the King's Bench and the other common law courts: each Justice filed his own separate opinion. Not all have cheered the abandonment of that system. In one of his concurrences, Justice Felix Frankfurter regretted that "[t]he volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions."[1] The reason for departure from the practice, however, was really not the press of business, but the forceful personality of Chief Justice John Marshall, who established the system we currently use, whereunder one of the Justices announces an opinion "for the Court."[2] It is a distinctive system, midway between the English practice of separate, signed opinions by all the judges and the Continental practice of a single, unsigned opinion for the court. Dissents from the signed opinion "for the Court" were very rare at first—only a single one-sentence concurrence during the first four years of Marshall's Chief Justiceship,[3] and very few during his entire tenure.



Chief Justice John Marshall established the system the Court uses for delivering opinions, where one Justice announces an opinion "for the Court."

The new system instituted under Marshall made Thomas Jefferson furious. Since 1811, the appointees named to the Court by Jefferson and by his successor and political ally Madison, had constituted a majority on the Court. Yet the Court continued to come out with unanimous, pro-federal opinions written by Marshall, as though nothing had changed and the Federalists were still in control. In an 1820 letter, Jefferson complained about opinions "huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."[4] In 1822, he finally wrote directly to Justice William Johnson, whom he had appointed to the Court in 1804, urging Johnson to return to the English practice of individual opinions.

> The judges holding their offices for life are under two responsibilities only. 1. Impeachment. 2. Individual reputation. But this practice [of unanimous opinion] compleatly withdraws them from both. For nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself. Be the opinion therefore ever so impeachable, having been done in the dark it can be proved on no one. As to the 2d guarantee, personal reputation, it is shielded compleatly. The practice is certainly convenient for the lazy, the modest and the incompetent. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all. That of seriatim argument shows whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve.[5]

Justice Johnson's response suggested that Jefferson may not have been too far off the mark. While some have attributed the unified Marshall Court to Marshall's great political skills, Johnson was more inclined to credit it to the lack of juridical skills on the part of Marshall's colleagues. "Cushing," he wrote to Jefferson, "was incompetent, Chase could not be got to think or

write—Paterson was a slow man and willingly declined the Trouble, and the other two (Marshall and Washington) are commonly estimated as one judge."[6]

In any event, since Marshall's time, separate opinions have become steadily more frequent. One scholar has calculated that up until 1928 dissents and concurrences combined were filed in only about fifteen percent of all Supreme Court cases.[7] Between 1930 and 1957 dissents alone were filed in about forty-two percent of all Supreme Court cases.[8] Last Term, a dissent or separate concurrence was filed in seventy-one percent of all cases.

In assessing the advantages and disadvantages of separate opinions, one must consider their effects both within and without the Court. Let me discuss the latter first. The foremost and undeniable external consequence of a separate dissenting or concurring opinion is to destroy the appearance of unity and solidarity. From the beginning to the present, many great American judges have considered that to be a virtually dispositive argument against separate opinions. So high a value did Chief Justice Marshall place upon a united front that according to his colleague, Justice William Johnson, he not only went along with opinions that were contrary to his own view, but even announced some.[9] Only towards the end of his career—when his effort to suppress opinions had plainly failed—did he indulge himself in dissents: a total of only nine dissents in thirty-four years.[10] In more recent times, no less a judicial personage than Judge Learned Hand warned that a dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."[11]

I do not think I agree with that. It seems to me that in a democratic society the authority of a bench of judges, like the authority of a legislature, or the authority of an executive officer, depends quite simply upon a grant of power from the people. And if the terms of the grant are that the majority vote shall prevail, then *that* is all the authority that is required—for a court no less than for a legislature or for a multi-member executive. Now it may well be that the people will be more inclined to accept without complaint a unanimous opinion of a court, just as they will be more inclined to accept willingly a painful course decided upon unanimously by their legislature. But to say that the *authority* of a court *depends* upon such unanimity in my view overstates the point. In fact, the argument can be made that artificial unanimity—the suppression of dissents—deprives genuine unanimity of the great force it can have when that force is most needed. Supreme Court lore contains the story of Chief Justice Warren's heroic and ultimately successful efforts to obtain a unanimous Court for the epochal decision in *Brown v. Board of Education.*[12] I certainly agree that unanimity helped to produce greater public acceptance. But would it have had that effect if *all* the decisions of the Supreme Court, even those decided by 5-4 vote, were announced as unanimous? Surely not.

Perhaps things are different when a newly established court is just starting out. Or perhaps they were different, even for a well established court, in simpler, less sophisticated, less bureaucratic times. But I have no doubt that for the Supreme Court of the United States, at its current stage of development and in the current age, announced dissents augment rather than diminish its prestige. Almost half a century ago—when the number of staff personnel in the executive and legislative branches was even a good deal less than it is today—Justice Brandeis made his oft-quoted observation that the reason the Justices of the Supreme Court enjoyed such a high level of popular respect was that "[we] are almost the only people in Washington who do [our] own work."[13] Dissents make that clear. Unlike a unanimous institutional opinion, a signed majority opinion, opposed by one or more signed dissents, makes it clear that these decisions are the product of independent and thoughtful minds, who try to persuade one another but do not simply "go along" for some supposed "good of the institution."

I think dissents augment rather than diminish the prestige of the Court for yet another reason. When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern. I think, for example, of the prophetic dissent of Justice Harlan (the earlier Justice Harlan) in *Plessy v. Ferguson,*[14] the case essentially overruled by *Brown v. Board of Education* a half century

The first John Marshall Harlan wrote a prophetic dissent in *Plessy v. Ferguson* arguing that the Constitution is color-blind. This view was ultimately adopted by the Court in *Brown v. Board of Education*.

later,[15] which held that the State of Louisiana could require railroads to carry white people and black people in separate cars. Harlan wrote:

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . .
>
> . . .[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind. . . . In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. . . .
>
> . . .The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.[16]

Or Justice Jackson's dissent in *Korematsu v. United States*,[17] the 1944 case in which the Court upheld a military order providing for the internment of Japanese Americans on the west coast. It said:

> A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . .rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[18]

A second external consequence of a concurring or dissenting opinion is that it can help to change the law. That effect is most common in the decisions of intermediate appellate tribunals. When a judge of one of our Circuit Courts of Appeals dissents from an opinion of his colleagues, he warns the Courts of Appeals of the other twelve Circuits (who are not bound by the *stare decisis* effect of that opinion) that they should not too readily adopt the same legal rule. And if they do not, of course—if they are persuaded by the view set forth in his dissent, pressed upon them by counsel in some later case—a

These women were among the first Japanese American "voluntary evacuees" from the Los Angeles area to settle into the Owens Valley Reception Center at Manzanar, California in March 1942. Their early decorating efforts included a portrait of General Douglas MacArthur on the wall.

"conflict" among the Circuits will result, ultimately requiring resolution by the Supreme Court's grant of a petition for certiorari. At the Court of Appeals level, a dissent is also a warning flag to the Supreme Court: the losing party who seeks review can point to the dissent as evidence that the legal issue is a difficult one worthy of the Court's attention.

At the Supreme Court level, on the other hand, a dissent rarely helps change the law. Even the most successful of our dissenters—Oliver Wendell Holmes, who acquired the sobriquet "The Great Dissenter"—had somewhat less than ten percent of his dissenting views ultimately vindicated by later overruling. Most dissenters are much less successful than that. Even more rarely does a separate concurring opinion have the effect of shaping the future law—rarely but not never. What immediately comes to mind is the separate concurrence of Justice Harlan (the later Justice Harlan) in *Katz v. United States*,[19] which held that the constitutional protection against "unreasonable searches and seizures" forbade the police to eavesdrop upon a telephone conversation conducted from a public phone booth. Harlan joined the opinion of the Court, but he also wrote separately to say:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement [for the provision against unreasonable searches and seizures to apply], first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."[20]

That formulation, rather than the opinion of the Court in *Katz*, is repeatedly cited in later cases; it has become the classic (if somewhat circular) statement of Fourth Amendment protection.

The dissent most likely to be rewarded with

later vindication is, of course, a dissent that is joined by three other Justices, so that the decision is merely a 5-4 holding. That sort of a dissent, at least in constitutional cases (in which, under the practice of our Court, the doctrine of *stare decisis* is less rigorously observed)[21] emboldens counsel in later cases to try again, and to urge an overruling—which sometimes, although rarely, occurs.[22] And that observation leads me to the last external effect of a dissenting opinion, which is to inform the public in general, and the Bar in particular, about the state of the Court's collective mind.

Let me give a concrete example: Two Terms ago the Court held, in a case called *Lee v. Weisman*,[23] that the Establishment Clause of the First Amendment forbids public officials to conduct a nondenominational invocation as part of the ceremonies at a public high school graduation. Had the judgment been rendered by an institutional opinion for the Court, that rule of law would have the appearance of being as clear, as unquestionable and as stable as the rule that denominational prayers cannot be made a mandatory part of the school day. In fact, however, the opinion was 5-4. It is clear to all that the decision was at the very margin of Establishment Clause prohibition; that it will not be extended much further and may even someday be overruled.

Or to take another example, one that involves the Free Exercise Clause of the First Amendment: Four Terms ago, in a case called *Employment Division v. Smith*,[24] the Court held that this did not form the basis for a private exemption from generally applicable laws governing conduct—so that a person could not claim a right to use a proscribed psychotropic drug (peyote) in religious ceremonies. There again, the decision on the point was 5-4, making clear to one and all (and to future litigants, in particular) that this is a controverted and thus perhaps changeable portion of our jurisprudence.

I have tried to be impartial in the examples I have chosen: I wrote the dissent in the first case, and the opinion for the Court in the second. In the one as in the other I think it was desirable, and not destructive, that the fragility of the Court's holding was apparent. This is not to suggest, by the way, that every 5-4 decision of our Court is a candidate for future overruling. In cases involving statutory law, rather than the Constitution, we will almost certainly not revisit the point, no matter how closely it was decided. But even there, disclosure of the closeness of the vote provides useful information to the legal community, suggesting that the logic of the legal principle at issue has been stretched close to its utmost limit, and will not readily be extended further. Assume, for example, a statute prescribing a supplementary penalty of five years for the second conviction of a crime of violence. If the Court has held, by only a 5-4 vote, that a robbery committed by brandishing (though not discharging) a firearm is a "crime of violence" within the meaning of the statute, it is not likely to hold that kidnapping by trick followed by false imprisonment qualifies. And it is useful for prosecutors and lower court judges to have that information.

It would be wrong to exaggerate this point. Dissenting or concurring opinions can sometimes obfuscate rather than clarify. Justice Jackson put it well in one of his essays:

> There has been much undiscriminating eulogy of dissenting opinions. It is said they clarify the issues. Often they do the exact opposite. The technique of the dissenter often is to exaggerate the holding of the Court beyond the meaning of the majority and then to blast away at the excess. So the poor lawyer with a similar case does not know whether the majority opinion meant what it seemed to say or what the minority said it meant.[25]

But it is always within the power of the Justice writing the Court's opinion to disavow the exaggerations and distortions of the dissent, and to make clear the precise scope of the holding. Which is one reason why it is my practice, when writing for the Court, always to respond to the dissent, rather than to adopt the magisterial approach of ignoring it.

Of course the likelihoods and unlikelihoods, the fragilities and rock-solid certainties signaled by unanimous or closely divided opinions have a relatively short shelf life. They become stale, so to speak, as the Justices who rendered the opinion in question are, one by one, replaced. And that raises what seems to be one of the undesirable external effects of a system of separate opinions.

Justice Robert Jackson argued that dissenting opinions often distort the issues rather than clarifying them, leaving attorneys in similar cases confused as to the real meaning of the majority opinion.

It produces, or at least facilitates, a sort of vote-counting approach to significant rules of law. Whenever one of the five Justices in a 5-4 constitutional decision has been replaced there is a chance, astute counsel must think, of getting that decision overruled. And worse still, when the decision in question is a highly controversial constitutional decision, that thought occurs not merely to astute counsel but to the President who appoints the new Justice, to the Senators who confirm him, and to the lobbying groups that have the power to influence both. If the decision in question is controversial enough—*Roe v. Wade,*[26] is the prime modern example—the appointment of the new Justice becomes something of a plebiscite upon the meaning of the Constitution in general and of the Bill of Rights in particular, in effect giving the majority the power to prescribe the meaning of an instrument designed to restrain the majority. That could not happen, or at least it could not happen as readily, if the individual positions of all the Justices were not known.

I confess not to be quite as aghast at this consequence of separate opinions as I expect most of my listeners are. It seems to me a tolerable, and indeed perhaps a necessary, check upon the power of the Court in a system in which the adoption of a constitutional amendment to reverse a Court decision is well nigh impossible. As you know, constitutional amendments must be proposed by a two-thirds vote of both Houses of Congress, or by a national convention called for by two-thirds of the States, and then must be approved by three-fourths of the states by either the state legislature or a special convention. In such a system, the ability of the people to achieve correction of what they deem to be erroneous constitutional decisions through the appointment process seems to me not inappropriate. I think that corrective has been overused in recent years—but I would attribute that to a popular legal culture which encourages the people to believe that the Constitution means whatever it ought to mean.

Avoiding the grave temptation to pursue that controversial topic, let me turn to the last, but by no means the least, of the "external" consequences of our system of separate opinions. By enabling, indeed compelling, the Justices of the Court, through their personally signed majority, dissenting and concurring opinions, to set forth clear and consistent positions on both sides of the major legal issues of the day, it has kept the Court in the forefront of the intellectual development of the law. In our system, it is not left to the academicians to stimulate and conduct discussion concerning the validity of the Court's latest ruling. The Court itself is not just the central organ of legal *judgment*; it is center stage for significant legal *debate.* In our law schools, it is not necessary to assign students the writings of prominent academics in order that they may recognize and reflect upon the principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself, and can be studied from that text. For example, whether the Constitution guarantees a generalized "right of privacy," or whether it protects unenumerated rights through the "due process" clause, questions you will have heard put to the nominees to our Court in their confirmation hearings—as they have been put in all confirmation hearings, at least since *Roe v. Wade.* The affirmative side of those questions appears in a number of Court opinions, including *Griswold v. Connecticut.*[27] To hear the case for the negative side, you might read the relevant

portion of Judge (and Professor) Robert Bork's book, ***The Tempting of America***.[28] But you need not. You will find the arguments for that side put quite concisely and quite elegantly in *Griswold* itself, in the dissenting opinions of Justice Black and Justice Stewart.

Supreme Court dissents convey knowledge, not only about what legal issues are current, but also about what legal controversies are timeless. Judicial activism, for example—which in our federal system means giving an expansive meaning to the text of the Constitution—is criticized first from the left and later from the right, as the practitioners of that philosophy have moved in the opposite direction. In 1905, when the Court held unconstitutional a New York law limiting bakery workers to a ten-hour day (on the theory that it deprived them of "liberty of contract" without the "due process of law" which the Fourteenth Amendment requires), Justice Holmes protested that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[29] And in another dissent he wrote:

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.[30]

More than half a century after Holmes began his protests, listen to the second Justice Harlan making the same objection, but now complaining about the Court's imposition of a *liberal* moral belief, in a case that used the Fourteenth Amendment to invalidate a State poll tax:

> Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.[31]

Justice Black wrote, in the same case:

> The Court's justification for consulting its own notions rather than following the original meaning of the Constitution . . . apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be 'shackled to the political theory of a particular era,' and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast of this Court's more enlightened theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written. . . .[32]

In sum, the system of separate opinions has made the Supreme Court the central forum of current legal debate, and has transformed its reports from a mere record of reasoned judgments into something of a History of American Legal Philosophy with Commentary. I have no doubt that this has contributed enormously to the prominence of the Court and of the United States Reports.

Let me turn now to what I have called the "internal" consequences of separate opinions—their effect within the Court itself. Let me assure you at the outset that they do not, or at least need not, produce animosity and bitterness among the members of the Court. Dissenting will have that effect, I suppose, if it is an almost unheard-of

Justice William J. Brennan, Jr., shown here with Society President Leon Silverman and Mrs. William Brennan, dissented regularly from opinions authored by Justice Antonin Scalia, as Scalia did from Brennan's opinions. However, the two developed a close personal relationship in spite of the differences in their judicial views.

occurrence, subjecting the writer of the Court's opinion to what may be viewed as a rare indignity. I am indebted to an article by the former Judge Stanley Fuld of the New York Court of Appeals for preservation of the following item from the ***New York Times*** of March 27, 1957:

> The Italian Constitutional High Court . . . accepted today the resignation of its president, Senator Enrico de Nicola. The reasons for Judge de Nicola's resignation were not given, [but] . . . it is understood . . . that . . . the fourteen judges who sit with him on the High Court had dissented from some of his decisions.[33]

Needless to say, none of the Justices of my Court would take such umbrage at a dissent. In part that is because we come, as I have described, from a tradition in which each judge used to write his own opinion. But mostly it is because dissents are simply the normal course of things. Indeed, if one's opinions were never dissented from, he would begin to suspect that his colleagues considered him insipid, or simply not worthy of contradiction. I doubt whether any two Justices have dissented from one another's opinions any more regularly, or any more sharply, than did my former colleague Justice William Brennan and I. I always considered him, however, one of my best friends on the Court, and I think that feeling was reciprocated.

The most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion. It does that in a number of ways. To begin with, the mere *prospect* of a separate writing renders the writer of the majority opinion more receptive to reasonable suggestions on major points. I do not mean to minimize the extent to which, even in the absence of a system of dissenting opinions, the colleagues of the judge who drafts the opinion can suggest and obtain desirable changes; that happens in our Court as well, not only when the opinion is unanimous, but even among the five (or six or seven or eight) Justices who form the majority in a split decision. However, human nature being what it is, nothing causes the writer to be as solicitous of objections on major points as the knowledge that, if he does not accommodate them, he will not have a unanimous court, and will have to confront a separate concurrence.

The second way in which separate opinions improve the majority opinion is this: Though the fact never comes to public light, the first draft of a dissent often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule. When I have been assigned the opinion for the Court in a divided case, nothing gives me as much assurance that I have written it well as the fact that I am able to respond satisfactorily (in my judgment) to all the onslaughts of the dissents or separate concurrences. The dissent or concurrence puts my opinion to the test, providing a direct confrontation of the best arguments on both sides of the disputed points. It is a sure cure for laziness, compelling me to make the most of my case. Ironic as it may seem, I think a higher percentage of the worst opinions of my Court—not in result but in reasoning—are unanimous ones.

And finally, the last way in which a separate opinion can improve the majority opinion is by *becoming* the majority opinion. Not often, but much more than rarely, an effective dissent or concurrence, once it is circulated, changes the outcome of the case, winning over one or more of

the Justices who formed the original majority. Objections to the proposed majority opinion made at oral conference, or even in an exchange of written memoranda, will never be as fully developed, as thoroughly researched, and as forcefully presented as they are in a full-dress dissenting or concurring opinion prepared for publication. I am so persuaded of this value of the separate opinion that I wish it were the practice of my Court, though it is not, for the Justices to refrain from joining the circulated majority opinion until the dissent appears.

Besides improving the Court's opinions, I think a system of separate writing improves the Court's judges. It forces them to think systematically and consistently about the law, because in every case their legal views are not submerged within an artificially unanimous opinion but are plainly disclosed to the world. Even if they do not personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of public embarrassment, meander back and forth—today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite.

Finally, and to me most important of all, a system of separate opinions renders the profession of a judge—and I think even the profession of a lawyer—more enjoyable. One of the more cantankerous of our Justices, Justice William O. Douglas, once wrote that "the right to dissent is the only thing that makes life tolerable for a judge of an appellate court."[34] I am not sure I agree with that, but I surely agree that it makes the practice of one's profession as a judge more satisfying. To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important and *no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure.

And it blesses him who receives, I think, as well as him who gives—that is, those who read separate opinions as well as those who write them. Legal scholars often bemoan the fact that ours is the only profession in which one does not necessarily study the best of what has been produced, but often the worst. If one is a student of Italian literature, he will read Dante. If a student of physics, Newton. If biology, Darwin. And so forth. But if his field of study is law, he will—at least in a common law system such as ours—be condemned to reading, as often as not, the likes of Lord Tindall or Justice Duvall, not because they write well or think well (they do not), but because what they say is authoritative; it is the law. Dissents and separate concurrences provide a small parole from this awful sentence. Unlike majority opinions, they need not be read after the date of their issuance. They will not be cited, and will not be remembered, unless some quality of thought or of expression commends them to later generations. That is often the case, however, since dissents can have a character and flair ordinarily denied to majority opinions—for reasons well put by Justice Cardozo:

> Comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase. He dreams of [the consequences] of careless *dicta* . . . . The result is to cramp and paralyze. Not so, however, the dissenter. . . . For the moment, he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant.[35]

How much poorer the patrimony of American law would be without those dissents and concurrences that have been thus preserved.

I quoted earlier from the eloquent dissents of the first Justice Harlan in *Plessy v. Ferguson* and of Justice Jackson in *Korematsu*. There are many others which have become part of our legal literature and our legal culture. For example, the marvelous dissent of Justice Holmes in *Northern Securities Co. v. United States*,[36] the antitrust case challenging the merger of two of the nation's greatest railroads, the Great Northern and the Northern Pacific. It was a merger which Teddy Roosevelt, the great trust-buster, vigorously op-

posed and appointed Holmes to the Court with the expectation that Holmes would oppose (and which Roosevelt never forgave him, by the way, for *not* opposing). Holmes wrote:

> 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. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[37]

Or the many memorable dissents of Holmes regarding freedom of speech, including such passages as:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.[38]

Or Justice Jackson's classic defense of freedom of speech:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[39]

Or, come to think of it, Justice Jackson's pithy remarks on a number of subjects. On judicial activism:

> This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone.[40]

On judicial humility:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[41]

Or (and with this I shall conclude) Justice Jackson on changing one's mind. This was written in a concurrence explaining why Jackson joined an opinion that reached precisely the opposite result of an opinion that Jackson himself had rendered ten years earlier, when he was Attorney General. It includes the following:

> Precedent . . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." . . . And Mr.

Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court . . . .". . . Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—"Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.[42]

Endnotes

[1]*Graves v. New York,* 306 U.S. 466, 487 (1939) (Frankfurter, J., concurring).

[2]See ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 44 ***Cornell L.Q.*** 186, 192-195 (1959)

[3]See Morgan, "The Origin of Supreme Court Dissent," 10 ***Wm. & Mary Quarterly*** 353, 355 n.6 (1953).

[4]Jefferson to Thomas Ritchie, December 25, 1829, Andrew A. Lipscomb and Albert E. Bergh, eds., ***The Writings of Thomas Jefferson*** (1903), v. 15, 298.

[5]*See* Morgan, "The Origins of Supreme Court Dissent," 10 ***William and Mary Quarterly*** 353, 355-56 (1953).

[6]Johnson to Jefferson, December 10, 1822, from ***Jefferson Papers***, Library of Congress, quoted in Donald G. Morgan, "Mr. Justice William Johnson and the Constitution," 57 ***Harv. L. Rev.*** 328, 334 n.23 (1944).

[7]ZoBell, *supra*, note 2, at 196 n. 58.

[8]See *id.* at 205.

[9]See Morgan, "Mr. Justice William Johnson and the Constitution," 57 ***Harv. L. Rev.*** 328, 332 (1994).

[10]See ZoBell, *supra*, at note 2, at 196.

[11]L. Hand, ***The Bill of Rights*** 72 (1958)

[12]347 U.S. 483 (1954). See B. Schwartz, ***Super Chief*** 82-101 (1983).

[13]C. Wyzanski, ***Whereas-A Judge's Premises; Essays in Judgment, Ethics & the Law*** 61 (1965).

[14]163 U.S. 537 (1896).

[15]*Brown*, 347 U.S. 494-95.

[16]*Plessy*, 163 U.S. at 554, 559, 560.

[17]323 U.S. 214 (1944).

[18]*Id.* at 246 (Jackson. J., dissenting).

[19]389 U.S. 347 (1967).

[20]*Id.* at 361 (Harlan, J., concurring).

[21]*See Payne v. Tennessee,* 111 S. Ct. 2597, 2610 (1991).

[22]*See, e.g., United States v. Dixon,* 113 S. Ct. 2849 (1993)(overruling *Grady v. Corbin,* 495 U.S. 508 (1990) (decided 5-4));*Payne,* 111 S.Ct. at 2611 (overruling *Booth v. Maryland,* 482 U.S. 496 (1987) (decided 5-4), and *South Carolina v. Gathers,* 490 U.S. 805 (1989) (decided 5-4)); *Garcia v. San Antonio Metro. Transit Authority,* 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery,* 426 U.S. 833 (1976) (decided 5-4)).

[23]112 S.Ct. 2649 (1992).

[24]494 U.S. 872 (1990).

[25]Jackson, ***The Supreme Court in the American System of Government*** 18-19 (1955).

[26]410 U.S. 113 (1973).

[27]381 U.S. 479 (1965).

[28]R. Bork, ***The Tempting of America*** 95-100 (1990).

[29]*Lochner v. New York,* 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[30]*Baldwin v. Missouri,* 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

[31]*Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 686 (1966) (Harlan, J., dissenting).

[32]*Id.* at 677-678 (Black, J., dissenting).

[33]Fuld, "The Voices of Dissent,"62 ***Colum. L. Rev.*** 923 (1962).

[34]Douglas, ***America Challenged*** 4 (1960).

[35]Cardozo, "Law and Literature," 14 ***Yale Rev.*** 699, 715 (1925).

[36]193 U.S. 197 (1904).

[37]*Id.* at 400-01 (Holmes, J., dissenting).

[38]*Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[39]*Board of Education v. Barnette* 319 U.S. 624, 642 (1943).

[40]*Douglas v. Jeannette,* 319 U.S. 157, 181 (1943) (Jackson, J., concurring in part, dissenting in part).

[41]*Brown v Allen,* 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[42]*McGrath v. Kristensen,* 340 U.S. 162, 177-178 (1950) (Jackson, J., concurring).

David Josiah Brewer
A Conservative Justice Reconsidered

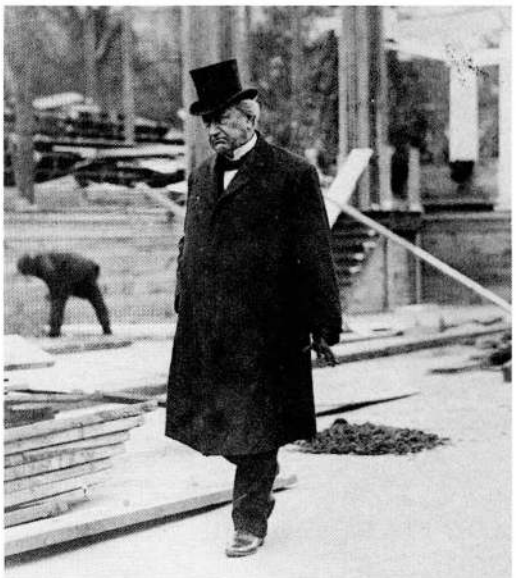
Joseph Gordon Hylton

Few Justices in the history of the Supreme Court of the United States have been more frequently disparaged than David Josiah Brewer. The Kansan, who served on the Court from 1890 to 1910, has been depicted as the embodiment of extreme judicial conservatism and has been characterized variously as an apostle of laissez-faire, a social Darwinist, an individual woefully out of touch with the social realities of his day, and as a political reactionary whose true agenda was the advancement of the interests of large business enterprises.[1]

Such criticisms began during Brewer's final years on the Supreme Court. To Theodore Roosevelt, he was "one of the corporation judges whose presence on the bench has been a source of grave discredit and weakness to it;" to the muckraking journalist Gustavus Myers, he was a Justice who "indoctrinated law in accordance with the demands of capitalist interests."[2] Henry Brown, Brewer's college classmate and colleague on the Supreme Court, identified him as one who embraced "the conservative view . . . regarding the rights of property" while the progressive journal, ***Supra***, described him as one who "followed the standards of an individualistic age from which this magazine believes the country is emerging."[3]

Perhaps the harshest judgment of Brewer has been that offered by historian Arnold Paul. According to Paul, "Brewer held to a strictly conservative, sometimes reactionary, position on the Court, opposing firmly the expansion of government regulatory power, state or federal." He was:

> an outspoken and doctrinaire conservative, who made little pretense of 'judicial self-restraint' and few compromises to Court consensus. . . . [He was] dogmatic and ultraconservative in a wide spectrum of social, political, and judicial matters. What Brewer represented was both an older kind of conservatism, manifested by such themes as a Puritan stress on obligation and character, an acceptance of social stratification (in conjunction with an insistence on social order), and a belief in *noblesse oblige*—and a newer kind more representative of his contemporary milieu, highly materialistic and property-conscious, elitist in the Social Darwinian sense, and fearful of the social challenges accompanying the growth of industrialism.[4]



Justice David Brewer has been portrayed by various historical accounts as a reactionary and "the William O. Douglas of the Right." Brewer was not completely conservative in his beliefs though, supporting a variety of "liberal" causes including women's suffrage, Asian-American rights and conservation of natural resources.

Paul's evaluation has been shared by most historians. Brewer has been described as the "leader of the ultra-conservative, economic laissez-faire advocates on the court;"[5] one of "the tough-minded twins of ultra-conservatism;"[6] the "William O. Douglas of the Right;"[7] a "firm believer in laissez-faire;"[8] "that old laissez-faire advocate;"[9] a "vigorous opponent of judicial sanctions for laissez-faire conservatism;"[10] a judge who possessed a "conservative commitment to a rigidly circumscribed concept of government regulatory authority;"[11] one who stood in "staunch defense of the rights of liberty and property;"[12] and an individual whose "thought turned in upon legal principles instead of expanding outward to an examination of the economic and social conditions to which law is intended to apply."[13]

Although revisionist studies over the past two decades have largely discredited the once widely accepted view that the Supreme Court in Brewer's era was committed to the principles of laissez-faire and the protection of corporations, Brewer's historical reputation has been unaffected.[14] In the past decade, he has been described as one who stood "in the forefront of the court's assault on social legislation;"[15] a judge who "forged conservative socioeconomic beliefs into constitutional doctrine" and "unabashedly relied on judicial power to protect private property rights from the supposed incursions of state and federal legislatures;"[16] one whose "overriding purpose was to limit and structure state interventions into the economy and to affirm the idea of limited government;"[17] a "doctrinaire conservative" who was "the most formalist member of the Court at the time;"[18] and "one of the most conservative members of a notoriously conservative bench . . . obsessed with the importance of private property to the preservation of a free and just society."[19] While a handful of historians have offered more favorable interpretations of Brewer's career, their work has had little impact on his general reputation.[20]

Limitations of the Traditional View

There was a distinct antistatist flavor to many of Brewer's judicial opinions and public addresses. Shortly after his appointment to the United States Supreme Court, he announced his opposition to unwarranted governmental regulation in unequivocal terms: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."[21] At different times, he described the state police power as the "legislative scalping knife,"[22] the refuge of every "grievous wrong to owners of private property,"[23] and an "omnivorous governmental mouth, swallowing individual rights and immunities."[24]

In a series of off-the-bench orations bearing titles like "The Protection to Private Property from Public Attack,"[25] "The Movement of Coercion,"[26] "The Liberty of Each Individual,"[27] "Some Thoughts About Kansas,"[28] (delivered in Kansas during the heyday of the Populist movement), and "The Spirit of Liberty,"[29] he rose to the defense of individual liberty as he understood it. He denounced visionary reformers like Edward Bellamy and Henry George, and he railed against "the black flag of anarchism flaunting destruction to property and therefore relapse of society to barbarism," "the red flag of socialism, inviting a redistribution of property," and the "fiend, fool or fanatic" who rose to their support.[30] Moreover,

he was an unabashed judicial activist who believed that courts not only had the power to review legislative motive but also had an obligation to do so. As he explained shortly before his appointment to the Supreme Court, "We [judges] are not limited to the letter of the statute. We can look beyond that, and see what is the spirit and meaning of the law, and determine whether, under the guise of police regulation, rights guaranteed by the federal Constitution are infringed."[31]

However, to assume, as most have, that such statements indicated a bias in favor of corporations and a relentless hostility to all forms of regulatory activity is to seriously misread his actual record.[32] To begin with, for someone who is often portrayed as a social and political reactionary, Brewer supported a wide variety of "liberal" causes. He was an advocate of women's suffrage, Asian-American rights, the initiative and referendum, prison reform, the rights of the handicapped, the conservation of natural resources, and the education of African-Americans. He was also a staunch anti-imperialist and an opponent of militarism who devoted a great deal of time to the movement for international arbitration and disarmament, and on several occasions he publicly criticized President Theodore Roosevelt for his militaristic foreign policy.[33]

He was also the best known Supreme Court Justice of his era.[34] Even ***The Outlook***, no admirer of Brewer's, admitted that he was "one of the most widely known and popular of all the judges who have ever sat upon the Federal Supreme Court bench."[35] He delivered almost 200 public addresses during his two decades on the nation's highest Court, and his willingness to confront controversial questions led the ***Washington Post*** to observe that "No Justice in the history of the Supreme Court has taken a more liberal hand in the affairs that affect the nation at large, nor has more freely exercised the right of comment on matters of human welfare."[36] (Brewer's enthusiasm for public speaking later prompted Edwin Corwin to remark, "Justice Brewer was inordinately fond of the lecture platform, doing his best to restore the old Federalist conception of the judges as moral mentors of the people."[37])

Of course, Brewer's support for liberal causes and his popularity with the public was not necessarily inconsistent with a general disposition toward the interests of large corporations. Brewer, however, repeatedly expressed concern about the growing power of large business enterprises in American society. In 1880, while a judge on the Kansas Supreme Court, he publicly called for a new state constitution so that his adopted state would be better able to deal with "gigantic corporations [that] are accumulating great properties, and will soon be found wrestling for political power and control."[38] He decried the "accumulated fortunes" of the day as a "danger to all free institutions and a menace to popular government," and he was an early critic of the Standard Oil monopoly.[39] As a state and federal court judge in Kansas, he compiled an extensive record of upholding state regulatory legislation in the face of constitutional claims of corporate appellants, and in 1889, newspapers as diverse as the New York ***World*** and the Burlington, Iowa ***Hawkeye*** endorsed his nomination to the Supreme Court on the grounds that he was a judge who had refused to accede to the wishes of corporations and monopolies.[40]

"No Justice in the history of the Supreme Court has taken a more liberal hand in the affairs that affect the nation at large, nor has more freely exercised the right of comment on matters of human welfare."

While a Supreme Court Justice, he characterized corporate action as "often selfish, remorseless, and cruel," and branded efforts to "crush out opposition" violations of "the first principles of the Declaration of Independence."[41] He favored granting the states great leeway to tax large national corporations, and he regularly supported prosecutions under the Sherman Antitrust Act, casting the crucial fifth vote in the landmark cases, *United States v. Trans-Missouri Freight Assn.*[42] and *Northern Securities v. United States.*[43]

George Shiras served as an Associate Justice for eleven years. He brought a lawyerly approach to case facts and precedent to the Court and was not affiliated with the ultraconservative bloc of Justices who supported laissez-faire economics, instead voting each case on the merits.

Although he was a frequent critic of organized labor, he was not as militantly antilabor as he is usually portrayed. In his view, unions were to be applauded as "the needed and proper complement of capital organizations," providing "wholesome restraints on the greed, the unscrupulous rapacity which dominates much of capital."[44]

Furthermore, a detailed analysis of Brewer's voting record on the Supreme Court reveals that while he was generally hostile to extensions of *federal* power, he was ordinarily willing to accept the legitimacy of state regulatory authority. For example, in forty-eight Supreme Court cases involving constitutional challenges to acts of Congress adopted pursuant to the Commerce Clause, Brewer voted to strike down the act twenty-three times. In contrast, the Court as a whole voided only fifteen of the challenged statutes, and no other Justice voted to strike down more than seventeen. (Two Justices, George Shiras and Horace Gray, voted to overturn a higher percentage of congressional acts than Brewer, but both participated in far fewer cases.[45])

On the other hand, in 739 cases involving challenges to the legitimacy of state regulation, Brewer voted to uphold the state action 589 times, or in just under eighty percent (79.2%) of the cases. In the same cases, the Court as a whole voted to uphold the challenged regulatory activity 619 times (representing 83.8% of the cases)—a difference of thirty decisions over a period of twenty years.[46] Brewer's percentage of "anti-state" opinions (20.6%) actually ranked tenth among the twenty Justices who served on the Court during the tenure of Chief Justice Melville Fuller (1888-1910). If the comparison is limited to the fourteen Justices who participated in at least 100 such cases, Brewer stills ranks only fifth, trailing Justices Field (23.9%), Harlan (23.5%), White (21.4%), and Brown (20.6%). Furthermore, if one compares Brewer to Horace Gray, the Fuller Court Justice least inclined to strike down state regulatory legislation, the percentage difference is just 8.2% (20.6% to 12.4%).[47]

When Brewer voted to strike down state regulatory legislation, it was most frequently on the grounds that it ran askew of either the Commerce or Contracts Clauses of the United States Constitution. In cases that involved claims under the Fourteenth Amendment, Brewer was ordinarily quite amenable to the state position which he upheld in 436 of 506 cases (86.2%). Here also, Brewer was only slightly more hostile to state regulation than the Court as a whole which favored the state in 464 of these cases (91.7%). In terms of his willingness to overturn state actions on Fourteenth Amendment grounds, he ranked behind Justices Harlan and White—both of whom are usually treated as being far more moderate than Brewer—and just ahead of Field, Peckham, Brown, and Day.[48] He also dissented seven times on *behalf* of state authority in Fourteenth Amendment cases, a total exceeded only by Fuller (fourteen) and Holmes (ten).

Within specific subject areas, Brewer's opinions follow a similar pattern. On one or two constitutional issues, he would adopt a stance at odds with his colleagues and would insist that the fundamental principles of justice required that the Court adopt his position. However, in regard to most constitutional questions, Brewer was squarely in the Court's mainstream, upholding state authority four-fifths of the time.[49] In doing so, he frequently sanctioned restrictions that seemed at odds with his libertarian rhetoric.

This was even true in regard to his approach toward extensions of federal regulatory author-

The United States won the Spanish-American War after only ten weeks of fighting, making the U.S. a world power with interests in the Western Pacific and Asia. After the war ended, the War Revenue Tax of 1898 was passed to finance the debt incurred in the war.

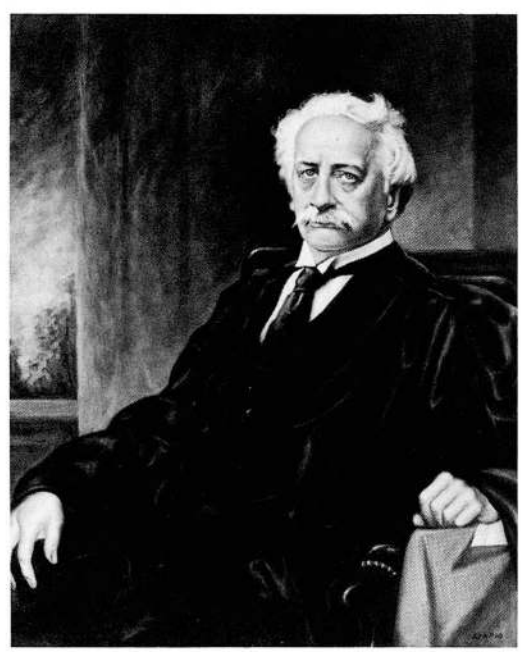
ity. On the one hand, his states' rights orientation prompted the ***New York Times*** to note at the time of his death that he was "an American of the old school, who believed strongly in government by the people and had no patience for the modern tendency toward centralization. . . . He was a strong supporter of states' rights and laid emphasis on the fact that the Tenth Amendment reserved to the states all the powers not delegated expressly to the Federal authorities."[50] In addition to his willingness to limit Congress' power to legislate under the commerce clause, Brewer often advocated a narrow construction of federal regulatory legislation that he found to be constitutional. This was his approach to the Interstate Commerce Commission Act, the Safety Appliance Act of 1893, the Elkins Act of 1903, and, at least initially, the Sherman Antitrust Act.[51] He also opposed certain efforts to extend the authority of Congress under the tax clause. He was a member of the five-man majority that struck down the federal income tax of 1894 in *Pollock v. Farmers' Loan & Trust Co.*,[52] and, after the Spanish-American War, he led the attack on the War Revenue Tax of 1898.[53]

However, at the same time, he supported other efforts to expand the power of the federal government. Not only was he sympathetic to prosecutions under the Sherman Antitrust Act, but when Congress clearly delegated the rate-making power to the ICC in the Hepburn Act, he voted to uphold it.[54] Also, outside of the income and war tax areas, he supported broad congressional authority under the tax clause. For example, he upheld a congressional prohibition of advertising coupons in packages of tobacco containing federal tax stamps, and he authored opinions endorsing the power of Congress to tax tobacco and state-operated liquor stores and to impose disproportionate taxes on the territories.[55] He also twice voted to uphold a punitively high federal tax on oleomargarine even though he had publicly criticized efforts to limit or prohibit the use of that product.[56] He endorsed the power of the federal government to condemn property for the purpose of establishing a Civil War memorial

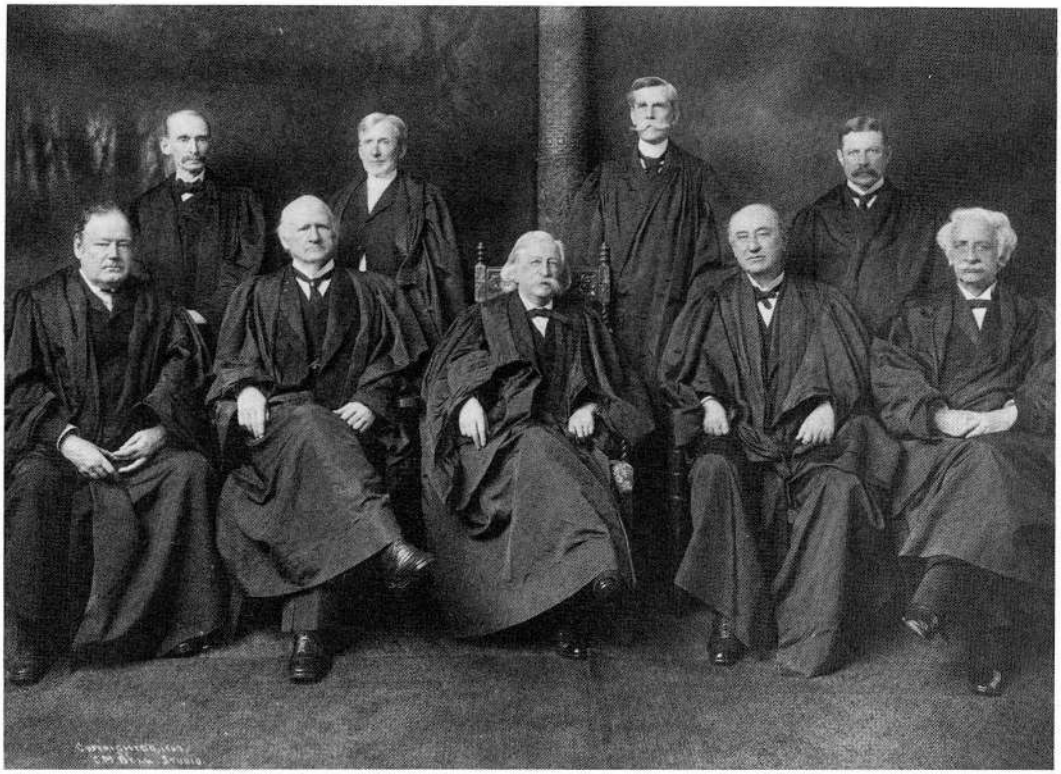
(although no specific provision of the Constitution authorized the exercise of the eminent power for this purpose) and, while he was a persistent critic of Congress' treatment of the Chinese, he accepted that it had broad control over immigration.[57]

The contrast between rhetoric and Brewer's actual voting record was even more dramatic in cases involving state regulatory efforts. His belief in the primacy of individual property rights led him to embrace a broad interpretation of the principle of just compensation, and he was one of the first to insist that certain forms of regulation under the police power were so onerous that they constituted a taking of property.[58] In a public address delivered shortly after his appointment to the Supreme Court, he announced that "The demands of absolute and eternal justice forbid that any private property, legally acquired and legally held, should be spoliated or destroyed in the interests of public health, morals, or welfare without compensation."[59] A few years earlier, he had, while a federal circuit court judge, created a firestorm of controversy when he ruled that the owners of breweries and distilleries were entitled to compensation for property which had been rendered virtually worthless by the Kansas prohibition act.[60] Although he did not question the power of the state to ban alcoholic beverages, he insisted that the cost of the public benefit could not constitutionally be imposed only on the operators of what had previously been a lawful business.[61] (After he reached the Supreme Court, he also asserted that he would have applied the same analysis to contemporary state laws that outlawed oleomargarine.[62]) Although Brewer's holding was soon overruled by the Supreme Court in *Mugler v. Kansas*,[63] his decision led several prohibitionist senators from his own judicial circuit to oppose his confirmation to the Supreme Court.[64]

But in later years, Brewer was surprisingly reluctant to find that a taking had occurred.[65] Only twice in his two decades on the Supreme Court did he file a written dissent in a case where the majority determined that no taking had occurred.[66] On the other hand, he could often be found defending the state's action when other Justices felt compensation was necessary. He dissented from Justice Harlan's controversial majority opinion in *Norwood v. Baker*[67] which held that special assessments for road construction had to be apportioned in regard to benefit, and in *Lindsay & Phelps Co. v. Mullen*,[68] he upheld a Minnesota statute that allowed the state surveyor general unlimited discretion to seize privately-owned logs to cover the costs of his services. The latter decision prompted an exasperated Rufus Peckham (Brewer's supposed ideological "twin") to accuse Brewer of tolerating "an arbitrary taking, under the form of a legislative enactment, of the property of one man and bestowing it upon another."[69] In *L'Hote v. New Orleans*,[70] Brewer rejected the appellant's contention that a zoning ordinance had effected a taking of his property by significantly reducing its value. (The ordinance in question required all prostitutes to ply their trade in the section of New Orleans in which L'Hote's property was located.) Writing for the Court, Brewer explained, seemingly at odds with his earlier prohibition decision, "The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."[71]



Rufus Peckham joined the Supreme Court in 1895, one year after his brother Wheeler's nomination to the Court was defeated 41 to 32. Considered Justice Brewer's ideological "twin," Peckham was a mainstay of the Court's conservatives.



The Fuller Court in 1907 included: (back row, from left:) William Day, Joseph McKenna, Oliver Wendell Holmes, Jr., William Moody. (Front row, from left:) Edward Douglass White, John Marshall Harlan, Melville Fuller, David Brewer and Rufus Peckham.

The same pattern can be seen in Brewer's decisions pertaining to rate regulation. Brewer arrived on the Supreme Court amid considerable fanfare generated by his expressed opposition to certain features of the Court's 1877 landmark holding in *Munn v. Illinois*.[72] Brewer disagreed with *Munn*, which had upheld the power of the states to regulate the rates charged by railroads and other businesses in which there was a public interest, in two fundamental respects. First, he believed that state-controlled rates had to be set high enough to guarantee the owners of the regulated enterprises some return on their money and that the reasonableness of the rates was properly a judicial question. (*Munn* had asserted that it was a legislative, not a judicial question.) Second, he believed, as his uncle Stephen Field had argued in his *Munn* dissent, that the power of rate regulation extended only to property devoted to a public use (like common carriers or public utilities) and not, as the *Munn* majority had held, to the more expansive category of businesses "affected with a public interest."[73] The latter standard, Brewer insisted, was too broad because the public could always claim an interest in any business. As he argued in 1892, "If it [the state] may regulate the price of one service, which is not a public service . . . why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, 'Looking Backward' is nearer than a dream."[74]

On the first issue, Brewer clearly prevailed. Shortly after his appointment, the Court upheld a lower court ruling by Brewer that rate schedules were subject to review by the federal courts. Eight years later, it upheld in *Smyth v. Ames*,[75] the right of investors in regulated industries to a reasonable return on their investment (again upholding a lower court opinion by Brewer).[76] However, on the second issue Brewer's efforts ended in defeat. In 1892 and 1894, Brewer tried to persuade his colleagues to overturn the *Munn* holding that the public interest warranted the

regulation of grain elevators, but by votes of 5-3 and 5-4, the Court reaffirmed the existing standard.[77]

After his defeat in 1894, Brewer conceded that the *Munn* standard remained in force.[78] Moreover, having made his point, Brewer proved to be generally sympathetic to state rate-setting practices. He denied that courts had the authority to second guess legislatures on the general desirability of a particular rate schedule, and from the outset, his opinions reflected a concern that the right to a return on investment not be used as a cover for mismanagement or as a way of undermining state regulatory authority.[79] While he believed that rates had to be high enough not just to cover costs but also to provide for some profit, he rejected the idea that a "reasonable" return was equal to the amount that could have been earned in an alternative investment.[80] Moreover, there is no case in which he voted to void a rate schedule on the grounds that it provided revenue adequate to cover the costs of operation but insufficient to provide for a profit. In fact, in eight of nine rate regulation cases decided after *Smyth v. Ames*, Brewer voted to sustain the challenged schedule.[81]

Brewer's decisions in cases involving matters of contractual liberty exhibited the same pattern. He was the author of the opinion in which the Supreme Court acknowledged a constitutional right of contract, and, in the context of the employer-employee relationships, he saw it as an important limitation on the state's regulatory power.[82] Although he wrote neither opinion, Brewer was part of the majority in the infamous *Lochner v. New York*,[83] which struck down a maximum hours law for bakers, and in *Adair v. United States*,[84] which overturned a federal prohibition of "yellow dog" contracts. His credentials as a defender of liberty of contract were further strengthened by dissents without opinion in four additional cases involving a Utah statute prohibiting the employment of men in underground mines, smelters, and ore or metal refineries for more than eight hours per day;[85] a Tennessee law that prohibited the payment of wages in scrip or vouchers rather than cash;[86] a Kansas statute that imposed restrictions on the hours of public works employees;[87] and an Arkansas act that required miners be paid on the basis of the weight of coal as mined rather than its weight after screening.[88]

However, the prohibition against state intervention into the employment relationship was not an absolute one. The standard that Brewer applied in such cases was implicit in his pronouncement that "A man in full health and strength is at liberty to contract to perform any ordinarily healthy work, for as many hours as he sees fit."[89] Consequently, if the worker was at less than "full health and strength" or if the work was not "ordinarily healthy," regulation could be warranted. Moreover, Brewer was aware that such protective legislation was the product of an ongoing struggle between workers and employers in which workers were often at a considerable disadvantage.[90]

As a result, he voted to uphold an Arkansas statute that prescribed the way in which back wages were to be paid to discharged railroad workers, and he joined a unanimous Court in upholding a congressional act that imposed a maximum eight-hour day for workers employed on federal public works projects.[91] He also apparently changed his mind on the constitutionality of hours restrictions for underground mining and supported such limitations for employees in the munitions industry and other "hazardous occupations."[92]

Moreover, Brewer was the author of two of the most important opinions *upholding* the regulation of the employment relationship. In *Patterson v. Bark Eudora*,[93] he rejected a liberty of contract challenge to an act of Congress that prohibited the advance payment of seamen's wages. He found the statute to be an acceptable regulation of the employment relationship since it was designed to correct a frequently abused practice used by wily shipowners to recruit seamen against their will. According to Brewer, "It was in order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed. . . . No one can doubt that the best interests of seamen as a class are preserved by such legislation."[94]

In *Muller v. Oregon*,[95] his best known opinion, he sustained a maximum-hours statute for female workers against a liberty of contract challenge. The statute in this case was distinguishable from the one in *Lochner*, Brewer maintained, because of the different legislative mo-

Curt Muller (arms folded) challenged an Oregon law limiting the hours that women could work in laundries. *Muller v. Oregon* was the first time the Supreme Court upheld a law limiting the number of hours an employee could work.

tive. The New York act was "unreasonable, unnecessary and arbitrary" because it singled out bakers from the pool of general workers for special protection (or, depending upon one's view, special restriction) without a reasonable basis for doing so, but in *Muller* a similar limitation was justified by the special needs and physical features of female workers.[96] Brewer elaborated on this distinction in a public address delivered shortly after he handed down his *Muller* opinion:

> I think I may safely appeal to all of the gentler sex before me, and ask them if making and baking bread is a specially hurtful and unhealthy labor. . . . Here is a man; strong, vigorous, healthy. Why should he not be permitted to contract for more than eight hours labor—for nine, ten, or a dozen, if he wishes?
>
> There is scarcely a man in charge of any department at Washington who does not work over ten hours a day. There is not a Justice of our court who does not work longer, and all of us look reasonably healthy. The Declaration of Independence and the constitution give us the right to determine these questions for ourselves.[97]

Brewer was simply unwilling to believe that baking was a hazardous profession or that male bakers needed special governmental protection. On the other hand, he readily believed that the public interest justified such protection for sailors and women.

Outside of the employment context, Brewer was much less sympathetic to liberty of contract claims. As he once explained, "That there is, generally speaking, a liberty of contract which is protected by the Fourteenth Amendment, may be conceded, yet such liberty does not extend to all contracts."[98] Elsewhere, he noted that liberty of contract was "not absolute and universal"[99] and could "properly be reduced in the interest of life and safety."[100] When states sought to limit the rights of citizens to enter into insurance contracts with out-of-state insurers or to ban options trading and margin sales in the financial marketplace, he voted to strike down the statutes (although in none of these cases did he write an opinion).[101] However, when the challenged restrictions were state antitrust and mechanics

lien laws or a United States statute that barred the use of attorneys in cases involving government pensions, he had no problem upholding the statutes at issue.[102] Given his reputation as an advocate of liberty of contract, it is ironic that all of Brewer's written opinions in liberty of contract cases *upheld* the power of the state to impose restrictions.

Finally, Brewer frequently asserted his belief that individuals had a right to make choices in matters of "habit, occupation, and life" free from the interference of the state.[103] As he put it, "No man should be restrained in the full and free control of his life, and its activities, except in so far as that life and those activities trespass upon the equal liberty of his neighbor."[104] However, one finds only a handful of situations arising during Brewer's long judicial career in which he found it necessary to invoke this right. He voted to strike down a small number of statutes that created monopolies in private trades or businesses;[105] he dissented from a decision of the Supreme Court upholding the power of a state to require mandatory inoculation for smallpox;[106] and he opposed state restrictions on the free exercise of religion (which was hardly a controversial stance).[107] In all but the latter of these cases, he chose to express his opposition by dissenting without opinion.

On other occasions, he was reluctant to invoke this principle as a limitation on state authority. In the early 1880s, he questioned the authority of a state to ban the manufacture and possession of alcoholic beverages for personal use (as opposed to sale); however, in spite of numerous opportunities to do so, he never chose to decide a case on this basis.[108] While he was fond of saying that "the choice of occupation is beyond legislative power," he did not view the right to an occupation as restricting the state's ability to require occupational licenses.[109] In a much criticized decision, Brewer upheld, over dissents by Justices Peckham, Harlan, and McKenna, a New York statute that barred convicted felons from obtaining a license to practice medicine.[110] Brewer maintained that this was a legitimate exercise of the police power, even though the prohibition applied to those who had committed felonies prior to the date of the statute.[111]

Although he expressed reservations about the possibility of achieving individual moral reform through legislation, Brewer was willing to grant the state broad authority to regulate morals.[112] Bans of gambling, lotteries, and prostitution were legitimate exercises of state power, as was the prohibition of the sale of alcoholic beverages, the criminalizing of polygamy, and the enactment of Sunday closing laws.[113] As he once remarked, "In what I have been saying [in regard to individual liberty] I have had no reference to cases in which a question of morality exists. Even though a considerable minority should believe in the right of free gambling houses or free brothels, or if such minority were Mormons and believed in polygamy, I should not doubt the right of the majority to enforce its views by ordinances in respect to such moral questions."[114] In cases involving prosecutions for crimes of vice, Brewer always voted to uphold the statute, even when the intrusiveness of the authorized state action prompted his colleague Rufus Peckham to dissent.[115] Also, for all his concern about property rights, Brewer readily accepted that the forfeiture of property was an appropriate penalty for those convicted of a crime.[116]

Brewer's Constitutional Theories

To understand the basis on which Brewer distinguished between legitimate and illegitimate usages of the police power, one has to appreciate the extent to which his constitutional views were shaped by his formative experiences in antebellum New England. Of particular importance to his intellectual development were the antislavery movement and the political theories of Theodore Dwight Woolsey, his professor of history and political science at Yale.

His states' rights views and his suspicion of the concentration of power in the national government can be traced to his identification with the branch of the antislavery movement which attempted to invoke the principles of states' rights to erect a barrier against enforcement of the federal fugitive slave laws.[117] The son of a free-soil Democrat who joined the Republican Party over the issue of slavery, Brewer as a college student had applauded the decision of the Supreme Court of Wisconsin asserting jurisdiction over an alleged fugitive slave in the custody of a federal marshal.[118] That the decision should subsequently be overruled by the United States

Supreme Court—the same institution that had earlier handed down the infamous *Dred Scott* decision—only confirmed the dangers of too great a concentration of powers in the national government.[119]

His belief that a line needed to be drawn between acceptable and unacceptable exercises of the police power can be traced to the theory of political economy he was taught at Yale. Although he is barely remembered today, Theodore Dwight Woolsey was one of the most prominent political theorists in the antebellum north. An ordained minister who had studied law, Woolsey achieved great academic distinction, first as a professor of Greek language and literature and later as a professor of history, political science, and international law and as president of Yale, a post he held from 1846 to 1871.[120] During the 1855-56 academic year, Brewer attended Woolsey's lectures as a nineteen-year-old college senior.[121]

Justice David Brewer (above) was influenced by the ideas of Theodore Dwight Woolsey, a Yale professor and one of the leading political theorists of the antebellum north.

Woolsey's theory of the state was founded on the belief that there was a divinely authored moral order and that man was a free moral being.[122] Every individual had certain God-given rights—the "powers and prerogatives with which the individual is invested"—which were to be used "for the purpose of developing his nature," and which "other individuals are bound to leave undisturbed."[123] The function of the state was to aid in the moral self-development of the individual which it accomplished by protecting these rights *and* also by maintaining a climate in which moral development could occur. The state was "in the natural order of things God's method of helping men toward a perfect life."[124] To this end, the state could guard the morality of the people by outlawing public behavior counterproductive to self-development, and it could enact laws to promote the general well being, so long as the power was not exercised in such a way as to interfere with the individual right to moral self-development.

The state could levy taxes, regulate the use of property (including absolute prohibitions of certain uses), establish public schools, adopt compulsory attendance laws for minors, promote industry, transportation, and health, define acceptable noise levels and sanitary practices, adopt rules regulating marriage, divorce, and descent, promote religion, and even establish a church, if the freedom to worship was not impaired. On the other hand, the state could not substitute its own judgment for that of the individual in matters that affected the process of moral development. "Society," Woolsey maintained, "was never meant to be the principal means by which the perfection of the individual was to be secured, but only the condition without which that perfection would be impossible. . . . If he [the individual] thinks that the end of government is to support him, to point out to him ways of industry, to lead the way in every enterprise, he remains a dependent, undeveloped citizen; he is not a freeman in his spirit."[125] In other words, the obligation to facilitate moral development meant that the state would be active in certain areas, but passive in others.

Although Woolsey's theories bore certain similarities to other nineteenth century views of the state, he was careful to distinguish himself from those who advocated a minimalist state or who believed that general social utility could form the basis of a democratic state. He dismissed utilitarianism as not just "useless" but "harmful." He rejected social contract theory as a baseless fiction, and because he believed in an activist state within prescribed bounds, Woolsey

had no use for theories of laissez-faire whether they be linked to the utilitarian tradition or to the evolutionary theories associated with Herbert Spencer and his (Woolsey's) former student, William Graham Sumner.[126] He distinguished his notion of natural rights from more traditional ideas of natural law, and he emphasized that liberty could be fully understood only in the context of Christianity.[127] Not surprisingly, he was also a militant critic of Marxism and other forms of socialism.[128]

Given the paucity of materials relating to Brewer's youth, it is not possible to know whether Brewer consciously adopted the constitutional theories of Woolsey or whether they merely confirmed what he already believed. Either way, Woolsey's influence on Brewer was undeniable. Although Brewer never cited Woolsey by name in any of his opinions, one cannot leaf through the pages of Woolsey's writings without being struck by their similarity to Brewer's later opinions. Certainly Brewer did nothing to disguise his admiration for Woolsey. In 1871, he initiated a movement to establish a "Woolsey Professorship of International Law" at Yale to honor the recently retired Woolsey, and after his professor's death two decades later, he lauded him as one of the nation's greatest educators and political theorists.[129]

It is easy to see why Brewer would have found Woolsey's views so appealing. They shared not only a common opposition to slavery and a continuing interest in international law, but also a deep religious faith rooted in the tradition of New England Congregationalism.[130] Although Brewer's intense religiosity has been frequently noted, the extent to which his constitutional and theological views were linked has not been fully appreciated. Throughout his career, Brewer found no reason to separate his religious and judicial roles. He believed that the laws of the United States were to be interpreted in light of the fact that it was a "Christian nation," and he was fond of saying that "the law and the Gospel ought always to go together."[131]

Like Woolsey, Brewer believed that God had made individuals responsible for their own moral development.[132] However, moral choices were genuine only if made by the individual himself. Consequently, any interference with the right of choice on the grounds that the state or the majority knew better than the individual was to frustrate God's design. According to Brewer, Christ's emphasis on the individual rather than the state had "laid the foundation of a truer and nobler republic."[133] Moreover, it was God's plan that ultimately limited the authority of democratic majorities since "the Almighty is wiser than even such majority, and He has decreed it best for man to leave each free to work out his own salvation."[134] Like Woolsey, Brewer saw a potential conflict between individual accountability and a paternalistic state. As he noted in 1906, "[T]oo much and too frequent interference by government blunts the sense of individual responsibility, and the danger is that we drift to a condition where the individual abandons his own duty and simply appeals to government."[135]

To Woolsey's use of individual moral development as the test of legislative legitimacy, Brewer added a formal justification for adopting this as the constitutional standard. The Declaration of Independence had, Brewer maintained, through its guarantee of the rights to life, liberty, and the pursuit of happiness, made the protection of the individual's right to pursue his own destiny the cornerstone of American constitutionalism. The Constitution, he insisted, embodied these same principles—even if they were not so clearly articulated in its text—and the Fourteenth Amendment had been adopted to insure that state governments honored the same fundamental principle.[136] The task of the judge was to draw the line between legislation that served the legitimate interests of the state and its citizens and that which, for whatever motives, impaired the individual's right of moral self-development. Knowing where to draw this line was no easy matter—Woolsey had acknowledged that it was often impossible to draw "a clear line between the grounds on which particular regulations for the public welfare may be made"[137]—but Brewer never seemed to doubt his ability to do so. Unfortunately, neither Woolsey nor Brewer ever developed formal guidelines for how this determination was to be made; for Brewer, the question was ordinarily addressed as simply one of the "reasonableness" of the challenged statute.[138]

Brewer never seemed to grasp that many of his contemporaries did not share his understanding of the relationship between American constitutionalism and Protestant Christianity, or, for that

matter, that well-intentioned judges and legislators might disagree as to what was reasonable and what was not. While Woolsey's mix of political science, religion, and individualism had great appeal in antebellum America, and while it continued to strike a responsive chord with much of the American public a half century later, most post-Civil War political scientists and constitutional scholars found it embarrassingly inadequate. Without rejecting religion or Christianity *per se*, the generation of social scientists who came of age after 1865 sought to root their disciplines in secular and scientific principles rather than religious ones.[139]

The impact of efforts to secularize political science after the Civil War can be seen in the unenthusiastic reception that greeted the publication of Woolsey's lectures in 1877, more than three decades after they were first delivered. Woolsey's treatise, entitled ***Political Science or The State Theoretically Considered***, offered a theory of American government essentially unchanged from the one he had propounded during Brewer's student days. Not surprisingly, most commentators found in it little of contemporary interest. The ***North American Review*** characterized the two-volume work as "not science at all" and as "a highly confused medley of principles drawn from all sorts of philosophies which do not advance the subject, and indeed would naturally tend to induce the reader to believe that political science was something like alchemy or astrology." It characterized the "fundamental assumptions of Dr. Woolsey's system" as "strangely confused," a result of the fact that "he [Woolsey] has at every stage introduced theological conceptions into his reasoning."[140]

The Nation, though somewhat more charitable in its evaluation, also faulted Woolsey for failing to explain how a people are to know "whether their institutions do or do not make for human perfection, and do or do not carry out God's ends in the creation of human society."[141] Although Woolsey's 1860 treatise on international law remained in print until 1908, ***Political Science*** quickly disappeared.[142] There was no second edition, and the work received only a smattering of attention in scholarly circles. A half century later, Vernon Parrington dismissed Woolsey's effort as an attempt to substitute "a composite social-moralistic conception" for the "romantic doctrine of natural rights" and "a dignified [but unsuccessful] attempt to rehabilitate the old Connecticut Federalism and suit it to the taste of a new age."[143]

Brewer, however, did not share in this evaluation. He continued to praise Woolsey as one of the greatest of American constitutional theorists, and his own public addresses illustrated that his own ideas were still strongly wedded to concepts he had embraced in the 1850s. He paid little attention to contemporary debates regarding the meaning of constitutionalism, and the enthusiastic response to many public addresses convinced him that the mix of Christianity, individualism, and American constitutionalism he espoused remained as viable as ever.[144] This made him something of an anachronism even among his conservative colleagues. No one was more inclined to refer to the demands of natural justice, and only Brewer seemed comfortable invoking explicit references to Christianity as part of the process of resolving constitutional questions.[145]

Conclusion

The religious emphasis in Brewer's opinions and public addresses seemed so outdated that many of his critics assumed that it was little more than a sanctimonious cover for what they believed to be his true objective—the protection of business interests from state control. For a generation of historians and political scientists inclined to believe that American history had essentially been a struggle between the people and the interests and that the Supreme Court had long been aligned with the interests, the case against Brewer was easily made. His bold antistatist pronouncements, often quoted out of context and shorn of their religious rationale, provided ample evidence of his (and the Court's) opposition to reform and tacit support for the interests of corporate America. His moderate voting record and his anticorporation pronouncements were either ignored or forgotten. By the mid-twentieth century, most historians simply took it for granted that Brewer had been an unrelenting opponent of state regulation.

As one who held on to a conception of American constitutionalism that had lost its currency, David Brewer can fairly be labeled a conservative. However, to say that he was a self-conscious

defender of the interests of corporate America or an enthusiastic disciple of laissez-faire is both unfair and inaccurate. While he was a staunch proponent of individualism, his was the individualism of the antebellum New England reformer and not that of the twentieth century libertarian. Depending upon one's definition, Brewer may or may not have been the most conservative Justice of the Fuller Court, but he has certainly been its most misunderstood member.

Endnotes

[1] Brewer was born in 1837 in Smyrna, Asia Minor, where his parents were missionaries. His father, Josiah Brewer, was a Congregationalist minister and his mother, Emilia Field Brewer, was the sister of Stephen Field, Brewer's future colleague on the Supreme Court. He was raised in Connecticut and Massachusetts and educated at Wesleyan, Yale, and the Albany Law School. In 1858, he left the northeast for Kansas, settling in Leavenworth the following year. He served on the Kansas Supreme Court from 1870 until 1884 when he was appointed judge of the United States Eighth Circuit Court by Chester A. Arthur. In December 1889, he was nominated to the United States Supreme Court by Benjamin Harrison. The principal sources of biographical information for Brewer are the Brewer Family Papers at Yale University. The only full length biography is the recently published Michael J. Brodhead, ***David J. Brewer: The Life of a Supreme Court Justice, 1837-1910*** (1994). Other secondary sources include: Lynford A. Lardner, "The Constitutional Doctrines of Justice David Josiah Brewer," Ph.D. dissertation, Princeton University (1938); Charles Fairman, "The Education of a Justice: Justice Bradley and Some of His Colleagues," 1 ***Stanford Law Review*** 217, 243-48 (1949); and D. Stanley Eitzen, "David Brewer, 1837-1910: A Kansan on the United States Supreme Court," 12 ***The Emporia State Research Studies*** 1 (1964).

[2] Roosevelt to William Allen White, November 26, 1907. 6 Elting E. Morison, ed. ***The Letters of Theodore Roosevelt*** 855 (1953); Gustavus Myers, ***The History of the Supreme Court of the United States*** 739 (1912).

[3] C. A. Kent, ed., ***Memoir of Henry Billings Brown*** 32 (1915); 94 ***The Outlook*** 786 (1910).

[4] Paul, "David J. Brewer," in Leon Friedman and Fred L. Israel, eds., 2 ***The Justices of the United States Supreme Court, 1789-1969*** 1515, 1520 (1969). See also, Paul, ***The Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*** 70-72 (1960).

[5] Henry J. Abraham, ***Justices and Presidents: A Political History of Appointments to the Supreme Court*** 138 (1974).

[6] Fred Rodell, ***Nine Men: A Political History of the Supreme Court from 1790 to 1955*** 187 (1955). The other "twin" was Rufus Peckham.

[7] Alan F. Westin, ***An Autobiography of the Supreme Court*** 24 (1963).

[8] Sidney Fine, ***Laissez Faire and the General-Welfare State*** 136 (1956).

[9] Loren Beth, ***The Development of the American Constitution, 1877-1917*** 185 (1971).

[10] Morison, ***Letters of Theodore Roosevelt***, *supra*, note 2 at 5:397.

[11] William F. Swindler, ***Court and Constitution in the Twentieth Century: The Old Legality, 1889-1932*** 93 (1969).

[12] Carl Brent Swisher, ***American Constitutional Development*** 563 (1943).

[13] Lardner, "Constitutional Doctrines," *supra*, note 1 at 221.

[14] This literature has emphasized that the judges of the Waite and Fuller Courts were part of a constitutional tradition rooted in the liberalism of antebellum America and characterized by a hostility to government-sanctioned monopoly and a belief in the sanctity of free labor. See James W. Ely, Jr., "Judicial Liberalism in the Gilded Age: Appraising John Marshall Harlan," 21 ***Reviews in American History*** 57-62 (1993); Howard Gillman, ***The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*** 1-18 (1993); Stephen A. Siegel, "*Lochner* Era Jurisprudence and the American Constitutional Tradition," 70 ***North Carolina Law Review*** 1 (1991); Herbert Hovenkamp, ***Enterprise and American Law, 1836-1937*** (1991); William Nelson, ***The Fourteenth Amendment: From Political Principle to Judicial Doctrine*** (1988); Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," 72 ***Journal of American History*** 63 (1985); Michael Les Benedict, "Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 ***Law and History Review*** 293 (1985); John Semonche, ***Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920*** (1978); Charles W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," 1984 ***Yearbook*** Supreme Court Historical Society 20; McCurdy, "The Knight Sugar Decision of 1895 and the Modernization of American Corporate Law, 1869-1903," 53 ***Business History Review*** 302 (1979); and McCurdy's seminal "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," 61 ***Journal of American History*** 970 (1975). For a discussion of the historiography of the Fuller Court prior to 1975, see Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," ***The Supreme Court Review 1976*** 135-159.

[15] David P. Currie, ***The Constitution in the Supreme Court: The Second Century, 1888-1986*** 82 (1990).

[16] Kermit Hall, "David Brewer," in Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., 1 ***Encyclopedia of the American Constitution*** 152 (1986).

[17] Owen Fiss, "David J. Brewer: The Judge as Missionary," in ***The Fields and the Law*** 58 (1986).

[18] William M. Wiecek, ***Liberty Under Law: The Supreme Court in American Life*** 121, 126 (1988).

[19] Stephen A. Siegel, "Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation," 70 ***Virginia Law Review*** 187, 215-16 (1984).

[20] Such works include Francis Bergan, "Mr. Justice Brewer: Perspective of a Century," 25 ***Albany Law Review***

191 (1961); Robert Gamer, "Justice Brewer and Substantive Due Process: A Conservative Court Revisited," 18 *Vanderbilt Law Review* 615 (1965); Semonche, "Charting the Future," *supra*, note 14 at 245; and Brodhead, *David J. Brewer*, *supra*, note 1.

[21] *Budd v. New York*, 143 U.S. 517, 551 (1892) (in dissent).

[22] *Cotting v. Kansas City Stock Yards*, 183 U.S. 79, 104-05 (1901).

[23] *Chicago, Burlington & Quincy Ry. v. Drainage Commissioners*, 200 U.S. 561, 600 (1906).

[24] Brewer, "Two Periods in the History of the Supreme Court," 19 *Reports of the Virginia Bar Association* 133, 155 (1906).

[25] 55 *New Englander and Yale Review* 97 (1891), also reprinted in 10 *Railway and Corporation Law Journal* 281 (1891).

[26] 16 *Report of the New York State Bar Association* 37 (1893); 47 *Albany Law Journal* 85 (1893).

[27] 45 *The Independent* 938 (1893).

[28] 12 *Kansas Bar Association Reports* 61 (1895).

[29] *The Spirit of Liberty: An Address by Hon. D. J. Brewer at the Annual Meeting of the Northwestern Agents, July 18, 1904*(1904).

[30] Brewer, "The Movement of Coercion," *supra*, note 26, quoted in Westin, *Autobiography of the Supreme Court*, *supra*, note 7 at 133.

[31] *Ex parte Kieffer*, 40 Fed. 399, 401 (1889).

[32] For similar conclusions that Brewer's rhetoric was more antistatist than his actual voting record on the Court, see Semonche, *Charting the Future*, *supra*, note 14 at 245 and Westin, *Autobiography of the Supreme Court*, *supra*, note 7 at 122.

[33] For Brewer's off-the-bench activities, see W. H. Baldwin, "Justice Brewer and Organized Charity," 24 *The Survey* 119 (1910); Lardner, "Constitutional Doctrines," *supra*, note 1 at 22-27; Michael J. Brodhead, "Justice David J. Brewer: A Voice for Peace on the Supreme Court," 1985 *Yearbook* Supreme Court Historical Society 93; and generally, Brodhead, *David J. Brewer*, *supra*, note 1.

[34] In addition to the sources cited in footnotes 35 and 36, below, for confirmations of Brewer's popularity see 187 *North American Review* 1 (1908); 39 *The Arena* 84 (1908); *New York Times*, June 20, 1909 at Sec. 5:5; *New York Times*, July 23, 1909 at 6; 16 *Virginia Law Register* 65 (1910); 48 *Current Literature* 483 (1910); *Proceedings of the Arkansas Bar Association* 25-26 (1910); *Proceedings of the American Bar Association* 660-61 (1910); and *Proceedings of the Bar Association of Kansas* 17-21 (1911).

[35] 94 *The Outlook* 785 (1910).

[36] *Washington Post*, March 29, 1910, quoted in Fairman, *supra*, note 1 at 248. The estimate of nearly 200 public addresses is based upon the manuscripts in the Brewer Family Papers and an examination of all *New York Times* stories pertaining to Brewer between 1889 and 1910.

[37] Edward S. Corwin, *Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government* 198 (1938).

[38] Brewer, "Constitutional Convention," 3 *The Western Homestead* 70 (1880), quoted in Lardner, "Constitutional Doctrines," *supra*, note 1 at 127.

[39] Brewer, "The Scholar in Politics," Topeka *Daily Capital*, June 13, 1883, quoted in *id.* at 128. He expressed his antipathy to the practices of Standard Oil in *Burlington, Cedar Rapids & Northern Ry. Co. v. Northwestern Fuel Co.*, 31 Fed 652, 657 (1887).

[40] See, for example, *Kansas v. Nemaha County*, 7 Kan. 542, 549 (1871) (in dissent); *Kansas Pacific Ry. v. Mower*, 16 Kan. 573 (1876); *Sherman v. Anderson*, 27 Kan. 333 (1882); *Missouri v. Bell Telephone Co.* 23 Fed. 539 (1885); *National Water-Works Company of New York v. City of Kansas*, 28 Fed. 921 (1886); *State v. Kansas City, Ft. Scott & G. R. Railroad Co.*, 32 Fed. 722 (1887); *Chicago, Burlington and Quincy Ry. Co. v. Dey*, 38 Fed. 656 (1889). For the newspaper endorsements, see undated newspaper clippings, Brewer Family Papers.

[41] Brewer, "Some Thoughts About Kansas," *supra*, note 28 at 69; Brewer, "Address to the Association of Agents of the Northwestern Mutual Life Insurance Company" (1908). Brewer Family Papers. For an elaboration of Brewer's dislike of the predatory practices of large corporations, see Brewer, "Organized Wealth and the Judiciary," 57 *The Independent* 301 (1904) and "Our National Opportunities," reported *New York Times*, November 29, 1907.

[42] 166 U.S. 290 (1897).

[43] 193 U.S. 197 (1904). Other cases in which Brewer voted to uphold prosecutions under the Sherman Act include *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899); *Montague & Company v. Lowry*, 193 U.S. 38 (1904); *Swift and Company v. United States*, 196 U.S. 375 (1905); and *Loewe v. Lawlor*, 208 U.S. 274 (1908). The principal case in which Brewer exhibited his approval of state taxation of national corporations was *Adams Express Co. v. Ohio State Auditor*, 166 U.S 185 (1897).

[44] Brewer, "The Supreme Court of the United States," 33 *Scribner's Monthly* 273, 280 (1903). He also authored a strongly pro-labor opinion in *Ames v. Union Pacific Ry.*, 62 Fed. 7 (1894). However, his belief that unions could be effective without resorting to coercive tactics led him on several occasions to support the use of judicial power to restrict the actions of strikers. *In re Doolittle*, 23 Fed. 544 (1885); *United States v. Kane*, 23 Fed. 748 (1885); and the landmark *In re Debs*, 158 U.S. 564 (1895).

[45] The cases examined are listed in Bernard C. Gavit, *The Commerce Clause of the United States Constitution* (1932). For examples of his hostility to the federal police power, see *Champion v. Ames*, 188 U.S. 321 (1903) (in dissent); *Keller v. United States*, 213 U.S. 138 (1909), (author of majority opinion); *Employers Liability Cases*, 207 U.S. 463 (1908) (joined in Justice Peckham's concurrence); and *Adair v. United States*, 208 U.S. 161 (1908) (joined majority opinion). To accept the Commerce Clause as a source of general police power jurisdiction, Brewer maintained, would constitute a "change in the internal conditions of this country as was never dreamed of by the framers of the Constitution." *Keller v. United States*, 213 U.S. 138, 148-49 (1909). For Brewer's belief that the Tenth Amendment prohibited the creation of a broad federal police power, see Brewer, "Two Periods," *supra*, note 24.

[46] The 739 cases involve challenges to state regulatory authority based on either the Fourteenth Amendment or the Constitution's Commerce and Contracts clauses. Overall the Fuller Court decided 773 such cases between 1888 and

1910. The cases examined to compile the data in this and following paragraphs are drawn from Charles Wallace Collins, ***The Fourteenth Amendment and the States*** (1912); Charles Warren, "The Progressiveness of the United States Supreme Court," 13 ***Columbia Law Review*** 294 (1913); Warren, "A Bulwark to the State Police Power—The United States Supreme Court," *id.* at 667; Gavit, ***The Commerce Clause***, *supra*, note 45; Benjamin Wright, ***The Contract Clause of the Constitution*** (1938); and my own review of volumes 128-218 of the ***United States Reports***.

[47] The comparable percentages for the other Fuller Court Justices who participated in 100 or more state regulatory cases are: Moody (20.2%); Peckham (19.8%); Day (19.3%); Blatchford (18.7%); McKenna (17.5%); Holmes (16.0%); Shiras (15.1%); and Fuller (15.1%).

[48] Ranked according to the willingness to overturn state legislation on the basis of the Fourteenth Amendment, the following Justices of the Fuller Court participated in at least 50 such cases: Harlan (16.4%); White (14.0%); Brewer (13.8%); Field (13.8%); Peckham (13.1%); Brown (12.8%); Day (11.2%); Moody (10.7%); McKenna (9.6%); Shiras (7.8%); Holmes (7.8%); Fuller (7.2%); Gray (4.4%); Blatchford (1.8%); and Lamar (0.0%).

[49] During his years on the Supreme Court, Brewer authored 540 majority opinions, which, at the time of his death, was a number that had been exceeded in the Court's history by only five Justices. The five were Miller, Field, Waite, Harlan, and Fuller. According to one tabulation, Brewer authored 607 opinions which included 533 majority opinions; eight concurring opinions, 57 dissenting opinions, and nine statements or other opinions. Albert P. Blaustein and Roy M. Mersky, ***The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States*** 142-44, 148 (1978). A search of the Lexis data base yields 539 majority opinions, ten concurring opinions, and sixty-six dissenting opinions. My own count is 540 majority opinions, seven concurring opinions, fifty-five dissenting opinions, and twenty statements for a total of 622 opinions.

[50] ***New York Times***, March 29, 1910.

[51] *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479 (1897) (Brewer opinion); *Schlemmer v. Buffalo, Rochester & Pittsburg Ry.*, 205 U.S. 1 (1907) (in dissent); *Armour Packing Co. v. United States*, 209 U.S. 56 (1908) (dissenting opinion); and *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (joined majority opinion). The Safety Appliance Act eliminated the assumption of risk defense for interstate carriers; the Elkins Act prohibited railroad rebates. For Brewer's later support of antitrust prosecutions, see notes 42 and 43, *supra*.

[52] 157 U.S. 429 (1895). He later defended his vote against the federal income tax on the ground that it had the potential to undermine state and local authority. Brewer, ***The Income Tax Cases. Address Delivered before the Graduating Class of the Law Department of the University of Iowa at the Annual Commencement, June 8, 1898*** (1898).

[53] Brewer dissented from the majority's decision sustaining the constitutionality of the progressive features of the War Revenue Act of 1898 in *Knowlton v. Moore*, 178 U.S. 41 (1900) and was the author of the majority opinion striking down the same act's tax on bills of lading in *Fairbank v. United States*, 181 U.S. 283 (1901).

[54] *Interstate Commerce Commission v. Illinois Central Railroad*, 215 U.S. 452 (1910).

[55] *Felsenheld v. United States*, 186 U.S. 126 (1902); *Patton v. Brady*, 184 U.S. 608 (1902); *South Carolina v. United States*, 199 U.S. 437 (1905); and *Binns v. United States*, 194 U.S. 486 (1904).

[56] *In re Kollock*, 165 U.S. 526 (1897); *McCray v. United States*, 195 U.S. 27 (1904). For his opposition to efforts to outlaw oleomargarine, see note 62, below.

[57] *United States v. Gettysburg Electric Ry.*, 160 U.S. 668 (1896) (Civil War memorial); *United States v. Bitty*, 208 U.S. 393 (1908) (authority of Congress to bar aliens who sought entry into the United States for immoral purposes). For Brewer's support of the rights of Chinese and Chinese-Americans, see J. Gordon Hylton, "The Judge Who Abstained in *Plessy v. Ferguson*: Justice David Brewer and the Problem of Race," 61 ***Mississippi Law Journal*** 315, 349-50 (1991).

[58] For evidence of Brewer's long standing commitment to a broad interpretation of "just compensation," see *Emporia v. Soden*, 25 Kan. 588 (1881); *McElroy v. Kansas City*, 21 Fed. 257 (1884); *Omaha Horse Railway Co. v. Cable Tramway Co. of Omaha*, 30 Fed. 324 (1887); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *National Waterworks Co. v. Kansas City*, 62 Fed. 853 (1894); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (dissenting opinion); *Backus v. Fort Street Union Depot Company*, 169 U.S. 557 (1898); *United States v. Lynah*, 188 U.S. 445 (1903); and *Chicago, Burlington & Quincy R.R. v. Illinois*, 200 U.S. 561 (1906) (dissenting opinion).

[59] Brewer, "The Protection to Private Property," *supra*, note 25 at 108.

[60] *State v. Walruff*, 26 Fed. 178 (1886). He reiterated his *Walruff* holding in *State v. Kansas City, Ft. Scott & G.R. Railroad Co.*, 32 Fed. 722 (1887). In *State v. Mugler*, 29 Kan. 252 (1883), Brewer had raised the compensation question but had not formally held that it was required.

[61] Brewer had supported the prohibition movement in his adopted state. See undated letter to the editor of the ***Palladium*** (a Kansas newspaper). Brewer Family Papers, cited in Lardner, "Constitutional Doctrines," *supra*, note 1 at 74. Brewer upheld the constitutionality of the Kansas prohibition laws in *Wermer v. Edmiston*, 24 Kan. 147 (1880); *Prohibitory Amendment Cases* 24 Kan. 700 (1880); the *Intoxicating Liquor Cases*, 25 Kan. 751 (1881); and *State v. Bradley*, 26 Fed. 289 (1885).

[62] In contrast to the prohibition of alcohol, which he accepted as a legitimate exercise of state power, Brewer viewed anti-oleo legislation as an effort to ban a harmless product solely to protect the dairy industry. The decision of the Supreme Court to uphold such statutes prior to his appointment in *Powell v. Pennsylvania*, 127 U.S. 678 (1888), led him to question how "the judicial eye" could have been "so blind as not to see through the thin disguise of a pretended regard for public health." Brewer, "Protection of Private Property," *supra*, note 25 at 105. See also, Brewer's remarks at a 1902 dinner honoring Justice Harlan (the author of the majority opinion in *Powell*) quoted in Westin, ***Autobiography of the Supreme Court***, *supra*, note 7 at 192.

[63] 123 U.S. 623 (1887).

[64] For an account of the prohibitionist opposition to Brewer's nomination, see 24 ***American Law Review*** 137-

40; 313 (1890).

[65] In regard to Brewer's approach to takings cases, John Semonche has written, "Based upon such opinions Brewer must be seen as a Justice who was quite sensitive to the need to grant considerable latitude to the states." Semonche, ***Charting the Future***, *supra*, note 14 at 119.

[66] *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) and *Chicago, Burlington & Quincy R.R. v. Illinois*, 200 U.S. 561 (1906). In a few other cases, he joined in another Justice's dissent, as in *Lawton v. Steele*, 152 U.S. 133 (1894) (dissenting opinion by Chief Justice Fuller) or else dissented without opinion, as in *Eldridge v. Trezevant*, 160 U.S. 452 (1896).

[67] 172 U.S. 269, 297 (1898).

[68] 176 U.S. 126 (1900) (author of majority opinion in 5-4 decision).

[69] *Id.* at 155.

[70] 177 U.S. 587 (1900).

[71] *Id.* at 598.

[72] 94 U.S. 113 (1877). Although Brewer had cited *Munn* approvingly in *Missouri v. Bell Telephone Co.*, 23 Fed. 539, 540 (1885), he had expressed his dissatisfaction with the decision in *Chicago & Northwestern Ry. v. Dey*, 35 Fed. 866 (1888) and *Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. Becker*, 35 Fed. 883 (1888) and in his address, "The Protection of Private Property," *supra*, note 25. In September, 1891, Justice Harlan wrote to Fuller, "Brewer is here, looking well. But *Munn v. Illinois* is still in force, ready to do battle against all the Romans, however able or noble." Quoted in William Duker, "Mr. Justice Rufus W. Peckham and the Case of *Ex Parte Young*: Lochnerizing *Munn v. Illinois*," 1980 ***Brigham Young University Law Review*** 539, 548.

[73] Field's dissent is at 94 U.S. at 136-154.. The relationship between Field and Brewer has never been adequately explored. Although they often reached the same result during the seven-plus years they sat together, Field's primary objection often seemed to be the failure of the state to remain neutral. Brewer, on the other hand, seemed more likely to frame the issue in terms of substantive rights. See Gillman, ***The Constitution Besieged***, *supra*, note 14 at 74 and McCurdy, "Justice Field," *supra*, note 14.

[74] *Budd v. New York*, 143 U.S. 517, 551 (1892). ***Looking Backward*** (1888) was a widely read utopian novel by Edward Bellamy that foresaw a future United States in which the institution of private property had disappeared. Brewer was hardly alone in condemning the *Munn* rule; in fact, a substantial portion of the legal community agreed with him. See Everett V. Abbot, "The Police Power and the Right to Compensation," 3 ***Harvard Law Review*** 189 (1889); [Seymour D. Thompson] "Police Power and Right to Compensation," 24 ***American Law Review*** 314-15 (1890); Charles C. Marshall, "A New Constitutional Amendment," 24 ***American Law Review*** 908-931 (1890); and Judge [no first name given] Hoadley, "The Constitutional Guaranties of the Right of Property as affected by Recent Decisions," cited in 24 ***American Law Review*** at 908.

[75] 169 U.S. 466 (1898).

[76] The Supreme Court acknowledged the reviewability of railroad rates in *Chicago, Milwaukee and St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890) which upheld Brewer's *Becker* opinion, *supra*, note 72. Brewer also authored the first opinion for the Court in which a state rate schedule was voided on the grounds that it did not provide for a return sufficient to cover costs of doing business. *Reagan v. Farmers' Loan and Trust Co.*, 153 U.S. 362 (1894). The lower court opinion upheld in *Smythe v. Ames* was *Ames v. Union Pacific Railroad*, 64 F. 165 (1894).

[77] *Budd v. New York*, 143 U.S. 517 (1892) (*Munn* upheld, 5-3); *Brass v. North Dakota*, 154 U.S. 391 (1894) (*Munn* upheld, 5-4).

[78] *Cotting v. Kansas City Stock Yards*, 183 U.S. 79 (1901). In *Cotting*, Brewer conceded the continuing application of the *Munn* standard, but argued that owners of property "affected with a public interest" were at least entitled to a higher rate of return than those whose property was devoted to a public use. Although the Court struck down the challenged statute on equal protection grounds, Brewer could muster only two additional votes for his efforts to modify the rule in *Munn*.

[79] As a circuit court judge he had ruled in *Chicago and Northwestern Ry. Co. v. Dey*, 35 Fed. 866, 879 (1888), that an act of the Iowa legislature setting rates was subject to judicial review, but the following year he refused to enjoin the implementation of the same schedule. *Chicago, Burlington & Quincy Ry. v. Dey*, 38 Fed. 656 (1889). In *Chicago & Grand Trunk Railway v. Wellman*, he insisted that "it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'" 143 U.S. 339, 346 (1892). In *Reagan*, he asserted that there could be circumstances where "reasonable" rates might not be sufficient to guarantee a return or profit for the investors in a mismanaged railroad. *Supra*, note 76 at 412.

[80] Initially, he argued that "some compensation, however small" was sufficient. *Chicago and Northwestern Ry. Co. v. Dey*, *supra*, note 79 at 879; *Wellman*, *supra*, note 79 at 157. Later, he would embrace the more expansive standards of "a reasonable percent on the money invested" and "adequate compensation." *Reagan*, *supra*, note 76 at 412; *Ames v. Union Pacific Railroad*, *supra*, note 76 at 176-77. On other occasions he seemed say that recovering costs of operation was all that was required to. *Cotting v. Kansas City Stockyards*, *supra*, note 78. Much of the uncertainty was related to the issue of whether a modest dividend to stockholders ought to be included in the costs of doing business.

[81] Brewer voted to uphold challenged rate schedules in *Chicago, Milwaukee, and St. Paul Ry. v. Tompkins*, 176 U.S. 167 (1900) (Brewer opinion); *Louisville & Nashville Railroad v. Kentucky*, 183 U.S. 580 (1902); *Minneapolis & St. Louis Railroad Co. v. Minnesota*, 186 U.S. 257 (1902); *Seaboard Air Line Railway v. Florida*, 203 U.S. 261 (1906) (Brewer opinion); *Alabama & Vicksburg Railway v. Mississippi*, 203 U.S. 496 (1906); *Interstate Consolidated Street Railway v. Massachusetts* 207 U.S. 79 (1907); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909); and *Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co.*, 212 U.S. 414 (1909). Only in *Ex parte Young*, 209 U.S. 123 (1908), did he side with the party challenging the rate schedule.

[82] On Brewer's recognition of the right, see Fine, ***Laissez-Faire***, *supra*, note 8 at 149; Paul, "David J. Brewer," *supra*, note 4 at 1531. The case was *Frisbie v. United States*, 157 U.S. 160 (1895). See generally, Charles

W. McCurdy, "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," 1984 ***Yearbook***, Supreme Court Historical Society (1984) 20.

[83] 198 U.S. 45 (1905).

[84] 208 U.S. 161 (1908). A "yellow dog" contract made the employee's agreement not to join a labor union a condition of the employment contract.

[85] *Holden v. Hardy*, 169 U.S. 366 (1898).

[86] *Knoxville Iron Co. v. Harbison*, 183 U.S. 13 (1901).

[87] *Atkin v. Kansas*, 191 U.S. 207 (1903).

[88] *McLean v. Arkansas*, 211 U.S. 539 (1909).

[89] Brewer, "The Legitimate Exercise of the Police Power in the Protection of Health," 21 ***Charities and the Commons*** 238, 240 (1908).

[90] In 1903, Brewer admitted that "the present relations of employer and employee differ from those which subsisted when the Constitution was framed" and that recently enacted labor laws were bringing before the Court "some of the profoundest and most important questions ever presented to any tribunal." While he professed to be sympathetic to the plight of modern workers, he questioned the extent to which the new legislation could be reconciled with the Constitution's emphasis on individual liberty. Brewer, "The Supreme Court of the United States," 33 ***Scribner's Monthly*** 273, 280 (1903).

[91] *St. Louis, Iron Mountain, and St. Paul Ry. Co. v. Paul*, 173 U.S. 404 (1899); *Ellis v. United States*, 206 U.S. 246 (1907). Brewer's silent concurrence in *Ellis* is somewhat problematic. It would appear to be a reversal of his earlier view that such restrictions were unreasonable. *Atkin v. Kansas*, *supra*, note 87. Although the majority upheld the constitutionality of the statute, six convictions were reversed on the grounds that the workers and their employers involved were not covered by the act, producing the same result that would have occurred had it been overruled. There is, however, no indication in the opinion itself that Brewer was concurring only in the result.

[92] Brewer, "The Legitimate Exercise of the Police Power," *supra*, note 89 at 239-40. This apparent reversal of his earlier view suggests that Brewer's principal objection in *Holden v. Hardy*, *supra*, note 85, may have been the Utah act's application to smelter and refinery employees as well as underground miners. Brewer may have believed that only the latter constituted hazardous employment.

[93] 190 U.S. 169 (1903).

[94] *Id.*, at 175. Brewer also suggested that seamen had historically constituted a special class of workers whose vital function justified state regulation of the terms and conditions of their employment. Since 1896, Brewer had been a member of the Seaman's Friends Society, an organization devoted to improving the physical and spiritual condition of sailors. Brodhead, ***David J. Brewer***, *supra*, note 1 at 129.

[95] 208 U.S 412 (1908).

[96] 208 U.S. 412, 419 (1908).

[97] Brewer, "The Legitimate Exercise of the Police Power," *supra*, note 89 at 238-41.

[98] *Patterson v. Bark Eudora*, 190 U.S. 169, 174 (1903).

[99] *Frisbie v. United States*, *supra*, note 82.

[100] Brewer, "The Legitimate Exercise of the Police Power," *supra*, note 89 at 239-40.

[101] *Hooper v. California*, 155 U.S. 648 (1895) (insurance); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (insurance); *Booth v. Illinois*, 184 U.S. 425 (1902) (options trading); *Otis v. Parker*, 187 U.S. 606 (1903) (margin sales).

[102] *Smiley v. Kansas*, 196 U.S. 447 (1905) (state antitrust statute); *Great Southern Fire Proof Hotel v. Jones*, 193 U.S. 532 (1904) (mechanic lien statute); *Frisbie v. United States*, *supra*, note 82 (prohibition of lawyers in pension cases).

[103] Brewer, "The Protection to Private Property," *supra*, note 25 at 99. *Intoxicating Liquor Cases*, 25 Kan. 751, 765 (1881).

[104] Brewer, "Some Thoughts About Kansas," *supra*, note 28 at 70.

[105] *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); *North American Storage v. Chicago*, 211 U.S. 306 (1908); *Bacon v. Walker*, 204 U.S. 311 (1907).

[106] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[107] *Feizen v. First German Society*, 9 Kan. 592 (1872).

[108] *State v. Mugler*, *supra*, note 60 at 273-74. There is, however, some circumstantial evidence that Brewer allowed this concern to influence his decisions in Commerce Clause cases. In cases involving prohibition laws that applied only to the *sale* of alcoholic beverages, Brewer voted to uphold the state regulation against commerce clause challenges. *Leisy v. Hardin*, 135 U.S. 100 (1890), *Lyng v. Michigan*, 135 U.S. 161 (1890), and *In re Rahrer*, 140 U.S. 545 (1891). Where the statute at issue involved prohibitions for personal use as well as sale, Brewer found it an unreasonable restriction on interstate commerce. *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Vance v. Vandercook*, 170 U.S. 438 (1898); and *Adams Express Co. v. Kentucky*, 206 U.S. 129 (1907). On the other hand, in Commerce Clause cases involving the prohibition on oleomargarine and cigarettes, he voted to strike down the statutes whether or not they applied to personal use. *Plumley v. Massachusetts*, 155 U.S. 461 (1894); *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898); *Collins v. New Hampshire*, 171 U.S. 30 (1898); and *Austin v. Tennessee*, 179 U.S. 343 (1900).

[109] *State v. Nemaha County*, *supra*, note 40 at 563-64; *Gray v. Connecticut*, 159 U.S. 74 (1895) (joined majority opinion); *Nutting v. Massachusetts*, 183 U.S. 553 (1902) (joined majority opinion); *Reetz v. Michigan*, 188 U.S. 505 (1903) (Brewer opinion approving delegation of licensing authority to administrative agency).

[110] *Hawker v. New York*, 170 U.S. 189 (1898).

[111] Even Ernst Freund, normally a supporter of a liberal interpretation of the police power, believed that *Hawker* was wrongly decided. Freund, ***The Police Power: Public Policy and Constitutional Rights*** 574-75 (1904).

[112] In *L'Hote v. New Orleans*, he observed, "[N]either the [Fourteenth] Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." *supra*, note 70 at 596, quoting *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). See also, Brewer, ***The Twentieth Century from Another Viewpoint*** 51-52 (1899); Brewer, "Two Periods," *supra*, note 24 at 133.

[113] Brewer, ***The United States: A Christian Nation*** 56 (1905).

[114] Brewer, "Obedience to Law, The First Civic Duty," reported in Topeka ***Daily Capital***, April 3, 1904, quoted in Lardner, "Constitutional Doctrines," *supra*, note 1 at 66.

[115] *Ah Sin v. Wittman*, 198 U.S. 500 (1905). See also, *Adams v. New York*, 192 U.S. 585 (1904) and *Marvin v. Trout*, 199 U.S. 212 (1905).

[116] Brewer, "The Protection to Private Property," *supra*, note 25 at 105.

[117] On his early involvement with the antislavery cause, see Brewer, "The Spanish War: A Prophecy or an Exception," (1899) 16 ***Kansas Collected Speeches and Pamphlets*** 16-17 (n.d.), quoted in Eitzen, *supra*, note 1 at 40 and, generally, Hylton, "The Judge Who Abstained in *Plessy*," *supra*, note 57 at 323-25.

[118] *In re Booth*, 3 Wis. 12 (1854). For Brewer's reaction to this case, see Fairman, "The Education of a Justice," *supra*, note 1 at 246-48. On the political affiliations of Josiah Brewer, see Brodhead, ***David J. Brewer***, *supra*, note 1 at 3.

[119] *Ableman v. Booth*, 62 U.S. 506 (1859). This distrust was reaffirmed for Brewer in July 1865 when the commander of the United States forces at Ft. Leavenworth refused to obey now Kansas state judge Brewer's order to return unlawfully seized horses to their rightful owners. Although the Civil War had ended, Brewer's order was ignored by the federal authorities, a decision that was later upheld by the Supreme Court in a related case. Fairman, "The Education of a Justice," *supra*, note 1 at 246-48. The case was *Tarble's Case*, 80 U.S 397 (1872).

[120] On Woolsey, see, Louise L. Stevenson, ***Scholarly Means to Evangelical Ends: The New Haven Scholars and the Transformation of Higher Learning in America, 1830-1890*** 89-117 (1986). Although recent studies have established the connection between post-Civil War constitutionalism and Jacksonian political theory, very little attention has been paid to the influence of Whig political theorists like Woolsey. The absence of attention to Woolsey is particularly unfortunate, given that three of his former students, Brewer, Henry Billings Brown, and George Shiras, sat on the Supreme Court at the same time in the 1890s and early 1900s.

[121] ***Catalogue of the Officers and Students of Yale College, 1855-56***. He had been admitted to Yale with junior standing two years earlier, after three years of study at Wesleyan.

[122] Theodore Dwight Woolsey, ***Political Science or the State Theoretically and Practically Considered*** 1:1 (1878). Woolsey's treatise repeated most of the points made in his lectures delivered in the 1840s and 1850s, the texts of which are in the Woolsey Family Papers at Yale University. On the similarity of the lectures and Woolsey's later treatise, see Stevenson, ***New Haven Scholars***, *supra*, note 120 at 189.

[123] Woolsey, "Particular Rights" (lecture), quoted in Stevenson, ***New Haven Scholars***, *supra*, note 120 at 106. The first two chapters of Woolsey's treatise are devoted to the subject of rights.

[124] Woolsey, ***Political Science***, *supra*, note 122 at 1:195.

[125] *Id.*, at 1:4.

[126] *Id.*, at 254-63; Stevenson, ***New Haven Scholars***, *supra*, note 120 at 104-09.

[127] Woolsey, "Relation of Christianity to the Doctrine of Natural Rights," 15 ***New Englander*** 631 (1857); ***Political Science***, *supra*, note 122 at 1:211.

[128] Theodore Dwight Woolsey, ***Communism and Socialism*** (1880).

[129] Fairman, "The Education of a Justice," *supra*, note 1 at 244; Undated Remarks to Yale Alumni Association, 1892. Brewer Family Papers. In these remarks, Brewer noted that "Yale on the bench [Supreme Court justices Brewer, Brown, and Shiras] writes into all its opinions his [Woolsey's] teachings and spirit." *id.* at 3. All three Justices studied under Woolsey in the 1850s.

[130] Woolsey was not an abolitionist, but he was an active opponent of the extension of slavery, and in 1857, his name headed a memorial from the citizens of New Haven to the United States Congress protesting the admission of Kansas to the union as a slave state. Reprinted in 15 ***New Englander*** 683 (1857). On Woolsey and antislavery, see George A. King, ***Theodore Dwight Woolsey, His Political and Social Ideas*** 44-45 (1956).

[131] *Church of the Holy Trinity v. United States* 143 U.S. 457 (1892). (Earlier, he had offered a similar pronouncement while on the Kansas Supreme Court, calling the United States a "Christian Commonwealth." *Wyandotte County v. First Presbyterian Church*, 30 Kansas 620 (1883)). See also, Brewer, ***The United States a Christian Nation*** (1905). The latter quotation is from ***Celebration of the Twenty-Fifth Anniversary of the First Congregationalist Church of Washington, D.C., November 9th to 16, 1890*** 14 (1891), cited in Brodhead, ***David J. Brewer***, *supra*, note 1 at 128.

[132] Brewer developed his argument in regard to the connection between Christianity and individualism in ***The Pew to the Pulpit: Suggestions to the Ministry from the Viewpoint of a Layman*** (1897) and "The Religion of a Jurist," 80 ***The Outlook*** 533 (1904).

[133] Brewer, "The Scholar in Politics," *supra*, note 39 at 59.

[134] Brewer, "Some Thoughts About Kansas," *supra*, note 28 at 70.

[135] Brewer, "Two Periods," *supra*, note 24 at 153.

[136] Brewer, "The Protection to Private Property," *supra*, note 25 at 109-10.

[137] Woolsey, ***Political Science***, *supra*, note 122 at 1:220.

[138] For a contemporary criticism of Brewer and his colleagues on this matter, see Edward Corwin, "The Supreme Court and the Fourteenth Amendment," 7 ***Michigan Law Review*** 643, 670-71 (1909).

[139] See generally, Thomas L. Haskell, ***The Emergence of Professional Social Science: the American Social Science Association and the Nineteenth-Century Crisis of Authority*** (1977).

[140] "Contemporary Literature," 126 ***North American Review*** 171, 173-74 (1878).

[141] "Woolsey's Political Science," 670 ***The Nation*** 293, 294; 671 *Id.* 309 (1878).

[142] Woolsey, ***Introduction to the Study of International Law*** (1860). The sixth edition of this work was published in 1889. After Woolsey's death on July 1 of that year, the text was edited by his son, Theodore Salisbury Woolsey. Stevenson, ***New Haven Scholars***, *supra*, note 120 at 163.

[143] Vernon Parrington, ***The Beginnings of Critical Realism in America: 1860-1920*** (Volume 3 of ***Main Currents in American Thought***) 123-24 (1930).

[144] In 1901, Brewer admitted that he read very little that was contemporary in the fields of economics and history. ***Topeka State Journal***, June 1, 1901, quoted in Lardner, "Constitutional Doctrines," *supra*, note 1 at 21-22. Brewer showed little interest in, or even awareness of, the writings of laissez-faire constitutional theorists like his contemporaries Thomas Cooley and Christopher Tiedeman. A Lexis search of all of Brewer's federal court opinions finds no citation to any of Tiedeman's treatises. Citations to Cooley's ***Constitutional Limitations*** are only for the most general principles.

[145] On Brewer's reliance on the principle of natural justice, see Walter F. Pratt, "Rhetorical Styles on the Fuller Court." 24 ***American Journal Of Legal History*** 189, 213 (1980).

The Cherokee Nation Cases Of The 1830s

Jill Norgren

"It is a serious thing, for a branch of history, to lack a general treatment. It means there is no tradition, no received learning, no conventional wisdom. But tradition is needed: to define what is important and what is not, to guide students, researchers, other historians—and the general public. Without tradition, there is no framework, no skeleton, nothing to hang one's ideas on, nothing to attack and revise."[1]

Despite the early study of Native American cultures in school, most Americans leave high school knowing almost nothing about the history of Native American-United States relations. Fewer still have any knowledge of the law that governs this relationship and the role played by the United States Supreme Court in forming that law.

This is neither surprising nor inexplicable. For years, writers in the fields of anthropology, history, law, and politics have asserted that scholars have dealt poorly—if at all—with subjects related to Native American-United States history. In his recent book ***The Long, Bitter Trail***, anthropologist Anthony F.C. Wallace writes that "it is remarkable how little attention has been paid to the [Indian] removal of the 1830s . . . ."[2] Historian Howard Zinn has noted that two of the best-regarded studies of the Age of Jackson do not mention President Jackson's Indian policy despite its importance to his election and political vision.

Contemporary surveys of American legal history similarly devote little attention to legislative and judicial lawmaking as they have affected Native Americans, although law was undeniably the handmaiden for colonial and American national expansion in North America and continues to be important in guiding Native American-United States relations. Most legal historians have shied from examining law in this context because they are not well-schooled in its content and because its content presents tough questions concerning European occupation of the continent. As a result of this neglect and, perhaps for political reasons, federal Indian law has come to be thought of—to the extent that it is thought about at all—as a dull, complex "backwater of law" that many legislators, jurists, and scholars would willingly avoid.[3]

The error of this judgment is amply demonstrated by the Cherokee cases of the 1830s. In three appeals to the Supreme Court of the United States, the leadership of the Cherokee Republic petitioned the American jurists to address the most fundamental issues of power and rights. This article tells the story of these appeals, legal cases that required the Marshall Court to develop an American law of real property and, in so

doing, to consider nothing less than who should control the North American continent.

In 1830 the leaders of the Cherokee Republic, having internalized the ideals of American law, hired lawyers to litigate in courts of the United States. The lawyers they hired were Americans; the goal was to protect the Cherokee Nation's internationally recognized political rights including their national boundaries and sovereignty. The Cherokee sought protection from the actions of the people and the government of the state of Georgia. Georgians were neighbors of the Cherokee. Early Georgia-bound colonists had come to the southeastern seaboard from England beginning in the 1730s. As their numbers grew, the colonists came into increasing conflict with the Cherokee and other original inhabitants of the region over land and its use. The European colonists, whose standard of living was not necessarily superior to that of the Cherokee, nevertheless had certain advantages in their pursuit of land. First, their numbers grew quickly, aided by high population and a poor economy in England. Their weapons were superior. They brought trade and capital that permitted the creation of economic and social networks helpful to expansion. Finally, the eighteenth century colonists had, in written language, a more efficient system of communication in their far flung ventures than the Cherokee who, until the early nineteenth century, did not have a written form of their language.

But most critically, the Cherokee and the Georgia colonists were separated by different world-views. The colonists came out of a tradition that honored individual effort and acquisitiveness. Individual rights—however limited by gender, race, and class—was an emerging theme in British colonial culture. The Cherokee, in contrast, lived by more communal norms. Among the Cherokee, for example, land was not held individually and was not considered a commodity subject to individual commercial transaction. Very different understandings of the universe also separated Cherokee and Georgians. The colonists, drawing upon Western religious ideas, believed nature to be God's gift to man, subject to man's dominion. The colonist was both permitted and expected to tame nature and to develop it in ways appropriate to the growth of empire and the enhancement of individual status. For the Cherokee, however, nature and, thus, the land

Georgian legislators set out in the late 1820s to claim Cherokee land and redistribute it to Georgian residents.

and its resources, had "sacred primacy." Human beings, according to the Cherokee, were only a part of the natural world and were required to respect its workings rather than manipulate them for selfish gain. As time passed, the clash of cultures also reflected the increasingly strong racial views of the colonists who believed the Cherokee, along with other Native Americans, to be inferior to them.

By the early nineteenth century, the Cherokee and their Georgian neighbors were in constant conflict. Georgians violated Cherokee Nation territorial boundaries repeatedly and made no secret of their desire to subjugate the Cherokee. The Cherokee and the Georgians were not, of course, the only people locked in this struggle. Throughout the United States there was agitation against Native American sovereignty. In the first decades of the nineteenth century, the southeast became a central site of the Americans' aggression and Native American resistance. As the United States and local state governments pursued policies to win Indian lands, the Native American nations of the southeast—the Choctaw, Chickasaw, Creek, Seminole, and Cherokee—

simultaneously promulgated policies of resistance. In the case of the Cherokee, this resistance employed a sophisticated campaign of public relations, political lobbying, and, finally, the decision to contest the aggressions of the government and people of Georgia in courts of the United States, using laws of the Americans' own making.

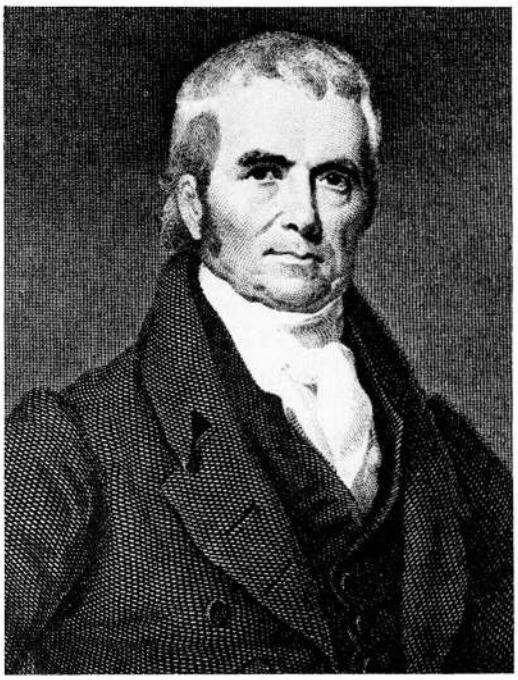
The Cherokee made this decision in 1830 in response to the draconian actions of the Georgia legislature in the last years of the 1820s when state legislators had attempted to extend the jurisdiction of the state over the people of the Cherokee Nation. In legislation backed by armed action, Georgia set out to nullify all Cherokee law, to make Cherokees second class citizens of color under Georgia law, and to claim and redistribute the lands of the Cherokee to Georgians. To block opposition to this plan to denationalize the Cherokee Republic, Georgia authorities decreed that the state would arrest any Cherokee official who tried to convene a meeting of the Cherokee government as well as any American living among the Cherokee who did not first swear an oath of allegiance to Georgia and its laws.

The Cherokee fought back in local Georgia courts and, finally, by appealing to the Supreme Court of the United States. In three cases, *State v. Tassels* (1830),[4] *Cherokee Nation v. Georgia* (1831),[5] and *Worcester v. Georgia* (1832),[6] attorneys for the Cherokee Republic argued that the actions of the state of Georgia violated the national sovereignty of the Cherokee Republic, a sovereignty acknowledged by the United States in various laws and international treaties. Defeated in their first two efforts, the Cherokee finally succeeded when, in *Worcester*, the Court concluded that Georgia's jurisdiction laws were "repugnant to the constitution, laws, and treaties of the United States" and had violated the political rights of the people of the Cherokee Republic.

The use of courts by the Cherokee was part of a deliberate strategy to maintain political control of their Republic. These Cherokee cases were the first brought by Native Americans in the Supreme Court of the United States. In the starkest terms, in these appeals, the leadership of the Cherokee Republic asked the members of the Supreme Court of the United States to choose between the rights of the original inhabitants of the continent and the power of the colonizers, now the United States. As a matter of patriotism and politics, the Supreme Court should have ruled openly and unequivocally for the United States. The Court operated, after all, under the authority of the United States. But this did not happen—exactly. Rather, using complex, obfuscating, and sometimes incorrect interpretations of history and treaties, as well as English and international law, the Court attempted to forge a compromise that would permit the United States to view itself as a nation under rule of law while continuing its quest to control the continent. This effort, begun in the earlier Supreme Court cases of *Fletcher v. Peck*[7] and *Johnson v. M'Intosh*[8] and completed in the Cherokee cases, saw the creation of an Americanized law of international relations and an American law of continental real estate that favored the United States while acknowledging diminished rights for Native American sovereignties.

According to law, it appeared that the United States had few claims. Native Americans had ancient possession of the lands of North America. Binding international treaties between the United States and the Cherokee (and other Native American governments) recognized Indian sovereignty and national land boundaries. American legal and political ideals, as expressed in the United States Constitution, committed the United States to fairness in government proceedings and respect for what Americans considered the sacred, inalienable right to property. Nevertheless, in spite of these constraints, between 1810 and 1832 the members of the Supreme Court of the United States constructed a jurisprudence that emphasized American interests. In these efforts, the Court was led by Chief Justice John Marshall.

Marshall had presided over the Supreme Court of the United States since 1801. A bold, assertive jurist, he used the authoritative decisions of the Court to support his Federalist vision of a powerful central government and national economy. Marshall also was strongly committed to increasing the stature of the United States in the international community of nations. The nation under the Constitution was barely a decade old when Marshall joined the Court; it was both politically and economically vulnerable. Marshall molded the law with skill. Part of his success lay in understanding that, despite the respected legal traditions of natural law, English common law, colonial law, and commentaries of international law, the United States must have an



Chief Justice John Marshall used the Cherokee appeals to establish an American jurisprudence of United States-Native American relations.

American law, developed by American jurists attending to American needs. Although the depth of Marshall's concern for the Cherokee remains open to question, there is no contesting the fact that, as Chief Justice, he used the Cherokee appeals to establish an American jurisprudence of United States-Native American relations.

An American law that addressed the issues of United States-Indian relations could not, however, be constructed without confronting the legacy of existing Western legal traditions. The Marshall Court had to contend with the idea of inalienable human rights as expressed in natural law, the concept of national sovereignty promoted in commentaries on international law, and the rules governing the acquisition, use, and transfer of property embedded in the English law of property. At the time of the Marshall Court, natural law referred to a set of abstract, unwritten principles concerning "justice, humanity, tolerance and 'civilized' living that were 'beyond dispute' in any culture which considered itself enlightened."[9] In the late eighteenth century, principles of natural rights—the inalienable rights of life, liberty, and property—became part of the American philosophy of natural law. Natural law as it was fused with natural rights represented a high—a revolutionary—human achievement. It symbolized the rejection of monarchy, corruption, and ascribed status, and a theoretical commitment to human equality. As a structure of universal moral and legal principles, natural law, natural rights, and international law logically posed the question of the status of Native Americans in Western law.

The Marshall Court might have approached the question of whether "Indians had any rights the white man was bound to respect" simply by acknowledging the common humanity and, therefore, the natural law rights of the Cherokee both with respect to their national sovereignty and their lands. Given the Indians' prior possession of these lands, the English concept of fee simple title, and international law, the Court might have confirmed that Native American nations such as the Cherokee had a complete, unencumbered title to their land. In short, the Justices might easily have cited existing legal principles, cases, and treaties leading to the conclusion that Native Americans had broad rights that the United States was bound to respect. But the Court did not do this.

If patriotism and politics did not direct the Court to rule unequivocally for the United States, neither did legal tradition guide it to rule completely for the Cherokee Republic and other Native American nations. Rather, the Court drew selectively upon existing Western legal traditions to create a federal Indian law that fit many of the political and economic goals of the United States. Where it served the Court's purposes, its members built a case on familiar rules. But where this approach worked against the interests of the United States, Marshall and his colleagues rejected or manipulated older legal traditions, arguing that the United States was a new nation and such rules were foreign to it. In the Cherokee cases, the Marshall Court shaped the legal tools that helped to define the future of United States-Native American relations. Building upon *Fletcher* and *Johnson,* the Marshall Court used the Cherokee cases to create a law of American continental real estate and, critically, did so by employing a cultural interpretation that argued that Native Americans, by some inferiority, did not have the requisite traits needed to possess natural rights, and could thus be appropriately denied the full legal regard of the United States

John Ross was the elected chief of the Cherokee Nation. He, along with other elected officials, was compelled to press Cherokee claims in the Supreme Court because other avenues of appeal had failed.

that otherwise would be demanded by natural law.

The elected officials of the Cherokee Nation, led by John Ross, had little choice in 1830 but to make their claims before the Supreme Court of the United States. Although the Court's earlier decisions in *Fletcher* and *Johnson* had not established a doctrine fully protective of Native American sovereignty or land title,[10] other avenues of appeal were foreclosed. President Andrew Jackson had long opposed Indian sovereignty and in December of 1829 had formally proposed that Congress enact a law which would permit the United States to pursue a policy removing all eastern Indian nations to the western side of the Mississippi River. The Congress accommodated the president, although on a close vote, and passed the Indian Removal Act in the spring of 1830. With a majority of Congress and a popular president committed to removal policy, and Georgia officials arresting and executing Cherokee citizens, the High Court of the United States became the only logical forum for the presentation of the case of the Cherokee Nation against Georgia. Leading statesmen, clergy, and lawyers in the United States urged the Cherokee government to pursue a legal strategy convinced that "the decisions of the Supreme Court shall compel Georgia to do them justice."[11]

With the approval of his government, John Ross hired two of the most prominent American attorneys of the day, former United States attorney general William Wirt and wealthy Philadelphia lawyer and former congressman, John Sergeant. Both were regulars in a small circle of nationally-known litigators and both were opponents of the policies of Andrew Jackson. Wirt entered the service of the Cherokee Nation with caution. He and his large family lived entirely off the legal fees he commanded as a lawyer of great reputation. Jackson's implacable commitment to the removal of the Cherokee, as well as his increasingly solid political position, would have given pause to any man about to rub a president's nose in constitutional principle. A few weeks after he was hired by the Cherokee, Wirt wrote to his good friend, Virginia judge Dabney Carr, that he was aware of the delicacy of his situation as the "instrument" to be used in thwarting a project upon which the president and the state of Georgia were bent. He told Carr that this delicacy made him hesitate, but he was "impressed with the injustice about to be done to these people" and so agreed to "examine their case and give them my opinion, and if necessary, my professional services in the Supreme Court." Reflecting further upon the predicament in which "I was about to place myself, and perhaps involve the Supreme Court of the United States," Wirt asked Carr to advise him "whether there is any thing exceptionable against me as a lawyer or a citizen of the United States, in the part I am taking in this case."[12]

Wirt, the first to be hired, was given a list of legal questions by the Cherokee leadership. He responded in three lengthy memorandums entitled ***Opinion on the Right of the State of Georgia to Extend Her Laws over the Cherokee Nation***; ***Opinion on the Claims for Improvements, by the State of Georgia on the Cherokee Nation, Under the Treaties of 1817 & 1823***; and ***Opinion on the Boundary between the Cherokees and Creeks in Georgia***. John Ross and others in his government read these legal opinions and were satisfied that Wirt was an appropriate attorney to make the case for Cherokee sovereignty and land rights; the Cherokee signaled Wirt that he should bring a case challenging Georgia's jurisdiction laws.

Wirt felt free to proceed with a test case in the

Supreme Court but he was uncertain how to fashion the case. While he had argued in his memorandums that the Cherokee were a sovereign people governed by their own laws, he was uncertain whether the Supreme Court would rule that the Cherokee Republic was a foreign nation entitled to bring a case under provisions for original jurisdiction. The Cherokee's attorney viewed an original motion as an appealing strategy because his client could avoid legal action in Georgia courts where, Wirt knew, the Cherokee would face delay and harassment. He summed up his expectations of Georgia officials to Judge Carr: "They will probably refuse to receive and put upon their records any plea which will show that the construction of treaties was involved, so that the record will contain nothing to found the jurisdiction of the Supreme Court, under the 25th section."[13]

Wirt took the further unusual step of asking Carr to speak to Chief Justice Marshall: "[A]s a brother judge," ask if he will give me "his impressions of the political character of this people."[14] Carr forwarded Wirt's letter to Marshall who thought it best to refrain from giving a legal opinion, although the Chief Justice did write that he wished that the political branches had acted differently on the question of Indian removal.

William Wirt gained fame as the prosecutor in the trial of Aaron Burr. He later served as Attorney General from 1817 until 1829, the longest tenure in that office. After the election of President Andrew Jackson, Wirt returned to private practice.

In the autumn of 1830 Wirt and Sergeant put aside their reservations and began preparing a bill of injunction which, if successful, would enjoin Georgia from acting on the jurisdiction laws. Shortly thereafter, however, the actions of Georgia officials pushed the two attorneys to gamble on another legal course. George Tassels, also known as Corn Tassels, stood accused of having "waylaid and killed" another Cherokee "within the territory in the occupancy of the Cherokee . . . ." Before the Cherokee could prosecute him, however, Georgia officials abducted Tassels saying that the state was arresting him under its new criminal jurisdiction law. Tassels was one of several Cherokee seized by state officials anxious to press forward with a full test of the new laws and President Jackson's willingness to tolerate them. In September of 1830, Georgia brought Tassels to trial where he was convicted and sentenced to be hanged. An appeal, conducted by local attorneys, failed when the Georgia high court bluntly rejected the claim that the criminal jurisdiction law violated treaties with the United States recognizing Cherokee self-government.

Wirt and Sergeant had been waiting for the outcome of the Tassels case and several other similar prosecutions. When John Ross notified them that the Georgia court had upheld state jurisdiction, Wirt immediately appealed to the United States Supreme Court for a writ of error under the Court's increasingly contested Section 25 powers. On December 12, 1830 Chief Justice Marshall granted the writ and ordered Georgia to appear before the Court on "the second Monday in January next . . . to show cause . . . why judgement rendered against the said Georgia as in the said writ of error mentioned should not be corrected . . . ."[15] As they had years earlier in the *Chisholm* case, Georgia officials refused to be summoned to the *national* court. Defiant state leaders announced that "interference by the chief justice of the U. States, in the administration of the criminal laws of this state . . . [was] a flagrant violation of her rights."[16] Ten days after the Chief Justice granted the writ, Georgia representatives voted, in a special legislative session, to carry out George Tassels' sentence of death by hanging. Georgia executed Tassels on Christmas Eve, 1830.

John Sergeant, a former Congressman from Philadelphia, teamed with William Wirt to represent the Cherokee Nation in the Supreme Court.

The *Tassels* case carried high costs for the Cherokee and for the Supreme Court of the United States. Tassels lost his life, the Cherokee paid at least a thousand dollars in local legal fees, and Marshall and his Court were embarrassed by Georgia's defiance of the Court's order. States' rights partisans were so enraged when Marshall granted the writ that they once again moved (unsuccessfully) for the repeal of the Court's Section 25 jurisdiction. In contrast, the case provided Georgia justices the opportunity to write an opinion approving the extension of state rule over Native Americans (an opinion cited for decades by other states) and political officials the occasion to act upon this authority in a dramatic way.

Whatever the cost to the Cherokee, however, Ross and the rest of the leadership stood fast in their commitment to a great legal test of rights. Wirt and Sergeant were instructed to resume preparations for the original jurisdiction case put aside during the Tassels appeal. In the face of President Jackson's opposition to Indian sovereignty, as well as Jackson's steadily increasing popularity, lesser men and women might have withdrawn from the legal arena. The Cherokee did not. It is the ultimate irony that the Cherokee, only recently described by the Georgia *Tassels* court as a people "incapable of complying with the obligations which the laws of civilized society imposed," maintained their faith in the rule of law and its promise of justice.[17]

Only days after Tassels' execution, Wirt and Sergeant resumed their efforts on behalf of Cherokee sovereignty. The attorneys petitioned the Supreme Court of the United States, under its original jurisdiction, "to restrain Georgia, the Governor, Attorney General, Judges, justices of the peace, sheriffs, deputy sheriffs, constables and others, officers, agents, and servants of that State, from executing and enforcing the laws of Georgia, or any of these laws, or serving process, or doing anything toward the execution or enforcement of those laws within the Cherokee territory . . . .[18] Repeating the argument made in the *Tassels* appeal, Wirt and Sergeant asserted that the Cherokee were a fully sovereign people. They contended that the state's laws violated international treaties between the Cherokee Republic and the United States, as well as the Article VI Supremacy Clause of the United States Constitution.

Although Chief Justice Marshall had presented himself as personally sympathetic to the cause of the Cherokee, he had also taken great care not to reveal his legal views. In the intervening months, Georgia had boldly challenged the Court and, in the small world of Washington Chief Justice Marshall, a most politically savvy jurist, could not ignore rumors that President Jackson would refuse to execute a judicial ruling favorable to the Cherokee. This knowledge tortured attorney Wirt who, just before oral argument, appraised the problems of the litigation in a letter to his wife: "I feel rather despondent about my poor Indians - not that I have the slightest doubt of the justice of their claims on the United States, but that I fear the Supreme Court may differ with me as to the extent of *their jurisdiction* over the subject, and hold the faithful execution of treaties to belong to the Executive Branch of the Government (the President) and not to the Judicial. . . .[It is a last hope], Chancellor Kent, Binney, Sergeant, and Webster (I understand) concurred with me in thinking that the Court had jurisdiction, and that, at all events, the question must be tried, and so thought my clients I

make this statement to show you that it is one of those questions in which the wisest and best ever may differ in opinion, that it is not I alone who have advised the course, and that if the decision be against us you must not consider it as reflecting any discredit on your husband."[19]

From the start of proceedings in the case, now formally titled *The Cherokee Nation v. The State of Georgia*, officials in Georgia had refused to acknowledge the legal papers served on them by Chief John Ross. Not surprisingly, when the time came for an attorney to speak for the state in oral argument before Marshall and his Court, none appeared. Instead, Georgia officials, adamant that a federal court should not review its business, tramped up and down the halls of Congress trying to win support for the bill limiting the Supreme Court's Section 25 powers.

In contrast, both John Sergeant and William Wirt appeared before the Court on March 11 to begin oral argument on behalf of the Cherokee. Wirt, having just participated in the acrimonious impeachment case against Judge Peck, was exhausted. When he stood before the Justices, Wirt managed to flourish his snuff box as was his habit, using it as an "oratorical weapon." But oral argument went on for several days, and although he was the better speaker, the weary Wirt often had to relinquish the presentation to Sergeant. Together, they kept to the script established earlier in the various opinions Wirt had written for the Cherokee in the summer and fall of 1830. The two lawyers' argument was forceful and eloquent, but Wirt's foreboding proved correct: a deeply divided Supreme Court denied the centerpiece of Wirt and Sergeant's argument that the Cherokee Nation was a foreign nation capable of suing under the Court's original jurisdiction.

Marshall's opinion, joined only by the recent Jackson nominee and presidential want-to-be, John McLean (taken as the holding in the case), never addressed the question of whether Georgia had violated treaty agreements or the United States Constitution. Rather, in *Cherokee Nation*, as decades before in *Marbury v. Madison*, Marshall extricated the Court from the rough seas of politics with a procedural sleight of hand. To shield the Court from the Georgia-Cherokee conflict, and the larger maelstrom of Jacksonian politics, Marshall found that he needed only to pose—and answer—a single question: "Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?"[20] Marshall's answer, much of which was dictum, relied heavily upon the so-called doctrine of discovery as well as a corrupt reading of history. In spite of the dozens of international treaties signed by the United States and various Indian nations including the Cherokee, Marshall concluded that the Cherokee did not constitute a foreign nation. According to the Chief Justice: "Though the Indians are acknowledged to have an unquestionable . . . right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government . . . it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent* nations. They occupy a territory to which we assert a title independent of their will . . . . [[T]hey are a people] in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[21]

In order to build his narrative, Marshall teased apart the language of the Commerce Clause and manipulated history. He wrote that with respect to original jurisdiction, the framers of the Constitution could not have had Indians in mind as foreign nations because, "[A]t the time the constitution was framed . . . [their] habits and usages . . . in their intercourse with their white neighbors" had never led them to "the idea of appealing to an American Court of justice . . . ."[22] This was a frank falsification of history. Since the mid-seventeenth century, Native Americans had been litigants in colonial and later state courts.[23] Marshall sounded less a fair-minded jurist than a zealous politician.

By denying that the Cherokee constituted a *foreign* nation, Marshall was able to reject the Cherokee's motion for an injunction on jurisdictional grounds. Marshall believed he was protecting the future of the Supreme Court by sidestepping further confrontation between the judiciary, on the one hand, and Georgia and the Jackson administration, on the other. However, failure to grant the injunction against Georgia and to judge the question of treaty rights violations on the merits of a legal argument denied the Cherokee the immediate and much-needed pro-

An artist's rendition of members of Cherokee tribe during the period of time surrounding the *Cherokee Nation* Cases.

tection of the Court. But Marshall's opinion was not a complete defeat for the Cherokee. Nothing in his opinion approved Georgia's attempt to extend state jurisdiction over the Cherokee. Quite the contrary, Marshall repeatedly asserted that, under the United States Constitution, authority to deal with Native American nations rested solely with the government in Washington.

In designating Indian tribes "domestic dependent nations," Marshall had elected a conservative strategy which, while denying the Cherokee the requested injunction, reaffirmed "unquestionable" Indian occupancy rights and formally acknowledged the national—if not the foreign—character of Indian governments. The opinion described the Cherokee Nation as "capable of managing its own affairs and governing itself . . . a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements . . . ."[24] Marshall's opinion further suggested that the "unique" relations between the Cherokee and the United States—the other-than-foreign-national political status of the Cherokee, and what he further described as a relationship of "ward to guardian"—were to be understood only in terms of foreign affairs. According to Marshall, tribes had the right to govern themselves internally without interference from the United States or any of its states.

The final paragraphs of Marshall's *Cherokee Nation* opinion, however, suggest something more than caution. The text bespeaks an aging statesman, beleaguered by those who would undo the accomplishments of his public service. Marshall was seventy-six years old and in his thirtieth year as Chief Justice when he wrote his *Cherokee Nation* opinion. He had struggled long and hard on behalf of a Federalist agenda, but now his career was nearly over and political opponents stood ready to seize the Court. Colleagues of the Chief Justice had privately begun to think about a future without Marshall at the head of the Supreme Court. In February of 1831, a few weeks before oral argument in *Cherokee Nation*, former president John Quincy Adams fretted in a diary entry that "some shallow-pated wild-cat, . . . fit for nothing but to tear the Union to rags and tatters, would be appointed in [Marshall's] place."[25] Soon after *Cherokee Nation*, in a letter to Justice Story, Marshall acknowledged these concerns, stating that: "[I] cannot be insensible to the gloom that lours [sic] over us" and confiding his fears that in the future, the judicial process would become "a mere inefficient pageant."[26] Marshall told Justice Story that if Jackson were defeated in the 1832 election, he would resign from the Court and hope for a worthy replacement.

The final two paragraphs of *Cherokee Nation*, in particular, offer evidence of Marshall's mental exhaustion as well as his abandonment of the Indian cause. In this text, Marshall asserts that the Cherokee have asked too much of the Court. He is barely to be recognized as the assertive jurist long reviled by states' rights partisans—the man whose Court had previously not shied from upholding national power in the great cases of *Martin v. Hunter's Lessee*[27] and *McCulloch v. Maryland*[28]—when he complains that the Cherokee bill "requires us to control the legislature of Georgia."[29] He invites more circumscribed litigation selectively addressing the property issue of Cherokee land title, "a proper case with proper parties." And while early in his opinion Marshall expressed the moral support of the Court for the Cherokee Nation—"[I]f Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined"—he did not close *Cherokee Nation* with these sentiments.[30] Instead, carefully ignor-

ing the openly hostile posture of Jackson and the majority of Congress toward the Cherokee, Marshall concluded his discussion with two of the most disheartening sentences in American jurisprudence: "[I]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted . . . this is not the tribunal which can redress the past or prevent the future."[31]

Justices Henry Baldwin and William Johnson voted with Marshall and McLean to deny the injunction but neither signed the Chief Justice's opinion, each electing instead to file separate opinions. When Wirt and Sergeant received copies of the Baldwin and Johnson opinions, they realized that matters could have gone far worse for their client. Court newcomer Henry Baldwin had been an early supporter of President Jackson. He had joined the Supreme Court in 1830, only months before argument in *Cherokee Nation*. While mental illness and an inconsistent jurisprudence limited Baldwin's intellectual contributions in the course of his judicial career, his opinion in *Cherokee Nation* was not at odds with several of the themes in his later work, namely concern for state power and the unwarranted extension of Supreme Court power. Most of all, Baldwin's *Cherokee Nation* opinion revealed him to be a Jacksonian in matters of Indian policy: Justice Baldwin flatly denied that Indian tribes constituted political communities of any kind, and described "mere judicial power" as inappropriate to "reverse every principle on which our government have acted (sic) for fifty-five years."[32] He considered Georgia to have full jurisdiction over the Cherokee, and fee simple title to their lands.

Justice Johnson's opinion was equally damaging to the case of the Cherokee, relying upon tortured and ethnocentric legal distinctions as to the meaning of "nation state":

> Their condition is something like that of the Israelites, when inhabiting the deserts. . . I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly . . . which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.[33]

Henry Baldwin was an early supporter of President Andrew Jackson and was rewarded with an appointment to the Supreme Court in 1830.

Justices Story and Thompson disagreed. Voting together in dissent, the two argued "that the Cherokees compose a foreign state within the sense and meaning of the constitution, and constitute a competent party to maintain a suit against the state of Georgia."[34] It was their view, after hearing Wirt and Sergeant, that an injunction should be granted immediately.

In one sense, the dissenting votes cast by Justices Story and Thompson did not surprise Washingtonians. Both were Northerners and each was willing to speak his mind. Story's jurisprudence emphasized the values of republicanism, nationalism, and the liberalism of John Locke. His vote against Georgia in *Cherokee Nation* reflected his New England roots, an unyielding commitment to the powers of the national government over those of the states and an abiding faith in private property rights. Thompson also brought a Northerner's perspective to the question of Indian sovereignty, a perspective undoubtedly encouraged during his legal apprenticeship with the nationally prominent New York

state jurist and legal scholar James Kent, who was well known for his support of Indian land rights.

Curiously, given the great importance of the case and the increasing practice of filing concurring and dissenting opinions, initially neither Justice Thompson nor Justice Story submitted an opinion to be published as part of the official Court record. When the spring session of the Court closed a few days after the announcement of the *Cherokee Nation* decision, Chief Justice Marshall apparently decided that the unbalanced nature of the public record would not do. Seeking to alter this, and perhaps regretting his own vote, the Chief Justice took the unusual step of suggesting that Thompson and Story draft an opinion. Justice Thompson honored Marshall's request with a written dissent that drew heavily upon the arguments made by Wirt and Sergeant. Many historians consider it to be the finest opinion written by Thompson. Justice Story signed it, and the court reporter Richard Peters added it to the official, published record.[35]

The Thompson dissent shows that, despite their opposing votes in the case, the Marshall-McLean faction and the Thompson-Story faction did not have widely differing *legal* views. None of the four supported Georgia's assertion that statehood gave sovereignty over neighboring Indian nations, and each of these Justices agreed that the Cherokee were a national political community. What separated the two groups was political. The Chief Justice feared for the future of the Supreme Court and was willing to sacrifice the rights of the Cherokee people to protect the Court he had served for three decades. To avoid further attack on the powers of the Court from Jackson and states' rights forces, Marshall contrived the "domestic dependent nation" classification, and argued that the failure to meet *foreign* nation status made the Cherokee ineligible to bring an original jurisdiction case. McLean joined Marshall in this transparent ploy but, in this case, neither Marshall's usual ally, Joseph Story, nor Smith Thompson feared for the Court as much as they honored the law.

Defeated twice in efforts to use legal action, the Cherokee might well, at this point, have abandoned the law. But they did not. In the spring of 1831 John Ross undertook a tour of the districts of the Cherokee Republic. As head of the government, he reported on the implications of *Cherokee Nation* and offered his optimistic appraisal:

> Upon the whole, I view the opinion of the Court as regards our political character & the relations we sustain towards the United States, as being conclusively adverse to the pretended rights which have been asserted by Georgia over us, under the countenance of the President. I do not regret the toil & trouble . . . preparatory to the motion being made for the injunction, because I sincerely believe that a foundation is laid upon which our injured rights may be reared & made permanent.[36]

Following the tour, Ross instructed Wirt and Sergeant to advise him whether they could proceed with the kind of property case Marshall had suggested. Wirt and Sergeant gave serious consideration to a property case but, in fact, the next case on behalf of Cherokee sovereignty involved neither property nor a Cherokee. Rather, the contest concerned several missionaries from the United States challenging the legality of their arrest within the Cherokee Republic by the state of Georgia.

Late in 1830, the Georgia legislature passed a bill intended to prohibit the passage of "any white person" onto Cherokee Nation territory without the permission of the state.[37] The legislation was meant to harass supporters of the Cherokee and, like earlier jurisdiction measures, to chase the Cherokee from their lands. The new law required that all whites living among the Cherokee apply for a residence permit from Georgia, and swear an oath of allegiance to the state and its laws. In the winter of 1831, while Wirt and Sergeant were preparing to argue *Cherokee Nation*, a group of American Board missionaries sympathetic to the cause of Cherokee sovereignty said they would defy the law. The missionaries, led by Northerner Samuel A. Worcester, opposed the license and oath law because it violated the sovereign right of the Cherokee to determine who could live in their nation and because they did not believe that missionary work should bend to state politics. Their arrest and subsequent conviction and sentence to four years

hard labor at the state penitentiary opened the way for a very different case. After consulting with Ross, and the American Board, Wirt and Sergeant put aside plans for a property case and took up the case of the two missionaries who ultimately refused a pardon and remained in a Georgia prison.

Technically the issue in the case, *Worcester v. Georgia*, was whether the missionaries had been arrested, tried, and sentenced under state law that violated the United States Constitution's Commerce Clause. The missionaries' appeal maintained that Georgia, in its assertion of states' rights, had entered into an area of law reserved exclusively for the federal government under the national constitution. Their appeal also asked the Court to rule whether the Cherokee Republic constituted a sovereign nation, recognized by treaties with the United States, over which no state of the United States could have jurisdiction.

When Wirt, John Sergeant, and local Georgia attorney Elisha Chester came to the Court on February 20, 1832, they found that their opponent had, once again, refused to send legal counsel. On the missionaries' side, however, preparations for "the case to follow *Cherokee Nation*" had been months in the making. Since the arrests, William Wirt had been more active than John Sergeant as legal advisor to the missionaries, the American Board, and the Cherokee leadership. In the weeks before the case was called, however, Wirt found himself bedridden, and Sergeant took charge of preparations. ***The Minutes of the Supreme Court*** and Sergeant's professional papers show that it was Sergeant who laid out the case for the missionaries on February 20, the first of three days of oral argument. Wirt, however, also argued on February 21 and February 23—the Court had adjourned on February 22 to attend "divine service in the Capitol" in honor of the centennial of the birth of General Washington. Justice Story reported to his wife that "[B]oth of the speeches were very able, and Wirt's, in particular, was uncommonly eloquent, forcible, and finished."[38]

Sergeant's notes for oral argument spell out a black letter legal approach with few of the rhetorical flourishes favored by his co-counsel.[39] Standing before six Justices—illness kept Justice Johnson away the entire session—Sergeant first addressed questions of jurisdiction. He was anxious that the Court not find jurisdictional obstacles, as it had in *Cherokee Nation*, that would stand in the way of considering the case on its merits. Pointedly, Sergeant reminded the Justices that the Court's authority to issue writs of error in criminal cases had been a settled matter of law since its 1821 decision in *Cohens v. Virginia*.[40]

With these preliminary arguments completed, Sergeant turned to the merits of the case. He asserted that Georgia's 1830 law unconstitutionally usurped powers rightfully belonging only to the United States and the Cherokee Republic. Next, in a strategic move that could be construed as bold, desperate, or simply logical, Sergeant told the Court that the laws and treaties affecting Cherokee-United States relations made *all* of Georgia's Indian laws, not just the one under which the missionaries had been convicted, unconstitutional. The United States had repeatedly, in binding federal laws and international treaties, recognized Cherokee sovereignty and land boundaries. "This system," Sergeant said, " has made the Cherokees what they are . . . I do not deny the power of Congress to repeal their own laws - to violate and, so far as concerns themselves, to put an end to a treaty. But until repealed and annulled by Congress, they are obligatory upon every body."[41]

Sergeant's argument against Georgia proceeded on the broadest grounds. He insisted that Georgia's law encroached upon the powers of the United States government protected by the United States Constitution, when he might have contended, more narrowly, that the 1830 state law conflicted with a federal statute, the Federal Intercourse Act of 1802.[42] Sergeant described the rights of the Cherokee government as having been violated but he always spoke of Cherokee rights as secondary to the issue of federal authority. He addressed the question of Cherokee political status cautiously, employing Chief Justice Marshall's language from the previous term: "As to the Cherokees themselves. They are a State - a community. Within their territory, they possess the powers of self-government . . . . They are 'domestic, dependent nations.'"[43]

On March 3, 1832, the Marshall Court ruled, as Wirt had predicted, against the state of Georgia. It was the judicial victory the Cherokee had sought since 1829. Writing for himself and Jus-

tices Duvall, Story, and Thompson, Chief Justice Marshall first held that there were no standing or jurisdiction issues that prohibited the Court from considering the merits of *this* appeal. The missionaries, as citizens of American states, could properly challenge their conviction under earlier Supreme Court doctrine affirming preeminent national judicial power. Marshall then announced that law under which the missionaries were convicted was "repugnant to the constitution, laws, and treaties of the United States."[44] The Court ordered that the missionaries be freed.

But that was not all. Marshall's opinion for the Court declared all of Georgia's anti-Indian legislation unconstitutional, and it did so in the most sweeping terms. The approach adopted by the majority condemned Georgia's jurisdiction laws both because they violated the authority of the United States and, as Sergeant and Wirt had argued, because they violated the political rights of the Cherokee Republic. The Court's willingness to address and support Cherokee rights was received in Washington with surprise because of the caution Marshall had shown only a year earlier in *Cherokee Nation.* In *Worcester*, after all, the Cherokee Nation was not a direct party to the litigation. But in an opinion that surveyed the entire history of political relations between the Cherokee, Great Britain and the United States, the majority specifically chose to address the illegality of Georgia's actions in terms of sovereign Cherokee rights, and to offer language defending the independent political status of Indian governments as recognized in United States law. Prodded by Justice Story, who wished the Court to "wash its hands clean of the iniquity of oppressing the Indians and disregarding their rights," Marshall used *Worcester* to outline the clearest, most pro-Indian doctrine of the time, refining earlier principles of federal Indian law and veering from the language of conquest used in *Johnson v. M'Intosh.*[45]

The influence that the Court's earlier conquest language in *Johnson* had exerted upon Georgia citizens and the Georgia legislature was very much on the minds of the Justices after oral argument in *Worcester.* Concerned that dictum in *Johnson* had encouraged incursions onto Indian land as well as the passage of Georgia's jurisdiction laws, Marshall now repudiated *Johnson's* conquest theory without, however, mentioning the earlier case by name. With this statement, Marshall intended to put to rest any notion that the Court supported non-consensual extinguishment of Indian land title. The Chief Justice also qualified the exaggerated claims he had made concerning discovery doctrine: "It is difficult to comprehend" Marshall wrote in *Worcester*, "that the discovery . . . should give the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient possessors."[46] He described as "extravagant and absurd" the idea that European discovery and settlement constituted conquest, or conferred property title under the common law of Europe.

In *Johnson*, the Court had affirmed that Indian rights in their lands were necessarily diminished by discovery. In *Worcester*, the majority turned its back on the larger implications of this theory, asserting only that the preexisting rights of the ancient possessors coupled with the European law of discovery granted no more to the settler than the exclusive right to purchase title, should tribal governments consent to sell. Underscoring the importance of this principle of Indian consent to extinguish title, Marshall described European colonial charters as "grants assert[ing] a title against Europeans only. . . [that] were considered as blank paper so far as the rights of the natives were concerned." A stern Court warned that "[t]he power of war is given only for defense, not for conquest," and that extinguishment of property title resulting from aggression would not be recognized.

Worcester offered Marshall the opportunity to write further on the question of the political relations between the United States and Indian nations. Marshall did so, circling back specifically to the meaning and implications of the "domestic dependent nation" designation introduced in *Cherokee Nation.* Caution ruled the new discussion. While Marshall's refinements favored Indian sovereignty, for a second time he pointedly refused to describe Indian nations as foreign nations and to embrace them as equal members of the Western political community. Nevertheless, Marshall and those signing his opinion did not approach the question of the political character of Indian governments in the manner of a Jacksonian. Describing them generally, Marshall wrote "[T]he Indian nations ha[ve] always been considered as distinct, independent

political communities, retaining their original natural rights, as the undisputed possessors of the soil . . . ."[47] Analyzing the specific legal position of the Cherokee Nation, he declared that relevant treaties explicitly acknowledged the Cherokee's right of self-government as well as the national character of their government. These treaties, Marshall wrote, guaranteed Cherokee lands, and imposed on the federal government the duty of protecting both land and sovereignty rights.[48]

"The settled doctrine of law of nations," Marshall argued, "is that a weaker power does not surrender its independence—its right to self government, by accociating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[49] "Protection" stated the Chief Justice, "does not imply the destruction of the protected."[50] Here was an explicit statement that the Court wished to legitimate the unique relationship outlined in *Cherokee Nation*, one in which Indian nations were acknowledged to be self-governing but were expected to accept protectorate status in foreign affairs.

The concessions made in support of American interests were not sufficient for two members of the Court. Justice McLean, who had been the only member of the Court to join Marshall's opinion in *Cherokee Nation*, voted with the majority in *Worcester* agreeing, in the narrowest sense, that the missionaries had been imprisoned through the use of state laws that violated the Commerce Clause as well as federal treaties. He did not, however, sign Marshall's opinion. Rather, McLean criticized the opinion for its broad acceptance of tribal sovereignty and its failure to adopt a realistic stance on the future of Indian-state relations. Georgia was in the wrong, McLean wrote, but Indian independence was doomed, a fact that Marshall and the Court would do well to recognize: "The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the [U.S.] government, in the extinguishment of their title, and especially by the compact with the state of Georgia [United States-Georgia Compact of 1802] . . . a sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities."[51] McLean argued that Indians could, at best, enjoy limited independence within the boundaries of a state and that when "either by moral degradation or a reduction in their numbers," they became incapable of self-government, the United State's shield of protection should cease in favor of state authority.

Justice Baldwin proved an even more staunch opponent of the majority's position. Baldwin not only refused to sign Marshall's opinion, he even refused to join the majority's vote condemning Georgia's actions as a violation of federally held powers. He delivered no written opinion to the court reporter, announcing in Court that his conclusions remained the same as those he had offered in *Cherokee Nation*. Baldwin remained consistent in his support of Jackson, and in the view that the Cherokee were properly under the jurisdiction of the state of Georgia.

Although disappointed in the positions taken by McLean and Baldwin, the message from the majority left the Cherokee jubilant. Against the backdrop of Georgia's aggression toward the Cherokee and congressional and executive branch approval of the Removal Bill, the Supreme Court of the United States was celebrated for having reached out in a conciliatory manner to Native American governments. John Ross understood that the Court had adopted a sweeping approach that had condemned the conviction of the missionaries and asserted that Indian nations possessed significant national political and property rights which were owed the highest respect by the United States.

Although not a direct party to this round of litigation, the Cherokee Nation had finally won its case against Georgia and President Jackson. Marshall had abandoned his earlier strategy of self-serving judicial politics, supporting Indian sovereignty—albeit on his terms—against the far more hostile positions of advocates of states' rights and much of the federal government. State power doctrine had been defeated; the national character of Indian governments was invoked, as well as the absolute requirement that such governments must give consent for the extinguishment of land title. It is possible to argue that the forthright support of Indian sovereignty expressed in *Worcester* was abstract and occurred primarily

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President Andrew Jackson remained steadfast in his position on the rights of the Cherokee Nation. Although Jackson did not utter the famous line, "John Marshall had made his decision, now let him enforce it," he did nothing to stop Georgia from defying the Court's order in *Worcester v. Georgia.*

because white men's rights and liberties were directly at issue. But it is also the case that the majority might have decided *Worcester* on the narrow legal grounds proposed by Justice McLean. It did not. At the same time, it is not possible to ignore the majority's unwillingness to accept Native American governments as full members of the international community of Western nations or to abandon the self-serving doctrine of discovery.

Ross and the Cherokee leadership, along with the missionaries, had welcomed Marshall's decision but each had been warned that Georgia and Jackson were likely to ignore the High Court ruling. Justice Story openly voiced this concern: "We have just decided the Cherokee case.... The decision produced a very strong sensation .... Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere, unless public opinion among the religious of the Eastern and Western and Middle States, should be brought to bear strong upon him. The rumor is, that he had told the Georgians he will do nothing."[52]

Story was wise to worry as events immediately following *Worcester* amply demonstrate the limits of judicial power. Political as opposed to legal victory for the missionaries and the Cherokee depended upon enforcement of the Supreme Court's decision. Here they each lost—with devastating results for the Cherokee. Two days after the Justices read their opinions, the Court issued a mandate to the Georgia Superior Court—carried from Washington by attorney Elisha Chester—ordering it to reverse its decision and to free the missionaries. Georgia Governor Lumpkin responded that he would hang the missionaries rather than "submit to this decision made by a few superannuated *life estate* Judges."[53] Officials of the Georgia Superior Court said that the United States Supreme Court had exceeded its authority and refused to reverse the conviction of the missionaries, who remained in the state penitentiary. In the view of local officials, Georgia needed to stand firm against a renegade national court which, they suggested, might soon attempt to assert its jurisdiction over *another* issue—African slavery.[54]

The Cherokee delegation housed in Washington had stayed on to monitor events while awaiting word from Chester on the actions of the Superior Court. A month passed with no message from the attorney. Chester already knew Governor Lumpkin and the Superior Court's response, and on Wirt's prior instructions, was preparing a letter to Lumpkin asking that he intercede and order the discharge of the prisoners.[55] That same week, a messenger in Georgia, knowing of the Superior Court's denial, rushed to Washington to get the new Supreme Court decree needed to authorize a federal marshal to free the prisoners.[56] The Supreme Court, however—possibly to avoid further confrontation—had adjourned on March 17 without waiting to hear whether or not Georgia had obeyed its mandate and freed the missionaries.

In fact, the whole business revealed a larger, unresolved legal problem in the United States. General law governing federal judicial and executive power over states was unclear and, for some, inadequate. As a result, technical legal issues provided a smoke screen for President Jackson, who invoked them as the reason for not pursuing enforcement of *Worcester*. Although

This Robert Lindneux painting, *Trail of Tears*, portrays the forced removal of the Cherokee, Creek, Choctaw, Chickasaw and Seminole Nations from Georgia and the Gulf States to "Indian Territory" (Oklahoma).

some historians believe that the president would have enforced the decision if the law had absolutely required it,[57] Jackson was known to be pleased by the Court's inability to "coerce Georgia."[58]

Even Wirt and Sergeant disagreed as to whether a federal judge could issue the necessary writ of habeas corpus following the refusal of a state court to execute a federal court decree. Responding to an inquiry from Congressman William Lewis, Wirt argued that nothing more could be done for the missionaries until Georgia put its refusal to free them in writing—something the governor's officials deliberately avoided doing until Georgia Superior Judge Charles Dougherty acquiesced and permitted the necessary affidavits to be prepared. Even after Dougherty's concession, Wirt wrote that there were legal obstacles and went on to argue the need for new federal legislation. Such a law, he said, would give federal judges the power to issue the writs necessary to free prisoners held under state laws declared unconstitutional by the United States Supreme Court. Wirt also recommended changes in the Militia Act of 1795, a statute that authorized presidential use of the militia to enforce national law. Wirt wanted the act amended to *require* that the President take action.[59]

Wirt believed that, if he was correct, there was little the Supreme Court could do until Congress made these legislative changes. Two months after the Court's decision, however, he continued to counsel the possibility of resolving the problem by directly petitioning Jackson and the Congress. Wirt had not given up the fight, and was displeased to hear that other Americans had advised the missionaries to admit their crime and accept a pardon. Influential "friends of the Cherokee," who only weeks before had considered the policy of Indian removal a contemptible violation of rights, suddenly found the idea reasonable and necessary. Supreme Court Justice John McLean took direct action. He asked the Cherokee delegation still living in the capital to meet with him, and proceeded to argue the futility of continued litigation. He urged them to sign a removal treaty by which the Cherokee Nation would become a territory with a patent in fee simple and a delegate in Congress.[60]

Months passed and the missionaries were not freed. They instructed Wirt and Sergeant to file papers to have the Supreme Court consider a new

writ for their release at the January 1833 session. And then, in November of 1832, two distant events occurred that ended the stand-off. First, Andrew Jackson established the popularity of his policies by soundly defeating Henry Clay in the presidential election. Simultaneously, the long-simmering states' rights rebellion in South Carolina exploded, producing the national nullification crisis. Americans feared for the future of the country; in their prison cell, the missionaries received letters and visitors urging them to cease prosecution of their case against Georgia in order to "help save the Union." For reasons that are unclear, the men concluded that the Cherokee had nothing more to gain from their appeal. After a battle of wills with the governor over the tone of the required letter requesting pardons, the imprisoned missionaries acknowledged the "magnanimity" of the state and were freed on January 14, 1833.[61] With their release, the third test case of Cherokee sovereignty ended.

The Cherokee cases have great significance for the history of American law and for our understanding of Native American-United States relations. On the one hand, they document the Cherokee leadership's belief in the promise and honor of the United States as a nation under law, and in courts that are fair and neutral. For many reasons, Ross and the Cherokee legislature had internalized the myths of liberal-constitutionalism. But *Tassels*, *Cherokee Nation*, and *Worcester* also forcefully demonstrate the limits of the judicial authority in which the Cherokee placed their faith. The cases posed such broad questions of power and rights with respect to control of the continent that it is easily argued that the Cherokee were naive to expect so much from the High Court or any other American court. But they did. Indeed, until removal west in 1838, the Cherokee continued a legal strategy that pursued appeals to the United States Supreme Court and made extensive use of American state courts.

The Supreme Court's decision in *Worcester* did not protect the Cherokee people from the policy of removal supported by President Jackson and the Congress. At the time of its writing, however, the 1832 opinion did provide the most comprehensive federal judicial statement regarding the status of Native American governments and their property rights. In contrast to the earlier assertions of conquest in the *Johnson* decision, *Worcester* affirmed American recognition of Native American sovereignty, the continuing right of Indian nations to occupy their territory, and the requirement of Indian consent for any extinguishment of land title. While retaining many key characteristics of the colonialist perspective, including avowal of the Native American's cultural inferiority and the assertion of protectorate status, the Marshall decision theoretically equipped Native American nations with legal protections, including important procedural guarantees, to be used in the decades to follow. The decision established a lasting foundation of Indian law jurisprudence in the United States.

Yet, in spite of *Worcester*, the history of Cherokee removal confirms that the most fundamental procedural and substantive rights of the Cherokee were openly and knowingly violated by the government of the United States. President Jackson sent his commissioners to negotiate with a wholly unauthorized group of Cherokee and the United States Senate supported him by ratifying the fraudulent removal treaty, the 1835 Treaty of New Echota. Although in many quarters the *Worcester* decision was thought to contain bold judicial language, the doctrine announced by the Marshall Court was not capable of preventing the loss of the Cherokee's homeland and their removal to foreign territory. Despite its foundational place in the development of American law, as a planned test case, *Worcester* failed the Native Americans whose sovereignty and land rights it was intended to protect.

Endnotes

[1] Lawrence M. Friedman, ***A History of American Law,*** 2nd ed. (New York: Simon and Schuster, 1985), p. 11.

[2] Anthony F.C. Wallace, ***The Long, Bitter Trail: Andrew Jackson and the Indians*** (New York: Hill and Wang, 1993), p.11.

[3] Philip P. Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," 107 ***Harvard Law Review*** 381, 383 (1993).

[4] 1 Dud. 229 (Ga.). Chief Justice John Marshall granted a writ of error in the case on December 12, 1830.

[5] 30 U.S. (5 Pet.) 1 (1831).

[6] 31 U.S. (6 Pet.) 515 (1832).

[7] 10 U.S. (6 Cranch) 87 (1810).

[8] 21 U.S. (8 Wheat.) 543 (1823).

[9] G. Edward White, ***The Marshall Court and Cultural Change 1815-1835,*** abridged ed. (New York: Oxford U. Pr., 1991), p. 676.

[10] The *Fletcher* majority wrote that "Indian title . . . is not

such as to be absolutely repugnant to seisin in fee on the part of [Georgia]." 10 U.S. (6 Cranch) at 142-43. Writing for the Court in *Johnson,* Marshall argued that discovery led to the considerable impairment of the rights of the original inhabitants: "[the Indians are the] rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion . . . [but] their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle . . . discovery." 21 U.S. (8 Wheat.) 574.

[11] Jeremiah Evarts to Eleazar Lord, December 31, 1829, quoted in E.C. Tracy, ***Memoir of the Life of Jeremiah Evarts, Esq.*** (Boston: Crocker and Brewster, 1845), p. 353

[12] Wirt to Carr, June 21, 1830, quoted in John Pendleton Kennedy, ***Memoirs of the Life of William Wirt,*** (Philadelphia: Lea and Blanchard, 1849), vol 2, pp. 253-256. Hereinafter, ***The Life of William Wirt.*** Wirt was under pressure from his family "not to oppose the settled policy, and wishes of [his] own government." William Wirt Papers, Library of Congress, Reel 13.

[13] Wirt to Carr, June 21, 1830 quoted in Kennedy, ***Life of William Wirt,*** p. 256.

[14] *Id.,* p. 257.

[15] ***Niles Daily Register,*** January 8, 1831, pp. 338-39.

[16] T. Wilkins, ***Cherokee Tragedy: The Story of the Ridge Family and the Decimation of a People*** (New York: Macmilan, 1970), p. 209.

[17] *Tassels,* 1 Dud. 229, 236 (1830).

[18] Sidney Harring, ***Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*** (New York: Cambridge University Press, 1994), p. 30.

[19] Wirt to his wife, February 10, 1831. Maryland Historical Society, William Wirt Papers, reel 13.

[20] *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 16 (1831).

[21] *Id.,* at 17. Italics added.

[22] *Id.,* at 18.

[23] See, e.g. Yasuhide Kawashima, ***Puritan Justice and the Indian: 1630-1763*** (Middletown, CT: Wesleyan U. Pr., 1986); Robert Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence," 1986 ***Wisconsin L. Rev.*** 219 (1986), note 134.

[24] Williams, *op. cit.,* p. 17.

[25] William F. Swindler, "Politics as Law: The Cherokee Cases," 3 ***Am. Ind. L. Rev.*** pp.7 and 14 (1975) citing to 8 ***Memoirs of John Quincy Adams,*** 315-16 (C.F. Adams, ed., Philadelphia: J.B. Lippincott & Co., 1876).

[26] Swindler, *op. cit.,* p. 14 citing to ***Mass. Hist. Soc. Proc.*** (2d. ser.), XIV (Oct. 12, 1831).

[27] 14 U.S. (1 Wheat.) 304 (1816).

[28] 17 U.S. (4 Wheat.) 316 (1819).

[29] *Cherokee Nation,* 30 U.S. (5 Pet.), 20.

[30] *Cherokee Nation,* 30 U.S. (5 Pet.), 15.

[31] *Id.,.* at 20.

[32] *Cherokee Nation,* 30 U.S. (5 Pet.), 49.

[33] *Cherokee Nation,* 30 U.S. (5 Pet.), 21-22, 27-28.

[34] *Id.,* at 80.

[35] Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," 21 ***Stanford L. Rev.*** 500, 516-18 (February 1969).

[36] Ross to the Cherokees, April 14, 1831, quoted in Gary E. Moulton, ***The Papers of Chief John Ross*** (Norman University of Oklahoma Press, 1985), vol. 1, p. 217. Hereinafter ***The Papers of John Ross.***

[37] Act of December 22, 1830. ***Acts of the General Assembly of the State of Georgia*** (1831), pp. 114-17.

[38] Joseph Story to Mrs. Joseph Story, February 26,1832 quoted in William W. Story ed. ***Life and Letters of Joseph Story, Vol. 2*** (Reprint of 1851 ed., Freeport, N.Y.: Books For Libraries Press, n.d.), p. 84. Hereinafter, ***Life and Letters of Joseph Story.***

[39] See untitled and undated manuscript at the Historical Society of Pennsylvania, Sergeant Papers, box 5: file 18. Hereafter, Sergeant Papers.

[40] 19 U.S. (6 Wheat.) 264, 412 (1821).

[41] Sergeant Papers, untitled manuscript. Box 5: file 18, pp. 21-22.

[42] Burke, "The Cherokee Cases," p.521.

[43] Sergeant Papers, untitled manuscript. Box 5: file 18: pp. 16 and 19.

[44] *Worcester v. Georgia,* 31 U.S. (6 Pet.), 562-3.

[45] Joseph Story to Sara Story, March 4, 1832 in ***Life and Letters of Joseph Story,*** vol. 2, p. 87; *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 587-90 (1823).

[46] All quotations in this paragraph are from *Worcester* 31 U.S. (6 Pet.), 543-546.

[47] *Worcester,* 31 U.S. (6 Pet.), 559.

[48] Treaty of Holston, July 2, 1791, United States-Cherokee Indians, 7 Stat. 39, Treaty of Hopewell, November 28, 1785, United States-Cherokee Indians, 7 Stat. 18, *Worcester,* 31 U.S. (6 Pet.), 551-56.

[49] Worcester, 31 U.S. (6 Pet.), 560-61.

[50] *Id.,* at 552.

[51] *Id.,* at 593.

[52] Joseph Story to Professor Ticknor, March 8, 1832 in ***Life and Letters of Joseph Story, Vol. 2,*** p. 83.

[53] Coody to Wirt, March 28, 1832. Maryland Historical Society, William Wirt Papers, reel 15.

[54] William McLoughlin has suggested that Southerners were beginning, at the time of this appeal, to link Indian anti-removal and anti-slavery agitation as, to them, twin evils. See McLoughlin, ***Cherokees and Missionaries, 1789-1839*** (New Haven: Yale U. Pr., 1984), p. 264.

[55] Wirt to Lewis, April 28, 1832, 10-11. The Papers of William Wirt, Collection of the Library of Congress, Manuscript Division, reel 4; Chester to Lumpkin, April 4,1832, Georgia Department of Archives and History, Indians: Cherokees - File 11, box 75.

[56] Burke, "The Cherokee Cases," p.525.

[57] Charles Warren, ***The Supreme Court in United States History,*** new rev. ed. (Boston, 1926), vol. 1, pp. 758-69.

[58] Jackson to Brigadier-General John Coffee, April 7, 1832 in John Spencer Bassett, ed., ***Correspondence of Andrew Jackson*** (Washington, D.C.: Carnegie Institution of Washington, 1929) p. 430.

[59] Wirt to Lewis, April 28,1832. The Papers of William Wirt, Collection of the Library of Congress, Manuscript Division, reel 4.

[60] Ross to Wirt, June 8, 1832. ***The Papers of Chief John Ross,*** vol. 1, p.245.

[61] Jack F. Kilpatrick and Anna G. Kilpatrick, ***New Echota Letters: Contributions of Samuel A. Worcester to the Cherokee Phoenix*** (Dallas: Southern Methodist University Press, 1968), pp.116-129. Also Worcester to Sergeant, Jan 22. 1833, Sergeant Collection, box 4, file 8.

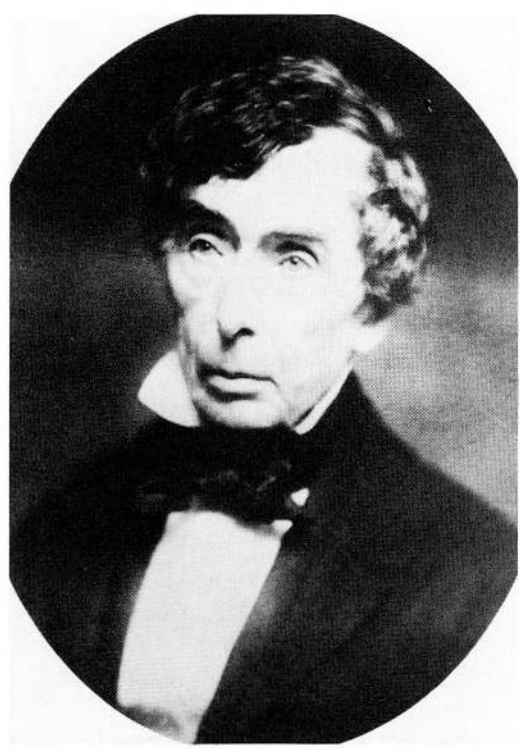
"Hooted Down the Page of History":
Reconsidering The Greatness of Chief Justice Taney

Paul Finkelman

> What is the office of Chief Justice, if it has been used to betray Human Rights? The crime is great according to the position of the criminal.—Senator Charles Sumner, February 23, 1865

In February 1865 the United States Senate considered what should have been a simple appropriation. Four months earlier Chief Justice Roger Brooke Taney had passed away. The bill before the Senate would have provided money for a bust of the late Chief Justice to be placed with busts of all other deceased Justices. This was almost a pro forma honor. No other Justice had ever been denied his place in the pantheon of American jurists.

But, no other Justice was like Roger Taney. At the time of his death, in 1864, he was denounced and vilified. He was the author of the Supreme Court's opinion in *Dred Scott v. Sandford*,[1] and that was enough for opponents of slavery, like Senator Charles Sumner of Massachusetts, to oppose having his bust placed along side all other departed Justices. Sumner argued that "[i]f a man has done evil during his life he must not be complimented in marble." Sumner noted that England had never honored the hated Chief Justice Jeffreys, "famous for his talents as for his crimes." Like Jeffreys, the Justice from



Roger Brooke Taney served as Chief Justice of the United States for twenty-eight years but is primarily remembered for one decision: *Dred Scott*.

Maryland had been "the tool of unjust power." Neither deserved honor. Taney had "administered justice at last wickedly, and degraded the judiciary of the country, and degraded the age." He was not to be remembered by a marble bust; rather Taney was to be dealt with in the works of scholars. There, Sumner confidently predicted "the name of Taney is to be hooted down the page of history."[2]

Taney and Historians

In 1873, after the death of Taney's successor, Salmon P. Chase, who had been an active abolitionist throughout his career, Congress finally appropriated money for busts of the last two Chief Justices. This avoided a debate over Taney's merits, but it did not rehabilitate him. Since then Chief Justice Taney's reputation has waxed and waned, often shaped by scholarly views about slavery, race, the Civil War, and economic development.

Most historians of the late nineteenth century had little good to say about Taney. For Northerners, writing after the Civil War, Taney was a spokesman for the slavocracy that caused the War. They argued he had attempted to write the theories of John C. Calhoun into constitutional law. That was sufficient. The hooting down the pages of history continued until the turn of the century. The great nationalist historian John Ford Rhodes concluded that in *Dred Scott* Taney "committed a grievous fault" and he "deserve[d] censure because he allowed himself to make a political argument, when only a judicial decision was called for." Rhodes thought "Taney sinned as a judge; and while patriotism and not self-seeking impelled him, the better motive does not excuse the Chief Justice; for much is demanded from the man who holds that high office. Posterity must condemn Taney."[3]

At the turn of the century, as American race relations changed, Taney's reputation grew. The North and the Supreme Court abandoned southern blacks in what Rayford Logan accurately described as the "Betrayal of the Negro." Laissez-faire capitalism and social Darwinism shaped attitudes about race and politics while scholars adopted new views about slavery, race, and the coming of the Civil War. Popular culture, best exemplified by the movie *Birth of a Nation*,

After the death of Salmon P. Chase in 1873, Congress appropriated funds for busts of Chase and Taney. By combining the funds into a lump sum, Congress avoided the heated debate over Taney's merits that had marked the earlier attempt to commemorate the Chief Justice.

reinforced these scholarly changes.[4] Not surprisingly, scholars reconsidered Taney's role in American constitutional history. Edward S. Corwin, for example, found Taney's *Dred Scott* decision consistent with American constitutional jurisprudence, although in the end he considered the entire performance by the Court in that case "a gross abuse of trust."[5]

In ***American Negro Slavery***, published in 1918, Ulrich B. Phillips argued that slavery had in fact been benign, and if not a positive good for African-Americans, then certainly it had not been a great evil for them either. Phillips, the son of a former slaveowner from Georgia, had received a Ph.D. from Columbia University and was teaching at the University of Michigan. His impeccable academic credentials and prodigious research, combined with his courtly racism, con-

vinced most white scholars that the Civil War could not, or at least should not, have been fought over slavery. Meanwhile, William A. Dunning's more blatantly racist work taught Americans that Reconstruction was a horrible era of black misrule and white Republican corruption.

The work of Phillips, Dunning, and their students led many scholars to begin to think that if slavery was not that bad, then *Dred Scott* was probably not such a terrible decision. Moreover, American passions over the Civil War, particularly in the North, had greatly diminished. By 1920 most Northerners no longer thought of Taney as Charles Sumner had: a man who "served . . . none other than that Slave Power which has involved the country in war."[6] The changing view of slavery and Chief Justice Taney dovetailed with the general disillusionment following World War I that led many Americans to the conclusion that the Civil War was simply a great mistake. Historians began to talk about the Civil War as an unnecessary conflict, caused by a blundering generation. Blame for the conflict more often fell on abolitionists than on fire-eating, pro-slavery Southerners. Some historians also blamed the collapse of the Union on the nation's mediocre political leadership. With the deaths of Henry Clay, Daniel Webster, and John C. Calhoun, Congress seemed bereft of leadership. The antebellum decade's quartet of easily-forgotten White House residents—Zachary Taylor, Millard Fillmore, Franklin Pierce and James Buchanan—personified the vacuum in national leadership. Compared to these lilliputian nonentities, Chief Justice Taney seemed to be the only leader in any branch of the government. On the eve of the Great Depression, Taney's stock among historians was rising faster than the market on Wall Street.

Taney's stock also rose because in the first four decades of this century his economic jurisprudence converged with progressive notions of constitutional and economic policy. Taney generally supported the right of the states to regulate their economies without federal interference or supervision. Thus Taney became something of a model judge for Progressives and early New Dealers seeking a usable past and judicial precedent to support government regulation of the economy. In an era when the White, Taft, and Hughes Courts were striking down progressive state legislation, the Taney Court offered a model of allowing state experimentation in economic regulation. Taney's support for federalism, particularly in the economic context, pleased progressives, who saw the states as engines for reform. Indeed, in his economic federalism Taney seemed almost Brandeisian. Writing in 1962, a historian argued that "on economic matters" Taney "faced the future" and in so doing threatened entrenched economic interests.[7] This was also the goal of most reformers in the first four decades of the twentieth century. Thus, Taney "became the darling of political liberals."[8]

No one was more responsible for Taney's rehabilitation than Harvard Law School's Felix Frankfurter. In the middle of the New Deal, Professor Frankfurter argued that Taney should be judged by his commercial decisions and not by his decisions on slavery, which Frankfurter downplayed and thoroughly misinterpreted. His analysis reflected prevailing views of the causes of the Civil War and a blindness towards the need to protect minorities from oppressive majorities that later marked his Supreme Court career.

Millard Fillmore became the United State's thirteenth president upon the death of Zachary Taylor in 1850. As president, he signed the Compromise of 1850 and sought to enforce its fugitive slave provisions. He did not receive the Whig nomination for president in 1852 but ran in 1856 on the Know-Nothing ticket.

While a Harvard Law professor, Felix Frankfurter argued for the rehabilitation of Roger Taney's reputation based on his economic and commercial decisions while ignoring his pro-slavery decisions.

Thus, he praised Taney for being "tolerant of legislative freedom for the states in the absence of Congressional legislation, the more so because implied restrictions upon the states were necessarily the creatures of judicial discretion."[9] Having come to intellectual maturity when the Supreme Court regularly struck down progressive state legislation on precisely such grounds—and having watched the Court eviscerate much of the progressive legislation of the early New Deal—Frankfurter admired Taney's support of state laws and his judicial restraint. Frankfurter thought judges should emulate Taney's "conception of the judicial function, from his unwillingness to open the door to judicial policy-making wider than the Constitution obviously required."[10]

Indeed, Frankfurter was so enamored with Taney that he reached the astounding conclusion that "Least of all was he a 'pro-slavery' man in any invidious sense; he was merely concerned lest the Union be broken by extreme action, and the South become the economic vassal of Northern capitalism."[11] In the middle of the Great Depression, and obsessed with the power of modern corporations, Frankfurter dismissed slavery as unimportant: "Certainly not slavery, but Taney's fear of the growing power of finance was most clearly reflected in his opinions" and thus he was "alert against an application of the Constitution which would foster an economic development regarded by him as mischievous."[12]

Frankfurter cheered Taney because he believed the Chief Justice wanted to "avoid the evils of monopoly." So, Frankfurter found Taney to be in the tradition of "the Insurgency of the elder LaFollette, the Progressivism of Theodore Roosevelt, and the New Freedom of Woodrow Wilson."[13] He concluded that "the intellectual power of his opinions and their enduring contribution to a workable adjustment of the theoretical distribution of authority between two governments for a single people, place Taney second only to Marshall in the constitutional history of our country."[14]

Frankfurter's article and Carl Swisher's admiring biography led scholars to concentrate on Taney's economic decisions while ignoring or downplaying his jurisprudence on race and slavery. This was misleading in two ways. First, these scholars never understood that Taney's economic jurisprudence stemmed not from some theory he had about judging, or the Constitution, but rather from his own political views. Taney was a good Jacksonian. Consequently, most of his economic decisions simply supported his policy goals. Second, Frankfurter and others never saw that Taney's jurisprudence on slavery and race was really much like his economic jurisprudence—it was result oriented. By reducing his slavery jurisprudence to just one case—*Dred Scott*—and then by dismissing that as a mistake or an aberration, scholars misunderstood the depth of Taney's support for slavery and his hostility to African-American rights. This led scholars to virtually ignore *Dred Scott* and slavery.

Thus, Alpheus T. Mason barely mentioned *Dred Scott* in a book ironically titled ***The Supreme Court in a Free Society***. Mason only examined Taney's commercial, economic, and police power jurisprudence. None of the index entries to Taney take a reader to Mason's two passing references to *Dred Scott*. Ignoring the central constitutional questions of the nineteenth century, Mason had no index entries to race, slavery, the Civil War, or Reconstruction.[15] Yale Law School's Fred Rodell, writing at about the same time, recognized that Supreme Court jurisprudence helped lead to the Civil War, and that Taney was blatantly pro-slavery, but even he argued that *Dred Scott* was "a great misfortune," rather than a decision consistent with Taney's overall career. Rodell thought that had Taney

died before *Dred Scott* "he might have gone down in history—half deservingly, half by happenstance—as the most liberal Chief Justice of them all."[16]

Recently, some scholars have taken a less sympathetic view of Taney. Part of this has to do with changing interpretations of the Civil War. Earlier scholars thought the war was caused by a conflict over states' rights, the ineptitude of a blundering generation, or the struggle between an aggressive capitalist North and a passive agrarian South that was finally forced to defend itself. This led Frankfurter, for example, to argue that Taney's decisions on slavery were only meant to prevent the South from becoming "the economic vassal of Northern capitalism."[17]

Today only the most dyed-in-the-wool lost cause partisans doubt that the root cause of the Civil War was slavery, or more precisely, the South's implacable demand that slavery never be harmed by the national government. Historians have come full circle. In 1861 Alexander Stephens, the Confederate Vice President declared slavery was "the cornerstone" of the putative Southern nation. Similarly, in his second inaugural address Lincoln observed that "[a]ll knew" that slavery "was somehow the cause of the war." With slavery once again at the center of the crisis of the Union, Taney's *Dred Scott* opinion looms larger. Moreover, Taney's overwhelmingly pro-slavery jurisprudence in other cases and his blatant hostility to the Union cause during the Civil War further undermine his reputation as a jurist. Thus, two eminent constitutional scholars, Harold M. Hyman and William M. Wiecek, concluded that "in his public capacity, he was supremely self-assured, capable of pugnaciously promoting his views, intolerant of disagreement, and dogmatic to a fault. Deeply conscious of his Maryland roots, Taney was to the core a Southerner, fiercely defensive of his region against the 'aggressions' of the Northern states. These attitudes served him poorly as Chief Justice."[18] Similarly, Don E. Fehrenbacher concluded in his Pulitzer Prize winning book on *Dred Scott*: "Taney's opinion, carefully read, proves to be a work of unmitigated partisanship, polemical in spirit, though judicial in its language, and more like an ultimatum than a formula for sectional accommodation." This is not surprising, since by the 1850s Taney had abandoned all pretense of neutrality in sectional issues. "Behind his mask of judicial propriety, the Chief Justice had become privately a bitter sectionalist, seething with anger at 'Northern insult and Northern aggression.'"[19]

Samuel F. Miller joined the Supreme Court in 1862 prepared to despise Chief Justice Roger Taney for his views on slavery and his role in squashing the Bank of the United States. Instead he found himself drawn to Taney and wrote later, ". . .before the first term of my service in the Court had passed, I more than liked him; I loved him."

Taney's Contributions to American Economic Development

If historians looked only at Taney's résumé, and not at the substance of his decisions, his reputation would be secure. Before joining the Court Taney had been a Maryland legislator, state attorney general, United States Attorney General and, briefly, Secretary of War. As Attorney General he drafted Jackson's famous message vetoing the rechartering of the Second Bank of the United States. Later, as an *ad interim* Secretary of the Treasury, Taney be-

gan removing federal deposits from the Bank. In 1836 he became Chief Justice of the United States. During a tenure of more than twenty-eight years he was a powerful, often dominant, figure on the Court. He wrote more than 270 majority opinions but only twelve dissents—fewer than one every two years. This record suggests Taney was almost always able to sway the Court to his views. He did this in part by his great tact and his willingness to assign important decisions to other members of the Court. As G. Edward White has noted, "Taney preferred to influence others through the power of suggestion rather than of persuasion."[20] Even those who despised his political and legal views found him irresistibly charming. Justice Samuel F. Miller, a Lincoln appointee, served with Taney during his last two terms on the bench. Miller later wrote of his earliest encounter with Taney:

> I had never looked upon the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the Bank of the United States, and I hated him for it. . . . He had been the chief Spokesman of the Court in the *Dred Scott* case, and I hated him for that. But from my first acquaintance with him, I realized that these feelings toward him were but the suggestions of the worst elements of our nature; for before the first term of my service in the Court had passed, I more than liked him; I loved him.[21]

Certainly Taney helped shape the development of the booming American economy. In the *Charles River Bridge* case, Taney allowed the states to promote economic and industrial development in an age of rapid technological change. He concluded that "any ambiguity in the terms of the contract" or corporate charter "must operate against the adventurers [stockholders] and in favor of the public."[22] The end result was to strengthen state governments by giving them more latitude in regulating their economies.

Despite his general deference to state regulation, Taney encouraged interstate economic development. Thus, in *Bank of Augusta v. Earle*,

Justice Joseph Story imported the English tidewater rule of Admiralty jurisdiction. In 1852 Chief Justice Roger Taney replaced that with a new test: navigability.

Taney held that a bank chartered in one state might do business in another, unless specifically prohibited from doing so. Here Taney enhanced interstate business while at the same time recognizing the power of the states to regulate their economies. This ruling left the states in the position of having to specifically ban out-of-state corporations from doing business within their jurisdictions.[23]

Taney's expansion of federal jurisdiction in *Propeller Genesee Chief v. Fitzhugh* (1852) also illustrates his sophisticated, non-doctrinaire approach to economic development. Here he reversed the Marshall Court's doctrine, enunciated by Justice Joseph Story in *The Thomas Jefferson* (1825), that had allowed the states to regulate traffic on inland waters. This made for an impossible set of differing and sometimes contradictory rules in the nation's water commerce. Taney concluded that federal admiralty jurisdiction extended to all navigable rivers and lakes, and not just to those affected by "the ebb and flow of the tide." Taney understood that the Great Lakes "are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is

carried on upon them. . . ." Thus, "Taney discarded the English tidewater rule of Admiralty jurisdiction that Story had imported into American law," replacing it with a more pragmatic test: navigability. As Hyman and Wiecek have noted, "*The Genesee Chief* ranks with *Charles River Bridge* as a triumphant marriage of technological development and legal advance, based on a realistic appraisal of the policy consequences of adopting one rule of law or another."[24] Decisions written by other Justices further illustrate the importance of the Taney Court in shaping the antebellum economy. In *Briscoe v. Commonwealth Bank of Kentucky* Justice John McLean, speaking for a majority that included Taney, upheld the right of a state chartered bank to issue bank notes. This narrowed the implications of Chief Justice John Marshall's opinion in *Craig v. Missouri*, which had prohibited states themselves from issuing paper money. Logically, if the Constitution prohibited a state from issuing currency, a state could not charter a bank to do what the state itself could not do. However, McLean distinguished between a bank issuing notes and a state issuing currency. This decision dovetailed with Jacksonian opposition to the federally chartered Bank of the United States, which Taney had helped destroy. More importantly, *Briscoe* enhanced the power of the states to regulate their economies.[25]

Similarly, in *The License Cases* the Taney Court upheld the right of states to ban the importation of liquor, while in *Cooley v. Board of Port Wardens of Philadelphia* the Court upheld a Pennsylvania law requiring that ships entering Philadelphia take on a local pilot. Both decisions reflected Taney's general deference to the states.[26] In *Mayor of New York v. Miln* the Taney Court (in an opinion by Justice Philip Barbour) upheld New York City's law requiring ships entering the port to provide detailed information about immigrant passengers. This decision gave states some control over immigration, or at least allowed them to better control immigrants. However, in *The Passenger Cases* the Court struck down, on Commerce Clause grounds, state laws taxing immigrants. This decision strengthened the federal government, and Taney, ready to defer to the states, dissented.[27]

The Taney Court's record on economic issues is clear. The Court generally allowed the states great flexibility in determining how their economies should develop. At the same time, for truly national concerns, such as the regulation of inland waterways at issue in *Propeller Genesee Chief v. Fitzhugh*, Taney pragmatically deferred to the national government.

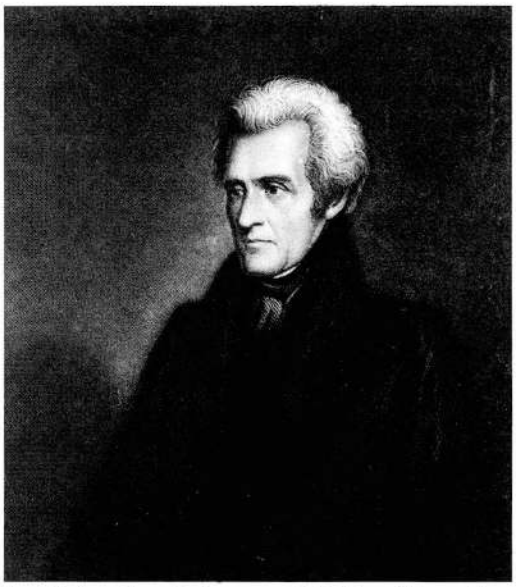
Had Taney's reputation rested on these economic decisions, the Congress in 1864 would not have hesitated to authorize a bust for the late Chief Justice. The record is impressive, even if one disagrees with the policy choices the Court made. For Felix Frankfurter and other scholars who agreed with Taney's policy choices and his apparent deference to legislatures, the Chief Justice's record was the stuff of greatness.

Slavery, Race, and Chief Justice Taney

But we cannot just look at Taney's record on the economy. We must also consider his decisions on race, slavery, and the Civil War. Here Taney's jurisprudence is clearly problematic.

Defenders of Taney have portrayed him as a moderate on the issue of slavery and race. Events in his early life support such an analysis. In 1818 he successfully defended Jacob Gruber, a Methodist minister prosecuted in Maryland for giving sermons that had antislavery implications. At about the same time Taney educated and manumitted virtually all of his own slaves. He retained only those who were too old to earn a living on their own.[28] These acts of personal generosity certainly deserve praise. Indeed if most other Southerners had followed Taney's lead, the problem of slavery in the United States would have gradually disappeared. But, we must be careful to separate Taney's early and admirable personal actions from his subsequent public acts. As attorney general and Chief Justice, Taney protected slavery and undermined the rights of free African-Americans at every turn. Equally important, during the Civil War Taney hindered Lincoln's policy of upholding the Constitution and keeping the Union intact.

Dred Scott is correctly seen as the most



President Andrew Jackson appointed Roger Taney attorney general in 1831 after the Peggy Eaton affair forced him to reorganize his cabinet. In 1833 Jackson shifted Taney to the Treasury Department as an interim appointment after Jackson's bank veto. The Senate rejected Taney's nomination and Taney returned to private practice. Jackson nominated Taney to the Court to replace Gabriel Duvall but the nomination was rejected. Finally in 1835 Jackson nominated Taney to be Chief Justice and the Senate confirmed him.

important decision Taney wrote on race and slavery. Many scholars have argued that *Dred Scott* was an aberration, inconsistent with his otherwise distinguished career. Defenders of Taney complain that this admittedly bad and unfortunate decision has unfairly been used to destroy his whole reputation. In 1931 Chief Justice Charles Evans Hughes said that *Dred Scott* was a "well-intentioned mistake."[29] Yale Law Professor Alexander Bickel called it a "ghastly error," while political scientist Henry J. Abraham still calls *Dred Scott* a "monumental aberration" and thinks it "a pity that Taney is so often remembered by that case."[30]

This sort of analysis is, however, wrong. Well before *Dred Scott* Taney had taken strong positions in support of slavery and against free African-Americans. Far from an aberration, *Dred Scott* can be seen as the culmination of Taney's ideas on race and slavery.

As President Andrew Jackson's attorney general, Taney argued, as he later would in *Dred Scott*, that African-Americans in the United States had no political or legal rights, except those they "enjoy" at the "mercy" of whites. Much as he would in *Dred Scott*, Taney ignored the fact that African-Americans voted in a number of states at the time of the ratification of the Constitution, as well as in the 1830s. Instead, Taney asserted that:

> The African race in the United States even when free, are every where a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as a separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They are not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be included by the term *citizens*.

In this opinion Taney also concluded that the Declaration of Independence was never meant to apply to African-Americans, who were, in the attorney general's mind, not entitled to the natural rights of "life, liberty, and pursuit of happiness."[31]

This attorney general's opinion on the rights of free African-Americans, demonstrates that the anti-black, pro-slavery views Taney expressed in *Dred Scott* were not aberrations, nor a function of the changing politics of the 1850s. Rather, he held these views a quarter of a century before *Dred Scott*. Taney never published this opinion, and therefore it did not affect public debate. But, it certainly bolstered Jackson's hands-off policy toward Southern regulations of free blacks from

the British Empire and the North.

Once on the Court, Taney dealt with slavery in a number of decisions. His first major encounter with slavery came in 1841, when both *United States v. The Amistad* and *Groves v. Slaughter* reached the Supreme Court.[32] The *Amistad* was the first great slavery-related *cause célèbre* to reach the Supreme Court, although it had little impact on the Court's jurisprudence over slavery. *Groves*, on the other hand, was a rather mundane case involving the interstate sale of slaves. While it raised no great political issues, it was fraught with important constitutional questions affecting slavery and the economy.

The *Amistad* was a Spanish schooner filled with slaves recently (and illegally) imported to Cuba from Africa. While being transported from one part of Cuba to another the slaves revolted, killing some of the crew and demanding that the surviving crewmen take them back to Africa. The crew sailed east during the day, but at night reversed course, heading north and west, in hopes of reaching a Southern state in the United States. Instead, the craft ended up in Long Island sound, where a Coast Guard vessel interdicted it. Various suits arose over the status of the vessel and the Africans on it. Eventually the Supreme Court, in an opinion by Justice Joseph Story, ruled that the blacks had been illegally taken from Africa, could not be held as slaves under Spanish or American law, and should be returned to Africa. Taney silently concurred in Story's opinion. By 1841 even many pro-slavery advocates found the African trade to be immoral and a violation of natural law as well as good public policy. Thus, Taney's acquiescence in freeing the Amistads cannot be seen as antislavery.

On its face *Groves v. Slaughter* also did not raise pro- or antislavery issues. It was essentially a Commerce Clause case, a suit between slave sellers and slave buyers. Mississippi's 1832 Constitution prohibited the importation of slaves for sale. This was not an antislavery provision, but an attempt to reduce the flow of capital out of the state. Slaughter, a professional slave dealer, sold slaves in Mississippi and received notes signed by Groves and others. Groves and his co-defendants later defaulted on the notes, arguing that sales of slaves in Mississippi were void. Speaking for the Court, Justice Smith Thompson of New York determined that Mississippi's constitutional prohibition on the importation of slaves was not self-executing. Thompson held that absent implementing legislation, the prohibition in the Mississippi constitution was inoperative. Thus he held that the notes were not void. This was a reasonable result based on commercial rules, and was consistent with the outcome in *Bank of Augusta v. Earle*. In that case Earle and other Alabamians refused to honor their own bills of exchange on the grounds that they had been bought by an out-of-state bank. In *Bank of Augusta* Taney had ruled that out-of-state banks could operate in any state, in the absence of an explicit act of the legislature to the contrary. Similarly, in *Groves* Justice Thompson held that the Mississippi purchasers could not hide behind a clause of the state constitution, and refuse to pay the notes they signed for the slaves they purchased, without an explicit statute in Mississippi banning slave sales. This result was "neutral" with regard to slavery.

Indicative of what would be his highly partisan approach to slavery throughout his career, Taney wrote a separate concurrence, insisting that the federal government had no power over slavery. This was one of only fourteen separate opinions that Taney wrote in his twenty-eight years on the bench. Taney's opinion dealt with an issue that was not directly before the Court. Clearly Taney did not want to leave any implication that under the Commerce Clause Congress might regulate slavery. He declared that "the power of this subject [slavery] is exclusively with the several States; and each of them has a right to decide for itself, whether it will or will not allow persons of this description to be brought within its limits from another State, either for sale, or for any other purpose . . . and the action of the several States upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States."[33]

Taney's separate opinion is consistent with his other decisions that allowed the states to regulate economic development. These are the decisions that Felix Frankfurter admired so much. However, *Groves* at least suggests that behind

Taney's commercial jurisprudence may have been a hidden goal: to protect slavery and to protect the right of the states—especially the Southern states—to regulate this aspect of their economy. In that sense, Taney's opinion in *Groves* dovetails perfectly with his "opinion" as attorney general on the rights of free blacks. He wrote that opinion in response to statutes adopted by most southern coastal states prohibiting free blacks (from other states or the British Empire) from entering their jurisdiction. Taney in effect had argued that because blacks had no rights and could be reduced to slavery at the whim of white society, the southern states were free to exclude free blacks from their jurisdiction.

Some of Taney's most important decisions, giving states greater control over their economies, are sandwiched between his "opinion" as attorney general and his opinion in *Groves*. This suggests that slavery was in the background of Taney's economic decision-making, that his desire to protect slavery influenced his commercial jurisprudence. He wanted to give the slave states great autonomy in regulating slavery and at the same time make sure that the federal government would not interfere with slavery.

In 1842 the Supreme Court heard *Prigg v. Pennsylvania*, its first case involving the Fugitive Slave Clause of the United States Constitution.[34] Edward Prigg had seized a black woman and her children without any state process and was subsequently convicted of kidnapping under Pennsylvania's 1826 personal liberty law which required that slave catchers obtain a proper writ from a state judge before removing any African-Americans from the state. In a sweeping victory for slavery, which shakes to the core his antislavery reputation, Justice Story struck down the Pennsylvania law, upheld the federal fugitive slave law of 1793, and further declared that slaveowners had a Constitutional right to seize their slaves anywhere they found them, without resort to any sort of legal process, as long as the seizure could be done without a breach of the peace. In reaching these conclusions Story swept aside the fact that at least one of the people Prigg seized had been born in Pennsylvania and was therefore free under that state's laws.[35]

In his opinion Story also asserted that the federal government could not require state officials to enforce the fugitive slave law of 1793, although he urged them to do so as a matter of patriotism, moral obligation, and (unenforceable) constitutional duty.[36]

But, Taney did not accept this. In another of his rare separate opinions, Taney argued that the states should be free to pass laws that aided in the return of fugitive slaves. He phrased this argument in terms similar to his economic arguments. He rejected the notion that the Fugitive Slave Clause, and the 1793 federal law adopted to enforce it, prevented the states from passing parallel enforcement legislation. Instead, he argued that "by the national compact, this right of property [slavery] is recognized as an existing right in every state of the Union," and thus the states were free to protect slavery.[37] When it came to slavery, Taney supported state power for the southern states, while rejecting the right of the free states to protect the rights of free African-Americans. But, this is not surprising. Since his days as attorney general, Taney had believed that free blacks had no rights that any government had to protect.

In *Strader v. Graham* Taney, speaking for a unanimous Court, wrote his first majority opinion in an important slave case.[38] Strader's steamboat had transported Graham's three slaves to Ohio, where they disappeared. Kentucky law held a steamboat operator liable for the value of any slaves who escaped by boarding the boat without written permission of the owner. Strader, however, argued that the blacks were free because Graham had previously allowed them to go to Indiana and Ohio. Taney ruled against Strader, arguing that the status of the African-Americans could only be decided by Kentucky, which had ruled they were slaves. Kentucky was free to ignore the laws of Ohio and Indiana on this question.

In *Strader* Taney in effect asserted the right of a state to decide the status of African-Americans within its jurisdiction. Presumably, had Graham's slaves asserted their liberty in Indiana or Ohio, those states would have freed them. But, Taney hedged on this issue, declaring that "[e]very State has an undoubted right to determine the *status* or domestic and social condition, of the persons domiciled within its territory" except as "restrained" by the Constitution.[39] This wording clearly applied to fugitive slaves, which the north-

Dred Scott and his wife Harriet sued for freedom after the death of their owner in 1843. Their separate suits were carried out until 1850 when Mrs. Scott dropped hers to avoid costly duplication, with the understanding that the results of her husband's suit applied to her as well. The trial judge of the Circuit Court of St. Louis County following the Missouri precedent of "once free, always free" ordered the Scotts freed. However, the Missouri Supreme Court reversed the lower court's decision.

ern states could not declare free, but it also held open the possibility that slaveowners had other federal rights to carry their slaves into the North or the federal territories. Part of this implication became explicit in *Dred Scott v. Sandford.*

The Dred Scott Case

Dred Scott was the slave of Dr. John Emerson, a military physician who had taken Scott to Fort Snelling, in present day Minnesota. At the time this area was free territory under the Missouri Compromise. After Emerson's death Scott sued for his freedom on the grounds that he had become free through his residence in a jurisdiction where slavery was illegal, and once free he was always free. After nearly eleven years of litigation in state and federal courts, the Supreme Court finally decided the case in 1857. Although all nine Justices wrote opinions, Taney's was the "Opinion of the Court." In his sweeping, fifty-five page opinion Taney sought to settle the nation's divisive political questions of slavery and race in favor of the South.

Taney might have dealt with Dred Scott's claim to freedom in a very simple way. Scott had lived in free jurisdictions, and might have been able to claim his freedom in those places. But, he did not do so. Therefore, Taney might have relied on the precedent in *Strader v. Graham* to affirm the decision of the Missouri Supreme Court that Scott was still a slave. Taney could simply have declared that when Scott moved back to Missouri he lost whatever claim to freedom he might have claimed under the Missouri compromise.[40] Initially the Supreme Court in fact planned to do this, with Justice Samuel Nelson of New York writing a narrow opinion denying Scott's freedom.[41] In taking this position, the Court in effect would have said that states were free to ignore the impact of the federal law—the Missouri Compromise—on the status of slaves.

In the end, however, the Court refused to decide the case on narrow grounds. Southerners wanted the Court to resolve the festering issue of slavery in the territories in favor of their section by striking down the prohibition on slavery in the Missouri Compromise. Congressman Alexander Stephens, for example, pressured Justice James Wayne, a fellow Georgian, to take such a position. Similarly, President-elect James Buchanan pressured some Justices to settle the territorial question, again in favor of the South. This would relieve Buchanan of the political difficulties presented by turmoil in the territories.

In February 1857 the four southern Associate Justices asked Taney to write a comprehensive opinion. Even without Taney's vote, these four easily outvoted the two concurring Northerners, Nelson and Robert Grier of Pennsylvania. The two northern dissenters, John McLean of Ohio and Benjamin Robbins Curtis of Massachusetts, had no impact on who wrote the majority opinion.

As Don E. Fehrenbacher has shown, by this time Taney had "become privately a bitter sectionalist, seething with anger at 'Northern insult and Northern aggression.'" Thus, the change of votes on the Court allowed him to write "the opinion that he had wanted to write all along."[42]

Three aspects of Taney's opinion made it infamous: his denial of Congressional power to regulate slavery in the territories; his application

of the Fifth Amendment to protect the property claims of slaveowners in their slaves; and his conclusion that free blacks had no legal rights under the Constitution.

In a tortured interpretation of the Constitution's clause on territorial jurisdiction Taney ruled that the Missouri Compromise was unconstitutional. Article IV of the Constitution empowered Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Despite the apparent grant of power in this clause, Taney denied that it had anything to do with the territories owned by the United States in 1857. Rather, in a totally unpersuasive analysis Taney declared that the territories clause of Article IV "was a special provision for a known and particular territory, and to meet a present emergency, and nothing more."[43] Taney's argument was strained, and unconvincing: "The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology . . . all indicate the design and meaning of the clause" was to be limited to the territories the government owned in 1787. He argued:

> [i]t does not speak of *any* territory, nor of *Territories*, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to *the* territory of the United States—that is, to a territory then in existence, and then known or claimed as the territory of the United States. . . . And whatever construction may now be given to these words, every one, we think, must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new Government might afterwards itself obtain by cession from a State. . . .[44]

Thus, Taney struck down the Missouri Compromise, a major piece of Congressional legislation that had been the keystone of sectional compromise for more than a generation.

Chief Justice Roger Taney drafted his opinion in *Dred Scott* with the hopes of ending the controversy over slavery in the territories and permanently denying legal rights to free blacks in the United States.

Second, Taney ruled that a ban on slavery in the territories violated the Fifth Amendment's Due Process Clause. Taney asserted that: "the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen," and thus "no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."[45] In essence, Taney held that slavery was a protected species of property, and that under the Constitution the Congress could not deprive any citizen of this kind of property.

By implication, this interpretation prohibited any territorial legislature from banning slavery. This pleased Southerners while angering Northerners. It flew in the face of the Northwest Ordinance, the Missouri Compromise, and other

laws in which Congress had banned slavery from federal territories. Moreover, the use of the Fifth Amendment seemed to some people cynical and ironic. That amendment, after all, asserted that no person could be denied life, liberty or property without due process of law. Taney stressed the "property" in slaves, and protected it, but ignored the obvious possibility that the amendment might ban slavery in all federal jurisdictions because slavery denied people liberty without due process.

Taney might have stopped here. These parts of the decision gave the South an enormous victory. But, he did not stop. Instead, he tackled an aspect of the case that was unnecessary for the larger decision or the political victory of the South. It concerned the issue of race and the place of blacks in American culture and society.

Dred Scott had brought his case to the federal courts under diversity jurisdiction. Scott claimed that sometime after 1852 he was sold to John F. A. Sanford, who lived in New York. In 1854 Scott sued Sanford for his freedom in federal court. It is impossible to determine whether Sanford actually owned Scott, or was merely acting as an agent for his sister, Irene Emerson, the widow of Dr. Emerson. It is also probably irrelevant. Sanford never denied he owned Scott, and he acknowledged this in all court papers and proceedings after 1853.[46]

Sanford argued that Scott was "a negro of African descent; his ancestors were of pure African blood" and as such he could not be a citizen of Missouri or of the United States and could not sue in federal court. United States District Court Judge Robert Wells rejected this plea, concluding that *if* Scott was free, he must be a citizen of the state in which he lived, for purposes of federal diversity jurisdiction.[47] When the case reached the Supreme Court Taney reexamined this plea and the response of Judge Wells.

Again, Taney might have answered this plea with a narrow, but fully sufficient analysis. He could have said that in Missouri free blacks were not citizens. He might have noted that under Missouri law free blacks could not vote, testify against whites, move into the state, own certain kinds of property, or enter certain professions, and that they lacked a wide variety of other legal rights normally associated with citizenship. In *Strader v. Graham* Taney had asserted that "[e]very State has an undoubted right to determine the *status* or domestic and social condition, of the persons domiciled within its territory."[48] Taney might easily have applied this logic, determining that Scott could not sue in diversity because even if free, he could never be a citizen of Missouri. This argument would have surprised no one, and would have allowed Taney to dismiss the case for want of jurisdiction without ever getting to the issues of slavery in the territories. Or, Taney might have used this analysis along with his argument that the Missouri Compromise was unconstitutional.

But in *Dred Scott* Taney was in no mood for restraint. This was his chance to settle the issues of slavery in the territories, to strike out at the North, and also to settle once and for all the place of blacks in American society. Taney, the seething sectionalist, hoped to place blacks beyond the pale of legal protection in the United States. This would head off the growing concern for blacks rights in the Republican Party and even in the mainstream of the North. After *Dred Scott* Taney could be certain that blacks would not appear before his Court—or any other federal court—as plaintiffs, defendants, or attorneys.[49]

Thus Taney argued that free blacks—even those allowed to vote in the states where they lived—could never be citizens of the United States and have standing to sue in federal courts. Taney offered a slanted and one-sided history of the Founding period which ignored the fact that free blacks had voted in a number of states at the time of the ratification of the Constitution. Although Taney was aware of black voters in 1787, the Chief Justice nevertheless argued that at the adoption of the Constitution blacks were either all slaves or, if free, were without any political or legal rights. He declared blacks

> are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time [1787] considered as a subordinate and inferior class of

> beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Taney concluded blacks were "so far inferior, that they had no rights which the white man was bound to respect."[50]

In *Dred Scott* Taney had hoped to end all controversy over slavery in the territories and the place of African-Americans in the United States. But, he wanted to accomplish this by giving the South a sweeping victory and by thoroughly vanquishing any notion of black rights. Taney delivered his *Dred Scott* opinion only a few months after the Republican Party had nearly won the presidential election on a platform that endorsed the "self evident" principles in the Declaration of Independence that all people "are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." But, Taney asserted that the Republican platform was historically and constitutionally wrong. Taney wrote in *Dred Scott*:

> In the opinion of the Court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.[51]

At one level Taney may have been right. Many of the framers—and certainly the vast majority of the Southern framers—did not intend to provide for racial equality through the Declaration of Independence. Taney's assessment seems correct:

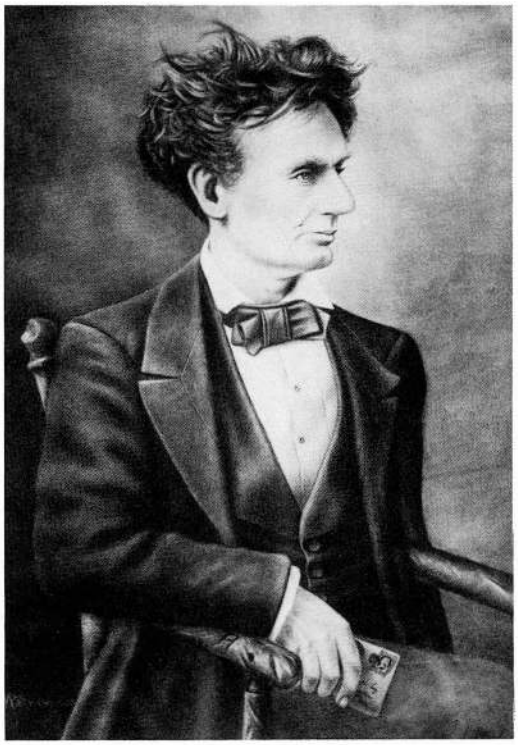
> But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.[52]

His understanding of the intentions of the Southern framers at the Constitutional Convention seems equally correct:

> It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.[53]

Moreover, his pro-slavery analysis of the Constitution comports with what we know happened in Philadelphia. The southern delegates there won a number of victories, and at relatively little cost.[54]

Yet, in the end Taney sought to prove too much, especially by relying on an intentionalist argument. His historical argument was narrow, partisan, and unsophisticated. He ignored the black soldiers who fought for the patriot cause. He refused to consider that African-Americans voted in a number of states in the 1780s. He was oblivious to the connection between the Revolution, the Declaration of Independence, and the ending of slavery in the North.[55] His opinion was not designed to persuade opponents of slavery that he was right; rather it was written to bludgeon them. In the end he severely miscalculated. Rather than acknowledge the complexity of slavery and race relations in a nation that was half slave and half free, Taney simply tried to sweep away opponents of slavery. He failed miserably. Northern anger over the opinion fueled the Re-



During the Civil War, Chief Justice Taney unsuccessfully attempted to thwart many of President Lincoln's policies. In *Ex Parte Merryman*, Taney, acting as a circuit court judge, denounced Lincoln's actions in the military arrest of a Marylander who was organizing troops for the Confederacy in Maryland, a border state.

publican Party and helped put Lincoln in the White House.

The Fugitive Slave Law, Secession, and Civil War: The Aftermath of *Dred Scott*

After *Dred Scott* Taney continued to push for a pro-slavery interpretation of the Constitution and all federal laws. His opinions in *Ableman v. Booth* and *Kentucky v. Dennison*,[56] showed the pro-slavery cynicism of Taney's jurisprudence.

In *Ableman* Taney rejected Wisconsin's attempts to remove from federal custody the abolitionist Sherman Booth, who had helped a fugitive slave escape. Taney refused to even consider the constitutionality of the new Fugitive Slave Law of 1850, even though it was substantially different from the 1793 law upheld in *Prigg*. As in *Dred Scott*, Taney made no attempt to persuade those who doubted the constitutionality of the 1850 law that his position was correct. Instead, he asserted without argument that the law was valid, even though it denied alleged slaves a jury trial or the right to testify in their own behalf. Taney also dismissed Wisconsin's states' rights arguments as though he had never heard of the idea of states' rights. Taney's *Ableman* opinion was a sweeping endorsement of federal power and the supremacy of the Constitution and the Supreme Court's interpretation of it. Chief Justice Marshall could not have written a more thorough assertion of the authority of the Supreme Court. Taney wrote this ultranationalist opinion to protect slavery from the antislavery states' rights ideas of the North.

In *Kentucky v. Dennison*, however, Taney changed his tune once again. This was a suit by the state of Kentucky to force Governor Dennison of Ohio to extradite a free black named Willis Lago who had helped a slave woman escape from Kentucky. The obvious pro-slavery result would have been to side with Kentucky. This would have also been consistent with Taney's opinions in *Prigg*, *Dred Scott*, and *Ableman*, where he rejected states' rights in favor of federal protection of slavery. But, by spring 1861, when the Court decided the case, seven slave states had already left the Union and Abraham Lincoln was about to become president. Sympathetic to the Southern cause, Taney avoided writing an opinion which would have given the federal government the power to force state governors to act. Thus, in an opinion reminiscent of Marshall's tactics in *Marbury v. Madison*, Taney castigated Governor Dennison, but refused to order him to act.

Taken together, the line of cases from *Prigg* (or even *Groves v. Slaughter*) to *Dennison* show that *Dred Scott* was neither uncharacteristic nor an aberration. These cases show that *Dred Scott* was part of Taney's larger jurisprudential goal of protecting slavery and the South whenever he could. By this time Taney lacked any sort of theoretical mooring for his opinions. He could flit back and forth from states' rights to federal supremacy. When it benefited slavery—as it did in *Strader v. Graham*—Taney was happy to allow the states to determine the status of people within their jurisdiction. But, in *Dred Scott*, Taney denied that states could determine questions of citizenship because to do otherwise would have allowed free blacks in places like Massa-

chusetts, Rhode Island, or New York to sue in federal court. He was uninterested in constitutional principles; only in pro-slavery and pro-southern results. When the Civil War began he applied this constitutional jurisprudence to protecting opponents of the Union.

Taney remained on the Court until his death in 1864. During his last few years as Chief Justice he did everything in his power to thwart Abraham Lincoln's policies. In *Ex parte Merryman* Taney, in his capacity as circuit court judge, denounced Lincoln for the military arrest of a Marylander who was organizing Confederate troops, destroying bridges, and in other ways making war against the United States. Lincoln ignored Taney's fulminations, and kept Merryman in Fort McHenry.[57]

Meanwhile, Taney privately compared enlistment in the Confederate army to enlistment in the patriot army during the Revolutionary War. He "wrote out gratuitous opinions that were never called into use, holding several acts of the federal government unconstitutional"[58] including an opinion declaring conscription unconstitutional. Refusing to recognize the nature of the Civil War, Taney dissented in the *Prize Cases* and opposed the taxation of judicial salaries to help pay for the war. He was, in some ways, the Confederacy's greatest ally in Washington.[59]

By the time he died Taney was a minority Justice, ignored by the President and Congress, held in contempt by the vast majority of his countrymen, and respected most in those places that proclaimed themselves no longer in the Union. Taney's obvious tilt toward the Confederacy showed that he had traveled far from the days when he had advised Andrew Jackson on how to suppress nullificationists. Indeed, he had become one himself.

In the Court of History

Taney's reputation as a Justice is mixed. At his death few had anything good to say about him, yet today it is clear that his impact on the law was great. For the first twenty years of his tenure he successfully guided the Court and helped develop important constitutional doctrines, especially in economic matters. Yet, he is most remembered for *Dred Scott*, the most infamous decision in American constitutional history. *Dred Scott*, however, should not be examined in isolation, but must be seen in the context of his entire career.

Taney's defenders, like Felix Frankfurter and Carl B. Swisher, made the same point about *Dred Scott* to argue for Taney's greatness. They examined his economic decisions and concluded they trumped *Dred Scott*. Indeed, they concluded *Dred Scott* was an aberration. But, they reached this conclusion by doing exactly what they said should not be done: they looked at *Dred Scott* in isolation—in this case in isolation from Taney's other decisions on slavery, race, and the Civil War. However, when Taney's whole career is examined, *Dred Scott* becomes part of a series of decisions designed to strengthen slavery, protect the South, and in the end, to undermine the cause of the Union after 1861. While Taney was creative in finding legal solutions to questions about banking, commerce, and transportation, he ultimately failed in creating a jurisprudence that could defend fundamental liberty and human rights. That failure will always overshadow his successes.

How do we reconcile Taney's apparently progressive economic jurisprudence with the characterization of him as a seething secessionist and pro-slavery ideologue? How to come to terms with the contrast between the admiration of Harvard's Professor Frankfurter with the disdain of Stanford's Professor Fehrenbacher?

Part of the answer may stem from the fields of the two scholars. Fehrenbacher and other modern historians have rightly tried to explain the impact of Taney's jurisprudence on the political, social, and legal development of the country. His economic cases thus become only a part of a much larger picture.

Frankfurter, a law professor, was enchanted by Taney's commercial jurisprudence, which seemed relevant to teaching and law practice in the 1930s. Moreover, like many legal scholars, Frankfurter was far more concerned with influencing public policy than with interpreting the past. His "history" was clearly instrumental. He wrote law office history to argue for a particular set of outcomes in the 1930s. He was not terribly concerned about getting history "right" so much as he was about exploiting history to shape present day policy. The big issue for Frankfurter was the depression; his goal was to see a Supreme

Court that would allow for state and federal legislative innovation and reform. In Taney, Frankfurter found—or thought he found—a model that the Supreme Court of the 1930s might have emulated.

The constitutional vehicle that the Supreme Court had used to overturn Progressive and New Deal legislation had been the concept of "substantive due process." Using substantive due process the Supreme Court had struck down state and federal legislation which limited various economic rights, such as the right to work more than a maximum number of hours (or the right to hire someone for more than a maximum number of hours) or the right to agree to work at whatever wage was offered (or the right to pay a wage below a minimum set by the state). The Court had held that such laws generally violated the due process of rights of individuals by denying them liberty to make contracts. In essence, the Court held that the liberty to contract was devoid of meaning if the government arbitrarily restricted parties from reaching whatever economic agreements they wished. Frankfurter doubtless hoped that the model of Taney—the apparently conservative judge of the nineteenth century—would be useful in convincing twentieth century judges that this policy was wrong.

There is a peculiar irony in Frankfurter's use, or misuse, of Taney. That is because Taney was the first Supreme Court Justice to adopt the concept of "substantive due process." In *Dred Scott* Taney wrote:

> These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[60]

How then, do we evaluate Taney's career? While he was Chief Justice the Court had a profound impact on the shaping of the American economy. However, it is not entirely clear if Taney was necessary for that result. For example, had President Jackson promoted John McLean to the Chief Justiceship, it seems likely that many of the same kinds of economic decisions would have been written. In that regard, a McLean Court would not have looked much different than the Taney Court. However, in the area of slavery, race, and the coming of the Civil War, McLean would have been a very different Chief Justice.

In the end then, it is Taney's jurisprudence on slavery, race, and secession that matters most. Here the Chief Justice failed to provide meaningful leadership for the Court or the nation. Recently Kenneth Holland, a political scientist, has offered a novel, but fundamentally flawed, defense of Taney's *Dred Scott* opinion. Holland's argument is twofold. First, he asserts that Taney showed restraint in *Dred Scott*, because he declined to accept a "higher law" interpretation of the Constitution, and instead "felt restrained by the Constitution, whose words had an objective meaning which the Court was bound to observe in cases raising constitutional issues."[61] Second, he argued that Taney's greatness lay in his attempt "to resolve once and for all time the slavery question because a majority of the people and their representatives demanded a judicial resolution."[62]

Both propositions stand reality on its head. Taney's reading of the Territories Clause of Article IV was incredibly strained. By limiting the clause to the territories owned by the United States in 1787 Taney struck down the Missouri Compromise, to the great shock of most Northerners and at least some Southerners. This part of Taney's opinion was clearly not supported by any reasonable textual interpretation of the clause in Article IV or any historical argument based on the intentions of the Framers of the Constitution. His analysis of the Territories Clause was

unpersuasive and contrary to the plain language of the text.

Nor was Taney's opinion restrained. It does not teach "that judges are restrained by the Constitution, whose interpretation must be anchored in the text and the framers' intent." Taney wrote an intentionalist opinion and his analysis certainly comported with the intentions of most of the Southern framers. Moreover, Taney was clearly right in asserting that the Constitution protected slavery in a great number of ways. Indeed, his opinion might be the strongest argument against ever making an intentionalist analysis. Why should the people of 1857 have been bound by the intentions of people in 1787?

But, Taney's intentionalist analysis was also cramped and constricted. He only examined the intentions of the southern framers, and ignored completely the intentions of people like Benjamin Franklin, who was a delegate to the Convention in 1787, a delegate to Pennsylvania's ratification convention, and the President of the Pennsylvania Abolition Society. Similarly, Taney ignored the free black voters in a number of northern states, as well as those in North Carolina, where free blacks could vote in 1787. If anything, *Dred Scott* illustrates the danger and difficulty of intentionalist jurisprudence.

Taney's opinion illustrates the impossibility of using an intentionalist argument or analysis when the intentions of the Framers are clearly mixed, uncertain, and contradictory. Instead, Taney did what Justices so often do: he offered an unsophisticated intentionalist claim that was, in reality, a thinly disguised political argument. Ultimately, the opinion was a blatantly political attempt to destroy the Republican Party and any opposition to the spread of slavery into the territories. Holland is right that Taney avoided a "higher law" doctrine. Instead, he adopted what we might call a "lower law" doctrine—he attempted to constitutionalize the most racist and pro-slavery aspects of southern legal and constitutional theory. This was not restraint, but rather the worst sort of judicial activism, because it was directed at a single section of the nation, a single political party, and a single race. In the end the opinion was also a political disaster.

Holland is also dead wrong in his assessment of what the "people and their representatives" wanted. Certainly the "majority of the people and their representatives" did not want anything like the result Taney offered. On the contrary, for thirty-seven years the overwhelming majority of free Americans had accepted the sectional accommodation of the Missouri Compromise as the way to resolve slavery in the territories. It was a compromise that worked reasonably well, until pro-slavery ideologues began to push to reverse it. Taney's *Dred Scott* opinion was not a statesmanlike attempt to settle a festering problem, but a partisan attempt to inject politics into the law for the purpose of securing a pro-slavery result.

In the end Taney must always be remembered more for *Dred Scott* than his opinions about the economy. *Dred Scott* indeed, has come to stand for all that can go wrong in a Supreme Court decision, and all that did go wrong under the pro-slavery Constitution. It remains the most infamous decision in American constitutional history, and its author suffers accordingly. While Taney was creative in finding legal solutions to questions about banking, commerce, and transportation, his ultimate failure resulted from his applying that same creativity and jurisprudence to deny fundamental liberty and human rights to millions of Americans. His blunt language in *Dred Scott* made men like Senator Sumner hate Taney. But it is his cynical pro-slavery, pro-southern jurisprudence, and his aggressive attacks on freedom, even in the North, that in the end make Sumner's prediction ring true. However we may admire Taney's personal grace, his clever opinions on commercial issues, and his sometimes brilliant analysis of constitutional issues, his racism, pro-slavery dogmatism, and secessionist sentiments will remain his legacy. Whenever the name Taney comes up, there will always be the echo of hooting.

Endnotes

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

[2] Charles Sumner, ***Congressional Globe*** 38 Cong. 2nd Sess, 1012-13 (Feb. 23, 1865). See Carl Brent Swisher, ***Roger B. Taney*** (New York, 1935) 581-82.

[3] John Ford Rhodes, ***History of the United States From the Compromise of 1850*** (New York, 1900), 2:261.

[4] See Rayford Logan, ***The Betrayal of the Negro*** (New York, 1965); John Hope Franklin and Alfred Moss, Jr., ***From Slavery to Freedom*** (7th ed., New York: 1994);

John David Smith, ***An Old Creed for the New South: Proslavery Ideology and Historiography, 1865-1918*** (Westport, Conn., 1985).

[5] Edward S. Corwin, "The Dred Scott Decision, in the Light of Contemporary Legal Doctrines," ***American Historical Review***, 17 (1911) 68.

[6] Sumner Speech, *supra.*, note 2.

[7] Henry F. Graff, "The Charles River Bridge Case," in John A. Garraty, ed., ***Quarrels That Have Shaped the Constitution*** (New York, 1962) 72.

[8] Kenneth M. Holland, "Roger B. Taney: A Great Chief Justice?" in William D. Pederson and Norman W. Provizer, ***Great Justices of the U.S. Supreme Court*** (New York, 1993) p. 74.

[9] Felix Frankfurter, "Taney and the Commerce Clause," 49 ***Harvard Law Review*** 1286, at 1288 (1936).

[10] Frankfurter, at 1291.

[11] *Id.*, at 1288. Frankfurter failed to comment on the fate of free blacks or slaves under Taney's jurisprudence. Apparently he was more concerned about "vassalage" of the South than the serfdom of blacks.

[12] *Id.*, at 1299, 1300.

[13] *Id.*, at 1300.

[14] *Id.*, at 1302.

[15] Alpheus T. Mason, ***The Supreme Court in a Free Society*** (Englewood Cliffs, N.J., 1959).

[16] Fred Rodell, ***Nine Men: A Political History of the Supreme Court of the United States from 1790 to 1955*** (New York, 1955) quoted at 115, discussing Taney's proslavery stances at 119-120.

[17] *Id.*

[18] Harold M. Hyman and William M. Wiecek, ***Equal Justice Under Law: Constitutional Development, 1835-1875*** (New York, 1982) 60.

[19] Don E. Fehrenbacher, ***The Dred Scott Case: Its Significance in American Law and Politics*** (New York, 1978) 3, 311.

[20] G. Edward White, ***The American Judicial Tradition*** (New York, 1976) p. 68. White also notes that in 1837 Taney assigned two key decisions, *Mayor of New York v. Miln*, 11 Pet. (36 U.S.) 102 (1837) and *Briscoe v. Commonwealth Bank of Kentucky*, 11 Pet. (36 U.S.) 257 (1837), to other members of the Court. White, at 67.

[21] Miller quoted in White, ***The American Judicial Tradition*** pp. 66-7.

[22] *Charles River Bridge Co. v. Warren Bridge Co.* 11 Pet. (36 U.S.) 420 (1837); see generally, Stanley I. Kutler, ***Privilege and Creative Destruction: The Charles River Bridge Case*** (1971).

[23] *Bank of Augusta v. Earle*, 13 Pet. (38 U.S.) 519 (1839).

[24] *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *Propeller Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443 (1852). William M. Wiecek, "Taney, Roger Brooke," in Leonard W. Levy, ed. ***The Encyclopedia of the American Constitution*** 4:1858-1859 (New York, 1986). Hyman and Wiecek, ***Equal Justice Under Law*** 75.

[25] *Briscoe v. Commonwealth Bank of Kentucky*, 11 Pet. (36 U.S.) 257 (1837); *Craig v. Missouri*, 4 Pet. (29 U.S.) 410 (1830).

[26] *The License Cases* (*Thurlow v. Commonwealth of Massachusetts*; *Fletcher v. Rhode Island*; *Pierce v. New Hampshire*) 5 How. (46 U.S.) 504 (1847); *Cooley v. Board of Port Wardens of Philadelphia*, 12 How. (53 U.S.) 299 (1852).

[27] *Mayor of New York v. Miln*, 11 Pet.(36 U.S.) 102 (1837); *Passenger Cases* (*Smith v. Turner*; *Norris v. Boston*), 7 How. (48 U.S.) 283 (1849).

[28] David Martin, ***Trial of the Rev. Jacob Gruber, Minister in the Methodist Episcopal Church*** (Fredericktown, Md., 1819), *reprinted in* Paul Finkelman, ed., ***Slave Rebels, Abolitionists, and Southern Courts***, 1:1 (New York, 1988); Swisher, ***Roger B. Taney***, p. 94.

[29] Charles Evans Hughes, "Roger Brooke Taney," 17 ***American Bar Association Journal*** 785 (1931).

[30] Alexander M. Bickel, ***The Supreme Court and the Idea of Progress*** (New Haven and London, 1978) 41; Henry J. Abraham, ***Justices and Presidents: A Political History of Appointments to the Supreme Court***, 2nd ed., (New York, 1985), p. 100-101.

[31] Unpublished Opinion of Attorney General Taney, quoted in Swisher, ***Roger B. Taney***, p. 154.

[32] *The United States v. Amistad*, 15 Pet. (40 U.S.) 518 (1841); *Groves v. Slaughter*, 15 Pet. (40 U.S.) 449 (1841).

[33] *Groves v. Slaughter*, 15 Pet. (40 U.S.) 449, at 508-09 (1841).

[34] *Prigg v. Pennsylvania*, 16 Pet. (41 U.S.) 539 (1842).

[35] For a more complete discussion of *Prigg*, see Paul Finkelman, "Sorting Out *Prigg v. Pennsylvania*," 24 ***Rutgers L.J.*** 605 (1993). For an intensive anaylsis of Story's opinion see Paul Finkelman, "Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Joseph Story's Judicial Nationalism." 1994 ***Supreme Court Review*** (1995 forthcoming).

[36] This holding was consistent with prevailing notions of federalism and states' rights and Taney should have applauded it. Indeed, later in his career, Taney would argue that the federal courts could not order state governors to enforce the criminal extradition clauses of the same 1793 law. *Kentucky v. Dennison*, 24 How. (65 U.S.) 66 (1861).

[37] *Prigg*, at 628.

[38] 10 How. (51 U.S.) 82 (1850).

[39] *Strader v. Graham*, 10 How. (51 U.S.) 82, 93 (1850).

[40] The Court in fact did just this for Scott's claim to freedom under Illinois law.

[41] Fehrenbacher, ***Dred Scott Case***, p. 306.

[42] *Id.* 3, 311.

[43] *Dred Scott*, at 432.

[44] *Dred Scott*, at 436-37.

[45] *Dred Scott*, at 451.

[46] Sanford spelled his name S-a-n-f-o-r-d, but the clerk of the United States Supreme Court added an extra "d" to his name, thus making the case *Dred Scott v. Sandford.*

[47] *Dred Scott*, at 396-97.

[48] *Strader*, at 93.

[49] By 1857, blacks had been admitted to the bar in Maine, Massachusetts, Ohio and New York. It seemed only a matter of time before a black lawyer from one of those states brought a case into federal court. This was something Taney could not allow. Paul Finkelman, "Not Only The Judges' Robes Were Black: African-American Lawyers as Social Engineers" 47 ***Stanford Law Review*** 161 (1994).

[50] *Dred Scott*, at 404-05.

[51] *Dred Scott*, at 407.

[52] *Dred Scott*, at 410.

[53] *Dred Scott*, at 417.

[54] Paul Finkelman, "Slavery and the Constitutional

Convention: Making a Covenant With Death," in Richard Beeman, *et al.*, eds., ***Beyond Confederation: Origins of the Constitution and American National Identity*** (Chapel Hill, N.C., 1987) 188-225.

[55] See generally, Arthur Zilversmit, ***The First Emancipation*** (Chicago, 1967).

[56] *Ableman v. Booth*, 21 How. (62 U.S.) 506 (1859); *Kentucky v. Dennison*, 24 How. (65 U.S.) 66 (1861).

[57] *Ex parte Merryman*, 17 Fed. Cas. 144 (C.C.D. Md. 1861).

[58] Fehrenbacher, ***Dred Scott Case***, p. 556.

[59] *The Prize Cases*, 2 Black (67 U.S.) 635 (1863).

[60] *Dred Scott*, at 450.

[61] Holland, *supra*, note 8 at 94.

[62] *Id.*, at 94-5.

The Supreme Court and Impartial Justice:
The View from the 1790s

Robert P. Frankel, Jr.[1]

The very first case to be placed on the Supreme Court docket, *Van Staphorst v. Maryland*, centered on the disputed terms of a loan that two Dutch bankers had made to the state of Maryland during the American Revolution. Chief Justice John Jay was familiar with the controversy, to say the least. Five years earlier he had represented the state as an arbitrator in an abortive attempt to bring about a settlement. Just as important, Jay had been a friend of the embattled Baltimore merchant who negotiated the loan with the van Staphorsts, the late Matthew Ridley, and over the years the two men had discussed the loan. Furthermore, in 1787, when Ridley married Catharine Livingston, sister of Sarah Livingston Jay, he became Jay's brother-in-law. Just after Jay's appointment as Chief Justice and before Ridley's untimely death, Catharine desperately appealed to Jay to appoint her husband as Supreme Court clerk.

Sarah Livingston Jay's (above) sister Catharine desperately appealed to Chief Justice John Jay to appoint her husband, Matthew Ridley, Supreme Court clerk to ease their financial situation and allow them to live closer to her family.

Despite Chief Justice Jay's intimate association with Ridley and the van Staphorst dispute, he presided over the Court on February 8, 1791, the day that Maryland's colorful attorney general, Luther Martin, appeared to respond to the summons. Although the case was settled out of court before the Justices heard any arguments, there is no indication that Jay was planning to recuse himself.[2]

As Jay's behavior in *Van Staphorst* illustrates, the conduct of the Justices during the Supreme Court's first ten years raises questions regarding their impartiality, or at least, potential

threats to their impartiality. The issue can be broken down into two broad, but overlapping, categories. First, the Justices engaged in certain extrajudicial activities that posed a possible conflict with the Justices' duties on the bench. Most notably, Chief Justices John Jay and Oliver Ellsworth both sailed to Europe to undertake major diplomatic missions while remaining members of the Court. Second, as revealed in the *Van Staphorst* example, the Justices often failed to disqualify themselves in cases with which they possessed some personal association.

Yet, despite the fashion in which Justices of the Supreme Court approached their duties in the 1790s, it would be a mistake to conclude that no one recognized the problem of bias. By no means did an "anything goes" mentality prevail. Congress legislated ethical guidelines only for lower federal court judges, but there is evidence that the Justices were sensitive enough to the issue of impartiality that—at certain times and in certain instances—they voluntarily checked their own behavior. The most important example of such restraint is that the Justices were generally diligent about recusing themselves when they confronted a case that they had argued, or heard, in another forum. Furthermore, when it appeared that a Justice might be compromising himself, voices were raised in protest. Individual members of Congress and newspaper columnists—principally from the Jeffersonian opposition—did make some attempt to scrutinize the members of the Court.

Of course, the conduct of the Justices must also be viewed in the context of the prevailing legal canons of the 1790s. Many of the practices of the bar during the Court's first decade can raise eyebrows when perceived according to modern ethical standards but were considered perfectly acceptable at the time. For example, it was not unheard of for a lawyer casually to switch sides in a case. When *Oswald v. New York* was before the Supreme Court in the early 1790s, Jared Ingersoll, one of the most prominent members of the Philadelphia bar, first represented the plaintiff and then the defendant.[3] Furthermore, the attorneys general of the United States in the Washington and Adams administrations routinely argued before the Supreme Court not as advocates for the nation but in a purely private capacity. Edmund Randolph of Virginia, the first attorney general,

Edmund Randolph served as the first Attorney General and the second Secretary of State in President George Washington's cabinet. While Attorney General, he argued *Chisholm v. Georgia* as a private attorney.

represented the plaintiff in the decade's most consequential case, *Chisholm v. Georgia*.[4] And not until 1799 were the United States attorneys accorded even the most modest of salaries to supplement the fees and allowances that accrued to them in performing their official duties; the assumption was that the district attorneys, as they were then styled, would sustain themselves through maintaining private law practices.[5]

Judges, though, were not merely lawyers, and Supreme Court Justices were not merely judges. In fact, the Founding Fathers took significant steps to try to insure that the Court would be both independent and impartial. One of the key features of Article III is the provision that all federal judges "shall hold their Offices during good Behaviour"—that is, essentially, for life. Moreover, the judges' salaries could not be reduced. But the framers made no restrictions on what federal judges could do in their time outside the confines of the courts, with the exception that, as Article I stipulated, they could not sit in Congress.

Although Supreme Court Justices during the 1790s were not prohibited from practicing law on the side, there is no evidence that they ever did.[6] In fact, the first Congress provided the members of the Court with fat salaries—$4,000 a year for

the Chief Justice and $3,500 for the Associate Justices. Although the salaries were modest compared to the whopping $25,000 annual compensation designated for the president, they were much more generous than the salaries received by the judges of the state superior courts.[7] At least part of the rationale behind remunerating the Justices so handsomely was, apparently, the assumption that it would be untenable for them to maintain law practices and represent clients who could conceivably then come before the Court.

As one writer observed in 1789, "the benches ought to be filled with men of ability, and... such men cannot be expected to quit lucrative employments without a full compensation." Another commentator, writing at the same time, asserted that it would be out of the question for a Supreme Court Justice, as well as a United States district court judge, to practice in either the federal or state courts. He said that there had been no need to bar such activity explicitly in the Judiciary Act of 1789 because "no gentleman of sentiments of honour or propriety, would attempt a thing of the kind." Congress, he maintained, had deliberately "given the Judges such salaries as render it unnecessary for them to do other business, or follow other occupations for a livelihood."[8]

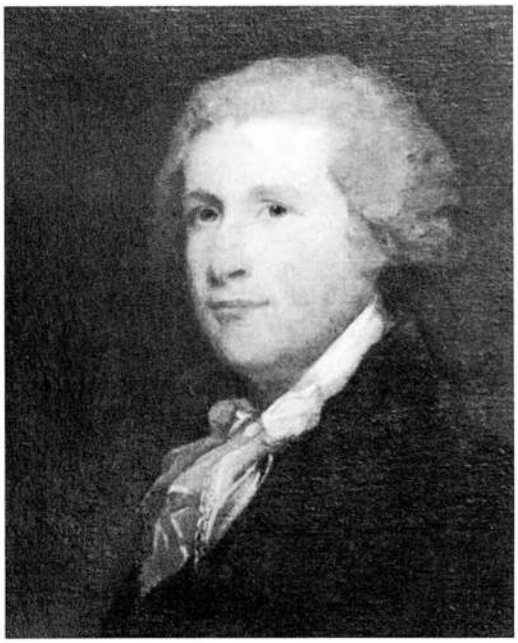
"the benches ought to be filled with men of ability, and . . . such men cannot be expected to quit lucrative employments without a full compensation."

Of course, even if a Justice refrained from practicing law, there was still the problem posed by a case coming before the Supreme Court that he had argued in another forum prior to his appointment as a Justice—which, in the early years of the Court, invariably meant prior to the establishment of the federal judicial system. The issue arose in 1795 when the Supreme Court heard *Penhallow v. Doane's Administrators*, a prize case dating back to the Revolution that had traveled through a succession of courts over the years.[9]

Just as the case came into the federal system in 1792, as *Greenough v. Penhallow*, Congress stipulated that "in all suits and actions in any district court of the United States, in which it shall appear that the judge of such Court is, any ways, concerned in interest, or has been of counsel for either party," then the district judge, at the behest of either party, must pass the case on to the circuit court.[10] When Congress amended the Judiciary Act a year later, it made clear that if such a scenario unfolded, then the Supreme Court Justice assigned to the circuit could hold the circuit court alone, without the participation of the district judge.[11] The implications of these laws for *Greenough v. Penhallow* were direct and immediate. The case came before the United States district court for New Hampshire in May 1792, but the judge, John Sullivan, had provided counsel to Penhallow and his associates several years earlier. Therefore, the case was moved to the federal circuit court for New Hampshire, where Justice John Blair rendered a decision in 1793 and Justice William Cushing handed down a final decree the following year.[12]

Congress, however, had not dictated what steps should be taken when a Justice, rather than a district judge, had represented a party in a case coming before him. Such was the ticklish circumstance when the Supreme Court took up *Penhallow*, for Justice James Wilson had argued on behalf of Doane when the suit was in the Court of Appeals in Cases of Capture under the Articles of Confederation. Wilson was present for the opening of the February 1795 term of the Supreme Court but absented himself during the days that *Penhallow* was argued and was not involved in the decision. Though no statement explaining his failure to participate in the case has survived, if indeed one ever existed, it can be inferred from the Justice's actions that he recused himself.[13]

In the important 1796 case, *Ware v. Hylton*, in which the Court decided that the Treaty of 1783 overrode Virginia's revolutionary war confiscation statute and that therefore British creditors could recover debts owed them, Samuel Chase considered recusing himself but was persuaded not to by his fellow Justices. Though he had never represented either party, he had once served as counsel to the debtors in a similar suit in a Maryland state court. In his opinion, his first as a



Alexander Dallas published four volumes of reports covering the first decade of the Supreme Court. Dallas' *Reports* were uneven because he was unable to attend all sessions of the Court and the Court had no requirement of written opinions from the Justices. Therefore, he relied on the notes of others in many cases.

Supreme Court Justice, Chase explained: "I wished to decline sitting in the cause . . . and I consulted with my brethren, who *unanimously* advised me not to withdraw from the bench." He added further that "I have endeavored to divest myself of all *former* prejudices, and to form an opinion with impartiality."[14]

A related issue that surfaced in both *Ware* and *Penhallow* was how a Justice should act when a case came before the Supreme Court on which he had sat as a judge in another forum. Again, Congress provided no guidance. The Judiciary Act of 1789 stipulated only that a district court judge should not cast a vote in the circuit court in a case brought on a writ of error or appeal from his own decision. The Antifederalists in the Senate had managed to add this clause during floor debate, though at the same time it was also determined that the district court judge would be allowed to place his previous decision on the record.[15] The outspoken William Maclay of Pennsylvania spearheaded an effort to include in the bill language prohibiting a Supreme Court Justice from voting in a case where he had ruled in the circuit court, but the Senate rejected the measure.[16] The Justices, as a consequence, were left in a difficult position. When in 1792 they wrote a joint letter to President Washington enumerating their grievances against circuit riding, one of their key points was "[t]hat the distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial Justice."[17]

The Justices apparently solved the problem on their own initiative by generally refraining from rendering opinions where they had ruled in the circuit court. In *Ware v. Hylton* Justice James Iredell did not cast a vote because he had heard the case on circuit. As Alexander Dallas, the Philadelphia lawyer who served as the semi-official Court reporter in the 1790s, noted, Iredell "in conformity to a practice which the Judges of this court have generally pursued, forbore taking any part in this decision, as a Judge, upon the present writ of error, having declared from the first he meant only to do so, in case of an equal division of opinion among the other Judges." Dallas reports that Iredell did gain the consent of his brethren to read his circuit court opinion, which would be effectively a dissent, from the bench.[18]

When the Court had ruled the year before in *Penhallow*, however, two of the Justices who had sat on the case on circuit did not precisely adhere to the "practice" described by Dallas. Although Blair reiterated what he had decided in the circuit court, he implied that he did so as a matter of choice and not obligation: "I have attended as diligently, and as impartially as I could, to the arguments of the gentlemen, upon the present occasion, to discover, if possible, how I may have been led astray, in the decision of this question; but as the impressions which my mind first received, continue uneffaced . . . I will repeat here the opinion which I delivered in the Circuit Court." Furthermore, he declared the need to amend his lower court decision in regard to the assessment of damages.[19] Even more significant, Justice Cushing delivered an opinion, even though he also had sat on the case in the circuit court, and in fact once before that—in 1786 in the Supreme Judicial Court of Massachusetts. In fact, he took an opposite stand in the Supreme Court of the United States from the one he had adopted in the

high court of his own state.[20] Although it could be argued that Cushing displayed independence of thought by departing from his former ruling, at least one commentator wondered why he made the flip-flop. This writer, who was unhappy with Cushing's 1795 *Penhallow* opinion, hoped that the Justice would "think it proper to offer some reasons" for his inconsistency.[21]

At the time *Penhallow* was argued, the nation was probably less focused on the Court's proceedings in Philadelphia than on the extrajudicial activities of the Justices—specifically on those of Chief Justice Jay, then in London. In 1794 President Washington had named Jay as envoy extraordinary to negotiate a treaty that would settle the outstanding issues with Great Britain. The appointment was controversial partly because in the eyes of some, the Chief Justice would be crossing not only the Atlantic, but also the line of permissible extrajudicial activity.

Although the Justices may have refrained from practicing law during the 1790s, or pursuing other purely private endeavors, they did assume various governmental duties. In fact, it was expected that the members of the Court—following the English tradition—would do more than simply decide cases, that they would use their wisdom and legal expertise to perform various public functions. For example, Congress designated the Chief Justice to serve on the Sinking Fund Commission as part of Hamilton's effort to reduce the revolutionary war debt. But the Justices, guided by their reading of the Constitution, did place some limits on what they would do. In 1792, in *Hayburn's Case*, they challenged a congressional statute when they declared that they would not—while holding the circuit courts—pass on the pension applications of invalid veterans. Although they offered to review the applications as ex officio commissioners, they believed that in their constitutional roles as Justices they could neither perform what they considered a non-judicial task nor submit their work to congressional assent. Furthermore, although Jay served as a personal confidant to President Washington, freely dispensing advice, in 1793 the Justices balked at the president's request to provide an official opinion of the Court on the interpretation of a treaty, as no suit involving that question had been filed.[22]

The Chief Justice of the United States has been called on to perform extrajudicial functions throughout U.S. history. Earl Warren headed the commission investigating President John F. Kennedy's assassination. Chief Justice Warren is shown here presenting the final report to President Johnson.

To this day the Chief Justice of the United States performs extrajudicial functions. In the wake of the 1963 Kennedy assassination, President Johnson tapped Chief Justice Earl Warren to lead the investigative commission. The present Chief Justice, like his predecessors, serves as chancellor of the Board of Regents of the Smithsonian Institution. But it seems a fair assumption that no Chief Justice in the modern era would agree to negotiate a treaty—if any president would be so bold as to ask—as Jay did in 1794. Yet even in the relatively permissive environment of the 1790s, Jay came in for criticism for taking on this diplomatic role. Five years later, history repeated itself when President Adams named Chief Justice Oliver Ellsworth to a delegation bound for Paris charged with alleviating tensions with France. Again, there were protests.

Of course, both the Jay and Ellsworth missions were high-stakes, high-profile undertakings, and much of the opposition emanated from partisans who simply could not abide the foreign policies the Chief Justices were charged with implementing. However, some of the criticism was based on constitutional grounds. Above all,

it was said that for the Chief Justice to serve the president in this capacity would violate the separation of powers as the executive would exert an undue influence over the judiciary, and the notion of the Chief Justice wearing two hats, and possibly drawing two salaries, also raised the specter of the much reviled English practice of plural office-holding. The point was even made that if the Chief Justice was out of the country, not only would his brethren be burdened, but no one would be constitutionally qualified to preside over the Senate in a presidential impeachment trial.[23]

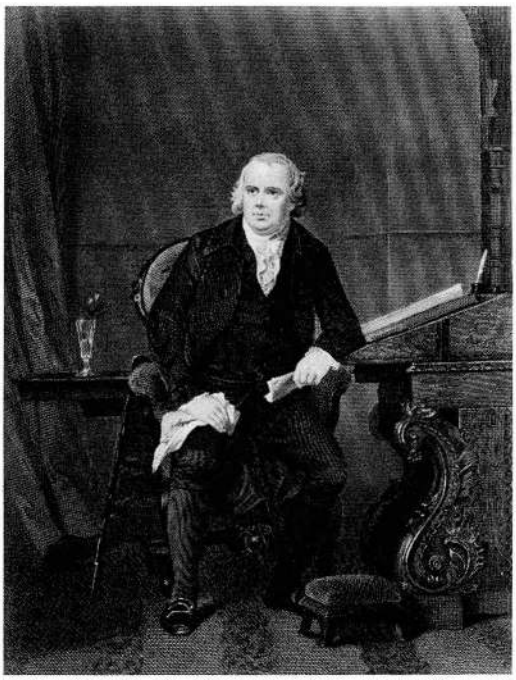
Intertwined with these charges was the notion that the diplomatic missions would compromise the Chief Justices' impartiality. The encroachment of the executive on the judiciary was viewed not merely as a threat to the fragile balance between the branches but also as a threat to the very dignity of the Justices, who would become beholden to the president and unable to decide on matters affecting him objectively. As a Pennsylvania legislator declared in the wake of the Jay controversy, "If temptations can be held out to judges, by means of new offices, you hold out a lure to their integrity, and a seduction to their independence." He also raised the presidential impeachment issue, not to lament that the Chief Justice would be unable to preside over a trial, but rather to assert that the Chief Justice, when ultimately available, would be unable to preside impartially over the trial of a president who had in effect bought his allegiance.[24]

Much of the criticism, however, focused on whether a Chief Justice's performance of diplomatic tasks created a direct conflict. When Washington nominated Jay as envoy in 1794, one contributor to a Philadelphia newspaper commented that "[i]f a Chief Justice is to sit in judgment upon his own acts, if he is to be the expositor of a law of his own making, our boasted constitution has become a dead letter, contrived to entrap an unsuspecting people."[25] After the Senate confirmed Jay, the Democratic Republican Society of Prince William County, Kentucky, proclaimed that "it has ever been held as a true principle in all republican Governments that it is improper for the same person to make and expound the Law."[26]

In the winter of 1800, while Chief Justice Ellsworth was still involved in negotiations in France, Charles Pinckney, a Republican Senator from South Carolina, forced Congress to focus on the issue of extrajudicial activities. He proposed—first as a constitutional amendment and then simply as a statute—that neither the Chief Justice nor any other United States judge be permitted to accept another federal or state appointment while serving on the bench.[27] Although Pinckney failed to obtain approval of his proposal, he made an eloquent argument on the floor of the Senate in which he dwelled on the incompatibility of a Justice performing other governmental functions while deciding cases.

"It is an established maxim," Pinckney proclaimed, "that the same men shall not in a *deliberative capacity*, agree to measures which they shall afterwards have a right to explain and decide upon in a judicial one." According to the senator, no judge could dispassionately review his own work. Alluding to the Ellsworth mission, Pinckney declared that if a judge had to pass on a treaty he brokered, he would be unable to block out of his thinking what had transpired during the negotiations and what he had intended in crafting the language. "In short," Pinckney said, "it is impos-

Charles Pinckney, a Republican Senator from South Carolina, forced a Congressional debate on extrajudicial activities of Supreme Court Justices in 1800, while Chief Justice Oliver Ellsworth was still involved in negotiations with France.



Robert Morris, the "financier of the Revolution" and reputedly the wealthiest man in America, attempted to move a suit from the North Carolina courts into the federal courts. This proved to be a problem for James Iredell, who rode the southern Circuit and was also a defendant in the case. Ultimately Morris dropped his suit, freeing Iredell from his repeated recusals in the case.

sible for him to be that cool and unbiassed interpreter of the Treaty which he otherwise might have been, had he not been concerned in concluding it."[28]

Of course, the Chief Justices could have simply recused themselves if questions concerning their European endeavors had come before the Court.[29] But it was by no means certain that they would have.[30] Lord Coke's maxim that no man should be a judge of his own case may have been familiar and even accepted, but the record shows that this notion did not always translate into reality in the 1790s. Although the Justices were generally diligent about disqualifying themselves when they had previously argued or heard a case, they were not as scrupulous when they were linked to a case by possessing an association with one of the parties, a history of involvement in the matter under consideration, or even a direct financial stake in the outcome. Today, federal law to a large extent defines when a Justice should be disqualified, and members of the Court, though not bound, can nevertheless be guided by the American Bar Association's Code of Judicial Conduct. The Justices of the 1790s operated without any such rules.[31]

In the early '90s Justice Iredell sought to avoid hearing a case in the circuit court, but the circumstances were so stark that for him to have taken any other course would have been unimaginable. After all, he was a defendant in the case. In 1790 Pennsylvania senator Robert Morris, the "financier of the Revolution," sought to transfer a suit he was pressing against some North Carolina merchants from the Superior Court of North Carolina to the federal circuit court for that state. Morris was attempting, in the superior court, to enjoin the judgment the merchants had won in a lower North Carolina court allowing them to recover certain of Morris's assets held in the estate of his late agent. Because Iredell was an executor of the estate, he got dragged into the suit, though he was not really a principal in the conflict. In fact, far from being at odds with Morris, he had displayed compassion for the Pennsylvanian's position when the Justice's brother-in-law, Samuel Johnston, represented Morris in some of the North Carolina litigation.[32]

Morris v. Allen is notable because after Senator Morris had obtained a writ of certiorari, signed by three members of the Supreme Court, to transfer the case to the federal circuit court, the state court refused to obey the writ, an act of defiance supported by the North Carolina legislature.[33] Despite the state's refusal to cooperate, the case was placed on the circuit court docket anyway, and Iredell was well aware that as a nominal defendant he should not hear it. At the same time, the Justice was feeling put upon for being permanently stuck with riding the arduous southern circuit. In a letter to his brethren written in February 1791, Iredell insisted that the circuits should be rotated and that furthermore it would be "peculiarly improper" for him to go south "for some time" because of the prospect of the *Morris* case coming before him.[34] The Chief Justice wrote back sympathetically, mentioning in particular that "[t]he Case in No. Carolina is disagreeably circumstanced."[35] Iredell's problem was relieved, at least temporarily, when Justice Blair agreed to take his place riding the southern circuit in the spring of 1791.[36] But then Iredell resumed his duties on that circuit in the fall of '91, under the misapprehension that Morris had dropped his

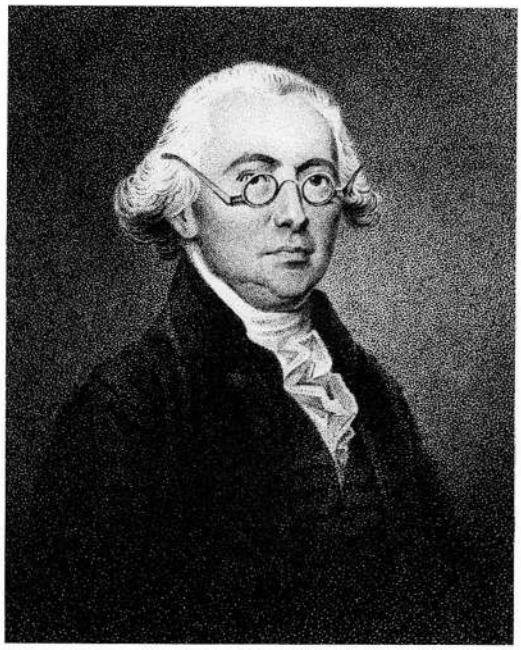
federal suit, and then again, under protest, in the spring of 1792. On both occasions Iredell was forced to recuse himself, and as a result the case was continued.[37] After the North Carolina superior court took action in the spring of 1793—denying Morris's quest for an injunction—the senator decided to cease pressing his suit in federal court.[38]

Rarely did the Justices of the 1790s face a situation as clear-cut as Iredell's—where his status as a party to the case virtually insured that he would recuse himself. When they did confront cases to which they were somehow personally linked, other than in their capacities as lawyers and judges, it seems they generally opted to participate anyway. Not only did Chief Justice Jay preside while motions were argued in *Van Staphorst v. Maryland*, despite his ties to Matthew Ridley and prior involvement in the controversy, but he also took no steps to disqualify himself in the second case to be entered on the Court's docket, *Oswald v. New York*. Eleazer Oswald brought suit against New York to recover compensation he claimed the government had failed to pay to his late father-in-law, John Holt, for services Holt had performed as the state printer. New York denied that the Supreme Court had jurisdiction over the case and refused to respond to the charges in court. The Antifederalist governor, George Clinton, upon whom the summons was served, strongly believed that states were sovereign and thus immune from having to defend such suits. Just as the Court was meeting for the February 1792 term, the first at which New York could reasonably have been expected to make an appearance, Federalists nominated Jay to oppose Clinton in the upcoming gubernatorial race. Although Jay was absent that term, in which the Court considered issuing a writ of *distringas* to force New York's cooperation, it was only because his wife was expecting a child and not because he thought it would be inappropriate for him to take part in forcing his political opponent's hand. After all, a year later the Chief Justice was in attendance when the Court decided to threaten the state with a default judgment unless it made an appearance the following term. The order was served on Clinton, who had remained as governor after defeating Jay in a bitter and disputed election.[39]

Aside from whatever slant on *Oswald* Jay's rivalry with Clinton might have provided him, the Chief Justice had also been personally involved in the origins of the dispute. It was Jay himself who in 1777 in the New York Committee of Safety moved that the state enter into negotiations with Holt and who proposed the salary terms—ultimately a point of great controversy—upon which the printer should be hired. In fact, in May 1794, two days before he sailed for England, Jay was deposed in the case, swearing before a New York state judge that he remembered Holt's appointment but none of the details. When *Oswald* was tried—before a jury—in the Supreme Court, resulting favorably for the plaintiff, Jay's deposition was entered as evidence. Had he not left the country to fulfill his diplomatic mission, he could have been called to testify as a witness. Because he was absent for the *Oswald* trial, Jay was spared from confronting the issue of whether to hear the case or disqualify himself.[40]

Although Justice James Wilson recused himself in *Penhallow* because he had once argued it, during the 1790s he sat on two cases in which he had a direct financial involvement, or, as it is termed today, a conflict of interest. It is not surprising that of the brethren, Wilson was the one who found himself in these circumstances. The Scottish-born lawyer had played a key role in framing the Constitution and was arguably the most cerebral of the original Justices—while on the Court he held the first professorship of law at the College of Philadelphia (now the University of Pennsylvania)—but Wilson was also an aggressive, even unscrupulous speculator, particularly in land. His reckless investing gained him an impressive portfolio, but his acquisitiveness would also prove to be his undoing, as he ultimately fell into insuperable debt. The demands of his creditors forced him to flee Philadelphia and eventually abandon all of his duties as a Justice. In 1797 he was arrested and jailed in New Jersey, and the following year, after enduring months of sickness, poverty, and heat in one room of a small-town North Carolina tavern, Wilson died.[41]

One Supreme Court case in which Wilson was financially entangled, *Hollingsworth v. Virginia*, resulted from the bill in equity filed by the Indiana Company to gain compensation for western land that the Six Tribes had ceded to the company in 1768 but that the commonwealth had



James Wilson was a delegate to the 1787 Constitutional Convention where he advocated his strongly nationalistic views. His influence on the Convention was second only to James Madison's. Appointed to the Supreme Court in 1789, he was forced to abandon his judicial duties to flee his debts.

never recognized as a legitimate grant. Wilson did not originally own a stake in the venture, which sought to settle a vast tract in what is now West Virginia, but in 1781 the company deeded him 300 shares of stock—apparently to secure his political backing.[42] When counsel for the Indiana Company drew up the bill in equity in 1792 for submission to the Supreme Court, Wilson was listed in the printed document as one of the complainants. On the copy of this bill in the Court records, Wilson's name is inked out in two of the three places where it appears. On the copy served on Virginia's attorney general, James Innes, however, Wilson's name is not crossed out at all.[43] At any rate, at the February 1793 term of the Court, the Justices granted the wish of the complainants' counsel to submit an amended bill in equity and consequently issued a new subpoena.[44] In the main part of the amended bill—again a printed document—Wilson is no longer mentioned as a complainant, but in an attached schedule he is still designated as a stockholder. On the copy of the amended bill in the records of the Court, but not the one on file in Richmond, his entry in the schedule is inked out.[45]

The cross-outs and omissions in the two bills in equity raise more questions than answers. Was Wilson in fact a party to the case when counsel drew up the first bill in 1792? If so, did he dump his stock by the time the amended bill was submitted? Or by 1793 had he perhaps removed himself from the suit while retaining his shares? Whatever the truth, the Justice did not recuse himself during the sessions that the Court took up *Hollingsworth*, which was dismissed prior to argument in 1798 because of the ratification of the Eleventh Amendment barring suits against states.

No evidence has survived suggesting that the public was disturbed by—or even noticed—Wilson's links to *Hollingsworth*. The story was very different in regard to another case centered on the issue of western lands, *Moultrie v. Georgia*. In 1789 Alexander Moultrie and his associates in the South Carolina Yazoo Company purchased from the state of Georgia a part of the vast Yazoo territory, an area comprising most of present-day Alabama and Mississippi. However, controversy soon arose as to whether the South Carolina and allied companies were paying for the Yazoo land according to the agreement. In 1795 the state proceeded to sell that very same land to a new group of investment companies. Not only did Georgia disregard the deal of 1789, but charges flew that members of the legislature had been bribed, and the Yazoo scandal quickly attracted national attention. As it turned out, one of the largest individual investors in the second Yazoo purchase was none other than Justice James Wilson.[46]

Wilson's role in the purchase drew immediate criticism. A month after the sale, the influential Philadelphia opposition newspaper, the ***Aurora***, published a letter from a Georgian who identified Wilson and Nathaniel Pendleton, United States judge for the district of Georgia, as two of the well-known public figures who took part in "plucking the *state goose*." The writer admonished that "[s]peculation cannot be censured in private individuals, when the judges and officers of the United States embark so notoriously in it."[47] Less than a week later, the ***Aurora*** published an even stronger denunciation of Wilson. The anonymous writer, who held out the prospect of impeachment, declared, "[h]ow much is the moral turpitude of this gambling itch for

speculation encreased when the public are to be fleeced to satisfy the overgrown appetities of these would-be nabobs, and the example is set from the bench of the supreme court." Not only was the Justice turning out to be, in modern parlance, a negative role model, but, the writer asserted, Wilson was jeopardizing his ability to dispense impartial Justice. If a case involving the Georgia land sale were to be initiated in the federal courts and perhaps come before him on circuit, would Wilson "deny Justice by a delay of it . . . [o]r if he continued on the bench could he exercise a righteous judgment, when he would be so manifestly interested?"[48]

Disappointment with Wilson was to be found not only on the pages of the newspapers, but within the halls of Congress as well. James Madison, then a leader of the opposition in the House of Representatives, sent his friend James Monroe, the ambassador in Paris, an account of the tainted Yazoo purchase and remarked, "Wilson & Pendleton . . . are known adventurers. The former is reprobated here by all parties."[49]

The fear that Wilson would be confronted with adjudicating the Yazoo controversy came to pass in 1795 when, at the time of the second sale, Alexander Moultrie and his associates in the South Carolina Yazoo Company filed a bill in equity against the state of Georgia in the United States Supreme Court. In a supplemental bill the complainants revealed that Wilson was a shareholder in the rival Georgia Company, also a target of the suit, and requested that he respond to interrogatories. Nothing apparently came of these bills, but in 1796 counsel for the South Carolina Company filed yet another, which designated the Georgia and Georgia Mississippi companies, as well as the state, as defendants. In the 1796 bill Wilson's name does not appear, but the suit is directed at all of the "associates" of the companies.[50]

After Georgia was subpoenaed in 1796, not only did the state protest that it could not be compelled to respond to the charges, but there was grumbling that as long as Wilson sat on the High Court, a fair hearing would be impossible. The grand jury of Chatham, Georgia, proclaimed: "We cannot suppose the state liable to be sued, and in this case we hope she will preserve her dignity, by refusing an answer, particularly in a court, where the judges have been guiding the last speculation, and where she can consequently expect no Justice."[51] The Georgia General Assembly remonstrated that the state "disdain[ed] an answer" to the subpoena, especially as it was issued by "a tribunal where one of the Judges is implicated as being concerned in the speculation."[52]

Like *Hollingsworth*, *Moultrie* was dismissed in 1798 after the Eleventh Amendment was proclaimed as ratified. Therefore, Wilson did not have to confront whether to hear the case or not; in fact, by the February 1798 term, when the case was to have been argued, he had already fled the scene. However, he had sat during sessions in which motions were made in the case. Even more important, perhaps, is why Wilson allowed himself to be put in this delicate situation in the first place. Although he had held his shares in the Indiana Company for almost a decade by the time he became a Justice, he purchased his Yazoo land—a considerably greater investment—while a member of the Court. Whereas Wilson had been scrupulous in recusing himself in *Penhallow* because he had argued the case before,[53] he seems to have had a blind spot when it came to his financial affairs. Even if he had divested himself of his shares in the Indiana and Georgia companies by the time *Hollingsworth* and *Moultrie* came before the Court—and it is not clear that he had—his prior relationship to the companies would presumably have prejudiced his view of the cases.

Wilson's conduct may not have been representative; each Justice of the 1790s was obviously guided by his own ethical compass. But certainly Wilson was not alone among the brethren in engaging in judicial behavior that would be unacceptable today. The question that demands to be answered is: why were the standards for the conduct of Justices different then? One explanation that has been offered is that in the early years of the republic, a different notion of judging prevailed. The idea was that judges did not make the law; rather, they discovered it. Therefore, according to this line of analysis, a judge's prior connection to a case was not considered automatically disqualifying. His task on the bench was purely intellectual—to apply the proper legal principle to the case before him.[54]

Another explanation tendered—at least for the Federalist view that a set of rigid ethical guidelines on extrajudicial activities was unnec-

essary—is that the Federalists assumed that gentlemen holding United States judgeships could be trusted to act honorably. A man asked to serve on the nation's highest court, buffered by the constitutional guarantees of life tenure and an irreducible salary, could be counted upon to act with dignity and discretion—to put the responsibilities of his position before any personal considerations.[55]

Though both of these explanations are compelling, neither should be taken too far—that is, to serve as rationalizations. It is as wrong-headed to try to excuse, or explain away, ethical lapses in the past as it is to project present-day values onto another era. The fact is that the 1790s, despite the ascendancy of such unimpeachable figures as Washington, Adams, and Jefferson, was not some golden age free of corruption. After all, apparently every member of the Georgia legislature who voted for the 1795 Yazoo land sale, except one, had been bribed.[56] There is much cynicism about the ethics of our own era, but standards have actually improved over what they were two centuries ago.

Although the conduct of the Justices during the Supreme Court's first decade was certainly more lax than that of their present-day successors, the ethical chasm between the 1790s and 1990s should not, however, be exaggerated. The record for the 1790s is a mixed one. Some of the Justices' behavior was questionable, even shocking, but on the other hand, there were the several instances of members of the Court taking pains to walk a straight and narrow path. And when they veered off that path, it did not go unnoticed. Criticism of the Justices was probably motivated to some extent by purely partisan political considerations, but surely much of it was sincere. For decades—both before and after the Revolution—Americans had been vigilant about exposing what they perceived to be corruption and abuses of power. The evidence suggests that during the 1790s the public was keenly aware of the importance of the Supreme Court to dispense impartial justice.

Endnotes

[1]The author wishes to express his gratitude to his colleagues on ***The Documentary History of the Supreme Court, 1789-1800***, editor Maeva Marcus, associate editors James C. Brandow, William Rolleston-Daines, and Stephen L. Tull, and former associate editor Natalie Wexler, not only because they provided valuable advice in the preparation of this article, but also because the article depends heavily on the project's work.

[2]Introduction to *Van Staphorst v. Maryland* in Maeva Marcus, ed., ***The Documentary History of the Supreme Court of the United States, 1789-1800***, vol. 5 (New York: Columbia University Press, 1994), pp. 7-20.

[3]Introduction to *Oswald v. New York* in Marcus, ed., ***Documentary History***, vol. 5, pp. 61, 62.

[4]Introduction to *Chisholm v. Georgia* in Marcus, ed., ***Documentary History***, vol. 5, pp. 131-34; 2 U.S. (Dall.) 419 (1793).

[5]Maeva Marcus, ed., ***The Documentary History of the Supreme Court of the United States, 1789-1800***, vol. 4 (New York: Columbia University Press, 1992), pp. 106-7, 114-15, 173-75, 177-78, 183, 184, 234-41, 553-55, 602-3.

[6]G. Edward White, ***The Marshall Court and Cultural Change, 1815-35***, vols. 3 and 4 of ***The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*** (New York: Macmillan, 1988), pp. 172-73.

[7]Marcus, ed., ***Documentary History***, vol. 4, pp. 19-22, 508, 522, 536. As it turned out, the Justices were forced to use a part of their salaries to defray the expense of circuit riding.

[8]"Cincinnatus," ***Herald of Freedom*** (Boston), October 2, 1789, and Letter from an Anonymous Correspondent, ***Massachusetts Centinel*** (Boston), November 19, 1789, in *Ibid.*, pp. 522, 524-25.

[9]The dispute began in 1777 when the privateer *McClary*, owned by John Penhallow and other New Hampshirites, captured the brigantine of Elisha Doane of Massachusetts, the *Lusanna*, and brought it into Portsmouth harbor on the justification that the ship was serving the British. The New Hampshire maritime court condemned the *Lusanna* and her cargo as lawful prize, a decision upheld the following year by the state superior court. However, when the case came before the appellate prize court under the Articles of Confederation in 1783, the judges reversed the New Hampshire ruling. The main question that the United States circuit court considered in 1793 was whether the federal court under the Articles could overturn the state judgment. The circuit court ruled that it could, and in 1795 the Supreme Court agreed. L. Kinvin Wroth and Hiller B. Zobel, eds., ***Legal Papers of John Adams***, vol. 2 (Cambridge, Mass.: Belknap Press of Harvard University Press, 1965), pp. 352-76; Henry J. Bourguignon, ***The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787*** (Philadelphia: American Philosophical Society, 1977), pp. 242-51, 307-18; Julius Goebel, Jr., ***Antecedents and Beginnings to 1801***, vol. 1 of ***The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*** (New York: Macmillan, 1971), pp. 708-10, 766-70; 3 U.S. (Dall.) 54 (1795).

This case will be treated in volume 6 of ***The Documentary History of the Supreme Court, 1789-1800***.

[10]"An Act for regulating processes in the Courts of the United States, and providing compensations for the officers of the said Courts, and for Jurors and Witnesses," May 8, 1792, in Marcus, ed., ***Documentary History***, vol. 4, p. 185; ***U.S. Statutes at Large***, vol. 1, pp. 278-79; Wroth and Zobel, eds., ***Legal***

Papers of John Adams, vol. 2, p. 374n.

[11]"An Act in addition to the Act, entitled 'An Act to establish the Judicial Courts of the United States,'" March 2, 1793, in Marcus, ed., ***Documentary History***, vol. 4, p. 204; ***U.S. Statutes at Large***, vol. 1, p. 334.

During the 1790s there were no circuit court judges. Instead, the circuit courts were manned jointly by the district court judges and Supreme Court Justices. This 1793 statute gave the Justices some relief from their circuit-riding activities by stipulating that only one Justice, rather than two, would be required to attend a circuit court. The Justices were not entirely relieved of this burden until the circuit courts of appeals, with their own judges, were created in 1891.

[12]Wroth and Zobel, eds., ***Legal Papers of John Adams***, vol. 2, pp. 372, 373-74; Bourguignon, ***First Federal Court***, pp. 312-13; Goebel, ***Antecedents and Beginnings to 1801***, pp. 708n, 766.

[13]Minutes of the Supreme Court, February 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 24, 1795, in Maeva Marcus and James R. Perry, eds., ***The Documentary History of the Supreme Court, 1789-1800***, vol. 1 (New York: Columbia University Press, 1985), pp. 231-38, 241; Wroth and Zobel, eds., ***Legal Papers of John Adams***, vol. 2, pp. 371-72n, 375n; Bourguignon, ***First Federal Court***, pp. 244, 251.

[14]3 U.S. (Dall.) 221 (1796); James Haw et al., ***Stormy Patriot: The Life of Samuel Chase*** (Baltimore: Maryland Historical Society, 1980), pp. 179-80; Goebel, ***Antecedents and Beginnings***, pp. 751-53. Despite his previous experience as counselor in the Maryland case, as well as his conspicuous public stance during the 1780s on behalf of Americans indebted to British subjects, Chase ruled, in an emphatic and impressive opinion, that the federal treaty was supreme over state law.

Ware v. Hylton will be treated in volume 7 of ***The Documentary History of the Supreme Court of the United States, 1789-1800***.

[15]"An Act to establish the Judicial Courts of the United States," September 24, 1789, in Marcus, ed., ***Documentary History***, vol. 4, pp. 44-45; ***U.S. Statutes at Large***, vol. 1, p. 75; William Maclay Diary Entries, July 7-8, 1789, in Marcus, ed., ***Documentary History***, vol. 4, p. 454.

[16]Marcus, ed., ***Documentary History***, vol. 4, pp. 79-82; William Maclay Diary Entries, July 7-8, 1789, in *ibid.*, p. 454.

[17]Justices of the Supreme Court to George Washington, August 9, 1792, in Maeva Marcus, ed., ***The Documentary History of the Supreme Court of the United States, 1789-1800***, vol. 2 (New York: Columbia University Press, 1988), pp. 288-92. See also the letter that the Justices drafted in 1790, which was intended for President Washington but may never have been sent. Justices of the Supreme Court to George Washington, ca. September 13, 1790, in *ibid.*, pp. 89-92.

[18]3 U.S. (Dall.) 256n (1796); Goebel, ***Antecedents and Beginnings to 1801***, pp. 753-54. For confirmation of Dallas's account of what Iredell did, see ***Philadelphia Gazette***, March 8, 1796, and Jeremiah Smith to William Plumer, March 9, 1796, Plumer Collection, NH.

In other cases Justices who had ruled in the circuit court did not participate in the Supreme Court vote but also did not read their lower court opinions: Wilson in *Talbot v. Jansen*, 3 U.S. (Dall.) 168 (1795) and *Hylton v. United States*, 3 U.S. (Dall.) 183-84 (1796), as well as Paterson in *Fenemore v. United States*, 3 U.S. (Dall.) 364 (1797). Russell Wheeler, "Extrajudicial Activities of United States Supreme Court Justices: The Constitutional Period, 1790-1809" (Ph.D. diss., University of Chicago, 1970), p. 145n.

[19]3 U.S. (Dall.) 108-9 (1795).

[20]After their 1783 victory in the court of appeals under the Articles of Confederation, Doane's administrators went into the Massachusetts courts to see if they could get the decree enforced. Cushing and the other Massachusetts high court justices ruled that the Confederation prize court had lacked jurisdiction and that the New Hampshire ruling was final. However, in the Supreme Court of the United States in 1795, Cushing held that the court of appeals had possessed the authority to overturn the New Hampshire superior court. Wroth and Zobel, eds., ***Legal Papers of John Adams***, vol. 2, pp. 373, 374-75; 3 U.S. (Dall.) 116 (1795).

Cushing obviously assumed that his ruling in the Massachusetts court did not preclude him from participating in the decision in the Supreme Court. He may have also believed that because he had only determined the award in the federal circuit court in *Penhallow*, in pursuance of Justice Blair's decision of the previous year and with the advice of a commission appointed by Blair, that it was not improper for him to deliver an opinion in the Supreme Court.

A similarly gray area had been entered in *Georgia v. Brailsford* in 1792, when Justice James Iredell cast a vote in favor of the granting of an injunction to stay the execution of his decision in the circuit court case, *Brailsford v. Spalding*. Iredell openly referred to his circuit court participation but said, "I shall give my opinion... detached from every previous consideration of the merits of the cause." The question before the Supreme Court did not go to the merits of the case, and so apparently he believed there was no conflict. 2 U.S. (Dall.) 405-6 (1792); Wheeler, "Extrajudicial Activities of United States Supreme Court Justices," p. 145n.

[21][John Hale], ***A Statement of the Cause of the M'Clary Owners, and Doane and Doane's Administrators*** (Portsmouth, New Hampshire: John Melcher, 1795), pp. 58, 61.

Although Hale was the author of this pamphlet, there is evidence that the last several pages are the work of Thomas Martin, who, as a co-owner with Penhallow of the *McClary*, was a party to the case. The quotation calling for Cushing to state his "reasons" was apparently from the pen of Martin. Hale also drew attention to Cushing's switch, but—unless he was being sarcastic—was more charitable in declaring, "lawyers and judges change their opinion, as they gain more light or examine questions more thoroughly." *Ibid.*; William Plumer to Jeremiah Smith, October 17, 1795, William Plumer Papers, DLC.

[22]Russell Wheeler, "Extrajudicial Activities of the Early Supreme Court," ***Supreme Court Review*** (1973): 123-58; Maeva Marcus and Emily Field Van Tassel, "Judges and Legislators in the New Federal System, 1789-1800," in Robert A. Katzman, ed., ***Judges and Legislators: Toward Institutional Comity*** (Washington: Brookings Institution, 1988), pp. 31-53.

Hayburn's Case will be treated in volume 6 of ***The Documentary History of the Supreme Court of the United States, 1789-1800***.

[23]Marcus, ed., ***Documentary History***, vol. 4, pp. 243-47; Charles Pinckney's Speech to the United States Senate, March 5, 1800, ***Aurora***, June 16, 1800, in *ibid.*, pp. 630-36, 653-56; Wheeler, "Extrajudicial Activities of United States Supreme Court Justices," pp. 206-49; ***General Advertiser*** (Philadelphia), May 10, 1794; Resolutions of Democratic Republican Society of Prince William County, Kentucky, June 7, 1794, Harry Innes Papers, DLC.

[24]***City Gazette*** (Charleston), April 11, 1796. See also Charles Pinckney's Speech to the United States Senate, March

5, 1800, in Marcus, ed., ***Documentary History***, vol. 4, p. 632.

[25]Marcus, ed., ***Documentary History***, vol. 4, p. 244.

[26]Resolutions of Democratic Republican Society of Prince William County, Kentucky, June 7, 1794, Harry Innes Papers, DLC.

A similar sentiment was enunciated by the Democratic Society convening at Wythe Courthouse, Virginia, on July 7, 1794: "Your Chief Justice has been appointed to an executive office, by the head of that branch of Government: In that capacity he is to make *treaties*: Those *treaties* are your *supreme law*;—& of this *supreme law* he is *supreme judge*!!" ***Virginia Gazette and Richmond and Manchester Advertiser***, July 24, 1794.

[27]Pinckney Amendment of 1800, February 3, 1800, Pinckney Extrajudicial Activities Bill of 1800, March 5, 1800, in Marcus, ed., ***Documentary History***, vol. 4, pp. 247-48. Pinckney withdrew his constitutional amendment on March 4, 1800, and introduced the bill, which died in the Senate when proponents were unable to muster enough votes for a third reading. *Ibid.*, p.246.

Edward Livingston of New York introduced a constitutional amendment in the House of Representatives on February 13, 1800, that mandated that a United States judge would have to wait six months after leaving the bench to accept any government appointment, except for another federal judgeship. The amendment was tabled. Livingston Amendment of 1800, February 13, 1800, in *ibid.*, pp 247-48; *ibid.*, p. 246.

[28]Charles Pinckney's Speech to the United States Senate, March 5, 1800, in Marcus, ed., ***Documentary History***, vol. 4, pp. 630-32.

[29]Russell Wheeler concludes that the Federalists, among whom could be counted both Jay and Ellsworth, believed that recusal would solve any conflict that could arise. Wheeler, "Extrajudicial Activities of United States Supreme Court Justices," pp. 211, 230-31, 234, 235.

As it turned out, neither of the Chief Justices returned to the Court upon completing their missions. Jay became the governor of New York, and Ellsworth retired because of poor health.

[30]Chief Justice Jay had participated in *Ware v. Hylton* in 1793 on the circuit court level even though he had helped to negotiate the Treaty of 1783. In a dissent he upheld the supremacy of the treaty. When *Ware* came before the Supreme Court, Jay was no longer on the bench, but his view prevailed. Wheeler, "Extrajudicial Activities of United States Supreme Court Justices," pp. 235-36n; Goebel, ***Antecedents and Beginnings to 1801***, p. 746.

[31]The 1792 legislation barring district court judges from hearing cases which they had argued also prohibited them from sitting when they were "concerned in interest." The provision did not apply to Supreme Court Justices. See above at note 10.

[32]Marcus, ed., ***Documentary History***, vol. 2, pp. 9, 87, 87-88n, 95-98; Wythe Holt and James R. Perry, "Writs and Rights, 'clashings and animosities': The First Confrontation between Federal and State Jurisdictions," ***Law and History Review*** 7 (Spring 1989): 89-94, 101-4, 108.

[33]Judges of the Superior Court of North Carolina to the General Assembly of North Carolina, [between November 19 and 30, 1790], Declaration of the Judges of the Superior Court of North Carolina, November 19, 1790, Resolution of the General Assembly of North Carolina, December 15, 1790, in Marcus, ***Documentary History***, vol. 2, pp. 110-13, 117-19; *ibid.*, 124-25, 128-29, 130n; Holt and Perry, "Writs and Rights," pp. 101-7.

[34]James Iredell to John Jay, William Cushing, and James Wilson, February 11, 1791, in Marcus, ed., ***Documentary History***, vol. 2, pp. 131-35.

In April 1792 Congress passed legislation, introduced in the Senate by Samuel Johnston, dealing primarily with when the circuit courts should be held. Iredell himself drafted the original bill, and he undoubtedly was the inspiration behind Johnston's successful attempt to add an amendment dictating that Supreme Court Justices must rotate their circuit court duties. *Ibid.*, p. 248n; "An Act for altering the times of holding the Circuit Courts, in certain districts of the United States, and for other purposes," April 13, 1792, in Maeva Marcus, ed., ***Documentary History of the Supreme Court of the United States, 1789-1800***, vol. 3 (New York: Columbia University Press, 1990), pp. 476-78; ***U.S. Statutes at Large***, vol. 1, p. 252.

[35]John Jay to James Iredell, February 12, 1791, in Marcus, ed., ***Documentary History***, vol. 2, pp. 135-36.

[36]*Ibid.*, pp. 135, 136n, 138. It seems that Blair had his own circuit-riding conflicts. In November 1791, when holding the Circuit Court for the district of Virginia, he left the bench before hearing the debt case, *Jones v. Walker*, predecessor to *Ware v. Hylton*, probably in part because of a personal financial interest in the outcome. The following spring, though he again rode the middle circuit, Blair avoided the Virginia court. *Ibid.*, pp. 124n, 251, 252n, 537-38; Charles F. Hobson, "The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797," ***Virginia Magazine of History and Biography*** 92 (April 1984): 188.

[37]Marcus, ed., ***Documentary History***, vol. 2, pp. 196-97, 238, 246-47, 251; Holt and Perry, "Writs and Rights," p. 109.

Because Iredell was the only Supreme Court Justice in attendance for these sessions of the circuit court, his disqualification meant that the case could not be heard. At the same time Iredell was also concerned about having to sit in the North Carolina circuit court on other cases that were coming up involving the same estate that had entangled him in *Morris v. Allen*. Holt and Perry, "Writs and Rights," p. 109; Marcus, ed., ***Documentary History***, vol. 2, pp. 238, 246, 537-38.

[38]Marcus, ***Documentary History***, vol. 2, p. 239n; Holt and Perry, "Writs and Rights," p. 110.

[39]Introduction to *Oswald v. New York*, in Marcus, ed., ***Documentary History***, vol. 5, pp. 57-62; Frank Monaghan, ***John Jay*** (New York: Bobbs-Merrill, 1935), pp. 325, 327; Harold C. Syrett, ed., ***The Papers of Alexander Hamilton***, vol. 11 (New York: Columbia University Press, 1966), pp. 38n, 378-79n; Marcus and Perry, eds., ***Documentary History***, vol. 1, pp. 6-7, 196n, 216-17, 730, 733.

Jay's participation in electoral politics in 1792, while he was still on the High Court, was not the last such occurrence of the decade. In 1795 he again ran against Clinton—this time successfully. Cushing was an uncooperative candidate for governor of Massachusetts in 1794 and 1797, when nominations were essentially thrust upon him, and lost both times. Neither Justice actively campaigned. In 1800 Chase stumped for President Adams in his reelection bid. Marcus and Perry, eds., ***Documentary History***, vol. 1, p. 7; Monaghan, ***John Jay***, pp. 326-27; Clifford K. Shipton, ***Sibley's Harvard Graduates***, vol. 13, ***1751-1755*** (Boston: Massachusetts Historical Society, 1965), pp. 37-38; Marcus, ed., ***Documentary History***, vol. 5, pp. 269, 625-26; Wheeler, "Extrajudicial Activities of United States Supreme Court Justices," p. 200; Haw et al., ***Stormy Patriot***, pp. 207-8.

[40]Introduction to *Oswald v. New York*, Deposition of John Jay, May 10, 1794, in Marcus, ed., ***Documentary History***, vol. 5, pp. 57, 64-66, 102-3; ***Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of***

Safety of the State of New-York, 2 vols. (Albany: Thurlow Reed, 1842), 1:793.

[41]Marcus and Perry, eds., ***Documentary History***, vol. 1, pp. 44-49; Marcus, ed., ***Documentary History***, vol. 3, pp. 151-52, 238-39, 277-78n; Robert Green McCloskey, ed., ***The Works of James Wilson***, 2 vols. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1967), 1: 17-19, 43-45.

[42]Introduction to *Hollingsworth v. Virginia*; Bill in Equity [before August 11, 1792]; in Marcus, ed., ***Documentary History***, vol. 5, pp. 274-90, 299-316; George Lewis, ***The Indiana Company, 1763-1798: A Study in Eighteenth Century Frontier Land Speculation and Business Venture*** (Glendale, Cal.: Arthur H. Clark Co., 1941), p. 253.

[43]Bill in Equity in *Grayson v. Virginia*, [before August 11, 1792], in Original Jurisdiction Records, RG 267, DNA, and Executive Papers, Vi.

[44]The problem was that the suit, as originally styled, did not clearly establish the diversity of citizenship necessary for the Supreme Court to have jurisdiction. The first parties mentioned in the bill, the heirs of the late Senator William Grayson, were Virginians. So, in the amended bill they were dropped from the suit, and Levi Hollingsworth, a Pennsylvanian, assumed the status of principal party. Thus, *Grayson v. Virginia* became *Hollingsworth v. Virginia*.

[45]Bill in Equity in *Hollingsworth v. Virginia*, [before February 20, 1793], in Original Jurisdiction Cases, RG 267, DNA, and Executive Papers, Vi.

[46]Introduction to *Moultrie v. Georgia*, in Marcus, ed., ***Documentary History***, vol. 5, pp. 496-514.

[47]***Aurora*** (Philadelphia), February 11, 1795.

[48]*Ibid.*, February 16, 1795.

[49]James Madison to James Monroe, March 27, 1795, in Thomas A. Mason, Robert A. Rutland, and Jeanne K. Sisson, eds., ***The Papers of James Madison***, vol. 15 (Charlottesville: University Press of Virginia, 1985), p. 499.

[50]Introduction to *Moultrie v. Georgia*, Bill in Equity, June 24, 1796, in Marcus, ed., ***Documentary History***, vol. 5, pp. 506-8, 541-50.

[51]Presentment of the Grand Jury of Chatham County, Georgia, October 21, 1796, in Marcus, ed., ***Documentary History***, vol. 5, p. 554.

[52]Remonstrance of the Georgia General Assembly, February 9, 1797, in *ibid.*, p. 560.

Shortly before the process was issued in *Moultrie*, one correspondent to a Charleston, South Carolina, newspaper facetiously noted that as Pendleton and Wilson were involved in the Yazoo speculation, "they must naturally be more minutely acquainted with the merits of the case, and are of course best qualified to decide on a matter of such intricacy." Introduction to *Moultrie v. Georgia*, in *ibid.*, p. 506n.

Despite the protests by Georgia and its supporters, it is not clear that Wilson would have been biased against the state. After all, the Georgia Company was also a defendant in the case. However, after the act authorizing the 1795 sale was repealed in 1796, the 1789 investors and the 1795 investors eventually came to recognize their common interests against the state. *Ibid.*, p. 512.

[53]Wilson may not have been consistent in recusing himself in such cases. He sat on the bench while the Supreme Court considered *Cutting v. South Carolina*, even though several years earlier he had apparently served as counsel to Commodore Alexander Gillon of South Carolina in the dispute that culminated in the federal suit. Richard G. Stone, "'The *South Carolina* We've Lost': The Bizarre Saga of Alexander Gillon and His Frigate," ***American Neptune*** 39 (July 1979): 168. See also the introduction to *Cutting v. South Carolina*, in Marcus, ed., ***Documentary History***, vol. 5, p. 452.

[54]White, ***The Marshall Court and Cultural Change***, pp. 171-72, 195-99.

[55]Wheeler, "Extrajudicial Activities of United States Supreme Court Justices," pp. 24-46, 256-57.

[56]C. Peter Magrath, ***Yazoo, Law and Politics in the New Republic: The Case of*** Fletcher v. Peck (Providence: Brown University Press, 1966), p. 7.

In Black and White:
Chinese in the Mississippi Delta

Jeannie Rhee

Editor's Note: This paper is the winner of the 1994 Hughes-Gossett Award for Student Essays. Ms. Rhee presented a longer version as her undergraduate thesis at Yale University in 1994.

Scholars of constitutional legal history have found much cause to celebrate the Supreme Court of the United States in the twentieth century. Benno Schmidt, for example, argues that by the Progressive era of the early 1910s and 1920s, the Supreme Court bravely stood alone breathing "life into the Reconstruction principles that had been left for dead."[1]

For Gong Lum and other Chinese in the Mississippi Delta who were seeking reentry into the all white public schools that had expelled their children, orders for desegregation came ironically from the local county district court, a supposed repository of racist ideology, only to be snatched away by the Supreme Court.[2] Rather than stand bravely alone in the midst of "rock-bottom levels of injustice and callousness,"[3] the Supreme Court in reality evinced the same levels of injustice, swept up and mired in the hotly contested, tense racial climate of the era.

The small communities scattered throughout the Delta could not be described as havens from the storm of racial discrimination that plagued minorities elsewhere. In the heart of the Jim Crow South, racism towards African-Americans permeated virtually every aspect of life to the extent that one "simply didn't question it." In the words of a local matron, "It was just the way that

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JIM CROW LAW.

UPHELD BY THE UNITED STATES SUPREME COURT.

Statute Within the Competency of the Louisiana Legislature and Railroads—Must Furnish Separate Cars for Whites and Blacks.

Washington, May 18.—The Supreme Court today in an opinion read by Justice Brown, sustained the constitutionality of the law in Louisiana requiring the railroads of that State to provide separate cars for white and colored passengers. There was no interstate commerce feature in the case for the railroad upon which the incident occurred giving rise to case—Plessey vs. Ferguson—East Louisiana railroad, was and is operated wholly within the State, to the laws of Congress of many of the States. The opinion states that by the analogy of the laws of Congress, and of many of states requiring establishment of separate schools for children of two races and other similar laws, the statute in question was within competency of Louisiana Legislature, exercising the police power of the State. The judgment of the Supreme Court of State upholding law was therefore upheld.

Mr. Justice Harlan announced a very vigorous dissent saying that he saw nothing but mischief in all such laws. In his view of the case, no power in the land had right to regulate the enjoyment of civil rights upon the basis of race. It would be just as reasonable and proper, he said, for states to pass laws requiring separate cars to be furnished for Catholic and Protestants, or for descendants of those of Teutonic race and those of Latin race.

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Jim Crow laws were prevalent in the post Reconstruction South, including the Mississippi Delta.

things were done; everyone knew their place and how to act in keeping with it."[4] Yet it was only the fact that blacks and whites "knew their place" in the social pecking order that allowed the Chinese to attain for themselves a measure of equality. As a nominal group, they posed little threat on their own, and faced prejudices only as a minority whites associated with African-Americans. To achieve any rights, therefore, the Chinese were compelled to endorse the racial hierarchy. They not only deferred to white supremacy over them, but actively complied with the systematic denigration and oppression of African-Americans.

Justice Attained: Chinese in the Mississippi Delta

At the March on Washington in 1963, a high point in the civil rights movement for African-Americans, Martin Luther King, Jr. captivated the audience with his words, "I have a dream . . . that the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice. . . I have a dream."

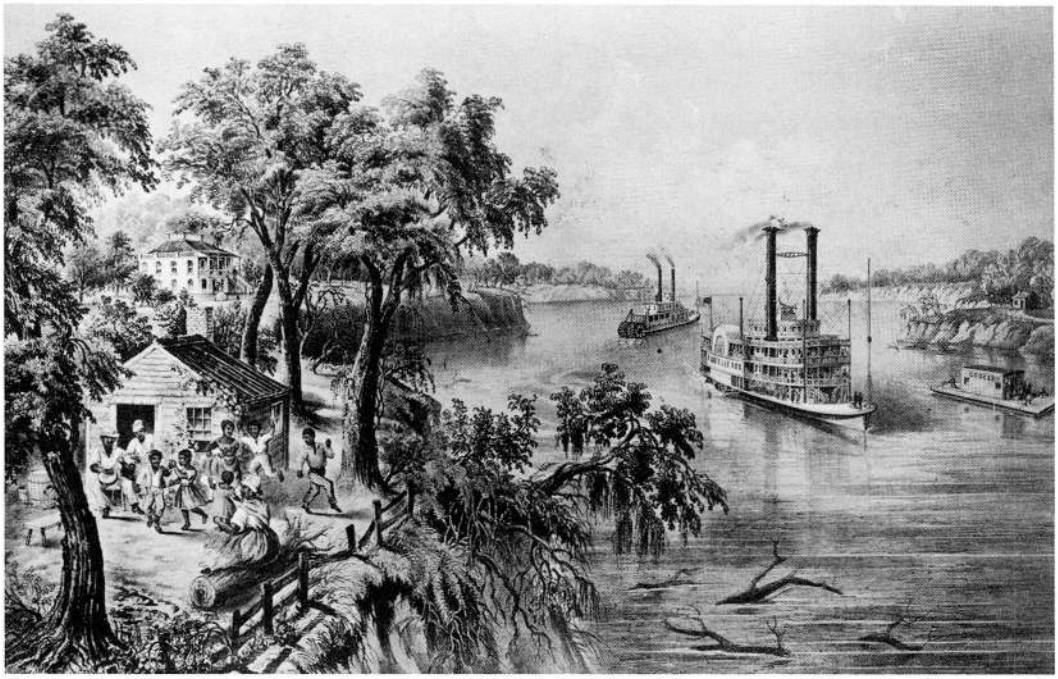
King most likely did not know that on November 5, 1924, in a remote Mississippi Delta county named after the great Latin American liberator Simon Bolivar, freedom did ring—not for African-Americans, but for the Chinese who had come to settle in the area. That day Judge William Aristide Alcorn of the eleventh circuit court of the state of Mississippi, the first judicial district of Bolivar County, emphatically ruled that the trustees of the local school board "had no right to forbid the Chinese their right of scholarship" under the Fourteenth Amendment in the case of *Gong Lum v. Trustees of Rosedale Consolidated High School*. They were to be promptly permitted back into the white public school system, defeating an attempt to enforce racial segregation.[5]

Implicit in the ruling was the belief that although the Chinese could not be considered white, they nevertheless had comparable legal standing to whites. In the eyes of Judge Alcorn, the Chinese not only possessed the rights denied to African-Americans, but were entitled to exercise those rights themselves. Alcorn was hardly more liberal than his peers; he had been born and bred in the bosom of the Delta aristocracy, inundated with the social dictates of white supremacy.[6] Moreover he was an elected judge who had absolutely no trouble with reelection after the case, and thus could not have strayed far from community sentiments with his decision for the Chinese.[7]

Alcorn's decision probably reflected the already existing high standing of the Chinese in the county, rather than a breaking of new ground in race relations. In a sociological study of Bolivar County, James Loewen found there exists, even to this day, extreme stratification, with wealth and power virtually wholly entrusted in the hands of a few select families and individuals of the community—even though African-Americans and poorer whites comprise the numerical majority. This distinct class controls almost everything in town and thus it has always been "the decisive element with which the Chinese have had to deal."[8] In Rosedale, the Chinese evidently distinguished themselves enough to Judge Alcorn, a representative of the ruling upper crust, so that he found them worthy of comparable status. This certainly was not always the case for the Chinese in the Delta.

As part of the cotton kingdom of the deep South, substantial planter-landowners rather than small yeoman farmers controlled the rich fertile soil of the Delta. Much of the area had not been cleared before the Civil War, and so the greatest period of land development, requiring massive labor, coincided with the point in which the traditional labor pool acquired independence and political power. Voting Republican and threatening to move in the midst of harvest season if not treated with due respect, the former slaves jeopardized the elite's entire way of life, challenging not only its economic, but also social and political control.

Fighting to preserve their cachet, the Delta whites responded with a fierce backlash, which consisted of measures to return "uppity Negroes" back to their rightful places in the social hierarchy. In one of the bloodiest postwar political struggles waged, the marginalized white citizens of Mississippi ousted the state Reconstruction government, and from there cleared the way for legal measures to effectively disarm and demolish the African-American challenge to their social dominance. The onset of Jim Crow, rather than abating race struggles between African-



This Currier & Ives lithograph shows low water on the Mississippi River. It is unclear exactly how the Chinese came to the Mississippi Delta but once there they immediately began opening grocery stores in every hamlet of the Delta.

American and white, only further fueled the animosity, providing infinite ways to reassert African-American inferiority. The ideal of white supremacy permeated every aspect of the social, political and economic life of the small towns of the Delta. Everything and everyone was either black or white. Thus the Chinese were not the primary minority group threatening the elite's dominant status. Most of the discrimination they faced came as an extension of white feelings toward African-Americans rather than any specific beliefs about the Chinese themselves. Nevertheless, they met with prejudice and racial discrimination.[9]

The Chinese who first came to settle along the banks of the Mississippi perhaps felt comfort in the fact that the Delta very much resembled the area of China from which they had come. Rather than genuine immigrants who sought to establish a new life in the country, the original Chinese were instead sojourners, seekers of work abroad in order to return triumphant to the homeland.[10]

Exactly how the Chinese found their way into Bolivar County is disputed, but once there they opened grocery stores in every tiny hamlet of the Delta.[11] The regional economy had traditionally functioned on a system known as "furnish and deducts," under which the credit merchant owned the lone store in the entire area and furnished all necessities on credit until cotton harvest time. Once the crop was in, he would deduct costs from the pay. However, the effects of the agricultural boom were changing the dynamics of that structure. With the demise of the large plantation during Reconstruction, smaller operations could not afford to support a "furnish" store of their own. At the same time with the heavy demand for labor, African-American sharecroppers were finally being paid in cash. They acquired the purchasing power that allowed them to patronize other stores and to escape the pitiful selection and brutal interest rates charged by the furnish.[12] When the Chinese arrived in the Delta, they found economic opportunities in the grocery trade and a chance to make the fortune they had set out from China to achieve.

As detrimental as the racial prejudices of the Delta may have appeared for the Chinese, they actually proved beneficial in providing the Chinese with a monopoly in this newly developing market. Whites certainly would not deign to serve their African-American sharecroppers and tenant farmers as customers according to the social etiquette, and African-Americans could

not raise nearly enough capital to start ventures of their own. That left only the Chinese capable of filling the economic void.[13] The first Chinese grocery opened in Rosedale in 1874, and many more followed in rapid succession as family members were recruited to take advantage of the opportunity. A particular clan, such as the Pangs in Marks or the Wongs in Rosedale, seemed territorially to claim each of the small towns.[14]

African-Americans comprised most of their clientele initially, and the Chinese immigrants lived among and served blacks, which did cause the white community to attach a stigma to them. As one white succinctly explained, "[L]ook at the Chinese stores down by the river. . . . They're right down in Niggertown, and what goes on there, God only knows."[15] The Chinese themselves did not act to dispel the negative association; according to an elderly Chinese resident, at the time "they didn't want to be African-American, 'colored,' or white, they just wanted to make money to send home to China."[16] In the interim, they deliberately remained impervious to the social and legal dictates of the Delta, unmindful of the prejudices whites might hold against them. As sojourners they continued to define their identity in terms of their position in China, not the United States. Arlee Hen recalled that her father wore his hair in a queue for years, keeping the braid because "he said if he cut it, he would never be able to go back to his village."[17]

The Chinese steadfastly held African-Americans in good stead, even knowing how sharply it cut against the social grain. The severe shortage of women as a result of national immigration laws led many Chinese men into romantic affairs with African-Americans. Arlee Hen, the daughter of a black mother and a Chinese father, stated, "There weren't any Chinese women for them to marry, and white women they weren't allowed to marry, so they had to do something." In 1881, Charlie Sing married Emma Clay, the daughter of a slave, born just after the Emancipation Proclamation and proceeded to have fourteen children.[18] While many of the liaisons were strictly out of physical convenience, others like Sing's, resulted in an enduring partnership. Through the late 1880s and into the early 1920s, records document that common-law marriages transpired between Chinese and African-Americans.[19] James Chow recalled that although whites looked upon these mixed relationships and the children produced by them with horrified disdain, the Chinese did not ostracize those families.[20] Arlee Hen never felt left out growing up, and was always treated as a Chinese by the Chinese of her Delta town.[21]

By the late 1910s, however, the Chinese began to question their sojourner mentality. The 1911 peasant rebellion in China indicated that all might not be so pleasant in the triumphant return home.[22] Arlee Hen noticed her father cut off his queue, dramatically signifying that he would not return to his native land.[23] Most significantly, as the business grew and prospered, Chinese grocers sent for their families from China to help work in the stores, reuniting them all in Mississippi. As one of the few occupational classes whose spouses remained exempt from the restrictions of the Chinese Exclusion Act, merchants, with the arrival of their wives, shifted the focus of their social identity away from China to the Delta.[24] Along with wives came children, and although the number of families remained small even in the late 1910s and 1920s, the families themselves expanded rapidly with the arrival of more and more offspring. As they no longer viewed the Delta as a temporary means of raising income to return to China but rather as home, particularly for their children, the Chinese faced the realization that they had to confront their negative social image in the eyes of the white ruling class. Fiercely ambitious for their children and determined to secure their opportunity for advancement, the Chinese now cared greatly whether they were "black," "colored," or "white."[25]

Never a threat in and of themselves to the dominant society, the Chinese men were well aware that their early social associations with African-Americans had brought on the social stigma that they now sought to eradicate. Beginning in the late 1910s, prominent members of the Chinese community made every attempt to dissuade fellow Chinese from consorting with the newly declared nemesis.[26] For the sake of their families, they calculatingly sought to police their own people to "behave themselves."

They betrayed African-Americans seemingly without remorse, but did so with the knowledge that to remain allied, they could only remain bonded in abject discrimination. Whereas Arlee Hen had never felt excluded as a child and had

Under the Chinese Exclusion Acts, Chinese immigration was severely limited as a result of anti-Chinese sentiments on the Pacific coast. As merchants, the Chinese in the Mississippi Delta were members of one of the few occupational classes allowed to have their wives join them in the United States.

always been considered Chinese by the community, Daisy Greene told of the fate of subsequent interracial children. An African-American woman born in 1904, she noted that "the thoroughbred Chinese wouldn't accept [these] children. . .not at all."[27] And as much as Arlee Hen was embraced by the Chinese enclave in her youth, in old age she lamented that she could not be buried in the local Chinese cemetery; the rules forbade half-blacks.[28]

As more and more of them shed their sojourner identification in the late 1910s and 1920s, the Delta Chinese began to kowtow subserviently to the white elite in what became a concerted campaign to curry favor and approval. One woman stated:

> We started families. . . that's when the Lo Fan [whites] began to take notice. . . . We went to church and got converted to become Christians. We gave them lots of money so they saw to it that we was treated different from the Lo Mok [blacks].[29]

Although most of their trade still rested with the African-Americans who populated the area, many Chinese nevertheless began to add superfluous brick facades and found themselves ordering modern, new fixtures for their stores, all in the hopes of luring respectable white patronage.[30] More significantly, the Chinese community, acknowledging the supremacy of the ruling class, adopted the social and civic institutions which the elite engaged in and found virtuous. Thus leading Chinese families, most of whom generally did not believe in Christianity, sent their children religiously to Sunday school every week and became active supporters of the dominant church denomination in towns throughout the Delta.[31] Yet they never sought to overtake, or even take the lead in an activity. Rather, according to Pap Pang, they just tried to get along with the white townspeople. Anytime the city needed a donation for something, although the family did not have a lot of money, they would give as much as they could to show they were cooperative, worthy citizens.[32] To demonstrate their identification with the ruling class, but also their direct concession to white superiority, the Chinese burdened their children with traditional southern white names, usually after either a famous state or regional figure, or more tellingly, after a leading white of the town who befriended them. Gong Lum's daughters, Berda Beadel and Martha Bond, were respectively named for two prominent, charitable women of Bolivar County.[33]

Although this effort met with mixed results in the cities, a positive reception to the Chinese community's transformation by leading whites in the smaller, remote towns of the Delta was quite rapid and thorough.[34] In the small towns, whites could not help but come into contact with the Chinese and notice the enormous efforts made on the part of the Chinese. Thus as early as 1910, the ruling whites of certain small townships began to favor their Chinese with elevated status. Although this was the era of Jim Crow, Chester Ju recalled that the Chinese could go to any public place they desired. Whites might not have always welcomed them, but there were no restrictions.[35]

Secure in their dominance over African-Americans in the community, small town white Delta leaders could easily justify dispensing privileges to those they viewed as non-Ne-

groes, including such favors as school admission, along with most other legal rights. They did not jeopardize their own status or set a precedent for African-Americans to follow.[36] Yet as much as the racial order of the Delta provided opportunities for the Chinese, it exacted a heavy cost. The Chinese had to demonstrate themselves to be "non-Negro," which meant, in reality, full adherence to the existing social system, treating African-Americans in the same denigrating manner as whites did. At the same time, they continually had to monitor themselves, exhibiting a clannish and docile behavior that would never challenge white superiority or purity. The Chinese faced no real other option given the racial structure of the Delta than to comply for their own sake.

By the early 1920s, the Chinese families living in Rosedale were basking in the privileges of their newly acquired status. Gong Lum, for one, lived a life of near-assimilation and acceptance in the white community. The owner of a flourishing market patronized by most of the town, he counted among his friends many of his white customers. When his daughters were born, he promptly asked a white couple, the ones who had kindly befriended him at the First Presbyterian church, to be Berda and Martha's godparents. As young girls growing up, Berda and Martha did all the things that their white playmates did. When Sunday came, they all trekked into church together, and when Monday came, they all marched into the schoolhouse.[37]

Thus when a few white individuals of the town began to grumble about the Chinese presence in their schools one summer, the Lums thought little of it and sent their daughters off to the first day of school, just as usual, in the fall of 1924. Berda Lum recalled the most unusual thing which happened that day, however:[38]

> Back then when we were in [the white] school, elementary at the time, the principal called us into his office—my sister, 2 other Chinese girls, and myself. And he came in and asked us to sit down, and told us, 'We're sorry, but you have to leave school.' He told us we were not allowed to attend the public schools any more. So my sister and I just got our books and went home. We felt so bad.

Incomplete, vague, and somewhat conflicting accounts exist as to what sparked the complaint which led to this action. The town patrons certainly did not call for the Chinese expulsion from their schools. In 1924, the trustees of Rosedale school district applied to the Southern Association of Secondary Schools and Colleges for state accreditation, bringing the school to the state's attention.[39] It appears probable that a few agitated local whites protested to state officials the Chinese presence in the white schools. Only under force of an order from the state superintendent of education did the Rosedale school board expel the Chinese children.[40] The decision to send Berda and Martha Lum home that day in September came explicitly from the state authorities, and not from any of their playmates' parents.

In fact, as Rosa Lee Black recalled, the vast majority of town residents found the heavy-handed state actions appalling. She stated that her father, who as a school trustee had to enforce the state orders, "was terribly upset about the whole situation. He did not support the policy at all. He just felt awful that it had to occur."[41] While the Rosedale residents themselves would have purged the school of any Chinese if they evidenced even a trace of African-American lineage, the pure Chinese were entirely another matter to them by this point. Whites, even more so than other Chinese, offered their support to the Lums, who chose to take the matter to court. The Lums retained the prestigious Clarksdale firm of Brewer, Brewer, and McGhehee. The very fact that such a firm would accept this case indicates that the Chinese had achieved a high status in much of the Delta; moreover, Berda Lum reported that the firm took on the case almost entirely *pro bono*.[42]

In their petition to Judge William Alcorn of the state district court of Bolivar County, the Lum's champions claimed, "The said school authorities have no discretion under the law" to expel Martha Lum "solely on the ground and for the reason that she [is] of Chinese descent, and, therefore, not a member of the white or Caucasian race." Further,

Martha most definitely was "not a member of the colored race." While justice, Delta style, allowed the law to ride roughshod over the rights of African-Americans, justice in some form still existed; and it required the white establishment to mete out full civility and equity to those groups in the community which they accepted. Hence Martha Lum, free from any taint of African-American blood, deserved "all the privileges and immunities of her citizenship . . . the same rights and privileges accorded to other educable children . . . residing in the said Rosedale Consolidated School district." To continue denying her school entrance " strictly on account of her race or descent" deprived her of the rights provided by the Fourteenth Amendment's Equal Protection Clause.[43]

On November 5, 1924, Judge Alcorn issued a writ of mandamus ordering the school board to admit at once Berda and Martha Lum to the white public schools.[44] Although obviously some anti-Chinese prejudice existed in the minds of some whites, the court ruled that the Chinese had achieved equal standing in the eyes of the ruling class, and implicitly chastised those townspeople who would treat them as African-Americans when clearly they were not. Pap Pang told of an incident that occurred when he was attending school in Marks, Mississippi. A fellow student's father, a carpenter, objected to his admittance. The man went to the school board and said he didn't want his kids going to school "with no Chinese." The president of the school board, also the richest man in town, asked, "Why do you object? My children go with them."[45] The local court, in *Gong Lum*, effectively told the residents of Rosedale the same thing.

White elites in the Delta were able to dispense social favors to the Chinese without endangering the existing state of race relations *vis-à-vis* African-Americans, and those who controlled the legal system could afford to grant the Chinese the full spectrum of rights without ever having to fear that it would in any way jeopardize their own status or set a precedent for black Americans to seize upon. Paradoxically the existence of a firmly entrenched racism and incontestable racial hierarchy not only provided the Chinese with opportunity to prosper economically and acquire social stature, but most importantly provided them with the right to justice and equality which was so often elusive for other racial minorities in this country.

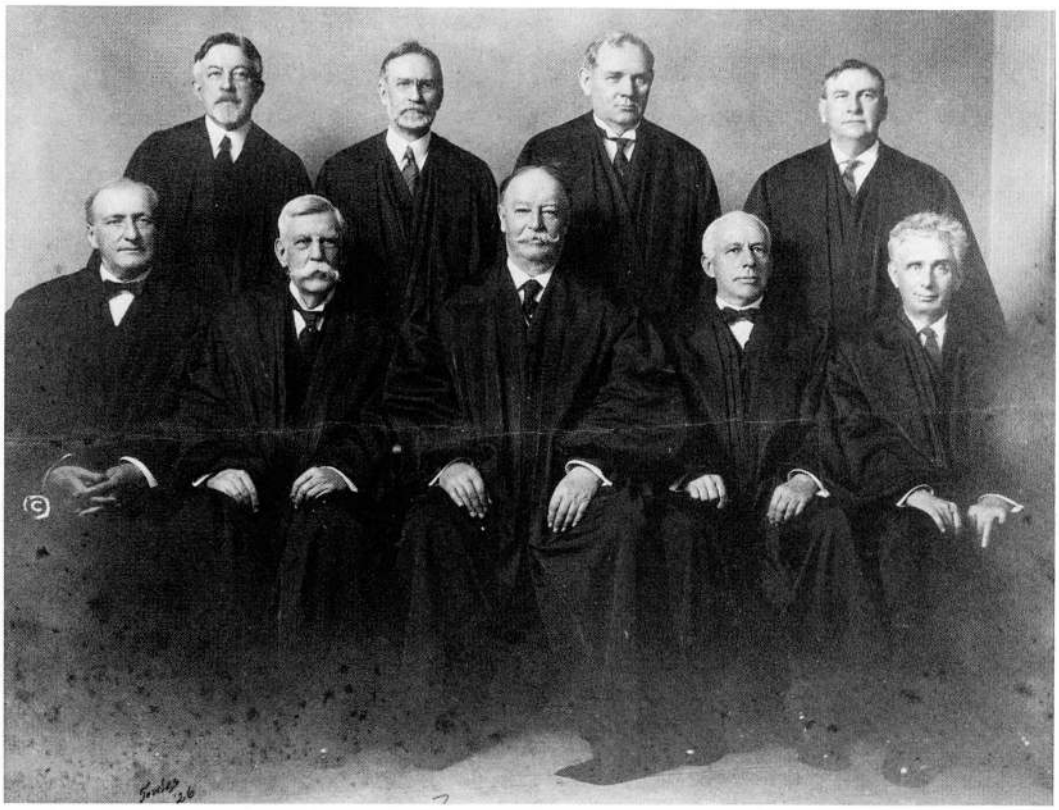
Justice Denied: Mississippi Chinese in the Supreme Court

Outside the Mississippi Delta, however, the social ordering of the races certainly did not go unchallenged. The 1920s saw the birth of a nascent African-American nationalist movement, urging African-Americans to confront whites and to challenge their present state of domination and disempowerment. In the flowering of the Harlem Renaissance, blacks gave voice to their own intellectual and artistic stirrings, asserting their humanity in the face of racial oppression.[46]

The status of Chinese in the rest of the country was not nearly as favorable and preferential as in the relatively secure Delta. On the West Coast, especially California which had the largest concentration of Asians in the country, the Chinese posed a threat to the white establishment similar to that posed by African-Americans in the Delta, and the status and treatment of the Chinese in California much resembled that of Mississippi Delta African-Americans.[47] At the time the Lums were being favored with admission to the white public school system in Rosedale, in San Francisco, the Wongs and other Chinese—not African-Americans—were the ones segregated from whites in the public schools.[48]

Given the contention surrounding the status of the various races in the whole nation and the jostling for position in the social hierarchy, higher courts could not grant rights to one race alone without raising concern that it would set a precedent for the other races to follow. As Justice John Marshall Harlan had argued in his *Plessy v. Ferguson* dissent, how could the Chinese receive the certain privilege of riding in an integrated passenger car if African-Americans could not? The Taft Court's reply to Harlan's question, given the climate of the era, would not be to bestow on African-Americans the same rights as first conceded to the Chinese. Instead they would deny rights to both groups. That was the fate that befell the Lums as their case left the confines of the Mississippi Delta.

A unanimous Mississippi State Supreme Court reversed Judge Alcorn's ruling on May 11, 1925.



The Supreme Court that rejected the appeal of Gong Lum included: (standing, from left) Edward T. Sanford, George Sutherland, Pierce Butler and Harlan Fiske Stone. (seated, from left) James C. McReynolds, Oliver Wendell Holmes, Jr., William Howard Taft, Willis Van Devanter and Louis Brandeis.

While conceding that the Chinese stood as a race separate from the African-Americans, the court refused to confer upon them access to a white privilege and domain.

"The dominant purpose of the two [school] sections [in question] of the constitution of our state was to preserve the integrity and purity of the white race," announced the court.[49] Judge George Ethridge centered his entire opinion around this declaration. Taken as truth without question, this belief served as the premise from which the rest of the decision flowed. The court rested its ruling on the grounds that the Chinese, while not African-American, were still nevertheless colored and thus forbidden under the state statute to attend public schools reserved for the white race. In justifying this conclusion, Ethridge asserted that "The word 'white' when used in describing the race, is limited strictly to the Caucasian race, while the word 'colored' is not strictly limited to Negroes or person having Negro blood." Ethridge held that in the Mississippi State Constitution, the word "colored" was employed in "the broad sense rather than the restricted," in effect classing Chinese with African-Americans. Martha Lum, now a "colored" citizen, could only attend the African-American public schools.

The Lums sought to reverse this decision which bestowed upon them such a disastrous categorization and appealed the decision to the Supreme Court of the United States. Following the same logic they had presented before the Mississippi Supreme Court, the appellants claimed they too firmly ascribed to the doctrine of segregation. Informing the Court that "their rights are amply protected if separate schools of equal merit are maintained for their education," the attorneys representing the Chinese stated, "If there were separate Chinese schools," the case at hand would have been dropped; the Chinese would not have fought to attend the white public schools. Rather such a case, would have involved, "evidence [being] heard on the [separate Chinese schools] . . . to show that Martha was provided for equally with the children of the more favored race."[50]

Only because no school "was maintained in the district for the education of children of Chinese descent, or in the county for that matter," did the appellants feel compelled to seek admittance to the white schools. To be denied, claimed the Chinese, would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. Yet the subsequent argument justifying that contention was not at all similar to their original Fourteenth Amendment claim filed in the local district court of Bolivar County. Before the Supreme Court, they proclaimed that the white "lawmaking race" could not favor itself with the right to create solely white schools when such benefit was not equally extended to the Chinese, forced to associate with African-Americans in a collective "colored" school. According to the Chinese, the white class originally instituted segregated schools because "such intercourse with African-Americans is objectionable; in many instances . . . repulsive and impossible." But if danger existed in the association of white children with African-Americans, the Chinese contended, "it is a danger from which one race is entitled to protection just the same as another." Yet no Chinese school existed, and the colored schools, by the very fact that African-Americans populated them, were deemed unequal. Thus there was no other choice, the Chinese asserted, despite their efforts not to infringe upon whites' preserve, but to attend the white public schools.

The Supreme Court of the United States was not persuaded. Chief Justice Taft, in announcing the unanimous decision on November 21, 1927, dismissed the case in one blow: *"Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided. . . ."*[51] That was the extent of the Supreme Court's deliberations on the case of Martha Lum. Despite attempts to demonstrate otherwise, despite the previous Court precedents cited to prove the Chinese were never legally viewed in the same class as African-Americans, the Court chose not even to respond to those contentions. Moreover, even though the Chinese made explicit that their claim did not question the priority of school segregation itself, but instead their placement within the system, the Court signified that it viewed the Chinese petition in exactly the same light as previous challenges to segregation made in cases regarding only African-Americans. Never before had the Supreme Court ruled on the school segregation of the Chinese, or on any question of segregating Chinese under Jim Crow statutes, but by terming it "an old question," the Court indicated it saw absolutely no difference between Chinese and African-Americans. From white to colored to African-American, the Chinese had come a long way outside the Mississippi Delta.

The Court with its emphatic decision, "this is not a new question," declared that the entire issue of school segregation, and even challenges as to the unequal implementation of it, were not open to any debate by the Taft Court of 1927.

Justice Regained: The Aftermath of *Gong Lum* on the Delta Chinese

In the only sociological study of the Mississippi Delta Chinese conducted before World War Two, Robert W. O'Brien noted: "Until a definite ruling had been made, the Chinese had identified themselves with the dominant race in assigning themselves a caste position. But with the Court decision . . . it became evident that according to the laws of Mississippi then, the position of the Chinese in the caste system was defined as that of the colored race." He therefore predicted that in the coming years, the Chinese would only further be removed from whites, eventually to the point of becoming indistinguishable from African-Americans in terms of social class.[52] Given the Court's ruling, O'Brien's prediction seemed valid. Yet in reality, his forecast proved almost wholly inaccurate. The Chinese in the aftermath of *Gong Lum* not only did not merge with African-Americans, but actually even regained their former status as honorary, near-whites. All the conditions that had first allowed the Chinese to gain a privileged status still remained, and the Chinese exploited them more than ever before. Eventually those conditions bestowed upon the Chinese once again their former place, despite the Supreme Court ruling.

The Delta Chinese responded to the Court decision in *Gong Lum* with steely resolve. Knowing the repercussions, under no condition could they allow themselves to be associated with African-Americans again. With the Court's refusal to protect, let alone acknowledge, their rights, the Delta white establishment would determine

their status and fate more so than ever before. If the Chinese hoped to secure a bright future for their children, they had to cater aggressively and remorselessly to the ruling class to win their approval. Not only did they have to consent to the social structure, they had to enforce it actively themselves. So although the Court categorized "coloreds" together in Jim Crow, the Chinese strictly segregated themselves from African-Americans, furthering the racial hierarchy and the denigration of African-Americans in the Mississippi Delta—the toll of trying to advance in a system which divided everything and everyone along black and white lines.

The Court had forbidden them to attend white schools, but the Chinese refused to enter the African-American schools assigned them. To maintain distance from African-Americans, they provided their children with various educational opportunities apart from the colored public schools. As Daisy Greene, a retired African-American teacher of the Delta recalled, since "they couldn't send their children to the white schools, they'd send them to Catholic ones. They wouldn't send them to the African-American public schools. They thought their children deserved better than that."[53]

After the *Lum* ruling, many Chinese children were taken in by private religious schools throughout the Delta, whose white patrons were sympathetic to the plight of their fellow churchgoers.[54] Those who could afford to, such as Joe Tong Im, sometimes hired white private tutors for their children.[55] Others, like the Sangs and Wongs, sent their children away to school out of state, rather than keep them at home, to assure that they did not have to associate with African-Americans. Joe Dunn, the Sang's eldest son, lived with friends in Memphis to attend school there returning home only on the weekends. Pershing Wong was sent to New York to attend school, seldom able to return and visit his family in the Delta at all.[56] Yet he went, not only to receive a worthwhile education, but to allow his parents to demonstrate to whites in town their distance from and superiority to African-Americans.

The Lums, the originators of the case, took the most drastic measure and moved the entire family to the Arkansas side of the Mississippi Delta. That state, with far fewer Chinese, had yet to find an applicable constitutional provision justifying the expulsion of Chinese from the white schools. When asked why they moved, Berda Lum replied that her father simply refused to allow his daughters, or himself for that matter, to remain classed as inferior.[57]

Among some of the towns of the Mississippi Delta, however, the one or two Chinese families who had established themselves there never had to resort to such actions. They had so fully integrated themselves with the white establishment of those small towns that to enforce the Supreme Court decision by expelling the Chinese from their schools appeared unjust. It violated community values and mores which saw the Chinese as comparable to whites in every other aspect of town life. Although they might have tried for a few months or even a year, white community officials found no choice really but to ignore the Court ruling and allow the Chinese to remain in the white public schools.[58]

For the Chinese in the small towns of the Mississippi Delta, the Supreme Court ruling failed to have any real impact or power over their daily lives. For the Chinese residing in the larger urban centers, however, the effects of *Gong Lum* were felt much more severely. In the cities, with a continual influx of new immigrants, the Chinese as a whole had already found it much harder to police their collective behavior so as to present to whites a positive, "respectable" impression of themselves. By reinforcing and perpetuating negative associations and assumptions which some members of the white establishment held about them, the Court's ruling in *Gong Lum* presented a formidable obstacle for the Chinese. Indeed, for those of the white community in Rosedale who had found the newer Chinese of the town unpleasant and questionable, possibly even of mixed blood (the probable cause that had set *Gong Lum* originally into motion), the Supreme Court's decision served only to legitimate their prejudices to the rest of the white townspeople.

Chinese hope rested with the one white institution that remained staunchly open to them. The various Protestant churches that dotted the Delta consistently kept their doors open to the Chinese throughout the late 1920s and 1930s. At the time, these churches were thoroughly engaged in carrying out a mission that can best be described as religious manifest destiny—a vision of spreading Christianity from the

civilized West to the heathen East, conquering and in their eyes, uplifting the world. The Chinese played a critical role in this plan. Not only were there so many of them potentially available for conversion, but more importantly, the contingent of missionaries sent to China arrived back in the United States with almost universally glowing portrayals and positive characterizations of them. According to the missionaries, the Chinese, as an inherently honorable people, were just ripe for the converting.[59]

Those returning to their sponsoring churches in the Mississippi Delta were no different, but they found upon their return Chinese living right there among them, all the more accessible for conversion. Yet they were appalled to discover that their peers were treating such a good and pure race so badly, as if the Chinese were depraved and thus, in their eyes, equal to African-Americans. Having served six years in China before accepting a job as minister of the prestigious First Baptist Church of Cleveland, Mississippi, Dr. Ira D. Eavenson recalled, "The presence of a large number of Chinese merchants and their families [here] made me feel that God was giving me an opportunity to share the Gospel with the same people to whom he had sent me across the ocean."[60] He became deeply disturbed, however, by the state of Chinese-white relations that he viewed before him in the Delta. "It worried me considerably the way we send missionaries to China and work our heads off to save their souls over there, but do nothing for the Chinese over here. It's as if we were only interested in their religion as long as we can keep them at arm's length."[61]

Thus the churches, lead by the likes of Dr. Eavenson, founded Chinese missions right there in the Mississippi Delta; they were determined to lead the crusade in their own backyard. Pastors admonished their congregations to reach out and acquaint themselves with the local Chinese, that as Christians it was their moral duty to do so. Chinese told of receiving unanticipated attention, as whites attempted to persuade them to consider Protestant religion. In the words of one woman, "Whites asked us to go to church all the time, and some even came and picked us up. So we went and became Christians. . . ."[62]

The Chinese became Christians, but not necessarily because they were concerned primarily about the state of their souls. Instead, many were deeply concerned about the state of their position in Delta society. For the Chinese, as Edward Pang aptly described it, the missions became a place where they could "establish relations between whites and [themselves] not only religiously, but more important[ly], socially,"[63] At the missions, the Chinese went to great lengths to show their "upstanding" character, proving their distance from and disdain for African-Americans. They ruthlessly expelled any Chinese who had even the remotest connection to African-Americans. James Chow told the story of one woman who tried to attend the mission. Married to a Chinese man, she was also more than eighty-percent Chinese herself, with barely a drop of black blood in her. Yet when she went to the church, all the Chinese informed her harshly not to come anymore. Chow recalled, "They didn't want the whites to know she had Hok-Guey [African-American] blood in her . . . it was bad for them to be associated with her."[64]

The church did not just provide a forum for the Chinese to court whites, however. In church, unlike elsewhere in the Delta, the Chinese possessed something coveted by whites, the potential for conversion. With a religious fever and zeal, white parishioners encouraged the Chinese to attend church even more than the Chinese were willing to participate. Many Chinese seized upon this and dangled their future baptisms in front of whites, using it as a bargaining tool to gain assistance in acquiring better treatment and greater status in Delta society. Mrs. Lum, Martha's mother, who had been heavily engaged in church activities, informed her fellow churchgoers, "If my children are not good enough to go to your school, we're not good enough to go to your church."[65]

When a local woman interviewed Delta Chinese leaders as part of the Federal Writer's Project, they took the opportunity to voice their complaints concerning the white church. Mrs. Wong, citing the hypocrisy of church actions, noted, "Why, they send American missionaries to China. Why don't they educate the Chinese children who are here, so that they can be potential missionaries? They would not have to learn Chinese; they have that language already." Her husband declared, "For all we are supposed to be God's children, I feel that I am not welcome,

since they don't permit my children to go to school."[66] The Chinese insisted that if whites wanted them to accept Christianity, white parishioners had to address the inequalities faced by the Chinese in the rest of Delta life.

Their words were evidently heard, for by the early 1930s, churches began to provide educational services for Chinese schoolchildren in order to entice more parents into their congregations. Dr. Eavenson set up a plan for teaching a class for the children in English on Sunday afternoon. The Chinese response was tremendous, as the "school" drew crowds of Chinese every Sunday to church. Faculty from the Delta State Teacher's College heard about Eavenson's school and many offered their assistance. Soon classes were expanded well into the week.[67] In Rosedale, Reverend L.A. Streete took it upon himself to conduct "a small school in one of the Sunday school rooms for the Presbyterian church," teaching the Chinese children every day as a full, viable alternative to the colored schools.[68] As more and more Chinese children came, whites increasingly realized the lack of educational opportunities otherwise available to the Chinese. By now, in the eyes of the white parishioners, the Chinese clearly did not belong with African-Americans in the public schools.

Consequently, it did not come as much of a surprise when the Chinese managed to convince white church members in Rosedale to petition the county school board on their behalf to allocate funds for the establishment of a Chinese public school. With a fair amount of influence behind them, the Chinese were granted a charter by the Bolivar County superintendent of education. On September 18, 1933, the first public school specifically for the Chinese opened its doors, with one teacher hired by the town serving seventeen students of all ages.[69] To reach this stage, the Chinese had regimented their behavior. They had slowly but surely changed the minds of whites about them, convincing them that as "non-African-Americans" they deserved far more consideration and privilege.

Florence Sillers Ogden, a town matriarch who even into the 1970s continued to compliment a person for being Aryan, nonetheless commented approvingly on this new development: "Even though barred from the white schools by the Supreme Court, the Chinese with their usual tenacity and continuity for purpose have succeeded in establishing a school of their own . . . which is their inalienable right."[70] Her statement could even be interpreted as indicating that she disagreed with the Court's ruling, showing how far indeed the Chinese had come.

The "public school" provided by the county in 1933, however, merely consisted of paying Reverend Street of Rosedale a paltry salary to teach a small number of Chinese children; at first in a building in the heart of the business district, later just in the study of his home.[71] By 1937, with the churches providing the impetus, plans were underway for the construction of a schoolhouse in Cleveland, Mississippi to serve all the Chinese school children of Bolivar County.[72] Similarly, most of the other major cities of the Delta, such as Greenville and Indianola, began establishing Chinese schools of their own.[73] To ensure that the county officials would not reject the proposal, pastors of the Baptist Church, which wielded great power in the Delta, exhorted members to contribute heavily to the $75,000 needed to erect the envisioned school, chapel and dormitory for their fellow Chinese Christians. Aside from money raised by the Chinese themselves, the churches provided the full amount of the required funds. Having amassed not only significant social, but even financial support from white patrons, only then did the Chinese go to the county board for approval. All that the county was asked to contribute were the salaries of the teachers, a minuscule request in the scheme of things.[74]

Housed in an attractive two-story frame building, painted bright yellow and surrounded by spacious play grounds the new Chinese school presented to one visitor "the model of appearance of an American public school today."[75] In contrast to previous facilities made available to them, this time the Chinese were genuinely provided with a public education comparable to whites. Not only were they taught the same curriculum as their white counterparts, even to the point where they took the same exams, they were also taught by white teachers who had previously been employed at the white public schools.[76] By 1937, the Chinese of the Delta cities had at least managed to throw off one aspect of the stigma placed upon them by the Supreme Court in *Gong Lum*. Chief Justice Taft had ruled

that the state had merely to ensure the Chinese the barest essentials of an education. The community now said otherwise, granting the Chinese a substantively "equal," if still "separate," education. Tackling their continued segregation came next.

Even more than the church, the schools incorporated almost all the Chinese in the large towns of the Mississippi Delta; there were few Chinese children who did not attend after they opened. Through their schools, the Chinese were able to show the establishment their homogeneity and demonstrate that they were just as concerned as whites about preserving their own racial identity. They would never present a threat to nor harm the supremacy and purity of the white race. By the late 1930s, they were looked upon most favorably as a result. Anne McAlpine, after surveying the Chinese community of the Delta for the Works Progress Administration, wrote, "As a whole, the Chinese, while still not fully accepted into all aspects of society," namely the white schools, "are liked and respected, nonetheless, by all who cannot fail to admire their honesty and integrity."[77]

World War Two further reinforced and validated such impressions of the Chinese. As they grew ever more wary of Japan and its intentions, Americans found themselves allied with the Chinese who faced the same threat. Consequently, throughout popular literature and culture, a view of the Chinese emerged which overwhelmingly praised and celebrated the Chinese character. For the first time since 1882, the nation lifted its ban on Chinese immigration, which ostensibly meant that they now qualified as "free white peoples."

In the Delta, the Chinese seized the opportunity to prove themselves once and for all the epitome of "good citizens." Their leaders mobilized and cajoled almost all the Chinese into contributing to the war effort. Joe Tong Im collected for the Chinese Refugee Fund. L.Y. Pang and his brothers drove all over the Delta trying to raise money from Chinese to add to the war chest against Japan.[78] Ong Beng was secretary-treasurer of The Chinese Against the Japanese Invasion. He recalled, "We raised about $50,000 for a war bond. That was a lot of money in those days."[79] The white establishment was suitably impressed. Roberta Miller, a retired school teacher, recounted, "With World War Two, China became an ally of the U.S., and Delta Chinese were exceptionally proud of that event. People saw them with new respect. White attitudes changed."[80]

White attitudes changed to the extent that in the immediate years following World War Two, virtually every white public school in the Delta opened to the Chinese. All the separate Chinese schools in the various cities were shut down. The specific circumstances sparking each individual town's decision to allow Chinese admittance seemed to have differed vastly, but they all essentially concurred with Greenville public schools board President Henry Starling. In a press conference announcing his board's 1945 decision to allow the Chinese into their schools, he declared, "It is purely a matter of democracy . . . as the children of native Chinese strain are pupils of high scholastic and character standards."[81] Just as in the small rural towns of the Mississippi Delta twenty years earlier, the whites of the large communities realized that as the Chinese integrated with them in all other facets of their lives, becoming their fellow parishioners, civic-minded neighbors, and even their friends, they could no longer justify excluding the Chinese from their schools. Hence the effect of *Gong Lum* upon the Mississippi Delta Chinese was, in the end, negligible. For the lives of the Chinese there, seen as near-whites not African-Americans, accepted by the community and in the school system again, it was as if the decision had never been handed down.[82]

Although the tale of *Gong Lum* ended not unhappily for the protagonists, it leaves behind a far bleaker moral, presenting a discomforting portrayal of race relations and the functioning of justice in American society. In the years following *Brown v. Board of Education* (1954) a sizable segment of the population which avoided integrating with African-Americans were, not surprisingly, Chinese students who had been fully accepted in the white public schools. They, like many whites, sought escape to "all white" private institutions, which fully embraced them. Indeed one Chinese woman became the head mistress of such a bastion, which educated over 1,250 students from the Delta, not one of them African-American.[83] After having worked so hard to defy one court decision placing them with African-

Americans in school, Chinese did not intend to allow another one to accomplish the same end.

Upon hearing the story of the Mississippi Delta Chinese, one is left to question the efficacy of the Supreme Court in meting out racial equality. More disturbing, however, are the ramifications that the Court's failure to ensure rights had on the Chinese of the Delta. Left to their own devices, they could acquire acceptance from the establishment with their explicit approval and assistance in the denigration and further oppression of African-Americans. It leaves one to ponder the price of that assimilation when "justice" could come to the Chinese only at the expense of African-Americans.

Endnotes

[1] Alexander Bickel and Benno Schmidt, ***Oliver Wendell Holmes Devise History of the Supreme Court of the United States. The Judiciary and Responsible Government: 1910-1921*** (New York, 1984).

[2] *Gong Lum v. Rice*, 275 U.S. 78 (1927).

[3] Bickel and Schmidt, ***The Judiciary and Responsible Government: 1910-1921.***

[4] Catherine Caldwell, in a phone interview with author, Rosedale, Mississippi, March 14, 1994. She is an eighty-four-year-old white woman, among the upper crust of the community who has resided in Rosedale all of her life.

[5] From the district court papers, docket no. 6122, Circuit Court First Judicial District Bolivar County, Mississippi. *Gong Lum, et al. v. Trustees Rosedale Consolidated High School, et al.* Mississippi Department of Archives and History.

[6] ***The Alcorn Family***, compiled by Lavitor Alex Gilliam, Jr., 74. Courtesy of the Coahoma County Library, Clarksdale, Mississippi. See also various obituaries of William Alcorn, among them ***Clarksdale Register and Daily News***, February 14, 1942; Vol. 34. No. 62, p. 1. Also Mary Fisher Robinson, "Sketch of James Lusk Alcorn," ***The Journal of Mississippi History***, ed. William D. McCain, vol. XII, January, 1950, 28+.

[7] ***History of Bolivar County, Mississippi***, compiled by Florence Warfield Sillers, regent and member of the Mississippi Delta Chapter of the Daughters of the American Revolution and the County History Committee. (Jackson, Mississippi, 1948) p. 21. William A. Alcorn held office as district judge from 1913 to 1942. He could proudly claim he never came close to losing an election. ***The Alcorn Family***, compiled by Lavitor Alex Gilliam, Jr., p. 74. See also various obituaries of William Alcorn, among them ***Clarksdale Register and Daily News***, February 14, 1942; Vol 34, No. 62, p. 1.

[8] James Loewen, ***Mississippi Chinese: Between Black and White***, (Cambridge, Mass., 1971) pp. 17-19.

[9] George Albert Rummel III, "Delta Chinese: An Explorative Study in Assimilation." Master's Thesis, University of Mississippi, 1966, p. 89.

[10] Loewen, ***Mississippi Chinese***, 26-30. See also Stanford Lyman, ***Chinese Americans*** (Cambridge, Mass., 1974).

[11] From all accounts, including James Loewen, George Rummel, and WPA sources, all but three Chinese families were engaged in the grocery store business. In the 1940s, the 900 Chinese living in the area operated a total of over 300 such stores.

[12] George Rummel and Betty Price, "A Vanishing Culture," ***Mississippi Magazine***, vol 5., 1965, p. 15. Confirmed by Arlee Hen and Berda Lum in oral interview, 1983 ***Mississippi Triangle***. The only two books which deal specifically with the Delta Chinese both go into greater detail about the workings of the old store system, and Chinese exploitation of its flaws. See James Loewen, ***Mississippi Chinese*** pp. 32-57, and Robert Seto Quan, ***Lotus Among the Magnolias: The Mississippi Chinese*** (Jackson: MS, 1982).

[13] Loewen, ***Mississippi Chinese***, p. 37.

[14] Transcript summary of an oral interview with Henry Goon, Greenville, Mississippi, 1981, conducted for the Mississippi Project, James Loewen Papers. See also Rummel "Delta Chinese." p. 24.

[15] Interview with white merchant, cited in Rummel, "Delta Chinese" p. 34. See also Quan, ***Lotus Among the Magnolias***, p. 43.

[16] Interview with an elderly Chinese, cited in Quan, ***Lotus Among the Magnolias***, p. 13, and Loewen, ***Mississippi Chinese***, pp. 26-30.

[17] Summary transcript of oral interview with Arlee S. Hen, Greenville, Mississippi, May 5, 1981, conducted for the Mississippi Project, James Loewen Papers. She claims her father, Charlie Sing, entered the Delta in the early 1870s, making him virtually one of the first Chinese in the area.

[18] Oral interview with Arlee Hen, Mississippi Delta, 1983 ***Mississippi Triangle***. She died while the film was being made. See also summary transcript of oral interview with Arlee Hen, Greenville, Mississippi Delta, May 5, 1981. Conducted for the Mississippi Project, James Loewen Papers. One of the few Chinese children around in the early years of the Chinese settlement in the Delta, due to the lack of Chinese women, her insights were particularly helpful and valuable—as she was one of the few people still alive in the 1980s who remembered the early settlement,

[19] Stanford M. Lyman, in the foreword to Quan, ***Lotus Among the Magnolias***.

[20] Summary transcript of oral interview with James N. Chow, Greenville, Mississippi, May 1, 1981, conducted for the Mississippi Project, James Loewen Papers.

[21] Summary transcript of oral interview with Arlee Hen.

[22] Interview with Julian Roebuck and Robert Seto Quan cited in Lillian Mirando, "Delta Lotus: Quan Relates Inside Story of Chinese Culture in Delta," ***Clarion Ledger***, 8-15-82, p. 16. Indeed by 1920 the communists had begun mass agitation in the mainland. Author's interview with Roebuck confirmed the dissipation of sojourner mentality among Chinese. Efforts to locate Quan to interview were unsuccessful.

[23] Summary transcript of oral interview with Arlee Hen.

[24] 16th Census of the United States: 1940 Population, vol. II shows in 1890 only two Chinese women for the 145 men in Bolivar County, which had the largest concentration of Chinese in the Delta. In 1900, thirteen women to 224 men; 1910, twenty-two women to 235 men; 1920, fifty-one women to 313 men; 1930, 123 women to 438 men; 1940, 226 women to 517 men. See also Lyman, foreword to Quan, ***Lotus Among the Magnolias***, xi.

[25] Florence Sillers Ogden's observation about the Chinese, "Chinese in Rosedale," unpublished manuscript 1933, Sillers Family Papers, Delta State College Archives, Cleveland, Mississippi, p. 1. See also Robert W. O'Brien, "Status of Chinese

in the Mississippi Delta," ***Social Forces***, ed. Howard W. Odum, vol. 19, 1941, p. 389. By 1930 there were already 200 or more Chinese children in the Delta.

[26] Julian Roebuck in phone interview with author, Starksville, Texas, February 9, 1994. See also summary of transcript of oral interview with Dr. Charles Williams, Memphis, Tennessee, 1981, conducted by Sonja Green for the Mississippi Project, James Loewen Papers. An African-American who grew up amongst the Chinese grocery stores in the Delta, he stated that as a child he felt that the Chinese stayed aloof from blacks, not wanting to antagonize whites.

[27] Transcript of oral interview with Daisy M. Greene, Greenville, Mississippi, 1976, conducted by Clinton Bagley, Mississippi Department of Archives and History, Mississippi Oral History Collection.

[28] Oral interview with Arlee Hen, Mississippi Delta, 1983, ***Mississippi Triangle***.

[29] Cited in Quan, ***Lotus Among the Magnolias***, p. 44.

[30] Virginia Winkleman Lee, "For the Delta—Nation's First Chinese Community Education Center." ***Memphis Commercial Appeal***. February 14, 1937

[31] Ogden, "Chinese in Rosedale," pp. 3-4. See also O'Brien, "Status of Chinese in the Mississippi Delta" ***Social Forces***, p. 386.

[32] Summary transcript of oral interview with Pap Pang, Marks, Mississippi, 1981, conducted for Mississippi Project, James Loewen Papers.

[33] Ogden, "Chinese of Rosedale," p. 5. See also Loewen, ***Mississippi Chinese***, p. 82.

[34] "Small towns" connotes here usually a population under 10,000. Loewen, ***Mississippi Chinese***. There are many small towns dotting the Mississippi Delta. Granted, not every small town received the Chinese warmly. However, the documents, including the WPA reports and transcripts of interviews conducted for the Mississippi Project, indicate that many did, and those that did not had greater tensions and struggle between whites and African-Americans. The whites in those towns did not have unquestioned authority over the African-American community.

[35] Summary transcript of oral interview with Chester Ju, Cleveland, Mississippi, April 26, 1981, conducted for the Mississippi Project, James Loewen Papers.

[36] Loewen, ***Mississippi Chinese***, p. 80.

[37] Summary transcript of oral interview with Berda Lum (married name Chow), Houston, Texas, May 8, 1981, conducted for the Mississippi Project, James Loewen Papers.

[38] Oral Interview with Berda Lum, Houston, Texas, 1983. ***Mississippi Triangle***. Also summary transcript of oral interview with Berda Lum, Houston, Texas, conducted for the Mississippi Project, James Loewen Papers.

[39] Douglas McDonald, Rosedale's Educational Development: 1876-1976," in Curt Lamar, ed., ***History of Rosedale, Mississippi: 1876-1976***, (Spartansburg, SC, 1976) p. 53.

[40] Statement of facts in *Gong Lum v. Trustees of Rosedale Consolidated High School.*

[41] Rosa Lee Black in phone interview with author, Yazoo City, Mississippi, March, 14, 1994.

[42] Oral Interview with Berda Lum, Houston, Texas, 1983 ***Mississippi Triangle***. In letter to author, James Loewen states he visited the firm of Brewer and Brewer which is still in existence, but they did not have any records of their work on the case. Judge John Pearson, who presided over the Bolivar first district court for many years and seems to know almost everyone in the area, could not think of any Brewer descendants left.

[43] Petition submitted in *Gong Lum v. Trustees of Rosedale Consolidated High School.* Mississippi Department of Archives and History.

[44] Decision in *Gong Lum v. Trustees Rosedale Consolidated School District.* Mississippi Department of Archives and History.

[45] Summary transcript of oral interview with Pap Pang, Marks, Mississippi, 1981, conducted for the Mississippi Project, James Loewen Papers.

[46] For examples of African-American endeavors during this period, see ***African American Social and Political Thought, 1850-1920***, Howard Biotz, ed., (New Brunswick, 1992). See also writings of Langston Hughes, Marcus Garvey, Zora Neale Hurston.

[47] Although the treatment was the same, the stereotypes associated with the prejudice were different between California Chinese and southern African-Americans. Both were based upon a notion that neither group was "human," but while African-Americans were portrayed most often as subhuman, savage, and indolent, thus a threat; the Chinese were more likely depicted as superhuman, machinelike and subversively clever, thus a threat. See Senator John Miller, "Speech on Chinese Exclusion," 1882.

[48] *Wong Him v. Callahan*, 119 Fed. 381 (1902). Unlike the Delta, in San Francisco African-Americans could legally attend school with whites. The Chinese there, however, could not. Cited in Victor Low, ***The Unimpressible Race: A Century of Educational Struggle by the Chinese in San Francisco*** (San Francisco, 1982), p. 85.

[49] *Rice v. Gong Lum* 139 Miss. 760 (1925).

[50] *Ibid.*

[51] *Gong Lum v. Rice* 275 U.S. 78 (1927).

[52] O'Brien, "Status of Chinese in the Mississippi Delta," ***Social Forces***, pp. 387-8.

[53] Transcript of oral interview with Daisy M. Greene, Greenville, Mississippi, 1976, conducted by Clinton Bagley, subject file Chinese of Mississippi, Mississippi Department of Archives and History.

[54] Lyman, in foreword of Quan, ***Lotus Among the Magnolias***, xii. Baptists, the largest denomination in the area, especially allowed many Chinese children into their parochial schools.

[55] ***Cleveland: A Centennial History 1886-1986***, Linton Weeks, ed., (Cleveland, MS, 1985) p. 134.

[56] Summary transcript of oral interview with H. Wong, of Rosedale, Mississippi, 1939, conducted by Anne McAlpine, WPA Federal Writer's Project Files for Chinese of the Delta - Bolivar County - Life History of the H. Wong Family. Mississippi Department of Archives

[57] Summary transcript of oral interview with Berda Lum, Houston, Texas. 1981.

[58] Jonestown initially intended to abide by the Court decision, expelling John Wing from school. But within a year, his father "worked it out through the white doctors and lawyers" who were family friends to allow him to return. The inclusion of Chinese in the white schools was never questioned again. Summary transcript of oral interview with John Wing, Mississippi Delta, 1981, conducted for the Mississippi Project, James Loewen Papers.

[59] Much scholarship, especially at Yale, has been done about the Protestant churches' relationship to the Chinese in China during this time. For a firsthand account of missionaries' positive depiction of the Chinese see Pearl S. Buck, ***The Good Earth*** (New York, 1931). It was a phenomenal best-seller, and did much to modify people's stereotypes and impressions of the

Chinese.

[60] Interview with Ira D. Eavenson cited in ***History of Bolivar Baptist Association of Mississippi***, compiled by the Historical Committee of the Bolivar Baptist Association. (Bolivar Baptist Association, 1988) p. 35.

[61] Interview with Ira D. Eavenson cited in Virginia Winkleman Lee, "For the Delta—Nations First Chinese Community Education Center." ***Memphis Commercial Appeal.*** February 14, 1937.

[62] Interview cited in Quan, ***Lotus Among the Magnolias***, p. 36.

[63] Summary transcript of oral interview with Edward Pang, Greenville, Mississippi, May 2, 1981.

[64] Summary transcript of oral interview with James N. Chow, Greenville, Mississippi, May 1, 1981.

[65] Summary transcript of oral interview with Berda Lum, Houston, Texas, May 8, 1981.

[66] Summary transcript of oral interview with H. Wong, and Mrs. H. Wong, of Rosedale, Mississippi, 1939. Conducted by Anne McAlpine. WPA Federal Writers's Project Files For Chines of the Delta-Bolivar County-Life History of the M. Wong Family. Mississippi Department of Archives and History.

[67] ***History of Bolivar Baptist Association of Mississippi***, p. 117.

[68] Ogden. "Chinese in Rosedale," p. 1.

[69] *Ibid.*, See also Douglas McDonald, "Rosedale's Educational Development: 1876-1976," ***History of Rosedale, Mississippi: 1876-1976 Its Creation, Pioneer Days and Progress in the Heart of the Mississippi Delta***, p. 53, and Anne McAlpine, WPA Federal Writers' Project Files for Chinese of the Delta-Schooling -Bolivar County. Mississippi Department of Archives and History.

[70] Ogden, "Chinese in Rosedale," pp. 1, 6.

[71] Anne McAlpine, WPA Federal Writers' Project Files of Chinese of the Delta - School - Bolivar County. Mississippi Department of Archives and History.

[72] ***History of Bolivar Baptist Association of Mississippi***, p. 35. Of all the Delta counties, Bolivar has always had the highest concentration and largest number of Chinese in the Mississippi Delta. Its major city is Cleveland.

[73] Greenville is the largest city in the entire Mississippi Delta. Some of the more middling to moderate towns throughout the Delta also seemed to have established some sort of "public school" for the Chinese. There is documentation that in addition to the cities mentioned, Ruleville, Duncan and Shaw also had at one point in the 1930s a school for Chinese. However, author found little documentation available on them beyond the mere fact that they existed, but she also focused primarily on Bolivar County. See WPA files on the various counties of the Mississippi Delta.

[74] ***History of Bolivar Baptist Association of Mississippi***, pp. 35, 117. Mississippi Department of Archives and History.

[75] Anne McAlpine, WPA Federal Writers' Project Files for Chinese of the Delta - School - Bolivar County. Mississippi Department of Archives and History.

[76] Ruth F. Walker, WPA Federal Writers' Project Files for Chinese in the Mississippi Delta. Mississippi Department of Archives and History.

[77] Anne McAlpine, WPA Federal Writers' Project Files for Chinese in the Mississippi Delta. Mississippi Department of Archives and History.

[78] Summary transcript of oral interview with Y. Pang, Marks, Mississippi, April 29, 1981. Also summary transcript of oral interview with Joe Tong Im, Cleveland, Mississippi, 1939, conducted by Anne McAlpine, WPA Federal Writers' Project Files for Chinese of the Delta - Bolivar County. Mississippi Department of Archives and History.

[79] Interview cited in Quan, ***Lotus Among the Magnolias***, p. 50.

[80] Summary transcript of oral interview with Roberta Miller, Greenville, Mississippi, April 5, 1981, conducted for the Mississippi Project, James Loewen Papers.

[81] Cited in Loewen, ***Mississippi Chinese***, 98.

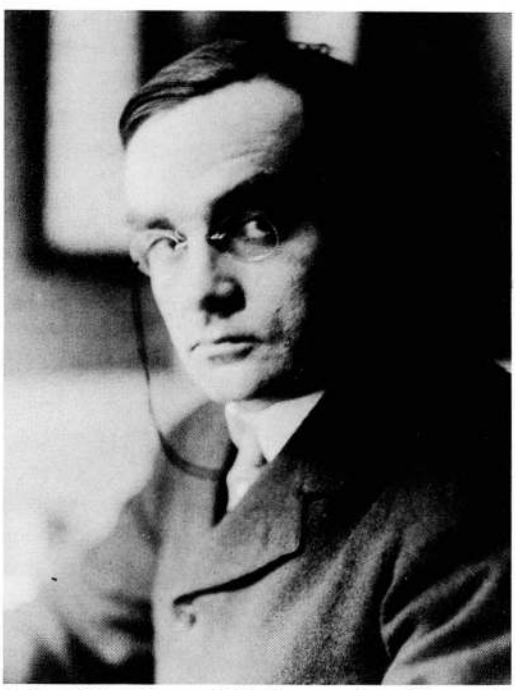
[82] Just as before in the small towns of the Delta pre-1927, the larger towns in the 1940s and as late as the 1950s still had some who discriminated against the Chinese. Thus people like John Wing complained that he felt much discrimination as a child growing up in the Delta. When asked to describe some incidents, he mentioned such things as the fact that when his brothers were on the football team at school, kids from other schools they played against sometimes wouldn't want to play opposite a Chinese; or how some students objected to standing in line with him at graduation from junior high. He complained he was never able to get dates with white girls. "Most of them wouldn't even talk to you." Obviously, then, discrimination existed, but this sort of discrimination was minor, on a very individual level. Wing clearly was not forbidden to do any of the things whites were, he had every opportunity they did. Indeed he went on to become one of the youngest mayors of the town. Summary transcript of oral interview with John Wing, Jonestown, Mississippi, April 29, 1981. In comparison to African-Americans, Chinese did not face any institutional or systemic racism or discrimination after World War II. In the late 1940s, after the Chinese also were allowed admittance into the local colleges, they realized they weren't being asked to join the popular sororities or fraternities, so they formed their own "Lucky Eleven," which mirrored white social organizations and held Delta-wide dances and socials for the Chinese youth. Rachel Sit Wong described their situation best when she said, "I would say that some of us were popular, in the sense that we could talk with all the white kids and participate in the extracurricular activities. We fitted in quite nicely, we thought. But when it came to slumber parties or things like that, you could hear them talking about it and we weren't included." Yet many white children not as popular were not included either. ***The Big Event 1987: A Celebration and Reunion***, yearbook compiled for the Southern-Chinese Heritage Convention, December 27, 1987 Washington County Convention Center, Greenville, Mississippi.

[83] Summary transcript of oral interview with Audrey Sitney, Greenville, Mississippi, May 3, 1981, conducted for the Mississippi Project, James Loewen Papers.

Learned Hand, The Man the Judge
A Review Essay

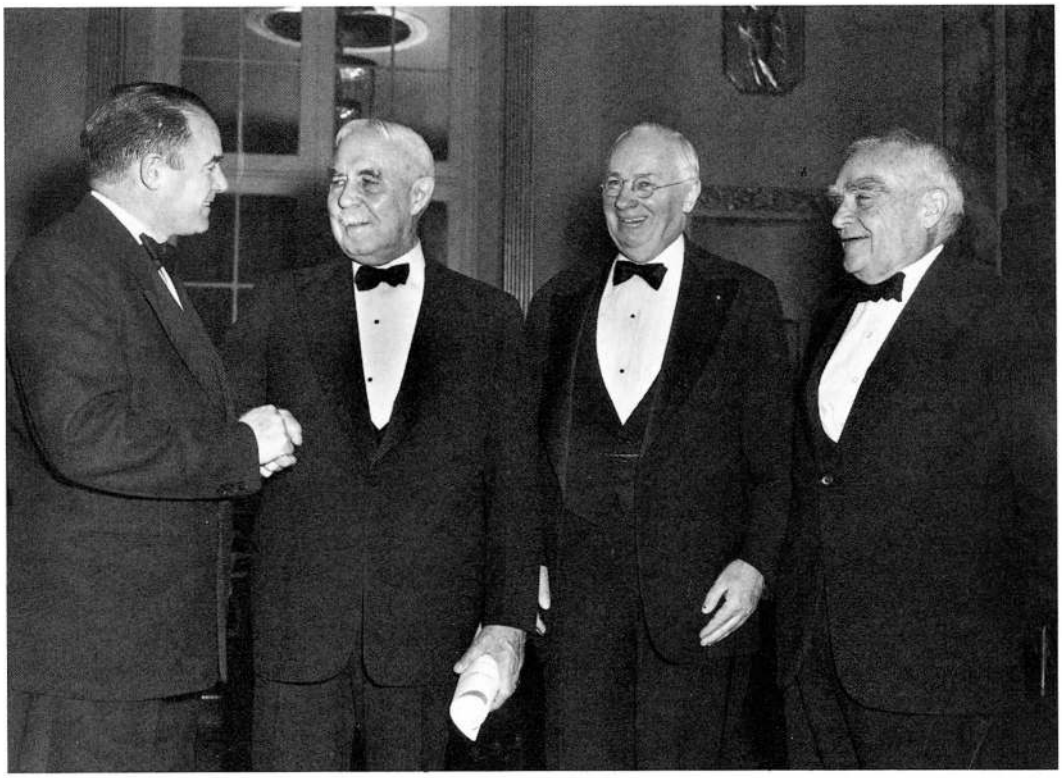
David W. Levy[1]

That *this* journal, devoted as it is to the history of the Supreme Court of the United States, should be reviewing a biography of Learned Hand, a judge, after all, who never made it onto that august body, is in itself revealing. The decision to do so seems entirely appropriate for at least two reasons. In the first place, Judge Hand's judicial opinions, by virtue of their shrewd reasoning and craftsmanship, very often insinuated themselves into the law handed down by the High Court. And second, if there was *anything* that people who followed public affairs between 1920 and 1950 knew for a fact, it was that Learned Hand, as much as any jurist in American history, *belonged* on the Supreme Court.



Judge Billings Learned Hand was perhaps the greatest judge never appointed to the Supreme Court.

Billings Learned Hand was born in Albany in January 1872. He entered the world burdened both by that ponderous name (concocted, as was the habit on his mother's side, by using family surnames for given ones), and by the clear expectation that he would study the law. The men in his family—his grandfather, his father, his two uncles—gravitated to the legal profession almost as a matter of course; his cousin Augustus Hand, a lifelong confidant and longtime colleague on the bench, was to have almost as distinguished a career as Learned himself. It was a curious family and it left its marks on the boy. His father, who was studious and reserved, died when his son was fourteen, and Learned was raised by a household of doting women. His mother devoted herself partly to perpetuating an exaggerated version of



Truman Administration Attorney General J. Howard McGrath (left) shakes hands with Judge Augustus Hand as John F. Borsnan, President of the New York County Lawyers' Association, and Judge Learned Hand look on at the 1951 Dinner of the Lawyers' Association. Judges Hand and Hand were first cousins who served together on the U.S. Court of Appeals for the Second Circuit.

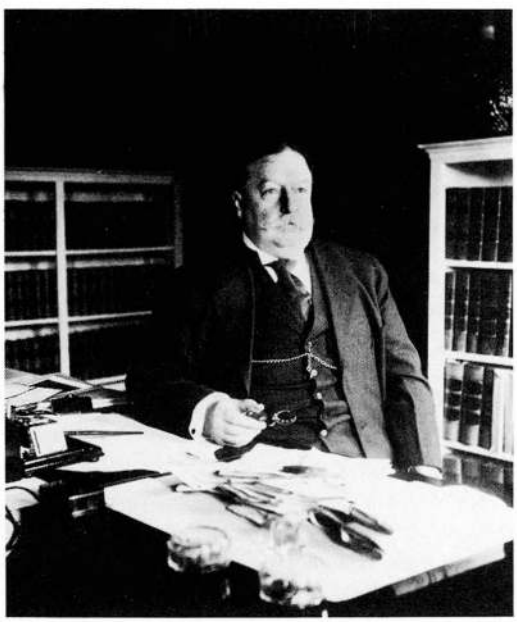
her lost husband's merits, a legend that put her son under considerable pressure to succeed, and partly to showering him with insistent and worried advice and with incessant demands—for decades Judge Hand felt obliged to assure her in almost daily letters that he was healthy and getting plenty of rest.

The Hands were prosperous and comfortable, but not well enough situated, when the time came, to secure the youngster entry into Harvard's most prestigious clubs. Despite his reputation for brains, therefore, he felt himself to be something of an outsider in college. Like so many other bright young outsiders of that "golden age" in Harvard's history, Hand was captivated by the Department of Philosophy. He admired William James and Josiah Royce and fell quite under the spell of George Santayana. Acknowledging that philosophy "attracted me more than anything else,"(Gunther, 33) Hand experienced a brief moment of hesitancy about fulfilling the family's expectations regarding the normal legal career. In the end, according to his biographer, "he took the path of least resistance" and "drifted" into Harvard Law School. But, in one of the many fine passages in this splendid biography, Gerald Gunther writes: "In 1893, Learned thought that he had turned his back forever on the searching intellectual quests he had admired in the great philosophers. He did not yet know that he would overcome and transcend the distinction between the lawyer's life of 'action' and the philosopher's life of 'contemplation.'"(42-43)

If Learned Hand entered Harvard Law with misgivings, they were quickly dispelled. In the first place, he discovered there a group of dedicated and inspiring legal scholars. They had been called together by President Charles W. Eliot and his pioneering dean, C.C. Langdell, and they revolutionized legal education during the last three decades of the nineteenth century. Hand was particularly attracted by James Bradley Thayer, a strong proponent of the judicial restraint that would characterize Hand's own career as a judge. In the second place, the young scholar found the Law School to be a genuine meritocracy,

where his ability and diligence were appreciated and encouraged. Unfortunately, Hand found himself poorly equipped by temperament for actual legal practice. To the irritation of his relatives, he seemed unable to strike an advantageous financial arrangement with any of the firms he got attached to. But even more serious, his strength was in quiet, constructive legal thought, not in glib and agile courtroom advocacy. Nevertheless, Hand practiced law, first in Albany and then in New York City, from his graduation in 1896 until 1909.

At the end of 1902, when he was thirty, he married Frances Fincke, a witty, attractive, and self-possessed Bryn Mawr graduate. Their partnership, which lasted until Hand's death sixty years later, was peculiar; no doubt it gave Hand much joy at the same time that it must have caused him considerable anguish. Before the marriage Frances had a particularly close relationship with Mildred Minturn, a Bryn Mawr house-mate whose warm friendship continued after college and after Frances' marriage to Hand. The two once had hoped to live together forever and wrote such fervid and intimate letters that Gunther feels it necessary to state that "there is no indication that their relationship was ever marked by overt sexual behavior."(95) After Mildred married, Mrs. Hand took up with a Dartmouth French professor named Louis Dow in a relationship, Gunther writes, that "was bound to raise eyebrows."(184) While Learned labored over his judicial duties in New York, Frances and Louis would be taking long walks and reading poetry together up in Cornish, New Hampshire; occasionally they went to Europe together without Learned. Once again, Gunther assures us that "there is no proof that Frances Hand and Louis Dow ever had a physical affair, though some speculated that they were lovers."(187) Throughout the whole business (which lasted until Dow's death in the mid-1940s), the two men maintained a warm friendship—indeed, Walter Lippmann, who had no doubts about the relationship, is reported to have remarked that "the first task of [Hand's] biographer will be to enquire why he remained for so long on such good terms with his wife's lover."(712)



President William Howard Taft appointed Learned Hand district judge for the Southern District of New York in 1909—a position he held until 1924 when he was appointed as an appellate judge for the Second Circuit. However, Taft actively blocked Hand's nomination to the Supreme Court in the 1920s, having never forgiven Hand for supporting Theodore Roosevelt and the Bull Moose Party in 1912.

In 1909, President Taft named Hand to be a district judge. He secured the appointment partly because his articles were earning him a growing reputation as a first class legal mind and partly because some well placed New York friends appealed on his behalf to Taft and his Attorney General. In any case, Learned Hand had escaped from his unhappy life as a practicing lawyer and entered the arena where his great talents would find their most fruitful and influential expression. The traits that made him a great jurist, as Gunther convincingly shows, were analytic power of a very high order, absolute intellectual integrity that encompassed the courage to do what was unpopular, and a sense of his own fallibility which led to open-minded tolerance and consistent self-restraint. He also had the ability to express the results of his thinking in unusually lucid and incisive prose. Over the course of the next fifty years, Hand poured these qualities into more than four thousand opinions—from 1909 to 1924 as a district judge for the Southern District of New York, and from 1924 until his retirement, as an appellate judge for the Second Circuit.

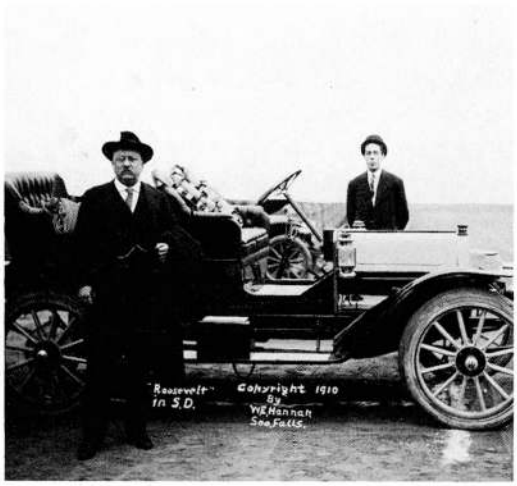
In general, historians of the Supreme Court occupy themselves with trying to explain how

Judge Learned Hand had an impressive array of admirers including Oliver Wendell Holmes, Jr., who named Hand to his "ideal" Court, and Louis Brandeis, who said that "Hand's opinions are the best Federal Court opinions that come before us to review."

one or another person got appointed; in the case of Learned Hand the job has always been to explain how he got passed over. From the start he was recognized by his colleagues as an exceptionally able judge. In 1923, Oliver Wendell Holmes and Harold Laski named him to their "ideal" Court. Benjamin Cardozo complained that "the greatest living American jurist isn't *on* the Supreme Court."(ix) Brandeis, who evaluated the work of the lower court judges with a stern schoolmaster's eye, told Felix Frankfurter: "Learned Hand's opinions are the best Federal Court opinions that come before us for review." (272) During the 1920s and 1930s, however, the admiration of Hand spread beyond the initiated and into the literate general public. Some of this was due to praise by the judges, the law professors, the journalists; some of it can be attributed to Hand's periodic entrance into public causes; some of it was because he was so quotable and so magisterial in appearance—with that wise face and those prodigious eyebrows; some of it, one suspects, came because of that first name of his.

Gunther's explanations for why, despite this reverence from many quarters, Hand was never appointed to the Supreme Court, are simple and persuasive. During the 1920s, Chief Justice Taft, who had originally appointed Hand to the federal bench in 1909 but who never forgave him for taking an active part against him in the Bull Moose campaign of 1912, lobbied successfully against him with the Republican presidents. After a meticulous review of the evidence, Gunther concludes that Hand had a genuine chance at the nomination in 1930; by one scenario, Hoover would promote Justice Harlan Fiske Stone to replace Taft as Chief Justice and fill Stone's seat with Hand. Instead, Hoover bowed to conservative pressure and named the elder statesman of the Republican Party, Charles Evans Hughes, to replace Taft. Hand's best opportunity, and his last, came in 1942 when Justice Byrnes resigned, at Roosevelt's request, to help in the war effort. An enormous effort to persuade Roosevelt to choose Hand, now seventy years old, was launched by an impressive array of the Judge's friends and admirers. In the end, however, the President, who had publicly based his attempt to "pack" the Court four years earlier on the excessive age of the Justices, felt unable to name Learned Hand. Thus one of the most eminent and highly regarded judges in the United States finished out his career on the Court of Appeals. Hand continued to perform his judicial duties (despite a formal retirement in 1951) until shortly before his death in August 1961.

The figure that emerges from this monumental biography is remarkably complex. Learned Hand lived his life and carried out his duties exquisitely suspended between a pair of tensions, tensions so intricately and uniquely balanced that they imparted to his judicial career a splendid equilibrium. The first tension was between his nagging self-doubt on the one hand and his professional need to make decisions on the other. The self-doubt, the uncertainty, the constant questioning of his own abilities was very pronounced in Hand. He recognized and lamented the trait in himself, admitting again and again that he was tortured by an "unconquerable nervousness and lack of confidence," and that he was "so full of fears and so vacillating."(57, 85) His most intimate friends also saw it. His cousin Augustus constantly urged him to overcome his "brooding," and, at the end of his life, Frankfurter spoke



Theodore Roosevelt left the White House in March 1909 intent on big-game hunting and retirement. However, after the Republican party suffered severe losses at the hands of Democrats in the 1910 Congressional races, Roosevelt reentered politics as the presidential candidate of the Progressive, or Bull Moose party. Judge Learned Hand served as an advisor on judicial affairs to Roosevelt during the campaign.

of him as being "buffeted and battered by the largest self-doubt of any human being I have ever encountered."(673) This morbid strain in him was probably encouraged by the unattainable standards imposed by the myth of his deceased father, by the feeling that he was never meeting his mother's expectations, by his rejection by the exclusive clubs at Harvard, by his lack of success as a practicing lawyer, by the knowledge that his wife preferred the company of another man. And yet, Learned Hand had actively campaigned for and for fifty years practiced a profession—perhaps more than any other—that required serene decisiveness, resolution, and confidently expressed finality.

The second tension that held Hand's life in a kind of precarious balance was between his strong liberal views, extending upon occasion even to his enlisting himself in liberal causes, and his judicial philosophy which stressed cool-headed impartiality, skepticism, and the sort of self-restraint that warned judges against imposing their own versions of social and economic rectitude. As a sitting judge he entered the presidential campaign of 1912 on behalf of the Bull Moose Party, writing planks for the platform and advising Roosevelt on judicial affairs. He was intimately involved with the founding of the liberal magazine ***The New Republic*** and wrote anonymous articles and editorials for it. He worked actively against anti-Semitic quotas and held very firm opinions on everything from the Treaty of Versailles to the minimum wage, from the expulsion of socialists from the New York legislature to the deportation of strikers from Bisbee, Arizona in 1917. These activities and views stemmed from a passionate engagement with the world of affairs and from a genuine sympathy with poor and working Americans. At the same time, Hand was (along with Justice Holmes who was his model in this) one of the most consistent and eloquent practitioners of judicial restraint. Like his old teacher James Bradley Thayer, Hand detested judges who arrogated to themselves the authority to enact their private views. "The spirit of liberty," he said in his most famous remark, "is the spirit which is not too sure that it is right . . . ."(549)

Somehow the diverse elements in his makeup—his self doubt and his decisiveness, his passionate commitment and his judicial reserve—failed to force him into paralysis. Instead his traits combined fruitfully, checking what might otherwise have been excesses of modesty or authoritarianism, the perils of exorbitant crusading or of cloistered contemplation. It is apparent, for example, that his judicial self-restraint was the product not only of his teachers and his logic, but of his temperamental hesitancy and personal doubts about his own wisdom.

To say that this biography eclipses everything written previously about Learned Hand is to say the very minimum. Gunther, whose reputation for erudition was already well established by his marvelous casebook on constitutional law, has added to his scholarly standing by this notable achievement. He has combed thousands of documents and letters, and he has combined his assiduous digging with wise and intelligent generalizations and fine writing. He maintains a skillful balance between his subject's life and the social, economic, and political contexts in which that life unfolded. It is true that Gunther has not been able to avoid the pitfall of all judicial biography, the chronological confusion that comes from pursuing lines of thought that surface sometimes at wide intervals in a jurist's life. Thus, for example, his full and illuminating discussion of the courageous 1917 decision in Hand's principal free speech decision, *Masses Publishing Co. v.*

Patten, occurs seventy-five pages before his account of Hand's work on Theodore Roosevelt's platform in 1912. But the author should not be criticized for failing to find a solution to a difficulty that has plagued so many others who write about judges.

Gunther served as a law clerk to Hand in the mid-1950s, and he closes his "Preface" by confessing "I began work on this biography despite the fear that my admiration might preclude an absolutely unprejudiced portrayal of the man and the judge; I end hoping that I have pictured him fully, warts and all. He remains my idol still."(xviii) There are undoubtedly some things in this account that would cause Learned Hand some pain to read, for the warts are fully described. But it is hard to believe that the Judge would not greatly admire the balance and the honesty, the thoroughness and the craftsmanship of his former clerk's work.

Endnote

[1] Gerald Gunther, ***Learned Hand, The Man the Judge*** (New York: Alfred Knopf 1994).

Justice Lewis F. Powell, Jr.: A Biography
A Review Essay

Norman Dorsen

This excellent book[1] describes Justice Lewis Powell's hugely successful life in the law. Powell made his vocation not only a career, but a life, and his eighteen years on the Supreme Court were merely the culmination of many personal and professional achievements. In an age when aspirants mount vigorous campaigns for a seat on the Supreme Court, Powell's pre-Court status and life-style are implied by his strong resistance to the appointment and by his wife Josephine's comment on the occasion of his swearing-in as "the *worst* day of my life. . . . I am about to cry."[2]

Justice Lewis F. Powell, Jr., with his family the day of his investiture to the Supreme Court, January 7, 1972. His wife, Josephine, called the day "the *worst* day of my life. . ." Justice Powell spent fifteen years on the Supreme Court.

Powell grew up securely as the son of a rough-hewn and eventually prosperous small businessman and a mother from a more genteel background, both of old Virginia stock. He attended private schools in Richmond, where he developed Spartan work habits and excelled academically. Powell then engaged in a "low-risk rebellion"[3] by choosing to attend Washington and Lee University and its law school rather than the highly regarded University of Virginia. He was a spectacular success at Washington and Lee, "a leader in almost every aspect of college life."[4] He was president of the student body, managing editor of the student newspaper, member of exclusive fraternities, Phi Beta Kappa, and a social (but not athletic) first-stringer. He graduated first in his class at law school, and as student body president he was a delegate to the National Student Federation, where he became a friend of Edward R. Murrow, the delegate from Washington State University. In the summer of 1930, Murrow and Powell attended an international student conference in Brussels, staying on for a mini-European tour that left Powell (but not Murrow) a great admirer of the British. Powell decided to take a graduate year at Harvard Law School, where he "worked my tail feathers off" and was "terrified" by Professor Felix Frankfurter's rapid-fire seminar in administrative law,[5] which featured a skeptical attitude towards judicial activism.

As a Harvard Law School professor, Felix Frankfurter intimidated many of his students including several future Supreme Court Justices: Harry A. Blackmun, William J. Brennan, Jr., and Lewis F. Powell, Jr.

Powell's year at Harvard is credited with instilling in him a concern for how legal rules and decisions affected society and the need for adaptation to social change, in contrast with the formalist concern for precedent that Washington and Lee featured. This tension played out decades later in Powell's judicial career.

Powell returned to Richmond, first as an associate in a small firm and, as his talents blossomed, as an associate and then junior partner in Hunton, Williams, Anderson, Gay & Moore, then and still a pillar of Virginia's legal establishment. Powell's developing career was interrupted by World War II, in which he performed with distinction as an intelligence officer in the European theater, regularly briefing top American and British generals on, among other things, the "Ultra secrets" learned after Germany's Enigma code was broken by Allied cryptanalysis. He returned to Richmond a more seasoned and worldly man, poised for great things.

He did not disappoint. Rapidly moving into a senior position at Hunton, Williams, Powell became a major figure in Virginia and not long thereafter on the national legal scene. Among other positions of influence, he chaired the Richmond Charter Commission, the Richmond School Board, the Virginia State Board of Education, the American Bar Association, the American College of Trial Lawyers, the American Bar Foundation, and the Colonial Williamsburg Foundation.

Powell's service in these leadership positions was not *pro forma*: for example, Dallin H. Oaks, a respected figure who had an opportunity to work closely with Powell at the American Bar Foundation, has described in detail the ways in which he was a "masterful teacher and exemplar of the arts of leadership,"[6] citing among other examples the program of Legal Services for the Poor, which "probably could not have been instituted" without his efforts.[7] The former director of the Urban Law Institute has also described how Powell brought an "initially distrustful ABA into partnership with the Johnson Administration in providing free legal services to the poor."[8] Powell was also socially prominent, belonging to the

best clubs in Virginia and Washington. Add to this a large and close family—Mrs. Powell and he have three daughters and a son—and we have a man with blessings to spare.

Lewis Powell's resistance to high public office was remarkable. He was seriously mentioned for the Supreme Court in 1969, after President Nixon's first choice, Judge Clement Haynsworth, was rejected by the Senate. Powell wrote to Attorney General John Mitchell asking to be removed from consideration. (This is the seat that went to Harry Blackmun, after the Senate vetoed Nixon's second choice, G. Harrold Carswell.) Earlier, Powell declined appointment to the Virginia Supreme Court, to the U.S. Court of Appeals for the Fourth Circuit, and to the chairmanship of the Securities and Exchange Commission. Only a series of almost badgering phone calls from Mitchell finally persuaded Powell to let his name go forward to the Supreme Court, and he said later that he would have declined absolutely if he had had twenty-four more hours to think about it.

The reason for Powell's reluctance to be a Justice can be explained in part by his glittering career and satisfying and comfortable private life—why change a winning formula? This biography suggests a deeper cause—a deep-seated anxiety about whether he could perform adequately at an age when he "would have to find the strength and energy to face a new challenge. Perhaps the Supreme Court would be more than he could handle.... Perhaps it would expose him as the rather ordinary person he secretly supposed himself to be."[9] Whatever the reason, once Powell was sworn in, he threw himself into the work with characteristic intensity.

All this is recounted in strong, clear prose by John C. Jeffries, a professor at the University of Virginia Law School and an early clerk to Justice Powell. The treatment is sympathetic throughout, but Professor Jeffries can be critical of his Justice, thus avoiding the hagiography that is an occupational disease of judicial biographies written by former law clerks, who inevitably develop attachments to their judges and whose careers often owe much to them. Jeffries describes the opposing contentions in Supreme Court cases fairly and with unusual perception, his vignettes of the Justices are psychologically astute, and his discussion of internal Court procedures is informative.[10] The book is further enhanced by well-chosen photographs, useful notes, and original tables showing the degree to which Powell and the Justices he served with agreed with each other in different types of cases and their individual agreement with the outcome in the cases. The high number of typographical errors is an isolated blemish on the volume.

When Professor Jeffries turns to analysis of Justice Powell's judicial product and philosophy, he understandably, but at a cost, makes his task easier by confining the discussion to six selected constitutional areas—school desegregation, abortion, executive powers via the *Nixon tapes* case, crime and the death penalty, racial affirmative action (especially the *Bakke* case[11]), and "changing times" in regard to sex discrimination and homosexuality. Powell's almost invariable method in these controversial subjects was to seek a moderate solution, to try to accommodate sharply contrasting principles and often fiercely divided Justices, and to resolve most cases on narrow grounds. A balancing approach became Powell's trademark as he found himself, Term after Term, at the center of the Court.

A notable exception to Powell's customary methodology was in the school desegregation cases, where in an early, emotional and unjoined opinion[12] he assailed the existing law. He deplored the doctrines that subjected to judicial desegregation orders, particularly those ordering the forced busing of children, numerous Southern schools that formerly had been segregated by the state but that immunized racially separate Northern schools where housing patterns and other indirect factors caused the segregation. Powell's certitude on this question can be traced to his years on local and state school boards, where he acquired familiarity with the problem and a clear sense that busing was undesirable academically and socially, and to his resentment as a Southerner at the double standard being applied to Southern and Northern schools. In his opinion Powell may have idealized neighborhood schools that, to many blacks, "meant confinement, a slow suffocation in the dankness of the ghetto,"[13] as another former law clerk wrote, but there is no disputing Powell's determination to preserve the "connectedness of home, church, and school,"[14] which played so positive a role in his life.

Justice Powell brought many years of school board experience to the Court in ruling on desegregation cases. He had seen first hand the difficulties that court-ordered busing could cause and remained a proponent of neighborhood schools while on the Court.

In the main Powell was an effective balance wheel, not a crusader or an ideological pathbreaker. Jeffries' tables show that in all five major areas of the Court's work—business, civil rights, criminal law, free speech and privacy—Powell had the highest percentage of agreement (ranging from 85% to 96%) with the outcome of cases of all Justices who sat with him for ten years or more. My colleague, Burt Neuborne, said at the time that Powell, as the principal lawgiver on the Supreme Court, was "the most powerful man in America."[15] Moreover, Powell was able to maintain impeccable conservative credentials throughout his tenure while simultaneously winning the respect of ACLU lawyers, whose fears for the future of *Roe v. Wade*[16] were palpable when Powell retired in 1987.[17]

Beyond statistics and outcomes, there is division over Powell's legacy, which Jeffries evaluates largely on two criteria. On the first, Jeffries echoes the widespread admiration for Powell's conscientiousness, innate sense of fairness, collegiality, openness to new ideas, and a style of judging that, in Gerald Gunther's words, exhibited his "careful mastery of the facts, his systematic examination of the competing interests, his capacity to articulate carefully developed and consistently held analyses through a series of case-by-case adjudications."[18] It would be a rash critic, and I am not he, who would differ with this evaluation, which is buttressed by Powell's graciousness, cheerfulness and loyalty. It is not surprising that Supreme Court personnel regarded it as a "terrible day" when he retired and, in a rare display, reporters and others present broke into applause after Powell's farewell press conference on leaving the Court.[19]

Jeffries' second broad criterion for evaluating Powell's judicial performance is highly pragmatic—did it work? I have much sympathy with this approach because in the final analysis the Court, as a coequal branch of government, should contribute to a better society for the American people. But there is a certain confusion in applying the standard to Powell. For example, Jeffries reveals in his book, for the first time, that

Powell after retirement came to regret his attempt at a middle ground that "neither categorically condemned capital punishment nor unreservedly approved it,"[20] and concluded that capital punishment should be abolished. His reason was strictly practical: the death penalty was not "intrinsically wrong," but "it could not be fairly and expeditiously enforced," and thus brought "discredit on the whole legal system."[21]

On the other hand, in another post-retirement switch, Powell announced in 1990 that he had erred in *Bowers v. Hardwick*,[22] which upheld the constitutionality of a law prohibiting homosexual sodomy (and which ducked the question of heterosexual sodomy). After a lecture at New York University Law School, he said that "I probably made a mistake in that one," and *Bowers* was "inconsistent in a general way with *Roe*."[23] This recantation sounds more grounded in principle, or at least in precedent, than in concern about the practical consequences of *Bowers*.

A major difficulty with a jurisprudence that seeks to accommodate a variety of concerns in reaching a practically sound result is chronic uncertainty over what works. For instance, Powell's analytically dubious but controlling opinion in the *Bakke* case, which rejected racial quotas in education but permitted favoritism toward minority applicants in the interest of diversity, has always struck me as a wise resolution of a terrible conundrum. But strong arguments have been mounted that, on the one hand, the decision unfairly excludes academically superior white students and, on the other, that it has proven too soft to protect adequately the valid interests of racial minorities in education, housing and jobs after centuries of exclusion.

Justice Powell's position on *Roe* and subsequent abortion cases infuriated activists on both sides of the issue. While Powell consistently supported the *Roe* decision, he refused to invalidate laws barring government payment for abortions even when these were medically necessary.

Similarly in the abortion area. Although Powell consistently adhered to the core principle of *Roe v. Wade*, he would not invalidate laws that barred government payment for abortions for poor women, even those that were medically necessary. This duality surely gave each side something important. But it infuriated anti-choice advocates, who claimed that *Roe* rested on inadequate constitutional foundations, and also provoked pro-choice supporters, who deplored the failure to protect the reproductive freedom of the most vulnerable women and the concomitant erosion of the constitutional principle underlying *Roe*, almost leading to its demise after Powell retired.

Some years ago Professor Paul Kahn mounted a broader attack on Justice Powell's jurisprudence. Kahn argued that Powell's penchant for balancing and accommodation represents a legislative and managerial model that is inconsistent with the judiciary's primary responsibility to employ constitutional principle to resolve controversies "by a standard external to the community."[24] Kahn deepened his critique by claiming that Powell's balancing process is flawed because it fails to utilize "traditional, or even nontraditional, legal materials—text, precedent, constitutional history, constitutional structure, or moral and political theory."[25]

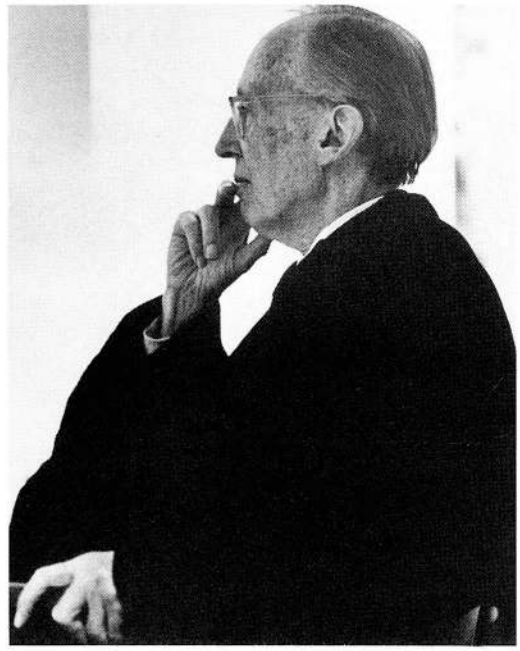
I cannot in limited space explore whether Powell's methodology is as extralegal as Kahn argued, or much different from that of other Justices. But the assault on Powell's balancing can be partially rebutted. Initially, there are many instances where Powell did not balance but instead relied on the commands of "specific" provisions of the Constitution, most often the First Amendment, or found protected constitutional rights in the due process and equal protection clauses of the Fourteenth Amendment. Examples of the former are Powell's dissenting opinion in support of press access to newsworthy information[26] and his opinion for the Court extending First Amendment protection to nude entertainment.[27] Examples of the latter are his opinion for the Court enabling non-marital children to recover workers' compensation benefits upon the death of their father[28] and a plurality

opinion invalidating a housing ordinance that denied a woman the right to live with her grandchildren.[29]

More generally, whether a judge balances interests and values or seizes on one "principle" to dispose of a case turns on the sort of person the judge is. Principles, or constitutional trumps, do not come clearly marked for handy use. At some stage in the decisional process, a judge must determine not only whether a proffered principle is strong enough to vanquish competing arguments in a case—the essence of balancing—but, more to the point here, whether an opinion should be written that attempts to define the principle so broadly that there is little or no room for further balancing in later cases.

Professor Kahn is correct in asserting that Justice Powell is not the sort of judge who often discovers a hard-edged principle. Various reasons may be suggested. Powell's years of negotiation and working things out in private practice and in many private associations taught him to appreciate different approaches to an issue and to seek compromise when possible. Nor was Powell sufficiently self-assured—recall his personal doubts about joining the Supreme Court—to canonize a debatable principle in an absolute way. Rather, he would likely fear dogmatism, haste, and a premature hardening of constitutional structure in the face of unpredictable cases that might call for nuanced modification of an earlier disposition. The method of balancing and accommodation is not an exciting jurisprudence, and it is usually less protective of individual rights than a firm adherence to constitutional principle, however derived, but as Judge Frank Coffin has persuasively shown,[30] it can be a sophisticated and lawyer-like process that has the considerable benefits of case-by-case, fact-oriented decision-making. Powell's jurisprudence aspired to this high standard, although his performance at times may have fallen short, as Jeffries acknowledges.

A fuller picture of these matters would have been presented had Professor Jeffries explored constitutional areas that his book slights. Thus, Justice Powell's opinions in free speech cases are, with rare exceptions, instances of balancing that invite appraisal. For example, his ruling in *Central Hudson Gas & Elec. Corp v. Public Service Comm'n. of New York* remains the leading commercial speech case.[31] Also conspicuous among the speech cases are those dealing with international security matters, in which Powell joined decisions taking an aggressively pro-government stance.[32] These votes are probably reflective of his wartime experience as an intelligence officer, just as his defense of the extended family in the *Moore* case might be attributable to Powell's close extended family.



Justice Lewis F. Powell, Jr., played a pivotal role at the Court's center for fifteen years. John Jeffries' biography describes that role in the context of the Justice's full and rich life.

Another line of cases—those concerning questions of justiciability, that is, litigants' access to the federal courts—is less balanced and, in my view, does not display Powell at his best. In a series of important decisions, Powell drastically narrowed the opportunities for people to challenge government action. In some of them, such as those denying poor plaintiffs standing to challenge a zoning ordinance that allegedly excluded low and moderate income residents[33] and an Internal Revenue Service ruling that induced hospitals to deny services on which indigents relied,[34] Powell's uncompelling opinions closed the judicial door on substantial law suits that should have been decided on their merits. In other cases, where he upheld the right to sue,[35] it is difficult to perceive the basis for distinguishing the cases that denied standing, leading one to

suspect that Powell at times may have joined the ranks of Justices who use justiciability rules flexibly, depending on whether he wanted to reach the merits of a controversy. If this seems harsh, it should be recalled that the essence of Powell's jurisprudence is openness to a wide range of factors and viewpoints. From that premise, one might expect him to be unusually welcoming to all litigants with colorable legal claims rather than an adherent of the Frankfurterian fear that "[r]elaxation of standing requirements is directly related to the expansion of judicial power [and] a shift away from a democratic form of government."[36]

But such a verdict would overlook the dominant elements in Justice Powell's history and nature. Like Justice John Marshall Harlan, whom Powell greatly admired and in whose tradition of "craftsmanship, clarity, lawyerly reasoning, and a modest conception of the judicial role"[37] he saw himself, Powell for two generations was an establishment figure, a member of the social and corporate elite who "dread[ ] chaos and upheaval" and who greatly value "social stability".[38] Such judges often be hospitable to claims of civil liberty and will usually validate legislative and administrative reforms. But even more will such judges tend to defer to, and support, the major institutions of society—governmental and private—as the best protection for what is, in their view, an essentially meritocratic social structure that may be flawed in certain respects but is nevertheless worth preserving in approximately its current form, especially against changes undemocratically imposed by courts.

Given their similar premises, Harlan and Powell found themselves in strikingly different postures on the Court. For fourteen years of his service, Harlan was initially part of a thin majority in a sharply divided body, and then—during the heyday of the Warren Court—in often lonely dissent. Only in his last two years on the Court, after Chief Justice Burger and Justice Blackmun replaced Chief Justice Warren and Justice Fortas, was Harlan at the Court's center, able to show himself as an essentially moderate constitutional voice.[39]

Powell, on the other hand, found himself in a pivotal position throughout his tenure. This is another reason that his opinions, whether majority or dissent, lack the sharp bite of a committed ideology and instead offer a more tentative and detached constitutional vision. John Jeffries' fine book does not probe every nook and cranny of Powell's jurisprudence, but he presents Powell's work fairly, gracefully and insightfully, and above all in the context of the Justice's full and admirable life.

Endnotes

[1]John C. Jeffries, Jr., ***Justice Lewis F. Powell. Jr: A Biography***, (New York: Scribner's).

[2] Jeffries, at 1.

[3] *Id.* at 26.

[4] *Id.* at 30.

[5] *Id.* at 39-40.

[6] Dallin H. Oaks, "A Tribute to Lewis F. Powell, Jr.," 68 *Va. L. Rev.* 161, 167 (1982).

[7] *Id.* at 165.

[8] Letter from Jean Camper Cahn to the Senate Judiciary Committee, quoted in George Clemon Freeman, Jr., "A Tribute to Lewis F. Powell, Jr.,"101 *Harv. L. Rev.* 404, 406-407 (1987).

One important issue on which Powell's record is more ambiguous is school desegregation. As the leading lay figure in public education first in Richmond and then in Virginia, and as a champion of high quality education, his responsibilities were made awesomely difficult by the state's "massive resistance" to *Brown v. Board of Education*, 347 U.S. 483 (1954). On the one hand, a leading Virginia civil rights lawyer has written of Powell's contributions to "educational excellence and racial cooperation" in Virginia during this period. Oliver W. Hill, "A Tribute to Lewis F. Powell, Jr.," 101 *Harv. L. Rev.* 414, 416 (1987). On the other, Jeffries describes with meticulous care two "large criticisms [that] can be made of Powell's service on the state board of education"—his failure to do "any more than was necessary to facilitate desegregation," Jeffries at 172, and the decision, which Powell supported, to waive the deadline for tuition grant applications from white parents in Prince Edward County who defied the Supreme Court and sent their children to segregated non-public schools. *Id.* at 175-177.

Despite Powell's personal belief that the *Brown* decision should be obeyed, which Jeffries amply documents, Powell's overall record on the race issue led Congressman John Conyers, Jr., of the Congressional Black Caucus, and Henry L. Marsh III on behalf of the all-black Old Dominion Bar Association to oppose Powell's confirmation to the Supreme Court. *Id.* at 233-236. Oliver Hill and other Virginia leaders in favor of desegregation supported confirmation, one of them (Armistead Boothe) saying that Powell "helped Virginia, in a Virginia way, to survive the Commonwealth's severest test in this century." *Id.* at 235.

[9] Jeffries, at 8.

[10] Jeffries does not duck controversial issues, such as the degree to which the Justices "do their own work" or are excessively aided by able and energetic law clerks. Jeffries at 272.

Former U.S. District Judge Marvin E. Frankel recently wrote a widely-noticed article stating that "law clerks are increasingly writing opinions" for the Justices and pointing out negative consequences from the practice. Marvin E. Frankel, ***New York Times*** Op-Ed, May 15, 1994, at E14.

[11] *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

[12] *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 217 (1973).

[13] Jeffries, at 297, quoting J. Harvie Wilkinson III, ***From Brown to Bakke—The Supreme Court and School Integration 1954-1978*** (1979).

[14] Jeffries, at 297.

[15] Quoted in Jeffries, p. xi.

[16] 410 U.S. 113 (1973).

[17] I discussed the "gloom [that] descended on American Civil Liberties Union offices throughout the country" on Powell's retirement in Norman Dorsen, "Civil Liberty's Unlikely Ally," ***National Law Journal***, Dec. 3, 1990, p. 13.

[18] Gerald Gunther, "A Tribute to Lewis F. Powell, Jr.," 101 ***Harv. L. Rev.*** 409, 412 (1987). See also Justice O'Connor's warm and laudatory comments. Sandra Day O'Connor, "A Tribute to Lewis F. Powell, Jr.," 101 ***Harv. L. Rev.*** 395 (1987).

[19] Jeffries at 544-546.

[20] *Id.* at 434.

[21] *Id.* at 452.

[22] 478 U.S. 186 (1986).

[23] Jeffries at p. 530, quoting Anand Agneshwar, "Ex-Justice Says He May Have Been Wrong," ***National Law Journal***, Nov. 5, 1990, p.3. Jeffries is highly critical of Powell's performance in *Bowers v. Hardwick*. Jeffries at 527-529.

[24] Paul W. Kahn, "The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell," 97 ***Yale L.J.*** 1, 53 (1987).

[25] *Id.* at 57.

[26] *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (Powell, J., dissenting).

[27] *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (Powell, J.).

[28] *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (Powell, J.).

[29] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Powell, J.).

[30] Frank Coffin, "Judicial Balancing: The Protean Scales of Justice," 63 ***N.Y.U. L. Rev.*** 16 (1988).

[31] 447 U.S. 557 (1980) (Powell, J.). See also *Abood v. Detroit Board of Education*, 431 U.S. 209, 244 (1977) (Powell, J., concurring in the judgment) (freedom of association).

[32] See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980); *Haig v. Agee*, 453 U.S. 280 (1981).

[33] *Warth v. Seldin*, 422 U.S. 490 (1975) (Powell, J.).

[34] *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) (Powell, J.).

[35] See, e.g., *Regents of the University of California v. Bakke*, supra note 11 at 280-281 n. 14 (opinion of Powell, J.); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 260 and n. 7 (1977) (Powell, J.).

[36] *United States v. Richardson*, 418 U.S. 166, 180 (1974) (Powell, J., concurring).

[37] Jeffries, at 349.

[38] *Id.* at 470.

[39] I have discussed Justice Harlan's judicial philosophy and record in 1991 ***J. Sup. Ct. History*** 50 and 36 ***N.Y.L. Sch. L. Rev.*** 81 (1991).

The Judicial Bookshelf

D. Grier Stephenson, Jr.

It is a truism to observe that the career of every Justice on the Supreme Court of the United States has been unique. The vagaries and values of those who have served as well as of the presidents who have selected them, the absence of formal constitutional requirements for a federal judgeship, and the hodgepodge of issues in the cases before the Court assure the uniqueness of each member's tenure on the bench. Yet the lifework of a single Justice may nonetheless illuminate characteristics and trends shared by colleagues and common to their collective labors. One such individual is Justice Harry Andrew Blackmun, who, on April 6, 1994, announced his intention to retire when the Court finished its regular business of the October 1993 Term.[1] In at least four respects, Justice Blackmun mirrors the institution of which he was a part for twenty-four years. Each of these in turn figures prominently in recent books about the Supreme Court, its decisions, and its Justices.[2]

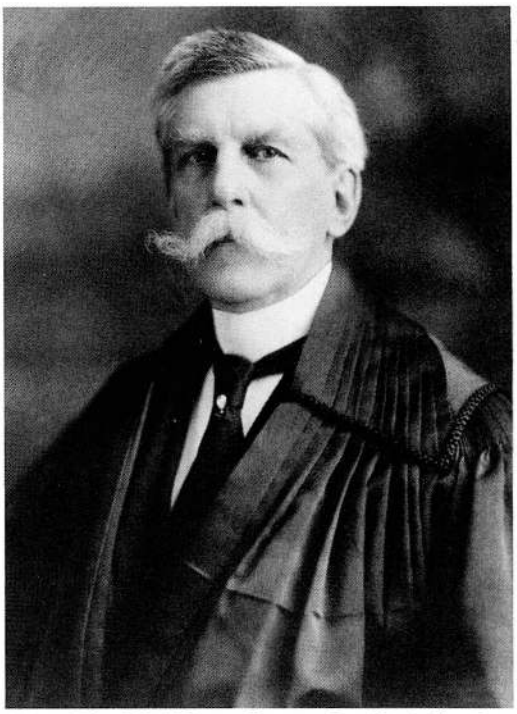
Availability

Examination of the nomination of any Justice reveals the interplay of a variety of factors, including luck and timing, that guide a president's choice. One is "availability"—a perception that an individual merits consideration for a seat on the highest tribunal in the land. A major dimension of availability is a person's accomplishments. While a résumé alone will not assure anyone's nomination, it may nonetheless secure a spot on the proverbial "short list."

While almost all Justices, past and present, have come to the Supreme Court with at least some background in public life, broadly defined, there has been no single preferred route to a Justiceship. Aside from the fact that all Justices have been lawyers, history suggests three wide avenues that have converged at the Court: private law practice sometimes combined with legal scholarship, service in the executive or legislative branches, and judicial experience. While a Justice's pre-Court career may have moved along two or even all three avenues, prominence in at least one category is practically essential.[3]

Blackmun was the Court's ninety-eighth Justice, his successor Justice Breyer the one hundredth eighth. Both appeared available to the presidents who nominated them in part because of prior judicial experience on the United States Courts of Appeals: Blackmun on the Eighth Circuit from 1959 until 1970, and Breyer on the First Circuit from 1980 until 1994.

Neither, however, came to the Court with nearly the judicial experience of Oliver Wendell



Oliver Wendell Holmes, Jr., was President Theodore Roosevelt's first Supreme Court nominee. Holmes' opinions on the Court caused considerable consternation for the President, who declared that he "could carve out of a banana a Judge with more backbone than" Holmes.

Holmes, Jr., who occupied the seat that Blackmun and Breyer would later fill and who is the subject of a new biography by G. Edward White.[4] Indeed, in the entire history of the Court, only Justices Cushing, Nelson, and Lurton surpassed the twenty years on the bench that Holmes had to his credit at the moment President Theodore Roosevelt chose him to replace Justice Gray in 1902. White's account makes clear that Holmes' service on the Supreme Judicial Court of Massachusetts was hardly a sufficient condition for the nomination but in all probability his service was a necessary condition. Not only was Roosevelt intent on making the appointment from New England,[5] but he was perhaps even more intent on finding a nominee whose judicial values were thought to be in harmony with the administration's. (Despite those intents, Roosevelt would soon join the ranks of presidents disappointed in the votes of their nominees,[6] lamenting that he "could carve out of a banana a Judge with more backbone than that!"[7]) Moreover, tradition during that period argued strongly in favor of Supreme Court nominees with a judicial background.

White's ***Justice Oliver Wendell Holmes: Law and the Inner Self*** is the fifth major book on Holmes to appear within the last six years,[8] a fact that stands in contrast to the near dearth of biographies of Holmes published during the half-century after his death.[9] The recent abundance partly results from the decision in 1985 by custodians of the Holmes papers at Harvard to allow scholarly access by way of microfilm to the collection of some 36,000 letters and manuscripts, most of which had never been published or otherwise disseminated. Previously, access to the Holmes collection had been tightly restricted, the original plan being to limit use of the papers to an authorized biographer. The Holmes estate designated Felix Frankfurter as the first authorized biographer, but upon his appointment to the Court in 1939 the responsibility fell to Mark DeWolfe Howe. Two volumes of his projected multi-volume work covered Holmes' life until 1882 (the year after publication of ***The Common Law*** and the year of his appointment to the Massachusetts bench), but Howe's death terminated the project.[10] In 1982, death also cut short the work of Howe's successor, Grant Gilmore.

Compared to recent books about Holmes, White's comes closest to balanced coverage of the public and private dimensions of the Justice's life.[11] Indeed, the subtitle of the volume ("Law and the Inner Self") reveals the author's intent: to describe his subject's "personal and intellectual life so as to emphasize the presence of certain central personal characteristics, to identify and to explicate certain distinctive ideas that he held, and to examine the relationship between personality and thought,"[12] in short, to connect the Justice's professional life with "inner self." The narrative reveals several tensions. There is what Holmes called "passion" alongside "action" (intensity of feeling mixed with a zest for accomplishment), acknowledgment of powerlessness alongside a drive for recognition, isolation combined with intimacy, and competitiveness tempered by detachment. White finds a "central organizing principle" by which Holmes sought to integrate but still to keep separate the "professional and private spheres of his life."[13]

It is unclear whether this principle is a conclusion the author reached from his exploration of Holmes' life or a hypothesis with which the author approached his study. In either case, the

book reflects the hand of the legal scholar, the historian, the biographer, and even the unlicensed psychologist at work.[14] Overall, the principle seems to fit. Meticulously described is the excitement with which Holmes accepted a seat on the Massachusetts court, his eventual recognition that he could not refashion the law into a consistent philosophic whole, and his delight in deciding ordinary cases, which abounded in the Supreme Judicial Court.

Then there was the "fleeting moment"[15] that presented the opportunity for appointment to the Supreme Court of the United States, an opportunity that, according to White, would probably have opened for Holmes under no other Republican president of that period.[16] The author demonstrates that Holmes did all that he could to secure a seat on the High Court, including a clandestine conversation with Roosevelt that convinced the president that, as Senator Lodge would reassure TR, he was "our kind right through."[17] In correspondence however, Holmes ascribed his nomination as merely "a reward for much hard work."[18]

White's guiding principle may also work in crediting Holmes' scholarly and judicial ambitions to a desire to distinguish himself from his father: "Dr. Holmes, for all his prominence, could never be a person whose decisions about the law directly affected the lives of others."[19] However, the principle seems to fit less well in discovering the "psychological origins" of ***The Common Law***." The author attributes the difficult writing style of the work to an attempt "to establish... a stylistic distance from his 'famous' father."[20] While that "is conceivable" and "possible,"[21] White's explanation needs proof.

The book succeeds, however, even if the reader is unwilling to travel the full distance with the author on this principle. And a key explanation for the book's success is the author's forthrightness. He writes about the admirable as well as the less admirable qualities in his subject, yet the analysis manifests a considerable effort to be unswayed by the ungrounded estimates of others. He also resists the temptation to allow assessments of Holmes published near the end of his long life to color his assessment of Holmes at earlier stages. For example, near the end of the chapter that surveys Holmes' work on the Supreme Court during the years 1903-1916, White concludes that there was by then "not much evidence to base a prediction that by the close of his tenure he would be lionized by 'progressives' and 'liberals' as one of the greatest Justices of all time." Except for his tolerance of the state police power, "Holmes had not only affirmed the orthodoxy [in all other areas of constitutional law]" but "had been, for the most part, more indifferent to the constitutional claims of minorities than [others]."

> In the area of race relations he had been less sympathetic to the claims of black plaintiffs than Southerners such as White. In the area of alien rights he had been less inclined to support the claims of Chinese or Italian petitioners than Brewer or Peckham. In antitrust cases he had been less sympathetic to government efforts at regulation than Brown. In First Amendment cases one of his restrictive opinions had provoked a dissent from Brewer. In short, he had not only voted consistently against claimants alleging that their civil liberties had been violated, he had been less sympathetic to those claimants than Justices typically identified as among the most "conservative" on the Court.[22]

Given the fact that the second half of Holmes' tenure on the Court was different in important ways from the first, White is entirely believable when he maintains that "Holmes scholarship will never end."[23] First, thanks in part to "genetic fortune" and a "capacity to survive," Holmes is unique among American judges as "a figure of popular romance." And the dimensions of that figure will hardly diminish with dissemination of the Holmes papers. Second, Holmes was among the first to discredit the notion that judges had little to do with making the law that they declared. Third, Holmes "was the first prominent judge to question whether [judicial lawmaking] was permissible in a majoritarian democracy," with all that critique has meant in constitutional law during the twentieth century. Fourth, his development of a higher standard of review in free speech cases after 1918 was so significant in White's view that, without Holmes, "the emer-

gence of significant protection for dissident speech in American society would have been indefinitely delayed." Finally, scholarship on Holmes will go on because "Holmes was about as good a writer . . . as America has produced." No judge in American history "has matched Holmes in literary flair" (***The Common Law*** presumably excepted) and "has left such a rich collection of correspondence, expressing so wide a variety of views on so many absorbing and important issues."[24]

William J. Brennan, Jr., was born in the year after Holmes wrote his famous *Lochner* dissent,[25] and he was graduated from Harvard Law School in the year before Holmes retired from the Court. Both benefited from the "fleeting moment" when vastly different circumstances led to their nomination. For Brennan even more than Holmes, experience as a state judge was essential in establishing his "availability." Total years served on their respective state benches and the United States Supreme Court were nearly identical: forty-nine for Holmes and fifty-one for Brennan. As a Justice, each man would have a considerable impact on the Court and partly shape the debate over constitutional interpretation for his successors. Yet, Brennan's upbringing in the Roman Catholic home of an Irish immigrant union laborer turned city politician in Newark, New Jersey, was very different from Holmes' in the Unitarian home of an old-stock professor of medicine turned author in Boston, Massachusetts. Moreover, American constitutional law when Holmes retired in 1932 was in some respects more similar to the constitutional law that prevailed in 1841, the year of Holmes' birth when Roger B. Taney was Chief Justice, than it was in 1990, the year of Brennan's retirement.

Brennan's role in this transformation is the subject of Kim Isaac Eisler's ***A Justice For All***.[26] Of the book's twenty-one chapters, thirteen consist of case-oriented vignettes highlighting many of the controversies that confronted the Court during Brennan's tenure. These chapters comprise fifty-six percent of the book's 290 pages of text. Subjects Eisler includes range from subversive activities[27] to flag-burning.[28] For the most part, the topics come from well-cultivated ground; he turns up little about the cases themselves that is new. Rather, the value of this part of the book lies in its contribution to an understanding of

William J. Brennan, Jr., joined the Supreme Court in 1956 after the retirement of Sherman Minton. Brennan, a Democrat, was nominated by President Dwight D. Eisenhower, a Republican.

Justice Brennan as a member of the Court. Eisler validates the conclusions of others[29] that Brennan excelled among his colleagues as a consensus builder.

The book has particular merit in its treatment of Brennan's rearing, his professional life in New Jersey as both attorney and judge, and the circumstances of his appointment to the Supreme Court of the United States.[30] As much as any other single factor, experience as a state judge combined with an association with New Jersey Chief Justice Arthur Vanderbilt established Brennan's availability for the United States Supreme Court. (Serendipity played a part too: President Eisenhower was in the middle of his campaign for reelection and for political reasons had decided to name someone who was a Catholic as well as a state judge.) Moreover, Eisler takes sides in the long-standing dispute concerning Vanderbilt's role in Brennan's nomination. One account depicts Brennan as Vanderbilt's choice. "Justice Brennan . . ., a Democrat, was suggested by New Jersey Chief Justice Vanderbilt, a Republican," wrote President Eisenhower. "Judge Vanderbilt said that, in his opinion, Brennan possessed the finest 'judicial mind' that he had known in a long experience, and was of the highest character."[31] The opposing account depicts Vanderbilt not only as one whose opinion about Brennan's fitness for the Court was never sought but as among the last in Brennan's profes-

sional circle to learn of his nomination.

> Brennan was invited to Washington, where he had a number of interviews. It was decided to announce the appointment. Only after all this did anyone think of checking with Vanderbilt. All of the individuals and groups involved took it for granted that someone else had talked with Vanderbilt. All also took it for granted that since Brennan appeared to be a protege of Vanderbilt, he must share Vanderbilt's judicial philosophy. But no one had asked. Now, Vanderbilt, like the wife of a philandering husband, became the last to know.[32]

Eisler's research, including a conversation with former Attorney General Herbert Brownell, leads him to believe not only that the latter account better reflects what happened but that Vanderbilt would have opposed the nomination had he been asked in advance. "He's [Eisenhower's] done it again. He's pulled another one," Vanderbilt is supposed to have exclaimed when he finally heard the news.[33]

Nonetheless, ***A Justice for All*** contains several distractions. First, Eisler's writing leans toward overstatement. Personalities and issues cross the pages in sharply contrasting hues without very much shading, or room for the middle ground. The reader gets a preview in the second paragraph of the Introduction:

> For two centuries the Marble Palace and its predecessor buildings had been anything but a haven for excellence. With the exception of a few spirited, great Justices like Marshall, Holmes, and Brandeis, its bench had just as often been filled with political hacks, cronies, and even bigots.[34]

Second, Eisler promises more than he delivers. At the outset, he casts Brennan as one who "would become the most influential Justice of the twentieth century. . . . [M]ore than any Justice in United States history, Brennan would change the way Americans live . . . [and] would emerge as the seminal Justice of our time!"[35] That may all be true, but the claims pose a scholarly and methodological challenge that ***A Justice for All*** does not meet. Moreover, against the observations of some that Brennan "changed" his views once he became a Supreme Court Justice, Eisler plausibly maintains instead that Brennan "grew."[36] If that is so, one would expect insights into how and why that growth occurred. One finds only a few hints, such as the suggestions that Justice Hugo Black influenced the new Justice and "[t]he departure of Frankfurter from the Court had been greeted by Brennan like a breeze of cool air."[37]

Third, citations to sources are plainly inadequate. Except insofar as the text itself reveals a source (as when Eisler refers to a newspaper column), it is often difficult to discern on particular pages the information on which he has relied.[38] Since Eisler states that he drew from the papers of Chief Justice Warren and of Justices Brennan, Black, Douglas, Frankfurter, Harlan, and Burton, as well as secondary materials, it would be helpful to know whose papers (or what articles) might have been the basis of the statements he makes. That can sometimes be surmised, but not usually. Does an account of a discussion among Justices in conference or another conversation between Justices come from a single source or several?[39] How does one know how a Justice "felt" or what a Justice "thought"?[40] Sources would especially seem proper when the text casts aspersions. At one point, Chief Justice Burger is "anxious to reward his White House patrons" and "willing to change a rule to do the bidding of the White House."[41] The reader is surely entitled to documentation for statements such as that, whether it be laid out formally in a note or inferentially in the text. Indeed, the latter is precisely what Eisler does in reporting what could be construed as an impropriety by Brennan.[42]

The general lack of citations is a greater cause for concern when one comes across errors of fact as well as questionable statements. For example, Francis Scott Key is said to have written "Stars and Stripes."[43] Eisler reports that Taft appointed Cardozo to the Supreme Court.[44] Senate rejection of Washington's nomination of John Rutledge in 1795 was not "the end of recess appointments" until Eisenhower tendered one to Governor Earl Warren in 1953.[45] *Roe v. Wade* was decided in 1973, not 1971.[46] Following its decision in *Furman*

(From left) Wiley A. Branton, Thurgood Marshall, and William T. Coleman, Jr., argued on behalf of the integration of the Little Rock, Arkansas schools on September 11, 1958. Marshall was the lead counsel for the NAACP Legal Defense Fund and built an impressive record fighting for civil rights.

v. Georgia, four years, not six, elapsed until the Court upheld capital punishment in principle.[47] Chief Justice Burger is said to have intended "to undo *everything* Brennan and Warren had done."[48] Truman's appointments to the Court are supposed to have "returned the court to the conservatism of the Taft era."[49] Even though such factual errors and questionable interpretations are minor in that they are not central to the book, they nonetheless compound the absence of citations because they cast doubt on the accuracy of statements which cannot be easily verified. They mar a book that otherwise adds to what is known about Brennan.

Like Brennan and Holmes, Thurgood Marshall had judicial experience when President Johnson named him to the Supreme Court in 1967. Unlike them, that experience was very brief (less than four years) and only contributed to his availability. While service on the U.S. Court of Appeals for the Second Circuit between 1961 and 1965 followed by two years as Solicitor General "groomed" him for the High Court, his availability had already been established: for a quarter century he had been in the forefront of those using litigation to fight racial discrimination. Ironically, his success as a practitioner also threatened his availability for the Supreme Court. Marshall's confirmations as a judge and later as a Justice were protracted by the standard still prevailing in the 1960s.[50]

The story of Marshall as civil rights litigator and legal strategist is the subject of Mark Tushnet's ***Making Civil Rights Law***.[51] The author, who clerked for Justice Marshall during the October 1972 Term, painstakingly recounts Marshall's career with the National Association for the Advancement of Colored People and its corporate offshoot, the Legal Defense Fund (LDF).[52] The result is a biography of his professional life until 1961; readers will hope for a second volume from Tushnet that traces the remaining three decades of Marshall's remarkably accomplished life. If the second part is forthcoming, one suspects that it will display the theme of the first: that throughout his adult life Marshall remained a tenacious and outspoken advocate of civil rights

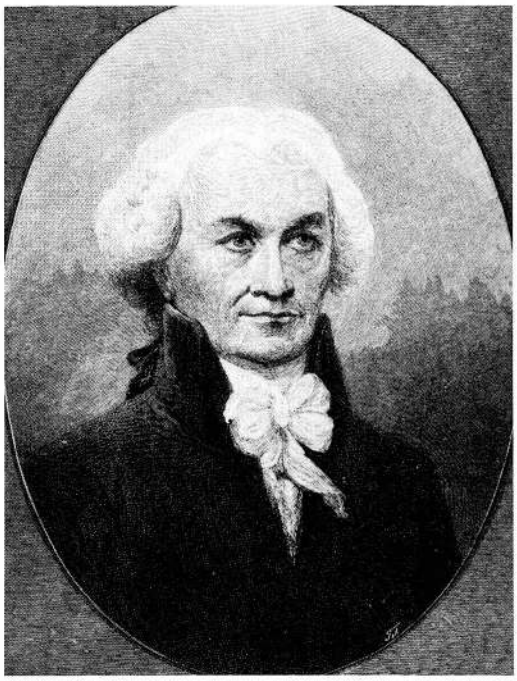
and a defender of those on whom the hand of official authority weighed most heavily. In a way unequaled by most, Marshall shaped constitutional law off the Court as well as on the bench. When he accepted a job with the NAACP in 1936, the Equal Protection Clause of the Fourteenth Amendment was an anemic part of the Constitution, not far removed from Justice Holmes' characterization of it as the "last resort of constitutional arguments."[53] When Marshall took his seat on the Supreme Court in 1967, that clause was the driving force in the Court's docket. And Marshall had had no small part in its vitalization.

In a recent issue of this ***Journal***, Tushnet suggested that "[t]he 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."[54] One surmises that Tushnet is interested in the Supreme Court largely because of its impact on civil rights. Thus, ***Making Civil Rights Law*** is two books in one. Alongside the story of "the most sustained and arguably the most successful of the civil rights efforts in this period,"[55] is the story of the Justices' reactions to the cases and arguments laid before them. In short, Tushnet portrays legal decision-making by two strategic parties: the central civil rights advocacy group of the day and the highest court in the land. The result is Supreme Court history at its best. In a volume rich with documentation that is copious, appropriate, and helpful, few sources seem to have been overlooked.[56]

Much of the civil rights law that Marshall helped to make as an attorney dealt with voting and education. When he began his work with the NAACP, laws segregated African-Americans from whites in the public school systems of many states and shut them out entirely from certain graduate and professional schools. In some states they lacked access to the most rudimentary instrument of political power: the ballot box. By 1961, the point in Marshall's life at which the book ends, landmark decisions such as *Smith v. Allwright*[57] and *Brown v. Board of Education*[58] had sparked change, the first invalidating the "white primary" that had effectively circumvented the Fifteenth Amendment in a one-party region and the second dooming the separate-but-equal standard that had legitimated segregation. However, in spite of such courtroom victories, the largest gains were only beginning in 1961 to unfold and to be felt in the lives of those who had endured the greatest legal deprivations.

Ironically, when Kennedy nominated Marshall to the Second Circuit Court of Appeals in 1961, significant opposition developed precisely because African-Americans were still unable to vote in significant numbers in many jurisdictions. *Smith v. Allwright* had not come close to ending racial discrimination at the polls, as the need for voting rights legislation in the 1960s (two decades after *Allwright*) made clear. As Tushnet notes, "By the mid-1950s, the NAACP had won substantially all its challenges to exclusion of African-Americans from voting. Yet, rather little had changed in the actual patterns of voting in the South."[59] However, by the late 1940s Marshall and the Legal Defense Fund refocused the drive for racial justice on 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 while Tushnet reports this shift, he offers no real assessment of its wisdom.

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. Perhaps the extent of opposition that developed in the wake of *Brown* was grossly underestimated. Even with an allowance for the exuberance of victory, Marshall's statements on May 17, 1954 about *Brown* bordered on the fanciful.[60] Perhaps they concluded that no further short-term progress on voting was possible, as Tushnet implies: "Marshall and the NAACP legal staff had done what they could to increase the level of African-American voting in the South, but they could not do nearly enough to make a substantial difference."[61] Perhaps, too, they believed later that passage of the Civil Rights Act of 1957 would accomplish far more in opening the franchise than it did, as Tushnet also suggests. "With the Civil Rights Act on the books, civil rights lawyers made a sensible strategic judgment to refrain for a while from making voting a major litigation target."[62] However, he does not explain why this judgment was "sensible." Had access to the ballot box been more fully assured by the mid-1950s, implementation of *Brown* would doubtless have met fewer obstacles, possibly with less



Oliver Ellsworth resigned as Chief Justice of the United States while in France heading a diplomatic mission to end the undeclared naval war with France. His resignation allowed President Adams to nominate John Marshall to the Court.

racial polarization. Similarly, Marshall would have encountered less hostility in the Senate in 1961. At least the question deserves exploration, and there seems to be a no more appropriate place for it than in a book about Thurgood Marshall.

Particularly for prominent figures such as Marshall, Brennan, and Holmes, the circumstances that established Supreme Court availability are easy enough to locate in volumes such as Tushnet's, Eisler's, and White's. Most Justices, however, have not been the subject of such extended treatment, and for them other sources must suffice. Surely among the most useful is a volume sponsored by the Supreme Court Historical Society. Edited by Clare Cushman, ***The Supreme Court Justices***[63] is a collection of illustrated biographical essays, each approximately five pages in length, on all members of the Court beginning with Chief Justice John Jay and concluding with Justice Clarence Thomas. Ms. Cushman is the author of thirteen of the 106 essays.[64] The Cushman book therefore occupies a useful middle ground between the extremely brief entries for most Justices in ***The Oxford Companion to the Supreme Court of the United States***[65] and the substantially longer essays in the now venerable five-volume set, ***The Justices of the United States Supreme Court***.[66] The Cushman book also presents essential data on the Justices arranged in tabular form[67] as well as a bibliography of works by and about them.

One example will illustrate the volume's utility. Certainly one of the critical events in Supreme Court history was the timing of Oliver Ellsworth's resignation as Chief Justice. Occurring when it did in the fall of 1800, the way was open to President John Adams to nominate John Marshall. Had Adams not acted when he did or had Ellsworth resigned after March 4, 1801,[68] Marshall most assuredly would not have become Chief, and, with the Court headed by a Jefferson appointee, the course of American constitutional interpretation might have been altered. Did Ellsworth resign because he knew of Adams' defeat or because political events made his defeat a near certainty? To begin to answer that question, one needs to know the exact date when Ellsworth, who was in France, sent his resignation to Adams. Curiously, several standard sources omit this important piece of information.[69] James Buchanan's essay on Ellsworth in the Cushman volume does not. He reports that Ellsworth wrote Adams from France on October 16, 1800, citing declining health as his reason for leaving the Court.[70] His decision to resign, therefore, had to have been independent of the political events of the fall. Given the slow pace of trans-Atlantic mail in those days, the most recent news Ellsworth could have possessed of events in the United States would have been of very late summer. Presidential electors, who would have been selected by state legislatures in most states during the preceding months, did not cast their ballots until early December. The certainty of Adams' defeat therefore did not become known until later that month. Indeed, Jefferson apparently believed that Ellsworth resigned when he did because he expected an Adams victory; had Ellsworth anticipated a different outcome, decency, Jefferson thought, would have dictated inaction so that the new president could fill the vacancy.[71]

Confirmation

Favorable presidential assessment of one's availability may assure nomination. The nomi-

nee, however, must still be favorably received by the United States Senate.[72] Usually Senators seem inclined to defer to the President's choice; at other times the process has been anything but deferential.

With the objectives of provoking thought and reform, Stephen L. Carter has assessed some of the confirmation struggles of the past quarter century and their impact on constitutional government.[73] His concern in ***The Confirmation Mess*** is not that recent presidents have encountered senatorial opposition to their nominees. The rate of rejection by the Senate of would-be Justices in the nineteenth century, after all, was higher than in the twentieth. Rather, circumstances have shorn the confirmation process of "decency" by transforming it into the "intellectual equivalent of a barroom brawl" with much "blood on the floor."[74] Etiquette aside, the politics of confirmation threatens judicial independence. Judge Bork's opponents in 1987 failed to perceive

> that one who disagreed with many of [his] substantive positions could nevertheless decide that trying to get him to tell the nation how he would vote on controversial cases if confirmed might pose a greater long-run danger to the Republic than confirming him and letting him do what we assumed he would. It seemed odd to me then, and only seems odder now, that everyone is evidently so happy with the idea that the Supreme Court should be limited to people who have adequately demonstrated their closed-mindedness.[75]

Robert Bork's (above) nomination to the Supreme Court was defeated 58-42 on October 23, 1987. Stephen Carter argues that Bork's opponents failed to realize that their desire to force Bork to reveal his views on controversial matters was more dangerous to judicial independence than to let Bork join the Court and vote as he saw fit.

Senators are not the only ones who must shoulder blame. "We seem unwilling to consider the many ways in which we damage judicial independence when presidential candidates promise to pack the Court if elected, and their opponents can offer nothing better than solemn undertakings to pack the Court the other way."[76] The result is posturing that pretends through sound bites that "views are extremist when we really mean simply that we disagree with them."[77] Restoring decorum would go far toward shoring the constitutional foundations that Carter believes "the confirmation [and nomination] mess[es]" have undermined.

Several developments during the past forty-five years have combined to threaten these foundations, Carter believes. First, the decisions by the Supreme Court since 1954 have touched a larger number of politically charged subjects than ever before in American history. Second, in contrast to earlier periods, since 1960 there has been a decline in the incidents of organized defiance to the Court's rulings. Third, if the Court is therefore able to effect its will on a larger number of issues, Carter suspects that the Justices have surely been emboldened. That is, there is now a diminished sense of restraint or "brake" that prudence in an earlier era would have fostered. The result is an ironic public perception of the Supreme Court as a "servant" that must be accountable. When it is not, Americans now insist on remaking the institution, "which is another way of saying that we are unhappy with genuine judicial independence."[78]

What, then, is to be done? Alas, Carter is better at diagnosis than cure, although any dissatisfaction readers feel at the end of the book may be mainly a sign of the magnitude of the

problem. Carter is convinced that the confirmation process suffers not from inadequacies in process but from defects in perception—the public's perception and expectations. Changing the rules will therefore do little to "fix" the process. Of the several proposals he considers, the only one that might moderate conflict would be a constitutional amendment requiring a two-thirds majority in the Senate to confirm nominees, as is necessary to ratify treaties. That would "screen out nominees who were perceived, rightly or wrongly, as narrow-minded . . . and would coax presidents away from figures whose public lives had made enemies."[79] Otherwise, restoration of decency in the process will come only when "what hangs in the balance" is something other than "the list of rights to be protected or unprotected. . . . [A]s long as our national attitude about the Supreme Court holds that only the bottom line matters, the battles over every vacancy are going to stay bloody. . . ."[80]

That of course is an exaggeration. Not "every vacancy" has erupted into a confirmation brawl. Decorum seems more in fashion when the same party holds the White House and the Senate. Moreover, Presidents may help to alter "our national attitude" through acts of statesmanship: rising above the clamors of organized interests purposefully to select nominees whose views, so far as they are known, are decidedly centrist.

Complementing ***The Confirmation Mess*** is Christopher E. Smith's ***Critical Judicial Nominations and Political Change***.[81] While Carter's study deals with the consequences of the contemporary confirmation process on the judiciary, Smith's looks beyond the Court to the impact of certain judicial nominations on the political system as a whole. The book thus offers another way of exploring the linkage between the Supreme Court and American society.

The key to understanding Smith's approach lies in the word "critical." For many years, students of American politics have used the word in connection with the evolution of political parties. As V. O. Key explained four decades ago, a critical election is one

> in which the depth and intensity of electoral involvement are high, in which more or less profound readjustments occur in the relations of power within the community, and in which new and durable electoral groupings are formed.[82]

Among presidential elections, those of 1800, 1828, 1860, 1896, and 1932 qualify, as perhaps does 1968.

As Smith applies the word to the judiciary, "critical" nominations are those "that serve as catalytic events for important changes in politics and public policy that were not anticipated by the political actors who initiated the nominations."[83] Smith might agree that the usages of the word "critical" are similar in that the criticality of an election or nomination emerges from its effects. Just as one does not know that a particular election is "critical" until successive elections have occurred, one has no way of knowing that a nomination to the Court qualifies as "critical" until months or even years have passed. Yet the concepts also seem different: an election is critical if its *own* outcome (a realignment of political parties) persists for some number of years; a nomination is critical because of *other* outcomes. That is, the nomination is critical because it has set political forces in motion that bring about unintended consequences of great magnitude. However, while it is easy to understand how these consequences surpass the comparatively modest objectives presidents usually have in mind when they select certain people for the bench, he does not make clear conceptually why objectives and consequences must be distinct.

While Smith does not intend his list to be exhaustive,[84] he uses the nominations of John Marshall, Earl Warren, and Abe Fortas (in 1968) to illustrate his concept of the critical nomination. Each one qualifies because it generated consequences for the political system that went beyond individual cases and the formulation of legal doctrine. Marshall's tenure contributed mightily to development of the judiciary as a co-equal branch of the national government; Warren's tenure "reshaped the Supreme Court's role and society's political reactions to the judicial branch;"[85] and the unsuccessful nomination of Fortas as Chief Justice heralded the demise of control of the Court by political liberals.[86]

Smith then turns to the nomination that consumes most of the book: Clarence Thomas' in 1991. In contrast to the nominations of

Jack Greenberg, shown here with Constance Motley and James Meredith (center) en route to a contempt of court hearing against Mississippi governor Ross Barnett, was staff counsel and assistant to Director-Counsel Thurgood Marshall at the NAACP Legal Defense Fund from 1949 to 1961. When Marshall left the LDF to join the Court of Appeals, Greenberg succeeded him and remained head of the LDF until 1984.

Marshall, Warren, and Fortas, the effects of the Thomas nomination have been felt mainly "on electoral behavior and outcomes."[87] By his measurement, even in the short term Thomas' nomination has proven to be critical because "President Bush could never have anticipated that a nomination intended to advance specific conservative policy preferences and to attract minority voters would mobilize larger segments of the electorate against Republican candidates and in support of liberal Democratic candidates."[88] Moreover, the nomination energized "women candidates and voters" and made sexual harassment a front-page story and a lead topic for television talk shows with significant consequences for the workplace.[89]

Were Smith's approach to be applied to Carter's analysis of the confirmation process, perhaps the nomination of Bork in 1987 could also be judged critical because of its enduring impact on the confirmation of Supreme Court Justices. The Senate's consideration of Thomas might have been less a spectacle had the process and the public not already have been so desensitized by the events of 1987.

The Docket

One does not read very far into the history of the Supreme Court without gaining awareness into the changing nature of the Supreme Court's docket.[90] Issues that consumed the Justices' time in one era are barely present in a later one. Momentous questions of one decade were only the stuff of legal imaginations a generation earlier. Such observations are true not only with respect to the work of the Marshall Court com-

pared with that of the Fuller Court, for example, but also with respect to the Court at the beginning and end of Justice Blackmun's tenure.

Accounting for evolution in the Court's docket is complex, yet any explanation must include litigation that is driven by interest groups. Such an orchestrated enrichment of the judicial agenda is amply displayed in Jack Greenberg's ***Crusaders in the Courts***, an account of the work of the NAACP Legal Defense Fund "to obtain for black Americans their full civil rights as citizens."[91] It would be difficult to imagine what the Supreme Court's agenda or docket would have been during the past half century had there not been an organization like the LDF. Litigation initiated by the LDF to combat racially discriminatory treatment in access to the ballot, education, and other public services inspired efforts to make the criminal justice system more equitable, particularly in the administration of capital punishment. As attacks on racial injustice moved from the courtrooms into the streets and other public forums, the LDF became involved in First Amendment issues. Once Congress passed civil rights statutes that reached discrimination in the private as well as public sectors, the LDF was in the forefront of efforts to shape their interpretations in the courts,[92] particularly in the context of affirmative action.[93]

Greenberg writes from hands-on experience. From 1949 until 1961, he was staff counsel and assistant to Director-Counsel Thurgood Marshall of the LDF; when Marshall was appointed to the Court of Appeals in 1961, the LDF picked Greenberg as Marshall's replacement, a position he held until 1984. ***Crusaders in the Courts*** overlaps only partly with ***Making Civil Rights Law***. While the general subject of the two books is the same, Tushnet's focuses on Marshall's role in the LDF which spanned 1939-1961. Greenberg's emphasizes the work of the LDF as a whole from 1949 until 1984, particularly the period after 1961. The LDF's activity under Greenberg's directorship comprises more than half the book.

In the years before 1984, the LDF was involved in over 1,000 reported cases in the state and federal courts, as well as many others that were not reported. Greenberg personally argued forty cases before the Supreme Court of the United States on behalf of the LDF. The business

The LDF opposed the nomination of Judge Clement Haynsworth to the Supreme Court on ideological grounds, but cloaked the objections in a smoke screen of ethics charges.

of the LDF was both proactive and reactive. At times, Greenberg and associates would seek out plaintiffs to advance the civil rights agenda. Just as frequently, especially after *Brown* in 1954, they would react to legal dilemmas resulting from the actions of others.

For example, at one point in 1963, the LDF represented 2,497 defendants in Birmingham.[94] Some had disobeyed an injunction of questionable constitutionality not to engage in a protest march. Their contempt convictions reached the United States Supreme Court in 1967; voting five to four, the Justices sided against the protesters in one of the LDF's few defeats before the High Court.[95] As an aside, Greenberg reports that "Justice Harlan was inclined to vote for us on the issue of discriminatory enforcement; if he had, we would have won five to four. For unknown reasons he later joined the four who favored upholding the conviction, making a majority for affirmance."[96] This account seems to conflict with that offered by Harlan's biographer: ". . . Justice Stewart held for the Court that individuals must at least make some attempt to appeal a court order before defying it, without clear evidence of bad faith on the part of the trial judge. *Harlan obviously concurred in such thinking,*

choosing not to file a separate opinion in the case."[97]

Crusaders in the Courts is both chronicle and memoir. The book recounts almost every civil rights case in the modern era with which most readers are familiar, plus many that, if once known, have been forgotten. There are retellings of the moments in the august surroundings of the Supreme Court of the United States as well as those in the humble confines of rural courthouses. But the volume is hardly a dry discussion of cases and their outcomes. As a memoir, the narrative is rich with the sort of lively detail only one who was intimately engaged with the process can easily provide. The book is one that any student of civil rights and of this period must consult. For example, in his account of the LDF efforts to defeat President Nixon's nomination of Judge Haynsworth to the Supreme Court in 1969, Greenberg confirms what others have suspected,[98] that the ethics charges were merely a smoke screen for ideologically based objections and so amounted to "a bum rap" for the nominee. Haynsworth's "consistently anti-civil rights and obstructionist positions that made up his judicial record were sufficient and proper grounds for opposing him."[99]

Nonetheless, it is an indication of the complexity of the story Greenberg tells for a reviewer to suggest that an author of a book of more than 600 pages has stopped too soon. Greenberg was fully aware of the challenge his memoir entailed: "I have tried to keep in mind the concerns of the legal scholar and historian while making LDF accomplishments intelligible to lay persons, all in a volume of manageable size."[100] While on balance the book will be useful to expert and novice alike, both would benefit from added clarification. For example, in a review of LDF efforts to shape the Voting Rights Act both before and after the 1982 amendments, Greenberg glosses over the complexities of representation that arise in various apportionment schemes.[101] The subject goes to the heart of political power and continues to perplex the Supreme Court.[102]

Similarly, readers already familiar with the terrain Greenberg navigates may wish that he had included more reflection on certain turning points in the LDF's movement to expand civil rights. First, there seems to be no more here than in Tushnet's book to explain why the LDF did not do more to consolidate its courtroom victories on access to the ballot box at the same time it made war on segregation in education.[103] Second, there is arguably a considerable distance between even what the LDF asked for,[104] but did not receive, in the second *Brown* case[105] (the implementation phase of the litigation in the Supreme Court) and what the LDF received from the Supreme Court by way of a construction of *Brown II* in *Green v. School Board of New Kent County*.[106] The difference has to do with the definition of de jure racial segregation and unitary school systems, with what the Court in 1968 considered acceptable compliance with *Brown*, and with what *Green* in turn would mean for later cases.[107] While Greenberg reports the results,[108] the doctrinal leap made in *Green* goes by almost unnoticed.

Third, there is the conspicuous change from relentless pursuit of the nondiscrimination principle, which might fairly be said to characterize the LDF's work through passage of the Civil Rights Act of 1964, to an emphasis on affirmative action in the 1970s and 1980s that went beyond efforts to compensate those who were direct victims of past discrimination. An undoubted strength of the civil rights movement that even predated establishment of the LDF was the argument that African-Americans only wanted the law to treat them like everyone else. This argument does not necessarily preclude affirmative action programs such as those challenged in *Regents v. Bakke*[109] and supported by the LDF, but the two do not obviously coexist comfortably. Greenberg includes a nine-page chapter entitled "Affirmative Action," but there must surely be more that he could have said on the compatibility of the two objectives. Instead he seems to plead necessity and results alone: "[W]e favored affirmative action because it was frequently the best way to get African-Americans into schools or jobs from which they had long been unfairly excluded. In many cases it would have been impossible to admit or promote minorities and women if in each instance we had to mount a full-scale case."[110]

To Greenberg's credit, the two last chapters contain his reflections on at least one sensitive matter. Particularly noteworthy is a section concerning the boycott of a class on civil rights he taught at Harvard Law School in early 1983.[111] According to Greenberg, objections to his ap-

pointment were based almost solely on his lack of a single qualification: the correct skin color. Boycott leaders insisted that the course be taught by an African-American; Greenberg is white. The incident vividly illustrates another direction taken by the revolution (American-style) that Greenberg helped to instigate.

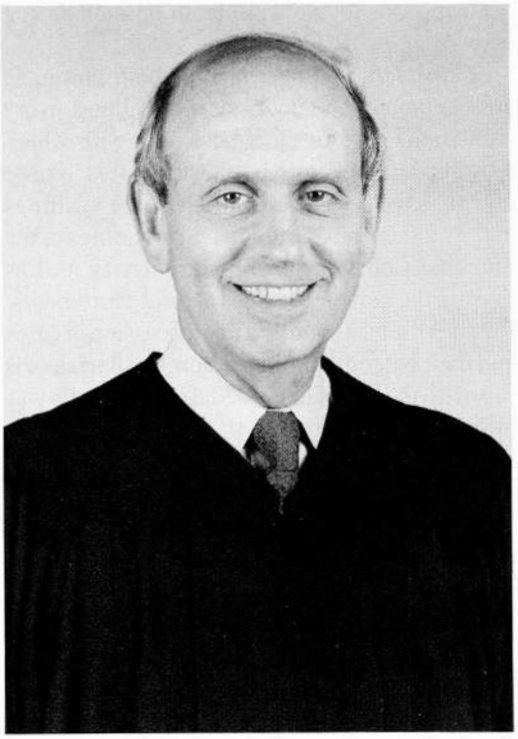
Just as the Supreme Court of the last half century cannot be understood apart from its connection with the quest for racial justice, so must the judicial scholar bear in mind the close link between the Court and privacy and all that link has meant for the American political system in recent years. With both, advocates for change resorted to the judiciary when the majoritarian political process failed them. As with Greenberg's memoir, litigation as politics by other means is the subject of David J. Garrow's ***Liberty and Sexuality***.[112]

The subtitle better describes the contents of the book: "The Right to Privacy and the Making of *Roe v. Wade*." Over one-third of the text recounts the origins and development of the movement against Connecticut's "uncommonly silly law" (as Justice Stewart described it) that since 1879 had criminalized for woman and physician alike the use and/or prescription of birth control devices. The efforts of those who wanted the right to operate family planning clinics for the poor eventually produced the litigation that led to the landmark decision of 1965, *Griswold v. Connecticut*,[113] which invalidated the statute. Another third traces the labors in several states to make state abortion laws less restrictive, labors that culminated in the Court's landmark abortion ruling of 1973[114] that rewrote the statutes of almost every state. The remainder of the volume follows developments in abortion policy through *Casey*[115] in 1992, plus the ramifications of the privacy right for sexuality generally.[116]

A skilled historian, Garrow tells a detailed, well-documented, and exceptionally readable story about reformers, opponents, and their lawyers, as well as about the Justices who decided the cases their conflicts produced. At the end, the reader is impressed (as would probably the original antagonists) not only by the distance that has been traveled but by the destinations that have been reached.

A measure of that distance lies in a pairing of statements from Justice Harlan's dissenting opinion in *Poe v. Ullman*,[117] the precursor to *Griswold*. He "believe[d] that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." Then he emphasized the importance of the qualification:

> I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. . . . Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether. . . . It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage. . ., it undertakes to regulate by means of the criminal law the



In 1994, Justice Stephen G. Breyer became the fourth former Law Clerk to join the Court . While clerking for Arthur Goldberg, Breyer drafted a concurrence in *Griswold*, which emphasized a combination of Ninth and Fourteenth Amendment arguments to overturn Griswold's conviction of violating Connecticut's birth control law.

details of that intimacy.[118]

For advocates of an expansive right to privacy in 1961, Harlan may have seemed at the cutting edge of the constitutional law of his day. His statement would not be entirely so regarded today.

If the goal of Marshall, Greenberg, and the rest of the LDF was to combat racial discrimination by convincing the Supreme Court to change its interpretation of the Equal Protection Clause, the goal of opponents of Connecticut's birth control law was very different. There was no right to privacy in the text of the Constitution. Moreover, since the late 1930s the Supreme Court had been extremely hesitant to impose limits on popular majorities that were not textually based.

According to Garrow, when the *Griswold* Court considered the matter in conference, there was little doubt that a clear majority existed to reverse Estelle Griswold's conviction under the Connecticut law.[119] The question was the form that reversal would take: would the right that was violated rest in implications (Douglas would call them emanations or penumbras) of the Bill of Rights as applied to the states through the Fourteenth Amendment, the "liberty" protected by the Fourteenth Amendment itself, a general constitutional standard of "reasonableness," or the Ninth Amendment? Garrow's narrative pieces together enough snippets of conversations, drafts of opinions, and memoranda to demonstrate that the case only barely generated a majority opinion. Although the vote to reverse was seven to two (with Justices Black and Stewart in the minority), only three Justices (Clark, Brennan, and Goldberg) initially signed on to Justice Douglas' draft of a majority opinion. White and Harlan wrote separate concurrences, and it seemed for a time that Chief Justice Warren would join White's, but not Douglas'. Garrow reprints parts of a lengthy memorandum written for Warren by John Ely, his clerk, which had apparently caused the Chief great concern: "No matter how strong a dislike for a piece of legislation may be," Ely advised, "it is dangerous precedent to read into the Constitution guarantees which are not there."[120] At the end, Warren removed his name from White's opinion and joined Goldberg's, which emphasized the combination of the Ninth and Fourteenth Amendments. (Goldberg's opinion had been drafted by law clerk Stephen Breyer.[121]) Seemingly, Douglas still had only four votes counting his own. However, since Goldberg expressly stated in his opinion that he joined Douglas, Warren's link with Goldberg created a technical majority of five for Douglas' opinion. Even so, it turned out that the separate opinions of Harlan and Goldberg proved far more useful in later privacy cases than Douglas'.

Aside from such accounts of changing alignments inside the Court and other useful information, Garrow's analysis of the abortion controversy outside the Court both before and after *Roe v. Wade* bears on the current debate whether *Roe* was actually necessary for abortion reform. One body of opinion contends that abortion reform was progressing in the 1960s and early 1970s and that, left alone by the Supreme Court, it would have led generally to laws that were tolerant of abortions at least in early stages of pregnancy. The Georgia statute invalidated in *Doe v. Bolton*,[122] the companion case to *Roe*, was, after all, far less restrictive than the Texas law at issue in *Roe*. And New York had decriminalized abortion in 1970.[123] While change would not have been nearly as rapid as that wrought by *Roe*, the eventual results would have been nearly the same. Moreover, the nation's presidential politics and the judicial confirmation process would have been spared considerable divisiveness.

A larger body of opinion maintains that *Roe* was essential. Without *Roe*, some states would have relaxed restrictions, but others would not. Of course the past cannot be re-created, and so the debate cannot be settled with certainty. However, by summarizing antiabortion efforts after 1965, ***Liberty and Sexuality*** lends support for the latter view in that change would have come more slowly and in fewer places than is sometimes supposed because the antiabortion movement, which has been so visible since *Roe*, was very active before 1973.

Yet even as comprehensive as Garrow's book is, a few important matters await fuller treatment. One interesting phenomenon in the antiabortion movement has been the degree to which certain Protestant denominations, particularly in the wake of *Roe*, have opposed abortion as fervently and with as much political energy as the Roman Catholic Church has historically done.

The Lochner Bakery (above) in Utica, New York was owned by Joseph Lochner. After being fined fifty dollars in 1902 for allowing an employee to work more than sixty hours in one week, Lochner appealed his conviction first to the Appellate Division of the New York Supreme Court, then to the New York Court of Appeals, and finally to the Supreme Court of the United States.

The antiabortion role of Protestants, however, is largely overlooked.[124] The names of the Reverend Jerry Falwell and the Reverend Pat Robertson, for example, do not appear in the index. Second, given the fact that public opinion for two decades has generally favored access to abortion (all the while that opinion also accepts certain restrictions on abortion),[125] the question arises whether *Roe* itself contributed to the widespread acceptance today of what was once widely opposed, or whether, by polarizing the debate, the decision retarded the growth of pro-abortion attitudes. These are difficult questions to answer, but they deserve a closer look.[126] As Garrow concludes, "I hope this book... will help open the door for others that will follow."[127] It probably will, but others should be forewarned: Garrow has set a high standard.

Legacy

Supreme Court Justices both inherit and bequeath a legacy that is institutional and doctrinal. The respect accorded constitutional interpretation creates the latter; overlapping tenures and the Justices' longevity[128] makes possible the former.

As virtually every study of the Court since Marshall's day has demonstrated, the Justices work with the past as they confront the present. In so doing, they remake the constitutional context for their successors. This is true even when the Court braves some seemingly new conundrum.[129] Although the Justices may differ sharply on the resolution of a case, each side attempts to ground its conclusion in legacy, itself frequently the handiwork of predecessors long removed.

Moreover, Justices benefit from an institutional legacy—knowledge of the Court's traditions, lore, and practices—that they receive first hand. Since Chief Justice Jay's time, all new Justices sit with colleagues whose first days at the Court predated their own, frequently by a long time. The more senior members of the Court may assist in the socialization and acculturation of junior members.

*The **Constitution Besieged*** by Howard Gillman[130] explores a part of the Court's doctrinal legacy that Justices and commentators today usually view in a negative light: *Lochner* era jurisprudence. In *Lochner v. New York*,[131] by a vote of five to four, the Court set aside a New York statute of 1895 which restricted bakers to a ten-hour maximum workday.

Favorable comment on the ruling was not lacking at the time, but the decision has since received "more nearly unanimous criticism than any other in the twentieth century."[132] Moreover, the decision sparked further interest in reform of the courts among those who felt that judicial power was surging unchecked.[133] Later years have been no kinder; the ruling has become the century's archetype of a judicial mistake:[134] no judge, it seems, wants to run the risk of having written a "Lochnerian" opinion.

Nonetheless, *Lochner* remains a significant case because it has had lasting, if indirect, influence. Justice Rufus Peckham's opinion for the majority rested the decision on a right ("liberty of contract") that the Court had recently recognized as implicit in the Constitution. As William Nelson has recently argued, *Lochner* helped to transform the Fourteenth Amendment from its mainly hortatory role in the nineteenth century to its decidedly judicatory role in the twentieth whereby the Court defines certain rights as fundamental and restrictions on them as suspect.[135] Moreover, having said that "reasonable" or "appropriate" regulation of constitutionally protected liberties was permissible, the Court took upon itself the essentially legislative responsibility of determining which regulations were reasonable and which ones were not.

Whatever its pertinency to current debates on constitutional interpretation, however, *Lochner* has been largely banished from respectable judicial company mainly because it has been read to embrace, as Justice Holmes wrote in dissent, "an economic theory which a large part of the country does not entertain."[136] That theory of course was laissez-faire economics which sanctioned only a very limited regulatory, or police power, role for government. Thus, the Justices took sides in the political wars of the day by writing an industrial-class bias into the Constitution. Holmes' observation laid the groundwork for the indictment: the Court based its decision not on the Constitution but on economics. Because the victorious side in *Lochner* became the losing side in post-New Deal America, the former's jurisprudence has been doubly suspect because its result was reactionary. Aside from serving as an example of judicial review run amuck, *Lochner* until recently was mainly of interest as the starting point for a debate on whether it actually retarded social legislation.[137]

Gillman's approach to the case is very different. He contends that *Lochner* and similar decisions in the state and lower federal courts of that period represented "a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other"[138] during a period of class conflict far exceeding anything the nation as a whole had known. Secondarily, he argues that a study of the *Lochner* era shows that judges of that day typically took constitutional theory seriously, that they were not merely legislators who wore robes.[139] The volume thus contributes to the debate over the limits to legal realism.

Accordingly, the crisis in constitutional interpretation that ensued from *Lochner* was not a result of overly enthusiastic economic ideologues masquerading as Justices. Rather, it was brought on by their attempt to maintain "the coherence

The tenure of Chief Justice Melville W. Fuller is the focus of the latest volume of the Oliver Wendell Holmes Device.

and integrity of a constitutional ideology averse to class politics" at a time when the "maturation of capitalist forms of production" made that ideology obsolete.[140] One finds the roots of their constitutional vision present not merely in opinions such as Justice Stephen Field's in the *Slaughterhouse Cases*[141] but in the Jacksonian era and even earlier.

> [T]he story of the *Lochner* era is not about how reactionary Justices . . . became more daring in their willingness to exploit legal materials in order to protect or promote their personal class or policy biases. Rather, the *Lochner* era is the story of how a changing social structure exposed the conservatism and class bias inherent in dominant ideological structures first formulated and institutionalized by the framers of the U.S. Constitution.[142]

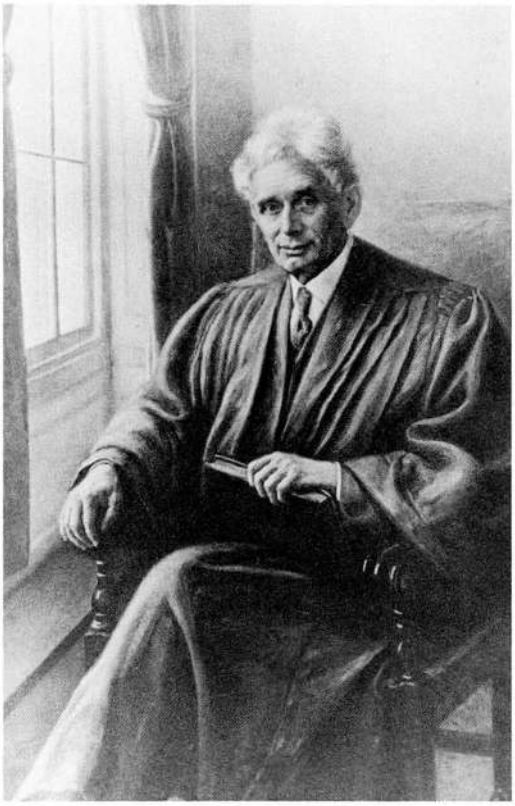
An apology for *Lochner*, Gillman's book is not a call for its return. If the outlook of Peckham and the others was already anachronistic in 1905, it must certainly be so today.

Lochner has a prominent place in the latest volume (VIII) to appear in the Holmes Devise ***History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*** by Owen M. Fiss.[143] The first volume in the series, now under the general editorship of Stanley N. Katz, appeared nearly a quarter century ago; there are still two more to go. Like its most immediate predecessor[144] the Fiss volume is a focused, almost monographic, account that does not attempt to be encyclopedic. Thus, while remaining a useful reference, the book is also readable. More than some in the Holmes series, this one is fully attuned to the political dimension within which the Court operates.

Like all Holmes Devise volumes, the scope of this one is defined by one or more Chief Justiceships. Volume one, by Julius Goebel, Jr., combines the Jay, Rutledge, and Ellsworth years. The Marshall Court is divided between two books (but three volume numbers), and the Chase and Waite courts are the subjects of volumes six and seven. The other volumes are (or will be) keyed to a single Chief Justice through Hughes, with the series ending in 1941. As a general way of dividing the Court's history the design is probably more convenient than important.

Fiss' subject is the Fuller Court, institutionally one of the lesser studied periods in Supreme Court history. While some decisions such as *Lochner* and *Plessy v. Ferguson*[145] have received inordinate attention, the Court as a whole at this time has not. ***Troubled Beginnings*** is thus probably the most detailed institutional record of the Fuller years since Willard King's biography of the Chief Justice was published forty-four years ago.[146] In the first chapter, Fiss suggests a reason for the inattention: "Each Court has been graded, and some have been deemed great, others mediocre, some quite dismal. By all accounts, the Court over which . . . Fuller presided . . . ranks among the worst."[147] Yet from another perspective, the inattention is surprising. One can view the Fuller Court as the first of the modern Courts because of the issues that some of its constitutional cases posed: racial equality, antitrust, social justice, and the federal police power generally. Fiss would add another reason. Just as the Court since 1937 has been defined by a commitment to liberty that after 1954 was symbolized by *Brown v. Board of Education*, most Justices of the Fuller Court "perceived a threat to liberty and used the power at [their] disposal to protect that value. . . . One very plausible view is that the failure of the Fuller Court lay not in the Court's understanding of its place in the American political system but in its attachment to a conception of liberty that consisted almost entirely of a demand for limited government."[148]

Like Gillman, Fiss rejects the evaluation dictated by the progressive school that the Peckham majority in *Lochner* abused judicial authority by writing their own economic predilections into the Constitution. Rather, Peckham's opinion "reflected a particular conception of state authority that had roots in contractarianism. . . . Peckham was trying to identify the bounds within which the social contract allowed the legislature to operate, and he invalidated the New York statute because, as he said, those bounds had been 'reached and passed.'"[149] Contractarianism is the theory that lies at the basis of the American idea of enumeration of powers. Since government is "artificially or deliberately created to serve discrete ends," every exercise of power must be "justified in terms of the ends for which that power was created." Among



The appointment of Supreme Court Justices is one of the few long-term actions that routinely survive a president's administration. Louis Brandeis served on the court for nineteen years after President Wilson left office and made a lasting impact on American law and legal thought.

approved ends for a state's police power were protection of safety, health, welfare, and morals. On common ground with Gillman, Fiss then explains that an unacceptable end for government in exercise of the police power was the redistribution of "wealth or power from one economic group to another."[150] The state's obligation in defense of the statute was to establish nexus: was there a sufficient connection between the limitation on working hours and the *health* of bakers? Because the Court was unconvinced that bakers needed protection more than other occupations, the statute posed the threat of ever-receding limits to state regulation: were there actual limits to the power of political majorities? "[T]he driving force behind *Lochner* [became] not a desire to invalidate the New York statute, but rather . . . to affirm, through a bold act of invalidation, the theory of constitutive authority."[151]

Again like Gillman's, Fiss' interpretation is plausible. *Lochner* stands for hostility not to regulation itself but to regulation gone too far. Yet one should be wary of imposing a single interpretation on jurisprudential developments in that era or any other. It is certainly possible that different members of the Court were moved to adopt the result reached in *Lochner* and other cases for different reasons. It is also reasonable to suppose that the pervasive laissez-faire thought of the day made the threat posed by the New York statute seem all the more dangerous.

Moreover, one could agree that the New York statute threatened important values without also siding with Peckham. As regulatory measures in the states vastly increased after the Civil War,[152] the perceived absence of constitutional limitations on popular majorities raised the question of what was to be done. The question was serious because the invigoration of judicial review necessary to accomplish the results in cases like *Lochner* ran against the Jacksonian tradition of popular sovereignty as expressed in the legislative will. *Lochner* stands for the proposition that judges may properly accommodate the Constitution to cope with newly perceived dangers, but was there another approach?

In 1890, Charles C. Marshall, a lawyer of conservative bent, looked back to the Supreme Court's decision in *Munn v. Illinois*,[153] which not only upheld the challenged regulatory measure but, in Chief Justice Waite's words, directed aggrieved parties to "resort to the polls, not to the courts."[154] Although Marshall thought that *Munn* was soundly based in constitutional law, its implications were terrifying.[155] His solution, however, was not judicial intervention. He did not question the correctness of the doctrine of legislative supremacy articulated in *Munn* even though he feared its consequences. Because *Munn* had revealed "a defect where all was supposed to be perfection," the imperfection was to be "properly remedied only by constitutional amendment."[156]

However appropriate Marshall's plan may have been for his day, in this century political groups have frequently found the route of formal constitutional amendment too steep, too cumbersome, and too slow. *Lochner* may be a judicial outcast, but an indirect consequence ironically survives: constitutional change, Peckham-style, seems firmly ensconced as the preferred method of "amending" the Constitution.

As an attorney, Louis Brandeis faced the

challenge of persuading the Court to accept the constitutionality of a maximum hours statute in spite of *Lochner*.[157] As a Justice, Brandeis participated in the interment of *Lochner*.[158] He succeeded in the first by devising what came to be known as the "Brandeis brief." He achieved the second through the articulation of judicial restraint all the while he remained aware that legislatures were fully as capable of mistakes as courts. Brandeis' political thought as reflected in his work and writings as both attorney and Justice is the subject of Philippa Strum's ***Brandeis: Beyond Progressivism***,[159] a volume that complements her biography of the Justice.[160]

It is a reality of American presidential life that many of a chief executive's actions barely survive the administration; some may not last a year. Others, however, are long-lasting and have a profound effect on the nation. President Wilson's nomination of Brandeis to the Supreme Court in 1916 illustrates the latter. Wilson left the White House in 1921 and died in 1924. Brandeis, who came to the bench with a remarkable list of public accomplishments, left the Court in 1939 with even greater stature.

Among other things, Brandeis' Justiceship demonstrated the close link between American constitutional law and American political thought. One cannot be fully understood without the other. Just as political ideas have influenced constitutional interpretation, so also one must look to judicial opinions to discern the dimensions of American political ideas. Through analysis of his judicial opinions, speeches, articles, conversations, and correspondence, Strum demonstrates Brandeis' contributions to both.[161] What emerges from her efforts is a Jeffersonian who "emphasized not means but goals, and the purpose most important to him was the establishment, by the government and other institutions, of policies that would best enhance individual fulfillment."[162] Every policy or institution would be measured by this goal. Freedom was thus a means to that end, not an end in itself. Crucial to the individual's attainment of fulfillment was participation in the political process and in the decisions of the workplace; participation was as much an obligation for Brandeis as it was a right. Participation and therefore fulfillment were both threatened by bigness in government and bigness in business. "[O]ne of democracy's proselytizers,"[163] Brandeis' answer to injustice on the job or in the polity was more democracy.

His vision for the United States inspired his Zionism as well. While the Zionist goal was a response to anti-Semitism, it was also an opportunity to build a new community that might promote individual fulfillment. Existing on a much smaller scale than the United States and with an agrarian rather than an industrialized economy already in place, a Jewish state in Palestine would be able to implement more perfectly his ideas of political and economic democracy.[164]

For a country like the United States that was far down the road toward bigness, Brandeis' prescription was not to turn back the clock. Instead, he devoted much of his energy to devising ways—Strum believes that they remain worthy of attention—to assure fulfillment in an era of unprecedented industrial and technological growth. "His insistence upon institutions large enough to be efficient but small enough to be controllable was and continues to be misinterpreted by the leaders of the New Deal and their heirs as a sentimental and unsophisticated yearning for an earlier age that could and should not be replicated."[165] Instead, she believes that Brandeis still speaks to problems that continue to plague the nation, including the widely held view that, somehow, government has gotten out of hand.

She notes in particular his thinking (also Jeffersonian in origin, one might argue) on the interrelationship between civil liberties and economic rights: that one who lacked the latter could never fully be a citizen. To paraphrase Madison, rights in property would bolster property in rights.[166] Here lies the basis for the book's subtitle, ***Beyond Progressivism***. Government regulation of big business on behalf of the individual was not enough; economic competition could better be guarded by the people who would be in a position to make those decisions most important for their lives.[167] Economic liberty would in turn contribute to the availability of adequate leisure, which would allow time for political participation. Ironically, the person who so focused himself on work remained concerned about the existence and use of spare time.

It is a measure of Brandeis' intellect that over a half century after his death his insights remain fresh and his ideas worth pondering. Those already interested in Brandeis will almost in-

stinctively turn to Strum's study, but it deserves a wider audience. Brandeis may be relevant not only to contemporary America but to the world. Examining the state of some nations since the end of the Cold War, one finds them casting about for new political and economic arrangements. Strum's ***Brandeis*** is an enlightening excursion for neophytes and old hands alike into the mind of a man who still has something to say.

And that is a definition of "legacy." Along with availability, confirmation, and the docket, legacy illuminates the political and judicial processes. Whether the focus is a Brandeis, a Blackmun, a body of constitutional doctrine, or a historical period, books such as those considered here enrich our understanding of the Court.

The Books Surveyed In This Article Are Listed Alphabetically By Author Below

CARTER, STEPHEN L., ***The Confirmation Mess: Cleaning Up the Federal Appointments Process*** (New York: Basic Books, 1994). Pp. xiii, 252.

CUSHMAN, CLARE, ed., ***The Supreme Court Justices: Illustrated Biographies, 1789-1993*** (Washington, D.C.: Congressional Quarterly, 1993). Pp. xv, 576.

EISLER, KIM ISAAC, ***A Justice For All: William J. Brennan, Jr., and the Decisions That Transformed America*** (New York: Simon & Schuster, 1993). Pp. 303.

FISS, OWEN M., ***History of the Supreme Court of the United States; Volume VIII; Troubled Beginnings of the Modern State, 1888-1910*** (New York: Macmillan, 1993). Pp. xix, 426.

GARROW, DAVID J., ***Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*** (New York: Macmillan, 1994). Pp. 981.

GILLMAN, HOWARD, ***The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*** (Durham, N.C.: Duke University Press, 1993). Pp. x, 317.

GREENBERG, JACK, ***Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*** (New York: Basic Books, 1994). Pp. xv, 634.

SMITH, CHRISTOPHER E., ***Critical Judicial Nominations and Political Change: The Impact of Clarence Thomas*** (Westport, Conn.: Praeger, 1993). Pp. xii, 172.

STRUM, PHILIPPA, ***Brandeis: Beyond Progressivism*** (Lawrence: University Press of Kansas, 1993). Pp. x, 228.

TUSHNET, MARK V., ***Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*** (New York: Oxford University Press, 1994). Pp. xii, 399.

WHITE, G. EDWARD, ***Justice Oliver Wendell Holmes: Law and the Inner Self*** (New York: Oxford University Press, 1993). Pp. 628.

Endnotes

[1] Ruth Marcus, "Justice Blackmun Announces Retirement," ***Washington Post***, April 7, 1994, at A1.

[2] Books are listed with full bibliographic citation just before the endnotes.

[3] Felix Frankfurter, "The Supreme Court in the Mirror of Justices," 195 ***University of Pennsylvania Law Review*** 781 (1957).

[4] G. Edward White, ***Justice Oliver Wendell Holmes: Law and the Inner Self*** (1993) (hereinafter cited as White).

[5] This was at a time when "representation" of certain regions of the nation weighed heavily in Supreme Court nominations. Justice Gray was from Massachusetts, and all previous Justices in that seat had come from New England. By contrast, regional identity counts for much less today. For example, there was little geographical concern expressed in 1981 upon the appointment of the Court's second member from Arizona. Moreover, in 1994 while President Clinton reviewed candidates for Justice Blackmun's seat, hardly anyone remarked that, were he to have chosen Interior Secretary Bruce Babbitt, a third of the Court's membership would have originated in the same small western state.

[6] *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

[7] Quoted in James E. Clayton, ***The Making of Justice: The Supreme Court in Action*** 47 (1964).

[8] John S. Monagan, ***The Grand Panjandrum: Mellow Years of Justice Holmes*** (1988); Gary J. Aichele, ***Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge*** (1989); Sheldon Novick, ***Honorable Justice*** (1989); Liva Baker, ***The Justice from Beacon Hill*** (1991).

[9] There has been for a long time no shortage of books and articles about Holmes, but these have been largely jurisprudential in scope. For example, see H. L. Pohlman, ***Justice Oliver Wendell Holmes: Free Speech and the Living Constitution*** (1991), as an example of one of the most recent. Moreover, many of Holmes' addresses, articles, and letters have long been available in print. For example, Mark DeWolfe Howe's two-volume set of correspondence between Holmes and Sir Frederick Pollock was published in 1941, followed by two volumes of correspondence between Holmes and Harold Laski in 1953. Max Lerner's ***The Mind and Faith of Justice Holmes*** (1943) remains a revealing collection of some of Holmes' opinions and

speeches. But it is the biography that has been, until recently, in short supply. Before David H. Burton's ***Oliver Wendell Holmes, Jr.***, was published in 1980, the shelf was nearly bare: Silas Bent's ***Justice Oliver Wendell Holmes*** (1932) appeared in the year Holmes retired from the Supreme Court and was a journalistic account of his life; Catherine Drinker Bowen's ***Yankee from Olympus*** (1943) was a partly fictionalized account of the Holmes family.

[10] Mark DeWolfe Howe, ***Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870*** (1957); ***Justice Oliver Wendell Holmes: The Proving Years, 1870-1882*** (1963).

[11] Because of timing, Aichele's was the only one of the most recent books (see endnote 8) not to benefit from dissemination of the Holmes papers. His focused on Holmes' work as a scholar and judge. Monagan's dealt with Holmes' latter years and was limited to his personal life. The Novick and Baker biographies attempted to be comprehensive, but attracted by the previously untapped material about Holmes, they emphasized more of his personal than professional life.

[12] White, 4.

[13] *Id.*, 5.

[14] Psychology plays not nearly the role in White's study that it does in H. N. Hirsch, ***The Enigma of Felix Frankfurter*** (1981).

[15] White, 303.

[16] *Id.*, 307.

[17] Letter from Henry Cabot Lodge to Theodore Roosevelt, July 26, 1902, quoted in White, 304.

[18] Letter of September 6, 1902, in Mark DeWolfe Howe, ed., ***Holmes-Pollock Letters***, vol. 1, at 105 (1941).

[19] White, 476.

[20] *Id.*, 183.

[21] *Id.*

[22] *Id.*, 352-3.

[23] *Id.*, 488.

[24] *Id.*, 486-8.

[25] *Lochner v. New York*, 198 U.S. 45 (1905).

[26] Kim Isaac Eisler, ***A Justice For All*** (1993) (hereinafter cited as Eisler).

[27] *Jencks v. United States*, 353 U.S. 657 (1957).

[28] *Texas v. Johnson*, 491 U.S. 397 (1989).

[29] Bernard Schwartz, ***Super Chief: Earl Warren and His Supreme Court*** (1983), and ***Behind Bakke: Affirmative Action and the Supreme Court*** (1988).

[30] Eisler at 17-96.

[31] Dwight D. Eisenhower, ***Mandate for Change 1953-1956*** at 230 (1963).

[32] Leo Katcher, ***Earl Warren: A Political Biography*** 355 (1967).

[33] *Id.*

[34] Eisler, 9.

[35] *Id.*, 13, 15.

[36] *Id.*, 14.

[37] *Id.*, 178.

[38] For example, see the reference on page 136 to a column in ***The Washington Evening Star***. However, even in discussing cases, Eisler fails sometimes to make clear the exact name of the case. This omission is an inconvenience to anyone who wants to turn to the source. See, for example, pages 278-279, where the actual name of the case [*Metro Broadcasting v. Federal Communications Commission*] never appears.

[39] *Id.*, 213.

[40] *Id.*, 210, 215.

[41] *Id.*, 215, 220.

[42] *Id.*, 216-7.

[43] *Id.*, 72.

[44] *Id.*, 96.

[45] *Id.*, 97. Thanks to President Polk, Levi Woodbury held one in the fall of 1845.

[46] *Id.*, 13.

[47] *Id.*, 245. The case was *Gregg v. Georgia*, 428 U.S. 153 (1976).

[48] *Id.*, 219 (emphasis added).

[49] *Id.*, 76.

[50] Michael D. Davis and Hunter R. Clark, ***Thurgood Marshall*** 234-235 (1992); Henry J. Abraham, ***Justices and Presidents*** 293-294 (3d ed., 1992).

[51] Mark V. Tushnet, ***Making Civil Rights Law*** (1994) (hereinafter cited as Tushnet).

[52] When the LDF was established in 1939, its name was the NAACP Legal Defense and Educational Fund, Inc. The LDF or "Ink Fund," as it was sometimes called, was legally separated from the NAACP in 1957. In 1982, the NAACP sued the LDF to prevent it from using the initials "NAACP" as part of its name. A U.S. district court ruled in the NAACP's favor, but a court of appeals reversed, and the Supreme Court denied review, 472 U.S. 1021 (1985).

[53] *Buck v. Bell*, 274 U.S. 200, 208 (1927).

[54] Mark Tushnet, "Writing Supreme Court Histories," ***Journal of Supreme Court History*** 11, 11 (1993).

[55] Tushnet, vii.

[56] The book's 315 pages of text are followed by 53 pages of endnotes which cite precise locations of letters and other manuscripts.

[57] 321 U.S. 649 (1944).

[58] 347 U.S. 483 (1954).

[59] Tushnet, 115.

[60] See Marshall's statements in the several news stories on *Brown* in the ***New York Times***, May 18, 1954, at 14, 16.

[61] Tushnet, 115.

[62] *Id.*, 307.

[63] Clare Cushman, ed., ***The Supreme Court Justices: Illustrated Biographies, 1789-1993*** (1993) (hereinafter cited as Cushman).

[64] The authors of the essays on Holmes, Brennan, and Marshall are Gary J. Aichele, Stephen Wermiel, and Susan Low Bloch, respectively.

[65] Kermit L. Hall, ed., ***The Oxford Companion of the Supreme Court to the United States*** (1992). Brevity was essential in the Hall book because of its scope. See my discussion of this valuable resource in the ***Journal of Supreme Court History*** 97-98 (1993).

[66] Leon Friedman and Fred L. Israel, eds., ***The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions***, 5 vols. (1969, 1978). The fifth volume was edited by Friedman alone. Because of his anticipated confirmation in 1969 as Justice Fortas' successor, the appendix to volume four includes five pages of biographical data on Judge Clement F. Haynsworth, Jr. See pages 3267-3271.

[67] In a later printing, the date of the second Justice Harlan's judicial oath should be corrected to read March (not February) 28, 1955 (Cushman, 534).

[68] Ellsworth died in 1807 while Jefferson was still president.

[69] See, for example, Charles Warren, ***The Supreme Court in United States History***, vol. 1, at 171-172 (1926); Albert J. Beveridge, ***The Life of John Marshall***, vol. 2, at 552 (1916); Henry J. Abraham, ***Justices and Presidents*** 81 (3d ed., 1992); the entry on Ellsworth in Kermit L. Hall, ed., ***The Oxford***

Companion to the Supreme Court of the United States 252 (1992); and Michael Kraus, "Oliver Ellsworth," in Leon Friedman and Fred L. Israel, eds., ***The Justices of the United States Supreme Court 1789-1969***, vol. 1, at 234 (1969).

[70] Cushman, 50.

[71] This seems to be a fair interpretation of Jefferson's letter to James Madison on December 19, 1800: "Ellsworth remains in France for the benefit of his health. He has resigned his office of C.J. Putting these two things together, we cannot misconstrue his views. He must have had confidence in Mr. A(dams') continuance, to risk such a certainty as he held." Quoted in Warren, ***The Supreme Court in United States History***, vol. 1, p. 174. (1926).

[72] That is, unless one enjoys a temporary recess appointment, as did Justice Brennan for five months. Justice Potter Stewart was the third Eisenhower appointee to have served on the Supreme Court while holding a recess appointment. No Justice since Stewart has held a recess appointment.

[73] Stephen L. Carter, ***The Confirmation Mess*** (1994) (hereinafter cited as Carter). The book includes some discussion of non-judicial nominations as well, such as those of Zoë Baird and Lani Guinier.

[74] *Id.*, ix-x, 187. Michael Comiskey has done some of the best work on the efficacy of the Senate's review of recent judicial nominees. See his "Can the Senate Examine the Constitutional Philosophies of Supreme Court Nominees?" 26 ***PS: Political Science & Politics*** 495 (1993), and his "The Usefulness of Senate Confirmation Hearings for Judicial Nominees: The Case of Ruth Bader Ginsburg," 27 ***PS: Political Science & Politics*** 224 (1994).

[75] Carter, x-xi.

[76] *Id.*, xi.

[77] *Id.*, 150.

[78] *Id.*, 188-189.

[79] *Id.*, 197-198.

[80] *Id.*, 191.

[81] Christopher E. Smith, ***Critical Judicial Nominations and Political Change*** (1993) (hereinafter cited as Smith).

[82] V. O. Key, Jr., "A Theory of Critical Elections," 17 ***Journal of Politics*** 3, 4 (1955).

[83] Smith, 11.

[84] *Id.*, 17.

[85] *Id.*, 29.

[86] *Id.*, 39.

[87] *Id.*, 154. One might add that the second Fortas nomination also had some consequences for the presidential election of 1968.

[88] *Id.*, 13-14.

[89] *Id.*, 85-87, 154.

[90] Richard L. Pacelle, Jr., ***The Transformation of the Supreme Court's Agenda*** (1991).

[91] Jack Greenberg, ***Crusaders in the Courts***, xix (1994) (cited hereinafter as Greenberg).

[92] See, for example, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), on the evidence needed to show a violation of Title VII of the Civil Rights Act of 1964.

[93] See, for example, *United Steelworkers v. Weber*, 443 U.S. 193 (1979), which found a voluntary affirmative action plan unobjectionable under Title VII.

[94] Greenberg, 337.

[95] *Walker v. Birmingham*, 388 U.S. 307 (1967). The majority's view was that the protesters should have challenged the validity of the injunction, rather than disobeying it first.

[96] Greenberg, 337.

[97] Tinsley E. Yarbrough, ***John Marshall Harlan*** 242 (1992) (footnote omitted, emphasis added). Greenberg credits as his source Bernard Schwartz, ***Inside the Warren Court*** 241 (1983).

[98] John P. Frank, ***Clement Haynsworth, the Senate, and the Supreme Court*** (1991).

[99] Greenberg, 387.

[100] *Id.*, xviii.

[101] *Id.*, 472-477.

[102] *Holder v. Hall*, 62 U.S.L.W. 4728 (1994).

[103] Greenberg, 108-109.

[104] Greenberg, 203.

[105] 349 U.S. 294 (1955).

[106] 391 U.S. 430 (1968).

[107] Greenberg, 388, discussing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[108] Greenberg, 383-384.

[109] 438 U.S. 265 (1978).

[110] Greenberg, 462.

[111] *Id.*, 502-504.

[112] David J. Garrow, ***Liberty and Sexuality*** (1994) (hereinafter cited as Garrow).

[113] 381 U.S. 479 (1965).

[114] *Roe v. Wade*, 410 U.S. 113 (1973).

[115] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 60 U.S.L.W. 4795 (1992).

[116] For example, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[117] 367 U.S. 497 (1961).

[118] *Id.*, 539, 552-553 (Harlan, J., dissenting) (emphasis added).

[119] Garrow notes that some confusion exists in the literature as to the identity of Estelle Griswold, even as to her gender. Garrow, 267-268. She lived in New Haven and opened the Planned Parenthood clinic, the business which violated the Connecticut anti-birth control law.

[120] Quoted in Garrow, 236. Initially Warren seems to have preferred a reversal based on the Equal Protection Clause. *Id.*, 241.

[121] *Id.*, 250. Garrow's account of the relationship between the Goldberg and Warren opinions differs somewhat from Jeffrey Rosen's. See the latter's "Breyer Restraint," ***The New Republic*** 19, 21 (July 11, 1994).

[122] 410 U.S. 179 (1973).

[123] Garrow, 421.

[124] The discussion on page 633, however, suggests a reason for the involvement by certain Protestant churches.

[125] *Id.*, 639.

[126] For a start, see Barbara Hinkson Craig and David M. O'Brien, ***Abortion and American Politics*** 245-277 (1993).

[127] *Id.*, 712.

[128] Of the 43 Justices appointed in the twentieth century whose tenures on the Supreme Court had concluded by the summer of 1994, the average length of service is 15 years, the median 16 years. Of these only seven served longer than Justice Blackmun. Of all Justices since 1789, Blackmun ranks third in the age at which he left the Court.

[129] For example, see *Cruzan v. Director*, 497 U.S. 261 (1990).

[130] Howard Gillman, ***The Constitution Besieged*** (1993) (hereinafter cited as Gillman).

[131] 198 U.S. 45 (1905).

[132] Robert McCloskey, ***The Modern Supreme Court*** 279 (1972).

[133] For example, see Louis Boudin, "Government by Judi-

ciary," 26 ***Political Science Quarterly*** 238 (1911). President Theodore Roosevelt wrote *Lochner* dissenter Justice William Day nearly three years after the decision, "If the spirit which lies behind [*Lochner*] obtained in all the actions of the Federal and State Courts, we should not only have a revolution, but it would be absolutely necessary to have a revolution, because the condition of the worker would become intolerable." Letter of January 11, 1908, in E. E. Morison and John M. Blum, eds., ***Letters of Theodore Roosevelt***, vol. 6 at 904 (1951).

[134] See Justice Douglas' allusion to *Lochner* in his majority opinion in *Griswold v. Connecticut*, and Justice Rehnquist's use of the decision in his dissent in *Roe v. Wade*.

[135] William E. Nelson, ***The Fourteenth Amendment: From Political Principle to Judicial Doctrine*** 199 (1988).

[136] 198 U.S. at 75 (Holmes, J., dissenting).

[137] Charles Warren was one of the first to enter this debate. See his "The Progressiveness of the United States Supreme Court," 13 ***Columbia Law Review*** 294 (1913), showing that the Court had upheld almost all the social legislation brought before it.

[138] Gillman, 10.

[139] *Id.*, 195-198.

[140] *Id.*, 10-11.

[141] For Field, the Fourteenth Amendment meant that the Louisiana butchers had "the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons. . . . This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. . . ." 83 U.S. (16 Wallace) 36, 97, 109-110 (1873) (Field, J., dissenting).

[142] Gillman, 199.

[143] Owen M. Fiss, ***Troubled Beginnings of the Modern State, 1888-1910*** (1993) (hereinafter cited as Fiss).

[144] That is, most immediate in timing of publication, not in terms of the Court's history. G. Edward White, ***The Marshall Court, 1815-1835*** (1988). The White book contains volumes three and four in the series, although they are bound together.

[145] 163 U.S. 537 (1896).

[146] Willard L. King, ***Melville Weston Fuller*** (1950).

[147] Fiss, 3.

[148] *Id.*, 20-21.

[149] *Id.*, 158.

[150] *Id.*, 158-160.

[151] *Id.*, 165.

[152] D. Grier Stephenson, Jr., "The Supreme Court and Constitutional Change: *Lochner v. New York* Revisited," 21 ***Villanova Law Review*** 217 (1976).

[153] 94 U.S. 113 (1877).

[154] *Id.*, 134.

[155] Charles C. Marshall, "A New Constitutional Amendment," 24 ***American Law Review*** 908 (1890). Curiously, Charles Marshall's name does not appear in the index to either the Fiss or Gillman volume. Nor was this author able to locate in either a reference to this important article.

[156] Quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., ***American Constitutional Law*** 284 (8th ed., 1987).

[157] *Muller v. Oregon*, 208 U.S. 412 (1908).

[158] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[159] Philippa Strum, ***Brandeis: Beyond Progressivism*** (1993) (hereinafter cited as Strum).

[160] Philippa Strum, ***Louis D. Brandeis: Justice for the People*** (1984).

[161] Anyone studying Brandeis must cast a wide net because Brandeis wrote no treatises expounding his views. This fact makes his thinking no less worthwhile, only more time-consuming for an author to extract.

[162] Strum, 2.

[163] *Id.*, 165.

[164] *Id.*, 109, 113, 115.

[165] *Id.*, 4.

[166] James Madison, "Property," ***National Gazette***, March 29, 1792, in Gaillard Hunt, ed., ***The Writings of James Madison***, vol. 6, at 101-103 (1900-1910).

[167] Strum, 116-149.

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