# Introduction

**Melvin I. Urofsky**
**Chairman, Board of Editors**

The history of the Supreme Court is written in many ways—monographs on particular cases, biographies of Justices, studies of the Court during the tenures of Chief Justices, and examinations of particular doctrinal developments. But one thing all studies of the Court have in common is a reliance on original sources, and for the Court's early years, this has long been a problem for even the most indefatigable researchers.

At the moment we have three documentary editing projects that are invaluable for students of the early Court—the Papers of John Jay, the Papers of John Marshall, and the Documentary History Project that the Supreme Court Historical Society sponsors. We have asked the editors of each of these projects to contribute to a special symposium in this issue, explaining what it is they are trying to do in their projects, and then providing an illustration of their work. We believe that even a casual perusal of this symposium will show the worth of these projects to students of the Court.

We note with sorrow the passing of Michael H. Cardozo, who did so much to lay the foundation for making the **Journal** an important outlet for research on the Supreme Court.

Michael, we think, would have been pleased that we now move to a twice-a-year publication schedule. It is our hope that with the continuation of the special lecture series and the articles they generate we will have one regular issue each year (the one on World War II which you received this fall). The next special issue will contain articles based on the lecture series examining the New Deal Court and the controversies surrounding it.

It is clear to us, from the number of people submitting articles or calling to talk about them, that interest in the history of the Supreme Court is on the increase. We hope that at least some of that interest has been generated by this **Journal**, and we hope to continue a double role of both encouraging new research and providing a forum for its presentation.

# The Appellate Committee and the Supreme Court: Anglo-American Comparisons

**Lord Woolf**

**Editor's Note**: *Lord Woolf delivered this address on September 18, 1995, as the Fourth National Heritage Lecture, which was cosponsored by the Society.*

The United States and Great Britain have a common heritage in the common law. The common heritage means that our legal systems are inextricably interwoven. The common history is particularly important because it explains the way in which our Courts are still structured. That is why I am envious of Americans for having this valuable Supreme Court Historical Society, which devotes itself to the history of your Supreme Court. We have no counterpart in my country. Without knowledge of its history, it is very difficult to understand the nature of a great institution such as this. That is particularly true in the case of the court system in the United Kingdom. No founding fathers starting from scratch would have devised our system. Those who framed your Constitution took care not to copy it. Under your Constitution, the three arms of government are carefully segregated from each other. That is not true on the other side of the Atlantic. We have the same three arms of government, but a cursory examination of the way in which they function shows the substantial overlap that exists. Their nature today reflects the fact that they are descended from a single source. That single source was an all-powerful monarch who, centuries ago, was responsible personally for all the three functions of government. This has left the whole of our government, and the court system in particular, with features that can only be understood in their historical context.

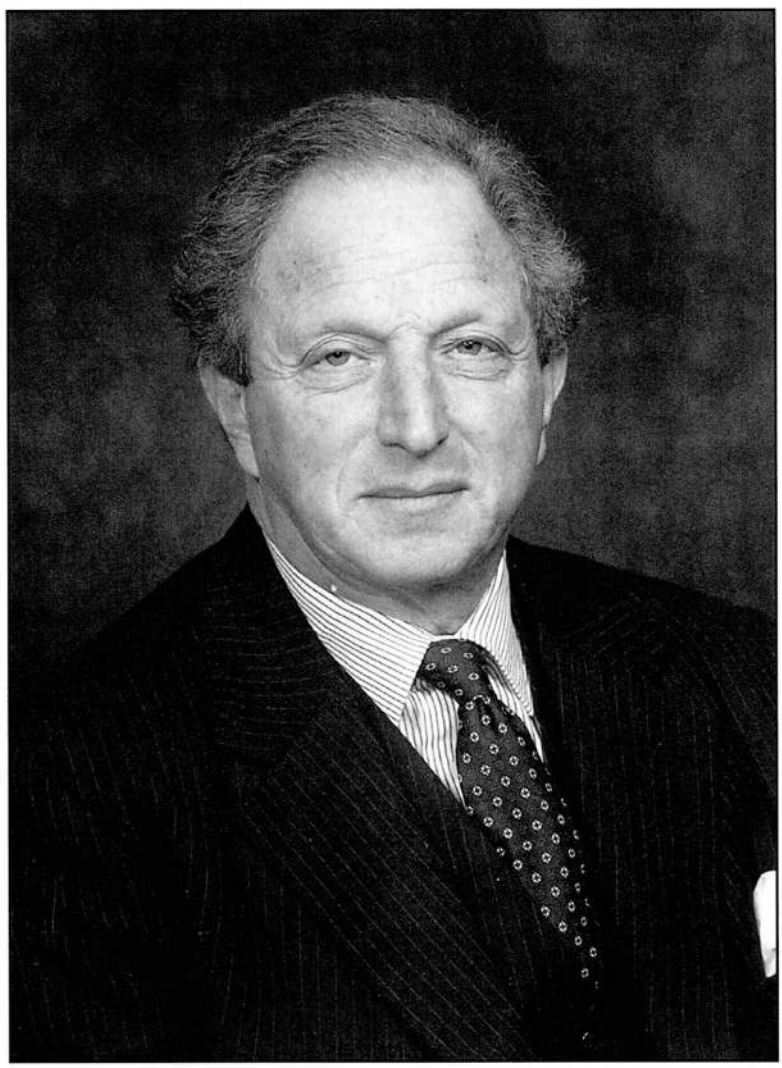
Chief Justice William H. Rehnquist describes the Supreme Court in his excellent book as the least understood of the three branches of your federal government. I suspect there is even greater misunderstanding of its counterpart in Westminster. Part of the explanation for this is that we have at least two courts of last resort. They are the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords. You may note from their titles that they are not really courts at all, but are "committees." There is a court for England and Wales called the Supreme Court. It is situated in London in the Royal Courts of Justice. It is the home of the English and Welsh High Court and Court of Appeal. The title is justified since technically it is the highest court for England and Wales even though its decisions can be reversed by the Appellate Committee of the House of Lords. It has no jurisdiction over the

rest of the United Kingdom. Many of its judges belong to the Queen's Bench Division. They are the direct descendants of the King's justices, who, in medieval times, went on circuit throughout England and Wales administering the King's justice uniformly throughout the kingdom. In London the same judges controlled inferior courts by issuing the King's prerogative writs including *certiorari*. In this way, a unified system of justice was developed.

In England today, these same judges still go out from London on circuit. *Certiorari* is now a powerful tool used by the same Queen's Bench judges, and is used not only to over-rule inferior courts but also decisions of public bodies, including central and local governments. There are aspects of the Supreme Court of the United States that link up with the Queen's Bench Division. The judges of both courts are justices. The justices in both instances are attached to circuits and both courts grant *certiorari*.

While there are these similarities between the Queen's Bench Division and the Supreme Court of the United States, it is not this division of the High Court which I wish to talk about, but the two Committees. They are more similar in function to the Supreme Court of the United States because of their final appellate power. These are also the Committees on which I sit. To find out how they came to be committees exercising final appellate power, it is necessary to return to the Norman Conquest and "1066 and All That."

While the King was sovereign, he, of course, could not do everything himself. This is why he sent out justices to exercise his judicial powers



**From 1992 to 1996 Lord Woolf served as one of ten Lords of Appeal in Ordinary—the equivalent of a British Supreme Court Justice to the extent that the American and British systems are comparable. In June of this year he became Master of the Rolls, which means he is director of the court of appeals' civil division.**

for him. However, the King retained a residual power and it is out of that residual power that the two committees emerged. First, he used this power to hear petitions from his subjects in his realms, which were then England and Wales. In due course, he delegated the hearing of those petitions to his King's council. After a period of time, Parliament evolved. The King's council was staffed by those close to the King, who were the nobles of the realm. They were members of the upper house of Parliament, the House of Lords. So it was to the House of Lords that the power to deal with those petitions was transferred. They were not heard by the House of Commons. The Commons were wise enough to appreciate that judges are not always popular. They made this clear in the late fourteenth century after Richard II was deposed. Judgments thereafter appertained exclusively to the King and the Lords and not to the Commons.

That is how matters remained until the late nineteenth century. Theoretically any member of the House of Lords could take part in the hearing of these petitions, which were by then coming on appeal not only from the various courts within England and Wales but also from Scotland and Ireland. In practice, by convention, and subsequently by statute, the Appellate Jurisdiction Act of 1876, a committee that heard these petitions was staffed exclusively by judges who were lawyers. Those judges were Lords of Appeal in Ordinary. The word "ordinary" distinguished them from the other Lords who did not, at least in the "ordinary" way, act in a judicial capacity. This continues to be the position up to the present time (under the Act of 1876).

The Channel Islands have remained to a substantial extent exempt from the powers of the Parliament at Westminster. And so petitions from the Channel Islands were retained in the King's privy (or intimate) council. As the empire developed, it was to this body, which became the Privy Council, that petitions from the King's overseas subjects were made. The Privy Council thus represented the King in relation to his judicial functions in connection with the colonies and other dominions overseas, including, for a time, this part of North America.

A feature of the two committees that was important for the development of the common law is that they were normally staffed by the same body of judges. The judges who were members of the committee that heard appeals in Parliament also presided in the Privy Council. Until recently they were ten in number, but this number has now been increased to twelve. They were ten in number because normally five would, on any working day, sit in the Privy Council, and five sit in the Lords.

From what I have said, you might assume that you can identify one of those judges because, like Lord Woolf, they would be called "Lord X." But that is not always the case. In England, all judges of the superior courts are addressed as "My Lord," unless, of course, they are appropriately addressed as "My Lady." A Lord or Lady is, however, what a high court judge is not (even though they are so addressed in court). If they are male they are knights and therefore a "Sir," and if they are female, they are a "Dame." Furthermore, the confusion is increased because the statutory title of an appeal judge in the Court of Appeal in England is "Lord Justice." In Scotland, the equivalent of the judges of the High Court are called "Lord," not only in court but socially as well. In fact, they are not peers and they are not members of the House of Lords.

Originally the position was even more confusing, since the wives of these Scottish judges did not acquire the title of "Lady" but remained "Mrs." Queen Victoria put an end to that. She learned that the impression was being created that her judges were living with women who were not their wives. This was a false impression. It arose because on becoming a judge and a Lord the judge would sometimes be required to change his surname to avoid his being confused with another lord, while his wife would retain his old surname. Queen Victoria was not amused by the stories being circulated. For example, Mrs. McCloed would be "living with" Lord Lothian, although she was his wife. From then on the wife became a Lady and had the same name as her husband and respectability was restored.

Judges who sit in the Privy Council are also appointed to the office of Privy Councillor, but fortunately no one goes around calling them Privy Councillors. I don't know whether the word "privy" has more than one meaning on this side of the Atlantic, but it does on my side. I say that because in my country the title can give a distinctly wrong impression. This was brought

home to me vividly when a friend wrote to me on my appointment as a Privy Councillor. Congratulating me on the appointment, he inquired whether he was right in assuming that the title indicated I had now become a high-class plumber!

I am sure I have said enough about titles to indicate that your Supreme Court sets a salutary example by merely conferring on its judges the proud title of Associate Justice. Their merit is conspicuous without the adornments that we still apparently find necessary.

## I

The significance of the Privy Council rests in its overseas jurisdiction. The Privy Council is still the final court of appeal for countries situated as far apart as the Caribbean, the Pacific, the Far East, and the Antipodes. This is but a shadow of what it once was. In the 1930s, its jurisdiction embraced more than one-fourth of the world, and included Canada, the Indian Subcontinent, South Africa, much of East and West Africa, Australia, New Zealand, and a host of other countries. In addition, it exercised jurisdiction over the consular courts in China and the dominions of the Ottoman Empire where the consular court usually sat in Istanbul.

In 1681, certain members of the Privy Council were appointed as a committee to handle petitions from the plantations. In this way the Judicial Committee was established. The task of the Committee was then, and still is in part today, to enable the monarch and her council to respond to the petitions of her subjects. So our judgments in the Privy Council are known as opinions, and with the exception to which I will refer in a moment, they end with these traditional words: "Their Lordships will humbly advise Her Majesty in Council that the appeal should be allowed," or, if appropriate, "dismissed." The appeal is not finally determined until Her Majesty, as she always does, by convention, makes the decision in Council herself in accordance with the opinion of her Judicial Committee.

The exception relates to an appeal from a country that has become a republic. There the Queen is not recognized as head of state. Fortunately, the jurisdiction of the Privy Council has proved sufficiently flexible to enable those countries, or some countries that have become republics, to still accept the jurisdiction of the Judicial Committee. In that situation, we either advise the president, or if the constitution so requires, directly allow or dismiss the appeal.

It is quite remarkable that countries that have demanded and received their independence from Britain should still accept the inroad into their national sovereignty that is implicit in subjecting the decisions of their courts to the jurisdiction of the Privy Council in London. They still, in effect, regard the Privy Council as their Supreme Court. The statute of Westminster in 1931 allowed the former colonies, when granted their independence, the right to discontinue such appeals. Canada, for example, discontinued appeals after the last war and India did so in 1947 upon gaining its independence. However, appeals from different states of Australia were only abolished in 1986. And in the case of Singapore, it was as recent as 1994.

There has been, from time to time, agitation from the Caribbean countries as to appeals to the Privy Council. Recent decisions concerning the death row situation in those countries have fanned that agitation. The Prime Minister of New Zealand has also recently been advocating the abolition of appeals to the Privy Council, but his views are regarded as controversial and are not necessarily shared by other members of his government. Hong Kong will certainly abolish appeals when it returns to China in 1997.

The decline in the jurisdiction of the Privy Council will undoubtedly continue. However, while it remains, it is a stabilizing force within the countries to which it applies and a protection of their democratic constitutional standards. It is unfortunate that in some cases where the appeal has been abolished, this has been the precursor to a departure from these standards. For countries of limited size there can be advantages in having the safeguard of a final appeal court that can take a more detached approach to an issue that excites considerable local controversy. There are also resource implications. The position of the Privy Council, and indeed the position of the government of the United Kingdom, is that while these countries want to send cases on appeal to London, they can do so. If they do not want to function in that way, they are entitled not to do so. The decision must be made by the individual countries

themselves, rather than by Great Britain.

While the jurisdiction of the Privy Council is in decline, it is, as yet, far from dead. It still provides approximately one-half of the work of the Law Lords, that is, fifty percent of the 125 to 150 cases we select for hearing on their merits each year. Furthermore, the cases that come before us from the colonies and the Commonwealth provide us with problems that are more akin to the kinds of cases that are heard in your Supreme Court. That is because most of the countries involved have a written constitution and a bill of rights which enables us, if it is appropriate to do so, to set aside their laws insofar as they are inconsistent with the constitution or bill of rights. That is different from the normal position as to the United Kingdom legislation, as I will explain later.

In the past, the Privy Council's powers in relation to the larger dominions, such as Canada and Australia, were similar to those of your Supreme Court. In due course, because of the process of devolution that may take place within the United Kingdom, it is possible that the experience that the Privy Council has gained in relation to Canada and Australia may be of great value and practicality within the United Kingdom itself. This is because it may be called on to rule as to whether a legislature in Scotland has exceeded its powers.

**The Maori people of what is now New Zealand ceded their sovereignty when they entered into the Treaty of Waitgani with Queen Victoria (left). More recently, New Zealand has been sending politically sensitive cases involving Maori claims to the Privy Council in the United Kingdom.**

New Zealand has been recently sending cases to the Privy Council involving their Maori population, cases of great political sensitivity within New Zealand. It is an advantage when those cases come before us that no one can claim we are not in a position to take an objective view. It could be said that it is appropriate that they should come before the Privy Council, meaning the Queen's council, because the Maoris rely upon the Treaty of Waitgani. This was entered into between Queen Victoria and the Maori people and when they ceded sovereignty to Queen Victoria prior to the establishment of what is now New Zealand.

This detachment, however, can lead to criticism. It has done so in relation to death row cases. No doubt some people guilty of appalling crimes have not been executed or have been acquitted as a result of decisions taken by the Privy Council. Naturally, this is not popular locally. However, the Privy Council has always adopted the position that its decisions apply the same standards of justice universally throughout its jurisdiction. Its decisions can bind not only the country from which the appeal comes, but other countries as well. In the past, the Privy Council has applied this standard, and it applies the same standard today. This was true in 1831 when upholding a regulation in India making it unlawful to continue the practice of suttee. This practice involves the sacrifice of the Hindu widow on the funeral pyre of her husband. It did so again in the case of *Pratt and Morgan v. Attorney General of Jamaica,*[1] decided just two years ago.

In *Pratt and Morgan,* the appellants argued that prolonged delay in carrying out the death penalty can be a cruel and unusual punishment. Instead of the usual five Law Lords, seven sat to review this appeal. (The first instance of a hearing by seven Law Lords since 1949). The seven Law Lords delivered a unanimous decision. Departing from an earlier decision of the Privy Council, they decided that to carry out an execution after a history of delay such as had occurred in this case would be unconstitutional and inhumane punishment, and would also constitute an abuse of due process. For the first time, it was decided that your concept of "due process" does not terminate with the court passing of sentence, but extends to cover the execution of the sentence as well. As a great many prisoners were being held in death row conditions throughout the Caribbean, it was essential that general guidance should be given. It was stated that in any case in which execution had not taken place within five years after the death sentence, there was strong ground for believing that to carry out the execution would constitute inhumane or degrading punishment. It is a testament to the small independent states of the Caribbean that they have since honored that decision, although it was not popular locally.

Of course the Privy Council has referred to the decisions of the United States on this subject, but looking as we do at the international developments in other jurisdictions, it was decided that our previous decision, which was consistent with decisions by U.S. courts, was not in accordance with current acceptable standards. The approach was supported by decisions in other common law jurisdictions and was reinforced by the decision of the European Court of Human Rights in *Soering v. U.K.*[2] In *Soering,* the European Court considered that for the United Kingdom to extradite to the United States in a capital case would not be in accord with the European Convention because of the delays that could occur in the United States in the carrying out of the death sentence. I interpose here to say that about the same time the House of Lords determined that the principle of due process can apply before the commencement of a trial. If someone is improperly removed from another country and brought to the United Kingdom, the procedure may not be in accordance with the due process a person would receive were he tried in the U.K. In the particular case to which I was referring, the South African authorities, according to the evidence of the applicant, had decided that the best route by which to extradite him to New Zealand was via London, where the police were waiting to welcome him. The lower courts rightly thought that was rather a strange route. The prosecution was stayed.[3]

In many other areas, decisions by the Supreme Court have been applied. In a recent case from Trinidad,[4] the Law Lords considered the validity of a pardon given by a president in a country where the prime minister had been shot, but not killed, while being held hostage. It was decided that the pardon should be upheld. In making the determination in that case, we applied a decision of the Supreme Court of the United States dealing with pardons that were granted

in connection with the Civil War.[5] In addition, without favoring Judge Learned Hand's approach to that of Justice Oliver Wendell Holmes, Jr.,[6] we have paid considerable deference recently to your decisions on free speech. Within the jurisdictions for which the Judicial Committee of the Privy Council and that of the House of Lords are responsible, we have gone a long way down the road paved by the Supreme Court in the *Sullivan* case.[7]

## II

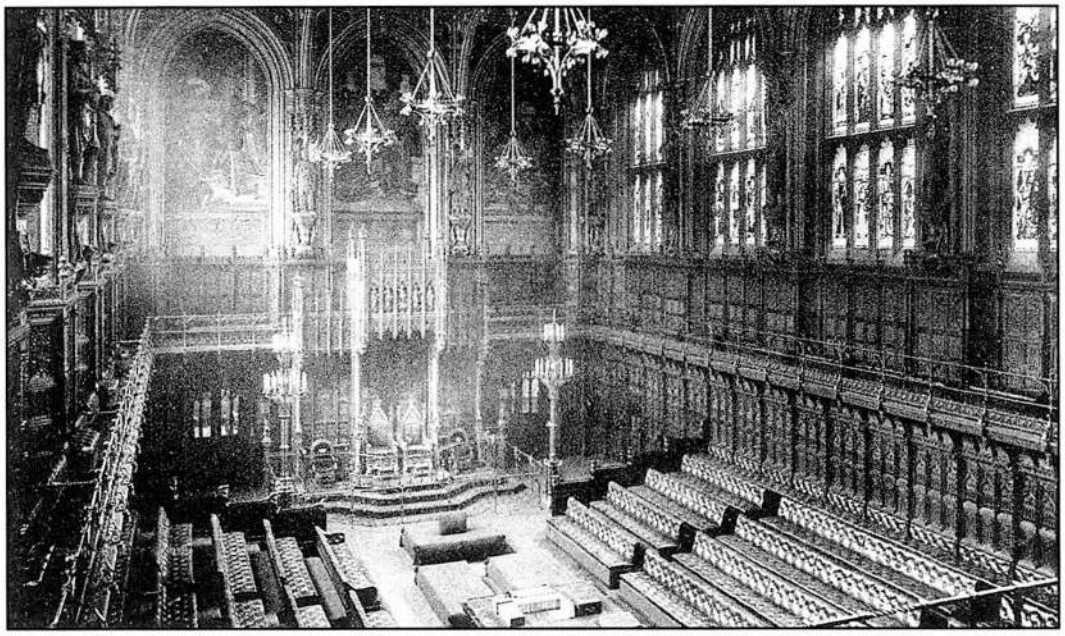
The Judicial Committee still meets in London. It does so in a panelled chamber in Downing Street in the building next door to the Prime Minister's home at 10 Downing Street. None of the Law Lords have rooms there, so each day, four times a week during the term, a limousine picks up the Lords who are sitting on the particular day from the main entrance of the House of Lords and drives them the 500 yards or so to the Privy Council in Downing Street and back and forth to lunch. As is appropriate in the case of judicial personages, we enter the vehicle in strict order of seniority. The junior judge, of course, occupies the tip-up seat. Until recently, Lord Lowry used to travel with us. For security reasons, because he had been the Chief Justice of Northern Ireland, he traveled in an armour-plated Jaguar with an armed escort in a second vehicle. We naturally felt that one of our numbers should volunteer to travel with him. The first time I did so, the guard explained to me that I should sit on the pavement side of the car and exit the car first. I asked why. He responded, "Well, the pavement side is the side nearest any possible assassin and in our experience we have found that assassins are usually impatient to finish their task and therefore could fail to wait for their real target to emerge from the car." I, for one, was left with the distinct impression that this approach to security was rather narrowly focused.

In order to sit as a member of the Appellate Committee of the House of Lords, the quorum of five Law Lords does not need to step outside the House of Lords. I understand that the Supreme Court of the United States used to share space with Congress in the Capitol building and that indeed, until 1860, they occupied "rather cramped quarters in the basement of the Capitol." The Court then moved to a chamber that had previously been occupied by the Senate and which had been described as one of "the handsomest halls in the Capitol." This was prior to moving to its magnificent building in 1935.

The Appellate Committee of the House of Lords is still occupying a corridor, "the Law Lords Corridor" as it is called, in the upper house of the legislative body. However, although the Law Lords' rooms were in that corridor until 1948, they actually held the hearings in the magnificent legislative chamber of the House of Lords. This meant that the legislative business could not commence until 3:45 in the afternoon, after the Law Lords had finished their judicial business. This practice ceased because of bomb damage during World War II. After the war, restoration work was necessary in Westminster and because of the noise, the Appellate Committee moved to an actual committee room. And that is where we currently sit, except when Parliament is not sitting. We still, however, always announce our judgments in the Chamber of the House of Lords.

The judgments take the form of speeches. They are given in the magnificent chamber that has at one end the golden thrones used by the royal family for the opening ceremonies of Parliament. The judgments are preceeded by the mace being brought into the chamber in solemn procession, which is followed by prayers. Matters then proceed as though this was the conclusion of a debate, the senior Law Lord presiding and sitting on the historical woolsack and each member, while no longer reading out the whole of his speech, indicates how he would decide the case. The recommended judgment is then presented as though it is a motion before the House.

The two committee rooms in which we now sit do not compare to the legislative chamber. They are much more intimate in scale and decor. The Law Lords still sit at a horseshoe-shaped table which is not elevated in any way. The Law Lords never wear robes or wigs, but ordinary business suits. Counsel, however, wear robes and wigs. The lawyers are a few feet away from the Lords. In the center of the horseshoe is a lectern from which the advocate speaks. He is almost encircled on three sides by the Law Lords. Having appeared as an advocate many times, I can tell you that when the going gets rough, you



**Until 1948 the Appellate Committee of the House of Lords held its judicial hearings in this magnificent room after official legislative business adjourned in the afternoon. Now the Appellate Committee meets in a separate committee room, but announces its judgments in the Chamber of the House of Lords.**

feel under attack on three fronts. An advocate who recently appeared before us has written of the experience in this way: "Although the challenge is cerebral, it brings to mind the scene from Daphne du Maurier's *The Birds* where the avian predators swoop into silent formation before starting their fearsome assault." Having attended hearings of the Supreme Court of the United States, I know that your Justices always treat advocates with the greatest respect, though they do sometimes ask searching questions. The striking distinction between the process in the Lords and the process in the Supreme Court is the length of time involved on the hearing in the Lords.

On average, hearings before the Lords last about two and a half days for each appeal, a time that may sound astonishing to you. The explanation for this is that in our system the hearing is used for a different purpose. We have no assistance, we have no law clerks, and no researchers, so we depend upon this argument process to carry out our examination in depth on the few cases that we hear.

We have, of course, methods by which we try to shorten the process. When we wish to do so we invoke the "Wall of Silence," which means that the Law Lords demonstrate their lack of interest in the case by not asking any questions at all. But these processes are not nearly as effective as the "traffic lights" that I believe exist in this Court. Occasionally during hearings, the advocates get irritated by the process. There was an occasion not so long ago, when his Lordship who was president asked how long the nonsense was going to continue? The distinguished barrister retorted, "About ten days if the interruptions continue, a few days if they diminish." On another occasion, an advocate who also was having difficulty with the Law Lords was told that "although the Lords had been listening to counsel for a long time, they were none the wiser." Counsel replied that he couldn't help that, but he hoped their Lordships were at least better informed!

Your Chief Justice indicated in his book that Justice Louis D. Brandeis once said that the Supreme Court was respected "because we do our own work." I am sure that statement is well justified and I believe it applies even more forcefully to the decisions of the Law Lords, who have no professional support. The way we deal with making a decision is to immediately meet to discuss the case after this prolonged argument. As I know from your Chief Justice's account, in conference they commence with the Chief Justice

and progress to the junior Associate Justice. When the members of my Court meet to discuss their judgments on recently argued cases, reverse seniority is invoked so that the junior judge is the first to speak. It is, therefore, for the junior judge to sum up in approximately ten minutes the reasons why he would take a particular course of action on the case, prior to hearing the views of the more senior members of the Court. Our justification is that allowing the junior justice to speak first means he is not overawed by more senior colleagues. (I say "he" since we are yet to have our first female member.)

There is, in fact, no Chief Justice of the Lords. There is a Lord Chief Justice of England, and although he is eligible to sit as a Law Lord, he almost never does so. His authority is over the High Court of England and Wales. He has no jurisdiction over Scotland and Ireland. The Lord Chancellor is our president, but because of his many roles he cannot sit with us regularly. The senior judge who is a member of the Committee, therefore, presides. At the end of conference, he will either decide if he is a member of the majority to write the first opinion himself, or nominate one of the other members of the Committee to do so. The opinion when ready is then circulated very much in the same way happens in this Court. We have no official policy on separate speeches, but I would hazard a guess that, in the interest of unanimity, certainly most, if not all, of my colleagues would write a separate opinion only if they had an additional point to make.

I do not know how long we can continue to indulge ourselves in conducting our hearings in this way. I regard our current system of operation as an indulgence because it is very demanding of time and very much dependent on the quality of the advocates who appear before us. They must have a complete mastery of the case. I suspect that it is even more expensive than your process, though it has been suggested to me by lawyers who practice in this Court that the cost of preparing the written briefs can be exorbitant, despite the limitations on length. It is my belief that we should move closer to your system and in my report on access to justice I have advocated the introduction of law clerks, as I feel if we are to change our system, they would be essential. I thus endorse the initiative of Judge Hand in 1909.[8]

We are rather in the same position as your Justices, in that we do miss seeing real witnesses. In the course of our hearings, we often speculate who present are the parties involved. We usually feel we can get guidance from who is sitting behind counsel. However, we have found on occasions that this can be misleading. One very distinguished advocate who recently died was very well aware of the inference that will be drawn from where a person sits. In one instance, he had a petition for leave to appeal to the House of Lords in which he had no confidence whatsoever. He saw his client in conference and advised him not to proceed, but the client insisted that he wanted to proceed with the appeal. The advocate was sure that if their Lordships saw his client there would be no doubt of the outcome because if ever a man looked like a crook, this was true of his client. So the advocate, Sam Stammler, suggested to the client that it would be better if he did not attend the hearing, but the client insisted he must be present. Much to Sam's surprise, and probably more to the surprise of his opponent, he obtained leave to appeal. As they came out, Sam's opponent said to him, "I can't understand what their Lordships were up to today. It was obvious you had no case and you only had to look at your client to know he was a crook." To which Sam replied, "I agree. That's why I told him to sit behind you."

## III

Earlier in this talk I made unflattering remarks about the Law Lords in the past. It was arrogant of me to do so, because the Law Lords were then playing a rather different role. Those comments could not be made about the Law Lords today. There has been a change of mood since the mid-1960s. In 1966 the Law Lords decided, quite remarkably, just by issuing a practice direction, that they would no longer be bound by previous decisions. This, of course, extended their role considerably. In addition, we have had the impact of the European Convention of Human Rights. It is not part of our domestic law, but decisions of the European Court of Human Rights on the Convention are highly persuasive. We also have the decisions of the European Court of Justice. Although the European Court of Justice deals with community law, and community law is mainly confined to commercial matters, the impact of that law is

now very extensive indeed. I believe that the decisions of these courts have stimulated the Law Lords to greater activity. Recent decisions have ensured that the executive now has to observe very strictly the requirements of any statutory provision that is imposed upon them. They have also ensured that the executive can no longer claim reliance on prerogative powers when seeking to avoid review. Throughout our civil law, you can see the impact of the Lords.

Recent cases have involved such delicate issues as the legal rights of the terminally ill and the rights of spouses to resist sexual advances by their marriage partners. The European Court is within its area, the final arbiter as to the meaning of community law. However, ultimately the Law Lords have the responsibility for determining whether the British legislation accords with the community law. On occasion they indicate that the legislation does not do so. It is then set aside as far as necessary.

In addition to their judicial role, the Law Lords do, of course, have the right to appear in the legislative chamber. By convention, a Law Lord must not indicate whether he is politically of the left or of the right when present during parliamentary business. So he sits on the cross-benches. When they speak, they avoid getting involved, if possible, in politically sensitive issues. They do, however, speak out in relation to issues where the rule of law is at stake and their views can have a striking effect on the decisions of the Upper House. They also chair, or are members of, parliamentary committees and in such a capacity they have been appropriately described as resident technical consultants to the legislature on the legal points arising out of proposed legislation. As mentioned earlier, from time to time individual Law Lords are appointed by the government to conduct or chair inquiries into topics of public concern. Lord Nolan, for example, is at the present time conducting an inquiry as to standards of behavior in public life, a matter of great importance. Indeed, as the inquiry dealt first of all with the House of Commons, it is perhaps a great compliment to him and to the standing of the Law Lords that the members of the House of Commons were prepared to have a committee presided over by a Law Lord look into what should be their permitted standards of conduct.

Bearing in mind these responsibilities, it is perhaps surprising that the appointment of members of the House of Lords Appellate Committee is not a matter of controversy. I know what happened when President Roosevelt sought to enlarge the membership of this Court in 1937. Because of the extrajudicial duties of Law Lords, two more Law Lords have been appointed recently, bringing the total to twelve. Neither the appointments of the two new members, nor the increase in the number of Law Lords, was a matter of controversy. That is a very happy situation and I hope it indicates that on the whole the public accepts that the Law Lords perform their tasks with a reasonable degree of efficiency.

## Endnotes

[1] [1994] 2 A.C.1

[2] (1989) 11 E.H.R.R. 439.

[3] *R. v. Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 A.C. 42.

[4] *A.G. of Trinidad and Tobago v. Phillips* [1995] 1 A.C. 396.

[5] *Ex parte Garland* 71 U.S. (4 Wall) 333 (1867); *U.S. v. Klein*, 80 U.S. (13 Wall) 128 (1872) and William F. Duker, "The President's Power to Pardon" 18 *William and Mary L. Rev.* pp. 475 and 510-520 (1977).

[6] Gerald Gunther, **Learned Hand, The Man and the Judge** (New York, 1994) pp. 161-7.

[7] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[8] Gunther, **Learned Hand,** p. 140

# The Story-Holmes Seat

**Harry A. Blackmun**

**Editor's Note:** *Justice Blackmun delivered this paper as the Society's 1996 Annual Lecture in June.*

This Society—the Supreme Court Historical Society—was founded in 1974, largely through the guidance of Chief Justice Warren Earl Burger. The former Chief had a certain sense of history and had noted that historical societies already were functioning within the other two branches. The Chief addressed the First Annual Meeting of this Society in 1976. And now, time has moved on so that we have gathered for the Twenty-first Annual Meeting.

When President Leon Silverman called, I was hesitant. After all, you already have had those twenty Annual Meetings and nineteen Annual Lectures that have served to benefit the Court. A review of the subjects of those lectures and the list of those who delivered them discloses that much ground has been covered. The list includes persons of notable stature in the field of American constitutional law: Richard Morris, Benno Schmidt, Maxwell Bloomfield, George Haskins, Henry Abraham, Robert Bork, William Leuchtenburg, Daniel Meador, Kenneth Starr, Liva Baker, and Herbert Brownell. Depending upon how one counts, Chief Justice Burger and Justice Antonin Scalia even have twice assumed the lectureship responsibility and no fewer than three other Justices of the Supreme Court, Lewis F. Powell, Jr., Sandra Day O'Connor, and Anthony Kennedy, have stood at this podium for the Annual Lecture. Last year, Professor Gerald Gunther spoke of Learned Hand,[1] one of the great American jurists and lawyers who, like Erwin Griswold and Augustus Hand, did not gain appointment to the Supreme Court of the United States. Then, in 1994, the preceding year, Justice Scalia presented his essay on the value of dissenting and concurring opinions.[2] And now I am asked to join the group after all those predecessors! So much, therefore, has been offered that one appropriately may ask, almost with a whimper, "What is there left?"

## I

The late Erwin N. Griswold, long-time dean of Harvard Law School and thereafter Solicitor General of the United States, described the seat on the Supreme Court occupied by Justice Joseph P. Story for thirty-three years (1812–1845) and by Oliver Wendell Holmes, Jr., for twenty-nine years (1902–1932) as a "distinguished" one.[3] That, of course, is a matter of opinion and may or may not prove to be correct as history unfolds. It cannot be denied, however, that,

through 1969, it has been occupied by a number of figures renowned in American law and in the annals of the Court. Its lineage begins with §1 of the Judiciary Act of 1789, 1 Stat. 73, when Congress created the Court to consist of a Chief Justice and five Associate Justices.

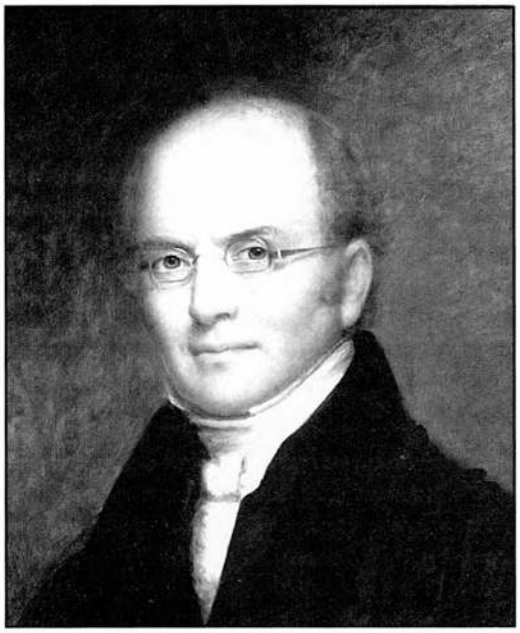
## II

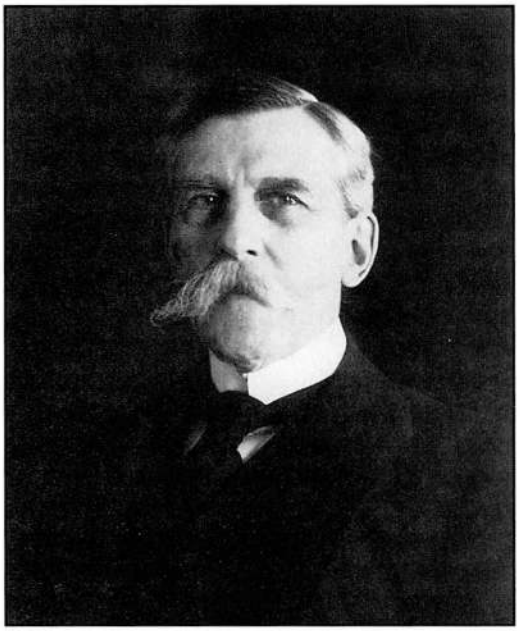
Until the present day, thirteen persons, every one a male, have occupied that seat. Here are the names of the eleven who have held the place successively from 1790 to 1969, the year I necessarily have selected as the termination date of this review:

William Cushing of Massachusetts
Joseph P. Story of Massachusetts
Levi Woodbury of New Hampshire
Benjamin R. Curtis of Massachusetts
Nathan Clifford of Maine
Horace Gray of Massachusetts
Oliver Wendell Holmes, Jr.,
of Massachusetts
Benjamin N. Cardozo of New York
Felix Frankfurter of Massachusetts
Arthur J. Goldberg of Illinois
Abe Fortas of Tennessee

For a time, the place was regarded as the "New England" seat, for, as the list discloses, until Justice Cardozo of New York took office in 1932, every occupant was from Massachusetts, New Hampshire, or Maine. Indeed, of the entire thirteen, a majority have been from Massachusetts alone. Then, there was a time when some considered it to be the "Jewish" seat, occupied successively by four members of that faith. Fortunately, these descriptions of small significance have faded away. Yet the prominence of the occupants of the seat during the 179 years from 1790 to 1969 cannot lightly be disregarded. It is a feature that tends to make any new appointee to that chair apprehensive and humble. Does he feel himself up to that tradition of strength and toughness? What is there about the successive names of Cushing all the way through Fortas that creates this degree of apprehension?

I refer to the chair duplicatively as the "Story-Holmes" seat, rather than merely the "Story" seat, in view of the well-known cast of the Holmes name over more than one distinguished generation and because the "Yankee from Olympus"[4] has been regarded as presenting particular appeal. It might just as properly be referred to as the "Story" seat or even as the "Cardozo" seat.





**The seat on the Supreme Court occupied by Justice Joseph P. Story (left) for thirty-three years (1812–1845) and by Oliver Wendell Holmes, Jr. (right), for twenty-nine years (1902–1932) has been described as a "distinguished" one. Others have called it the "scholar's seat" because of the brilliant writings of several of its occupants. The seat has also been known as the "Jewish seat," because four Jews—Benjamin N. Cardozo, Felix Frankfurter, Arthur J. Goldberg, and Abe Fortas—held it in unbroken succession.**

## III

But what about those occupants that make, for me at least, such interesting history and discovery? Let us consider them:

1. **Joseph P. Story**, who served for thirty-three years from 1812 to 1845. Youngest person ever to be appointed to the Supreme Court. Member of a large family (ten siblings and seven half siblings). Harvard class of 1798. Writer of the class poem, which, in those days, was a special honor. Turned from verse to the law. A few years reading law and practicing in Massachusetts. State legislator. Speaker of its House. Congressman. Dane Professor at Harvard Law School. President James Madison's fourth nominee for the vacancy created by the death of Justice Cushing. Supported Chief Justice John Marshall and almost his alter ego. Filled the gap in legal writings of his day with volume after volume in almost every area of the law. Jurist. Teacher. Author. A natural predilection for judging. The first to give meaning to our federal system of government. Truly, the father of American legal education. Even Holmes, one of his later critics, conceded that Story had done more than any one else to make the law easier to understand.

2. **Oliver Wendell Holmes, Jr.,** who served for twenty-nine years from 1902 to 1932. The Great Figure of Massachusetts. Authentic and complete Bostonian. Born in that Commonwealth. Son of a famous father of the same name. Poet of his Harvard Class. Served in the Union Army during the War Between the States. Wounded three times. Practiced in Boston for seven years. Instructor at Harvard Law School. Member of the Supreme Judicial Court of Massachusetts. Then, its Chief Justice. Author of **The Common Law** (1881). A legend at Harvard Law School. I remember when he visited there in 1931, somewhat bent physically but alive mentally. Yet I may state—and it is risky so to do—that while I was on the federal bench I rarely found a Holmes majority opinion that was helpful to the matter at hand. It was otherwise with dissents. I always stop by his grave in Arlington Cemetery when I walk there. One cannot underestimate Holmes' influence in the law schools of the eastern United States. One need not expand further in evaluation. His status in that respect is established.

3. **Benjamin N. Cardozo**, who served for six years from 1932 to 1938. I concede some probable bias here, for his appointment by President Herbert Hoover came during my last year at law school. A Democrat and the Chief Judge of the Court of Appeals of New York, he was a favorite in academic circles of the East and, I suspect, a welcome choice everywhere. The selection of a successor to the then-revered Holmes demanded excellence unhampered by party considerations or other strictures. And so Cardozo's selection came about. But death occurred too soon.

4. **Felix Frankfurter**, who served for twenty-three years from 1939 to 1962. A Vienna-born New Yorker. Assistant United States Attorney. Counsel to the President. Member of the Harvard Law School faculty. Here again, I must confess some possible bias, for I sat among the many at his feet in a course called "Public Utilities," which reached out for all aspects of the law and its procedure and had comparatively little to do with public utilities. A leader in the Socratic method. Sorted out the brightest students and stayed with them, leaving the rest of us to listen and hold on by ourselves. For me, with the possible exception of Samuel Williston, the most proficient instructor in law I had. Taught the ways of litigation and we all profited. An FDR confidant, a fact he did not conceal. Basked in the limelight of governmental activity at the time of the Great Depression. Helped to pull us together when cohesiveness was needed. One cannot minimize his influence in and on the Court.

## IV

So far, I have named only four—Story, the second in the line, Holmes, the seventh, Cardozo, the eighth, and Frankfurter, the ninth. What of the other seven? Are they lesser lights to be passed over as inconsequential or ineffective? Hardly, for consider:

1. **William Cushing**, the originator of the line, who served for over twenty years from 1790 to 1810. Perhaps, as some have said, Cushing was not a person with the greatest legal capacity. But he had powerful connections in the hectic and important days of the American Revolution. He wrote only nineteen opinions but successfully survived two major transitions: from a royal appointee to a member of the judiciary of

the independent Commonwealth of Massachusetts, and from being a member of the comparatively weak Supreme Court in the early days to the beginning of the era of the Court's authority under John Marshall. Yet he had, some have asserted, a "propensity to over-simplify complex issues.[5]

2. **Levi Woodbury**, who served for five years from 1845 to 1851. Member of a prosperous rural New Hampshire family. Graduate of Dartmouth. The first Justice to study at a law school. On his state's Supreme Court at twenty-seven. Governor. Speaker of the New Hampshire House. Congressman. Secretary of the Navy. Secretary of the Treasury. Guardian of states' rights. A progressive conservative. It has been said: "He had too much talent to be a mediocrity, but not enough verve to use his talents dynamically."[6]

3. **Benjamin R. Curtis**, who served for five years from 1851 to 1857. Harvard and Harvard Law School. Prospered at the Boston Bar. A compromiser but prominent in legal reform. Wrote fifty-three majority opinions and a controversial dissent in the *Dred Scott* case, which may have led to his leaving the Supreme Court in 1857 at the age of forty-seven. An influential conservative whom the times may have passed by.

4. **Nathan Clifford**, who served for twenty-three years from 1858 to 1881. A poor education in the New Hampshire schools. Member of the Maine legislature. Speaker there at twenty eight. State Attorney General. Congressman. Involved in the difficult negotiations at the time of the Mexican conflict. A Buchanan appointee confirmed by a vote of only twenty-six to twenty-three. Capacity to grow from meager roots. Justice Samuel Miller called him a "lifelong bitter Democrat." Dissented in one-fifth of his cases. Perhaps a portrait of "massive mediocrity."[7]

5. **Horace Gray**, who served for twenty years from 1882 to 1902. Large physically. Imposing scholarship. On the Massachusetts Supreme Judicial Court at the age of thirty-six. Strict on court procedure. Wrote 1,367 opinions for the state court. Its Chief Justice. Had Brandeis as his "secretary." Perhaps not a great Justice, but not one to be ignored.

6. **Arthur J. Goldberg**, who served for two years from 1962 to 1965. General Counsel, United Steelworkers of America. Chief of the Labor Division in Europe of the Office of Strategic Services. Secretary of Labor. Ambassador to the United Nations.

7. **Abe Fortas**, who served for three years from 1965 to 1969. Yale Law School professor. Undersecretary of the Interior. Adviser to the United States Delegation to the United Nations.

These seven are not underdogs or incompetents. Powerful connections. Determination. Broad knowledge of the law. Governors. Speakers. Congressmen. Diplomats. State attorneys general. State supreme court justices and chief justices. Public prominence.

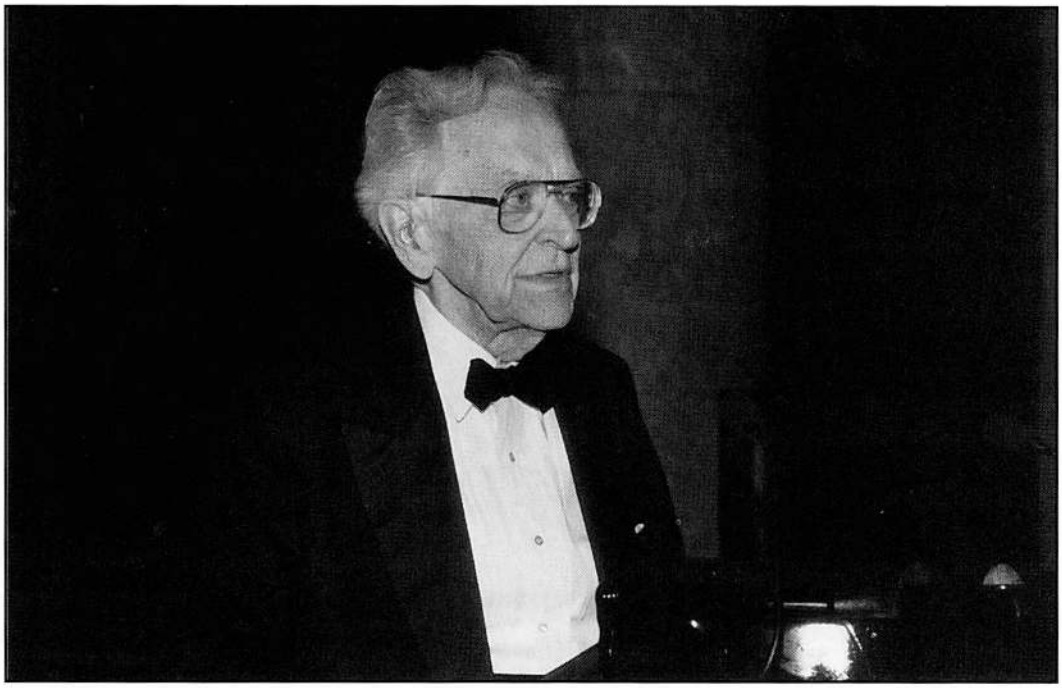
Of course, there have been other great Justices who were not in the Story-Holmes line. Who would deny exalted status to John Marshall, or Charles Evans Hughes, or Samuel Freeman Miller, or the first Harlan, or Brandeis, Brennan, and the others whose names I would seek to mention here but refrain from doing so for reasons of brevity and of avoiding anticipated controversy? Allegations of greatness of stature or of influence embody opinions with many measures, biases, and sympathetic favoritism. I am content to tread only on safer and more solid ground. There is risk enough as it is.

## V

So much for the roster of the Story-Holmes seat for the first 179 years. What is there, if anything, about that roster that has led Dean Griswold and some others to give it special notice? I submit, with diffidence, that there are a number of factors to consider.

1. The first, which must be shared with others, is its very antiquity. As has been noted, the seat was one of the six originals of 1790. The seventh chair was created only seventeen years later by §5 of the Act of Feb. 24, 1807, 2 Stat. 420, 421. There is some status and authority, usually deserved, in being among the first.

2. The second factor is that the appointment demonstrated where the power lay. The nation was new and small in 1790. It was in only its twelfth year of independence. The colonial experience, however, brought forth the ultimate crucial decision on the then-proposed Constitution of the United States of America. This was the result of hard and compromising—and perhaps inspired—labor by the Founding Fathers who had



**The subject Justice Harry A. Blackmun chose for the Society's Annual Lecture was the history of the seat he occupied on the Supreme Court Bench. His descriptions of his predecessors and their accomplishments are succinct and illuminating.**

assembled in Philadelphia during the summer of 1790. But the signing by thirty-nine men from twelve states, with the attestation by the Secretary, was not the conclusion of the task. Ratification by at least nine states was yet to be accomplished. The ensuing months were a period of uncertainty, for it was known that in some of the state conventions there would be worthy opposition, heated debate, and seriously stated doubts about the wisdom of the proposed document and about what it would mean for the infant nation. Massachusetts, New York, and Virginia were critical. The final vote in Massachusetts was 187 to 168 in favor of ratification; a ten-vote switch out of 355 would have meant defeat. In New York, it was thirty to twenty- seven, a margin of only two votes. In Virginia, it was eighty-nine to seventy-nine. But I suspect that the very closeness of the vote served to solidify the result. The issue had been studied and investigated, and the decision was made. This obviously meant that some military action, not merely the risk of it, was likely, for the mother country was not about to let the colonies go in peace. They were peopled by Englishmen and were England's foothold for her development of the largely unknown but alluring lands west of the Atlantic, and it forecast continued antagonism, not accepted peace with differences permanently settled and fading into the background of history.

I presume to call it a *mature* decision that pointed the way for the future. The die was cast. The decision was made and the well-known events followed.

3. With the decision effectuated, the third factor, so far as the Story-Holmes seat was concerned, emerged. It was tenacity in holding on to that seat. Here New England's power and influence at the time were exercised and felt. The facts speak for themselves.

4. The very names of some of the occupants conjure up a vision of strength and prominence. Among them are Story, Holmes, and Frankfurter, each known for more than his membership on the Court, and each serving during a different generation—Story for his presence at the very beginning of the nation's existence; Holmes for a name already famous; Frankfurter for his prominence as a professor of law and his closeness to a powerful President of the United States at a vital period in the twentieth century.

5. There is a challenge that abides in the very appointment to a seat that has been occupied by persons of such recognized ability and accom-

plishment. Closeness to power often breeds additional power. A sterling example begets emulation and challenge.

6. The length of service by a number of the occupants served to impose impressive stamps upon the seat: Cushing, the first occupant, served for twenty years; Story, the second, for thirty-three years; Clifford, the fifth, for twenty-three; Gray, the sixth, for twenty; Holmes, the seventh, for twenty-nine; Frankfurter, the ninth, for twenty-three. These six were there for a total of 148 years of the 179-year period.

7. Not unimportant was the widespread perception of the innate, sterling, and powerful character first of the New Englander and then of the Jew. This can be said to have lent strength and leadership qualities to the seat. One need not expand on the New England character of those days. That is a part of our well-known and accepted heritage. And one need not expand on the history of the Jewish people—scattered worldwide and always gathering fortitude and strength in the process of re-establishing themselves.

8. Good training and education, both by preceptors and then in undergraduate and graduate schools, added their influence. It may seem strange that these seem always to have been present in the early days. Perhaps those qualities were sought out more diligently then than they are today, when greater equality of training is so available.

9. Then perhaps there is the element of mere chance when fortune seems specially to smile. There have been and are, literally, hundreds of able lawyers (and nonlawyers for that matter) in the world "out there" who, if selected, would perform the work of a Supreme Court Justice not only passably, but well. The timing of a vacancy, the multitudinous shadows that are influential—age, the prevailing political situation, popularity—all play their parts. Justice Tom C. Clark expressed it well when he said, so many times, "One has to be on the corner when the bus comes by." There is a point when favorable odds are at their full, and thereafter recede.

## VI

I, of course, speculate, and it is likely I am only musing and drawing tentative conclusions based on assumed and devised but elusive "facts." There is not only amusement but an element of satisfaction in seeking to ascertain and evaluate what really took place in the minds of the appointing powers and the appointees of years ago. Dean Griswold's estimate cannot be proved conclusively, but neither can it be denied conclusively. One must be entitled to express his opinion on so fascinating a subject, even though that opinion does not carry the day with others.

## Endnotes

[1] G. Gunther, "Judge Learned Hand: The Man, the Myth, the Biography," *Journal of Supreme Court History* 1995, p. 47.

[2] A. Scalia, "The Dissenting Opinion," *Journal of Supreme Court History*, 1994, p. 33.

[3] *See* E. Griswold in "A Tribute to Justice Harry A. Blackmun," 108 *Harv. L. Rev.* 11, 12 (1994).

[4] *See* C. Bowen, **Yankee from Olympus** (Boston: Little, Brown, 1944).

[5] *See* H. Johnson, "William Cushing," in 1 **The Justices of the United States Supreme Court 1789–1969** (L. Friedman and F. Israel, eds., 1969), p. 66.

[6] *See* F. Gatell, "Levi Woodbury," in 2 **The Justices of the United States Supreme Court 1789–1969** (L. Friedman and F. Israel, eds., 1969), p. 854.

[7] *See* W. Gilette, "Nathan Clifford," in 2 **The Justices of the United States Supreme Court 1789–1969** (L. Friedman and F. Israel, eds., 1969), p. 973.

# Documentary Editing and the Jay Court: Opening New Lines of Inquiry

**Ene Sirvet and R.B. Bernstein**

For too long, Americans have thought that the history of the Supreme Court of the United States began with John Marshall. Even many lawyers, legal scholars, and historians, though aware that three Chief Justices preceded Marshall, have dismissed their tenures as insignificant at best, failures at worst. Evaluating the Supreme Court that *was* by reference to the powerful appellate tribunal that *is* wrongly gauges a Chief Justice's success by two rules of thumb: did the Court under that Chief Justice hand down important constitutional decisions that have become bulwarks of modern American constitutional law? Was that Chief Justice a leading force in promulgating such decisions?

Using the modern understanding of the Supreme Court as a measure to evaluate earlier Courts obscures how, by a process neither unopposed nor foreordained, the Court became the center of gravity of American constitutionalism. Moreover, focusing the historiography of the federal courts on the Supreme Court scants the vital role played in the development of American law by the lower federal bench, whether trial or appellate.

## The Promise of Documentary Editing

One factor obscuring the early Court was the difficulty of access to historical evidence. Until recently, most primary sources for the early Court were unpublished, scattered in repositories around the nation, and difficult to use for anyone lacking historical background and legal training. Lawyers of that era used a complex legal jargon that can baffle unprepared researchers. For example, studying the federal circuit courts requires a grasp of such subjects as the common law writ system and federal jurisdiction. Knowing the difference between a suit "in trespass" and one "in trespass on the case" is key to analyzing the kinds of lawsuits that these courts heard; knowing the rules of federal jurisdiction reveals whether cases were properly brought before the courts and lays bare patterns of interstate litigation and the economic transactions behind such suits.

Now the "documentary editing revolution," hailed by historian William W. Freehling as the most important development in modern Ameri-

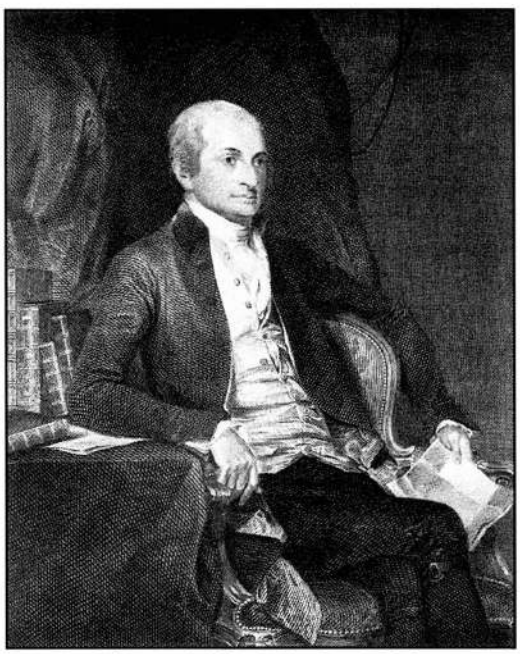
can historiography,[1] has embraced the federal courts. Not only is John Marshall the focus of one of the most distinguished documentary editing projects, **The Papers of John Marshall**—two other projects examine the pre-Marshall federal judiciary: **The Documentary History of the Supreme Court of the United States, 1789-1800** and **The Papers of John Jay.**

A documentary history portrays the growth of an institution or process of government, tracing the development of collegial relations among its members and its processes of collective decision-making. A documentary editing project keyed to an individual complements institutional documentary histories by presenting the institution's development through that person's eyes—especially when, like Jay or Marshall, he is the institution's leader. A Chief Justice oversees and speaks for the Supreme Court and the federal judiciary; he monitors the administration of the federal bench, the courts' ability to fulfill their constitutional and statutory duties, and the judiciary's place in the public mind.

Focusing on the first Chief Justice offers a unique view of the federal courts' early development. This is the goal of the last volume of **The Papers of John Jay: Chief Justice and Federalist Statesman, 1789-1829**, which will examine Jay as the Court's Chief Justice and as one of six circuit judges. It will assess the burdens he faced while riding circuit and while presiding over the Court, leading his colleagues in defining the Court's role in an evolving constitutional system. It will describe the number and kinds of cases that Jay heard, and it will trace patterns of federal litigation. It will analyze how Jay and his colleagues grappled with the problem of extrajudicial activities and responsibilities—those imposed by Congress (as in the 1792 statute asking the Justices to hear Revolutionary War veterans' pension claims) and those sought by President George Washington and his administration (such as his 1793 request for an advisory opinion from the Court, discussed in the following article, and his 1794 naming of Jay as Minister Plenipotentiary to negotiate a treaty with Great Britain). **The Papers of John Jay** thus will cast new light on the federal judiciary's formative years.

## John Jay as Chief Justice

When in 1789 the forty-three-year-old John Jay of New York became the first Chief Justice, he had already compiled a distinguished record of public service to his state and nation.[2] As the government authorized by the Constitution took shape, Jay was often cited as a candidate for high



**John Jay (left) married Sarah Van Brugh Livingston (right), the daughter of William Livingston, a future governor of New Jersey, in 1774. That same year he represented his state at the First Continental Congress. The Jays had six children, two of whom would follow their father into the law.**

federal office. After much thought and discussion, including a meeting with Jay, President Washington nominated him as Chief Justice of the United States, on September 24, 1789, and the Senate unanimously confirmed his appointment two days later.

Jay found himself at the head of a new, untried federal judiciary. The Constitution's Article III gave only cryptic hints about federal courts; Congress built on those hints in the Judiciary Act of 1789. The federal judicial system that statute delineated was a transitional stage between the unarticulated state judiciaries of the 1770s and 1780s and today's hierarchical, pyramid-shaped judicial structures.[3] Not only were the federal courts experimental—they carried a heavy burden of suspicion growing out of the ratification controversy of 1787-1788. The first federal judges not only had to make the courts work—they had to win the people's trust.

The Chief Justice's duties included overseeing the Court's organization and administration, leading his colleagues in deciding the Court's cases, and managing the federal judicial system. Modern Chief Justices meet many of the same responsibilities, but their nature and relative importance differed in 1789 from what they are today. (Chief Justice Jay was a trusted informal advisor to the Washington administration. For a detailed discussion *see* the next article.)

First, Jay and his colleagues had to define the Court's rules of procedure and its standards for admission to practice before it. With these goals met, the Justices had little to do during the Court's twice-yearly meetings, other than admit lawyers to its bar, until the lower courts generated appeals.

Jay's next focus was the federal circuit courts —assigning the Court's members to each of the three geographic circuits, and then holding circuit courts in each state in his allotted circuit.[4] The 1789 statute required the Justices to "ride the circuit" twice a year. Because the Supreme Court had no cases until the early 1790s, the circuit courts dominated the Justices' time.

Circuit judges not only heard and decided cases; they also convened and instructed grand juries and admitted lawyers to practice before the circuit courts. Jay and his colleagues used these ceremonies to establish the federal bench's legitimacy in the public mind, to dispel lingering suspicions of the federal courts, and to expound the Constitution's principles and explain the laws enacted under its authority. For example, in his first grand jury charge, first delivered in New York City in April 1790, Jay discussed amending the Constitution:[5]

> It is pleasing to observe that the present national government already affords advantages which the preceding one proved too feeble and ill-constructed to produce. How far it may be still distant from the degree of perfection to which it may possibly be carried, time only can decide. It is a consolation to reflect that the good-sense of the people will be enabled by experience to discover and correct its imperfections, especially while they continue to retain a proper confidence in themselves, and avoid those jealousies and dissensions which, often springing from the worst designs, frequently frustrate the best measures.

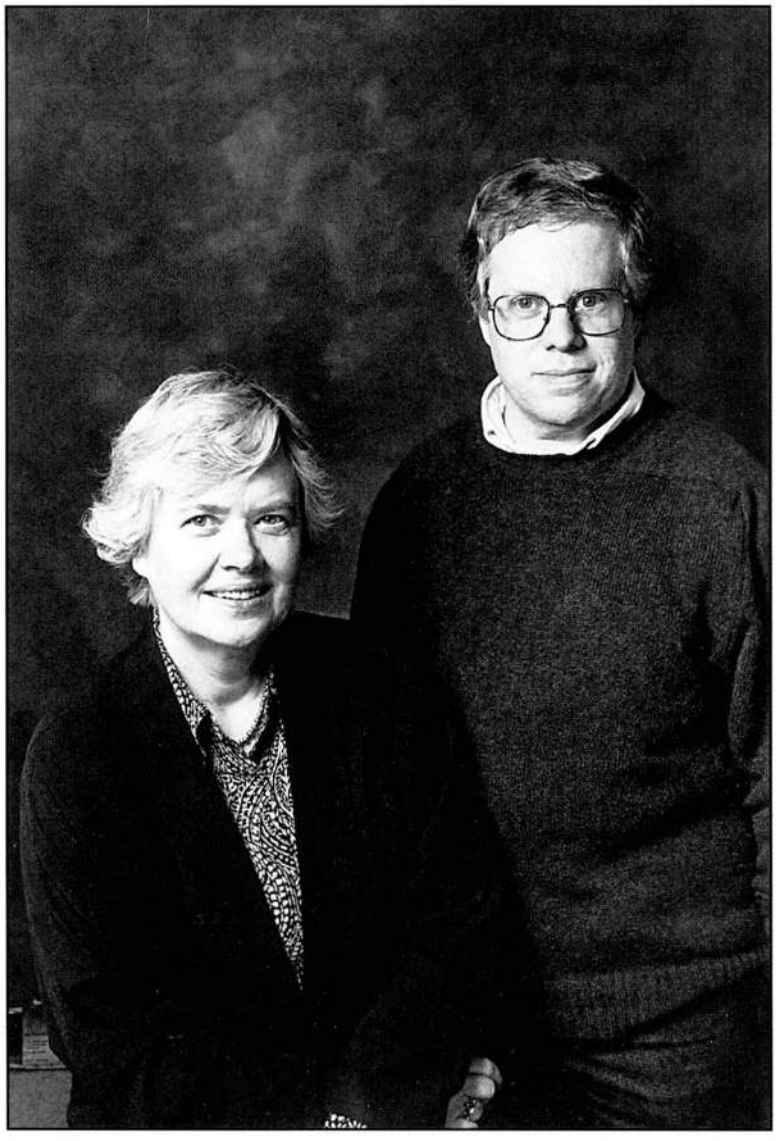
Most circuit court cases were "diversity cases": suits between citizens of different states or between foreign subjects and citizens of a state. Usually, out-of-state creditors sued on debts owed them by in-state debtors. Some cases pitted provisions of the Constitution or treaties against state laws. For example, a Connecticut debtor invoked a state statute that barred the accruing of interest during the Revolution on debts owed to British creditors—though such statutes were invalid under the Treaty of Paris. Upholding federal supremacy, Jay and his colleagues set aside such laws on federal constitutional grounds nearly twenty years before the Marshall Court's decisions in *Fletcher v. Peck* (1810) and *McCulloch v. Maryland* (1819).[6] And yet the Justices chafed at the increasingly difficult burdens of circuit riding and appealed more than once to Congress and the executive branch for relief—but in vain.[7]

In the early 1790s, the Supreme Court decided its first cases. In the most important, *Chisholm v. Georgia* (1793),[8] a South Carolina executor of a South Carolina creditor sued Georgia to recover debts contracted to fund the Revolutionary War. The Constitution, Georgia insisted, did not permit citizens of one state to sue another state in federal court. When the Jus-

tices ruled that Chisholm could sue Georgia in federal court, the resulting furor spurred Congress to propose what became the Eleventh Amendment—the only constitutional amendment limiting the federal courts' power, and the first to overturn a decision of the Supreme Court. Adding insult to injury, Congress worded the amendment as a correction of what it deemed the Court's misreading of Article III, section 2 of the Constitution.[9]

While the amendment was pending before the states, Jay was in Great Britain. In April 1794, the President named him a Minister Plenipotentiary to negotiate a new British treaty. Jay's concern to preserve peace between the United States and Britain overcame even his commitment to his judicial duties. As he wrote to his wife Sally:[10]

> The object is so interesting to our country, and the combination of circumstances such, that I find myself in a dilemma between personal considerations and public ones. Nothing can be much more distant from every wish on my own account . . . . This is not of my seeking; on the contrary, I regard it as a measure not to be desired, but to be submitted to. . . . If it should please God to make me instrumental to the continuance of peace, and in preventing the effusion of



**Ene Sirvet (left) has been editor of *The Papers of John Jay* at Columbia University since 1989, when she succeeded the late Richard B. Morris, with whom she had worked on the Jay project since its founding. R.B. Bernstein (right) is associate editor of *The Papers of John Jay* and an adjunct professor at New York Law School. They are coeditors of the forthcoming work *The Life and Legacy of John Jay*.**

> blood, and other evils and miseries incident to war, we shall both have reason to rejoice. Whatever may be the event, the endeavour will be virtuous, and consequently consolatory.

Returning home in 1795 with the completed treaty, having been absent from the federal bench for more than a year, Jay discovered that he had been nominated and elected governor of New York that spring. (In 1792, Jay had allowed New York's Federalists to nominate him for governor against the incumbent George Clinton, but did no campaigning; the Clintonians manipulated voting results to keep the incumbent in office.) Contemporaries who observed the New York election expected Jay to resign from the Court to accept the governorship—and, on June 29, 1795, he did.

Jay served two difficult terms (1795-1801) as governor of New York, contending with growing partisan splits in American politics fueled by controversy over the British treaty he had negotiated. In 1801, looking forward to the end of his second term, Jay was determined to retire from public life. Without consulting him, however, President John Adams nominated him to succeed Oliver Ellsworth as Chief Justice, who had resigned in late 1800, and the Senate confirmed him. To Adams' surprise, Jay declined the appointment on three grounds, having "carefully considered what is my duty, and ought to be my conduct, on this unexpected and interesting occasion."[11] First, he cited the origins and development of the federal judiciary—sources of repeated frustration for him during his Chief Justiceship:

> I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the judges on this important subject have been treated.

Second, he declared, "I wish and am prepared to be and remain in retirement." Finally, he cited "the state of my health," which "removes every doubt, it being clearly and decidedly incompetent to the fatigues incident to the office." With this polite but firm letter, John Jay ended his nearly three decades of public service.

Retiring to his farm in Bedford, New York, Jay devoted the rest of his life to his family, agriculture, and the consolations of religion. In 1802, the sudden death of his wife Sally, who had been ill for several years, cast a pall over his retirement. Jay died in 1829, after several years of increasing ill health.

## Illuminating the Jay Court

John Jay's papers from his chief justiceship, which will appear in Volume IV of **The Papers of John Jay**, offer an array of new insights on the evolution of the federal judiciary and the office of Chief Justice. Administering the federal courts through the mails, Jay's correspondence with his fellow Justices displays his mastery of the Chief Justice's duty to lead the Justices while maintaining collegiality and mutual trust among them. On February 12, 1791, for example, Jay consoled Justice James Iredell, who complained that his duties on the Southern Circuit were disproportionately difficult; Iredell estimated that he had to travel 1,900 miles twice a year to ride his circuit, besides the 1,800-mile trip to and from Philadelphia. Noting that "[t]he Inconveniences you mention are doubtless great and unequal," Jay pledged "to re-examin[e] the merits of the Question of Rotation" of the Justices among the circuits, and acknowledged that "[i]f the Decision on it at New York should on further consideration appear to have been erroneous, it ought to be relinquished." He also warned Iredell that "an adequate Remedy can in my opinion be afforded only by legislative Provisions"—a prospect that years of congressional and executive indifference proved unlikely.[12]

Jay's circuit court diary, which will appear as a unit in Volume IV for the first time, illuminates his understanding of the purposes of circuit riding and his deep interest in politics and

agriculture. In particular, his diary shows how Jay, like other politicians of his day, collected not only information on social and economic conditions of the different regions of the nation he visited, but also what historians would deem political gossip.[13]

We also will analyze the patterns of litigation and judicial caseloads of the federal circuit courts on which Jay served from 1790 to 1794. These records will cast new light on the growing interconnectedness of the American economy in the early republic and the federal judges' evolving understanding of the workings of the judiciary, the scope of their jurisdiction, and the problems of judicial administration.

Because Jay and his colleagues recognized that their posts carried symbolic as well as substantive responsibilities, we will present documents establishing the contexts of and public reactions to the grand jury charges that Jay delivered while riding circuit. These ceremonies show how the federal courts were in effect missions of goodwill from the federal government to the people.[14]

Finally, study of the federal judiciary from Jay's vantage point as Chief Justice permits analysis of how Jay's character, demeanor, and political and diplomatic skills served him well on the Court, while riding circuit, and in assuming (or refusing to assume) extrajudicial duties and responsibilities.

## Conclusion

John Jay was a lawyer and jurist, a veteran politician who was keenly aware of the political context in which the first federal courts operated, and a seasoned diplomat who understood the interplay of law and politics and could apply his diplomat's skills and talents to the conduct of the courts and the resolution of disputes of various kinds. Viewing the history of the Supreme Court and the federal judiciary through John Jay's eyes, therefore, as **The Papers of John Jay** does, provides a unique perspective on the origins and early years of the Court, the federal judicial system, and the Constitution in their social and political setting.

## Endnotes

[1] William W. Freehling, **The Reintegration of American History** (New York: Oxford University Press, 1994), ch. 1.

[2] Henry P. Johnston, ed., **The Correspondence and Public Papers of John Jay,** 4 vols. (New York: G. P. Putnam's Sons, 1890-1893), will be superseded by Richard B. Morris and Ene Sirvet, eds., **John Jay: Unpublished Papers,** 2 vols. of 4 projected (New York: Harper & Row, 1976—). Unless cited to other compilations or repositories, all documents cited in this article will appear in volume 4 of **The Papers of John Jay: Chief Justice and Federalist Statesman, 1789-1829** (forthcoming). *See* also Ene Sirvet and R. B. Bernstein, eds., **The Life and Legacy of John Jay** (forthcoming) (collection of 1995 Speranza Lectures at Columbia University marking Jay's 250th birthday).

[3] The sources for the framing of the Judiciary Act appear in Linda Grant DePauw et al., eds., **The Documentary History of the First Federal Congress,** 12 vols. of 20 projected (Baltimore: Johns Hopkins University Press, 1972—), vols. 5 (legislative history), 9 (Senate debates), 10-11 (House debates) and Maeva Marcus et al., eds., **The Documentary History of the Supreme Court of the United States, 1789-1800,** 5 vols. of 8 projected (New York: Columbia University Press, 1985—), vol. 4. *See* also Wilfred J. Ritz (Wythe Holt and L. H. LaRue, eds.), **Rewriting the History of the Judiciary Act of 1789** (Norman: University of Oklahoma Press, 1990); Maeva Marcus, ed., **Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789** (New York: Oxford University Press, 1992); and William Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (Columbia, SC: University of South Carolina Press, 1995), 1-70.

[4] Jay first served on the Eastern Circuit—the states from New Hampshire to New York—and then on the Middle Circuit—the states from New Jersey to Virginia.

[5] Jay delivered this grand jury charge at each circuit court held during his first stint of circuit riding, in the Eastern Circuit in the spring of 1790.

[6] *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

[7] *See, e.g.,* Justices of the Supreme Court to George Washington, August 9, 1792, enclosing Justices of the Supreme Court to the Congress of the United States, November 7, 1791.

[8] *Chisholm, Executor, v. Georgia,* 2 U.S. (2 Dall.) 419 (1793).

[9] *See* the documents collected in Marcus et al., eds., **Documentary History of the Supreme Court, vol. 5: Suits Against States.** *See* also Casto, **Supreme Court,** 184-212.

[10] John Jay to Sarah Livingston Jay, April 15, 1794.

[11] John Jay to John Adams, January 2, 1801. All quotes in this paragraph are from this letter.

[12] John Jay to James Iredell, February 12, 1791.

[13] *See* Joanne B. Freeman, "Slander, Poison, Whispers, and Fame: Jefferson's **Anas** and Political Gossip in the Early Republic," **Journal of the Early Republic** 15 (1995): 25-57.

[14] *See* Ralph Lerner, "The Supreme Court as Republican Schoolmaster," *Supreme Court Review: 1967* (Chicago: University of Chicago Press, 1967), 127-180, reprinted in Ralph Lerner, **The Thinking Revolutionary: Principle and Practice in the Early Republic** (Ithaca, NY: Cornell University Press, 1987), 91-136.

# John Jay, Judicial Independence, and Advising Coordinate Branches

**Ene Sirvet and R.B. Bernstein**

As the first President of the United States, George Washington had to invent the presidency step by step. So, too, as the first Chief Justice of the United States, John Jay had to determine what that post meant, what duties it entailed, and how the Chief Justice should shape the Supreme Court and the federal judicial system.

In the Constitution's first years, all federal officeholders were uncertain how the new system would work. They thus had to be vigilant about both the issues they dealt with and the implications of those issues.

Chief Justice Jay grasped these important points firmly. He had a vision of the roles that the federal judiciary would play in the constitutional system, and sought whenever he could to articulate and defend that vision. He envisioned an independent federal judicial branch, led by an independent Supreme Court; these courts would wield the full range of powers needed to vindicate their independence, to adjudicate with fairness and professionalism the cases coming before them, and to serve the general good.

In a notable paradox having its roots in Article III of the Constitution, however, Jay had to defend the federal courts' independence and integrity by *disclaiming* power in certain cases. President Washington and members of his administration regularly asked Jay or the Court to advise the government on a variety of issues. Jay thus faced a thorny problem: Although he wanted the Constitution to succeed and although he had cordial relations with all the officials of the executive branch, he believed that neither he nor the Court could provide *official* advice to the executive branch. When the executive branch requested official advice from the Chief Justice or the Court, Jay either disclaimed the Court's power to render an advisory opinion or doubted the necessity of such opinions. In most cases, he was able to provide the needed advice by treating the request as a private matter calling for his private opinion.

On April 3, 1790, as the Justices were about to begin their first circuit riding assignments, they received a letter from President Washington. Citing his belief that "the Interpretation and Execution of [the] Laws" of the United States would be vital to the American people's happiness, Washington stressed "that the Judiciary System should not only be independent in its operations, but as perfect as possible in its

**The House of Representatives requested that Attorney General Edmund Randolph (above) prepare a report on how the federal courts functioned during their first year. Consequently, Chief Justice John Jay decided to withhold his advice on restructuring the federal courts, preferring to defer to the legislative and the executive branches.**

formation." He therefore assured the Justices of his willingness to "receive such Information and Remarks" on the structure and operations of the judiciary "as you shall from time to time judge expedient to communicate." The President's letter expressed friendly encouragement for the Justices as they launched the first sessions of federal circuit courts. Although he did not perceive or intend it, however, his letter also foreshadowed conflicts between his professed desire for an independent federal judiciary and his need to receive advice and guidance from the officials of the new government.[1]

By September 13, 1790, after discussions with his colleagues in August,[2] Jay drafted a reply to come from the Court. He sent copies to each Associate Justice, whom he asked "to return it with such Alterations and Corrections as You may think it requires." Jay pledged to "incorporate such additions and make such other alterations as we may all appear to agree in."[3]

Although Jay subjected the 1789 Judiciary Act to rigorous criticism on administrative and constitutional grounds, his draft is a model of tact. Jay questioned Congress's decision to require Supreme Court Justices to serve on the circuit courts, because it disregarded the bright line that the Constitution's Article III drew between the Court's original jurisdiction and its appellate jurisdiction. Jay pointed out the danger that, should a circuit court's decision be appealed to the Supreme Court, at least two Justices would have to review their own decision in an inferior court:

> We are aware of the Distinction between a Court and its Judges, and are far from thinking it illegal or unconstitutional, however it may be inexpedient to employ them for other Purposes, provided the latter Purposes be consistent and compatible with the former. But from this Distinction it cannot, in our Opinions, be inferred, that the Judges of the Supreme Court may also be Judges of inferior and *subordinate* Courts, and be at the same Time both the *Controllers* and the *controled*.

Though the Justices were ready to make a vigorous case that Congress should restructure the federal courts, they knew that, as Jay wrote his draft, the House of Representatives had requested Attorney General Edmund Randolph to prepare a report on the federal courts. For those reasons, Jay's draft suggested, "[W]e think it most proper to forbear making any Remarks on this Subject at present"—deferring to both the House and the Attorney General.[4]

Jay's draft suggests that, in the first year of the federal courts' operation, Jay and the other Justices were ready to provide expert testimony about how the system was working and what changes it needed. At the same time, however, they chose to defer to the legislative and executive branches of the general government when it came to devising legislation.[5]

Besides issues of judicial administration, President Washington regularly sought Jay's opinions on matters of American foreign policy. In each case, Jay gave Washington a thoughtful, full assessment of the questions referred to him. Jay's letters illustrate his willingness to advise

officials in the executive branch when he saw their requests as private, rather than as official solicitations by the executive branch of advisory opinions from the judicial branch.

For example, on June 13, 1790, Washington sent Jay a private letter regarding Thomas Bird's application for a presidential pardon. Bird, a British subject, had been convicted, after trial in the Circuit Court for New York (Jay, Associate Justice William Cushing, and U.S. District Judge James Duane), of piracy and murder and faced a death sentence. Jay answered that evening, giving the requested advice on Bird's character and application and the likely foreign policy complications of executing him.[6]

Similarly, on August 27, 1790, seeking advice about the Nootka Sound controversy with Great Britain, Washington wrote a "secret" letter to the Vice President, the heads of the executive departments, and the Chief Justice: "Mr. Jay will oblige the Pr[esident] of the United States by giving his opinion in writing on [the] above Statement." Jay again responded promptly and fully—but as a former Secretary for Foreign Affairs and experienced diplomat tendering an informal, person-to-person opinion, not as the Chief Justice.[7]

On matters of domestic policy, Jay drew a fine line between requests for advice and assistance from the other branches that he deemed permissible and those that he saw as inappropriate and unnecessary. On November 13, 1790, for example, Treasury Secretary Alexander Hamilton wrote to Jay in alarm after Virginia had adopted resolutions criticizing the Hamiltonian fiscal program: Calling the resolutions "the first symptom of a spirit which must either be killed or will kill the constitution of the United States," Hamilton asked, "Ought not the collective weight of the different parts of the Government to be employed in exploding the principles they contain?" Aware that his request appeared irregular, Hamilton noted, "This question arises out [of] a sudden and indigested thought."[8]

On November 28, returning from Exeter, N.H. (where he had just held a circuit court), Jay penned a calming reply.[9] He suggested that the resolutions were fodder for political satire, not needing a concerted response from the general government: "The author of McFingall could do Justice to the subject." He added, "The assumption will do its own work. It will justify itself and not want advocates." Passing silently over Hamilton's implied request that the Justices pronounce against the Virginia resolutions, Jay sketched what the government ought to do:

> The national Gov[ernmen]t has only to do what is right and if possible be silent. If compelled to speake, it should be in few words strongly evincive of Temper, Dignity, and self Respect; conversation and desultory paragraphs will do the rest.

While Hamilton sought the Court's support for his fiscal program, President Washington made a more measured request. On November 19, 1790, in a letter marked "private," he sought Jay's advice for his annual message: "If any thing in the Judiciary line, if any thing of a more general nature, proper for me to communicate to that body at the opening of the Session, has occurred to you, you would oblige me by submitting them with the freedom of frankness of friendship." Washington's letter made clear what his earlier consultations with Jay and the Court had implied: he saw the Court as on the same level with the "great Departments" of State, Treasury, and War.[10]

The President's letter crossed one from Jay dated November 13, 1790, which set forth Jay's thoughts on various matters of federal law and prospects for new legislation.[11] Jay enclosed "for your private information" his September 13 draft letter on the federal courts, noting that he had also sent a copy to Attorney General Randolph, then immersed in preparing his report for the House on the federal courts.[12] He concluded by giving Washington a sketch of public opinion as he had observed it that fall: "Much content and good Humour is observable in these States. The acts of Congress are as well relished and observed as could have been expected. The assumption gives much general Satisfaction here." As this passage suggests, Jay and Washington saw the Justices as valuable observers of the state of American thinking on the new government.

In 1793, the nation faced its first foreign policy crisis under the Constitution. The revolutionary French republic had executed Louis XVI and declared war on conservative European powers. On April 9, Treasury Secretary Hamilton wrote Jay two letters seeking his

advice. His second asked whether "a proclamation prohibitting our citizens from taking Commissions etc." from foreign governments "on either side" (that is, with France or with the powers allied against it) and "includ[ing] a declaration of Neutrality" would be "proper." He closed, "If you think the measure prudent could you draft such a thing as you deem proper? I wish much you could." On April 11, Jay replied, sending a draft proclamation; yet again, he gave advice not as Chief Justice but as an informal advisor to the executive branch.[13]

These previous events, and Jay's responses to them, set the stage for the Washington administration's attempt, in the summer of 1793, to seek formal advice from the Supreme Court, and the Court's response.

American officials knew that the war just begun in Europe between France and its conservative foes could embroil the United States. The conflict would menace American shipping on the high seas; just as threatening, belligerents' vessels would seek to use American harbors. Moreover, France might invoke its 1778 treaty of alliance with the United States. Already, the French minister in the United States, "Citizen" Edmond Genet, had directed efforts in Philadelphia to arm a captured ship, the **Little Sarah,** and send her forth as a French privateer. The **Little Sarah** controversy divided the Cabinet and highlighted the seriousness of the diplomatic and legal issues facing the nation.

Thus, on July 12, 1793, President Washington met with Secretary of State Jefferson, Treasury Secretary Hamilton, and Secretary of War Henry Knox to discuss the options. One product of this meeting was a decision by the President and his Cabinet "That letters be addressed to the Judges of the Supreme Court of the US. requesting their attendance at this place on Thursday the 18th. instant to give their advice on certain matters of public concern which will be referred to them by the President."[14] That same day, Jefferson wrote to each Justice relaying Washington's request and stressing that the President was the source of this summons: "It is on his particular charge that I have the honor of informing you of this."[15]

Individual Cabinet members drafted questions for the Court, but the full Cabinet delayed preparing the final list because they wanted to wait for Attorney General Randolph to return to Philadelphia, which he had not yet done by July 17. That evening, having returned to Philadelphia, Jay visited Washington and asked him "at what time he should receive [the President's] communications." As Washington wrote to Jefferson on the morning of July 18, he was "embarrassed" by Jay's question, but he explained that the Cabinet's decision to wait for Randolph before framing its questions caused the delay. The President then instructed Jefferson to "draft something . . . that will bring the question properly before" the Justices.[16]

Jefferson received Washington's letter on July 18, and immediately penned a summary letter to the Justices apprising them of what was coming. Jefferson acknowledged the novelty of what the administration was asking of the Court and cited necessity as its justification.[17] His letter is noteworthy for four reasons. First, he conceded that such questions as troubled the administration did not ordinarily present themselves as justiciable cases before the courts. Second, he jus-

**The United States could not help but get embroiled in France's war in Europe against its conservative foes. When the French minister in the United States, "Citizen" Edmond Genet (above), directed efforts in Philadelphia to arm a captured ship, the *Little Sarah*, and send her forth as a French privateer, the controversy divided the Cabinet and highlighted the seriousness of the diplomatic and legal issues facing the nation. When called on to give advisory opinions, the Court was careful to emphasize the importance of maintaining the independence of the three branches.**

tified submitting such issues to the Court on the ground that the Justices were more qualified than members of the executive branch to interpret "our treaties, . . . the laws of nature and nations, and . . . the laws of the land. . . ." Third, he admitted that the Court might not "with propriety" be able to give "their advice on" some or all of "these questions. . . ." Last, he hinted that this request might set a general precedent: "The President would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court." The implication of Jefferson's letter is that Washington hoped to treat the Court as an adjunct of the Cabinet for purposes of obtaining advice on legal matters.

On July 18, the Cabinet wrote its twenty-nine questions, based on drafts previously framed by Hamilton, Jefferson, and Knox.[18] Later that day, Jefferson sent Washington the final version of the questions, as well as Hamilton's and Knox's drafts.[19] On the morning of July 19, Washington approved the questions and ordered that they be sent to the Justices.[20] Later that day, Jefferson reported to Washington that Jay and Associate Justice James Wilson visited him to ask how soon the Cabinet needed answers: "They were told the cases would await their time." When Jefferson asked how long it would take to reply, Jay and Wilson "said they supposed in a day or two."[21]

On July 20, the Justices wrote Washington and Jefferson that they needed more time for consultation. Only four of the six Justices—Jay, Wilson, Paterson, and Iredell—were in Philadelphia, they noted, and "we feel a Reluctance to decide it, without the Advice and participation of our absent Brethren." Conceding the issue's urgency, and uncertain whether they should be postponed "untill the Sitting of the Sup. Court," they told the President, "We are not only disposed but desirous to promote the welfare of our Country, in every way that may be consistent with our official Duties."[22] On July 23, after consultation with Jefferson, the President replied:[23]

> The circumstances which had induced me to ask your counsel on certain legal questions interesting to the public, exist now as they did then; but I by no means press a decision whereon you wish the advice and participation of your absent brethren. Whenever, therefore, their presence shall enable you to give it with more satisfaction to yourselves, I shall accept it with pleasure.

Although Washington assured Jay and his colleagues of his willingness to wait, he and the Cabinet apparently concluded that they had to frame a neutrality policy before the Justices could respond. Therefore, on August 3, the Cabinet agreed to "Rules on Neutrality" and began efforts to promulgate them.[24]

Not until August 8, 1793, did the Justices submit their answer to Jefferson's July 18 letter.[25] Apparently they delayed in hopes of assembling the full Court, but only five of the six Justices were present to sign the letter; Cushing had not yet returned to Philadelphia. The Justices' response, penned by Jay and signed by all five Justices present, framed the issue as one of "the lines of separation drawn by the Constitution between the three departments of the government." The letter continued:

> These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

Although historians have read this letter merely as the Justices' invocation of the Constitution's Article III, section 2, which limits the federal courts' jurisdiction to actual cases or controversies, a close reading suggests that it says far more. Jay's letter stressed that the federal government was one of checks and balances. This basic fact, he insisted, required the Court to consider with care any attempt to draw it out of its accustomed sphere and into the sphere of executive policymaking. In sum, Jay probed beyond Article III's "cases or controversies" requirement to the principled reasoning justifying it. He read Article II, section 2 of the Constitu-

tion, which empowered the President to call on the heads of departments for opinions, as reaching executive departments only. The judiciary, as a branch separate and distinct from the legislative and executive branches, thus does not fall within the scope of the President's power to request such opinions.

## Conclusion

These documents illustrate the prudent course that John Jay traced for himself and the Court as the federal government's three coordinate branches tried to put the Constitution's untested principles of separation of powers and checks and balances into effect. They trace the careful distinction that Jay made between official requests for advisory opinions from executive-branch officials, which he and his colleagues rejected, and informal private requests for advice and assistance by executive branch officials to Jay himself, with which he complied. They show not only Jay's delicate handling of such issues, but the larger context of uncertainty with which all officials of the new government approached their constitutional and legal responsibilities. In a 1790 letter to the British historian Catherine Macaulay Graham, President Washington observed, "I walk on untrodden ground."[26] So did Chief Justice Jay—and he was therefore especially careful where he stepped.

## Endnotes

[1] George Washington to Justices of the Supreme Court, April 3, 1790. On April 10, Jay circulated Washington's letter to his colleagues and requested them to send him their thoughts on the matter. Unless cited to other compilations or repositories, all documents cited in this article will appear in volume 4 of **The Papers of John Jay: Chief Justice and Federalist Statesman, 1789-1829** (forthcoming).

[2] The Justices conferred in New York City on August 3, 1790, taking up Washington's request of April 3, 1790. *See* John Blair to John Jay, [5 August 1790], enclosing his "Objections to the judiciary-bill," notes based on the August 3 discussions.

[3] John Jay to William Cushing, September 13, 1790, enclosing Justices of the Supreme Court of the United States to President Washington, draft, September 13, 1790. (The letter to Cushing is the only copy extant of Jay's letters to the Justices conveying this draft.) All quotations in the following paragraph are from Jay's draft.

[4] *See* note 12 and accompanying text below for the later use that Jay made of this draft.

[5] *See, e.g.,* Caleb Strong to [John Tucker], April 22, 1790, in Maeva Marcus et al., **Documentary History of the Supreme Court,** 4: 532-533. Senator Strong, a Massachusetts Federalist, reported that a Senate committee on which he served had met with several of the Justices to persuade them to assist in drafting a Process Act. The Justices present (probably Jay and Cushing) begged off, citing the absence of southern colleagues who would be more familiar with the southern states' forms of legal process.

[6] George Washington to John Jay, June 13, 1790; John Jay to George Washington, June 13, 1790.

[7] George Washington to [John Adams, the Heads of Departments, and John Jay], August 27, 1790; John Jay to George Washington, August 28, 1790.

[8] Alexander Hamilton to John Jay, November 13, 1790.

[9] John Jay to Alexander Hamilton, November 28, 1790.

[10] George Washington to John Jay, November 19, 1790. This letter apparently renewed an earlier, oral request from Washington to Jay.

[11] John Jay to George Washington, November 13, 1790. All quotes in this paragraph come from this letter. Jay apparently was responding to Washington's earlier, oral request for advice.

[12] *See supra,* notes 3 and 4 and accompanying text, for the origins of this enclosure.

[13] Alexander Hamilton to John Jay, April 9, 1793 (first and second letters); Jay to Alexander Hamilton, April 11, 1793, with enclosed draft of proclamation. The proclamation Washington issued on April 22, 1793, drew principally on a draft prepared by Attorney General Randolph, but including suggestions from Jay's and Hamilton's drafts.

[14] "Cabinet Opinion on Consulting the Supreme Court," in Julian P. Boyd, Charles T. Cullen, and John Catanzariti, eds., **The Papers of Thomas Jefferson,** 26 vols. to date (Princeton, N.J.: Princeton University Press, 1950—), 26: 484-485 (quote at 485) (hereafter **Jefferson Papers**). *See* also "Notes on Neutrality Question," in *id.,* 498-499 (Jefferson's memorandum of Cabinet discussions on July 12, 1793).

[15] Thomas Jefferson, Circular to the Justices of the Supreme Court, July 12, 1793. The editors of the **Jefferson Papers** list three surviving originals—to Jay, Iredell, and Paterson. **Jefferson Papers** 26: 488. Jefferson submitted the letters for Washington's approval on July 13; Washington approved them on July 15. Dorothy Twohig, ed., **The Papers of George Washington: The Journal of the Proceedings of the President, 1793-1797** (Charlottesville, VA.: University Press of Virginia, 1981), 196, 198 (entries of July 13, and July 15, 1793).

[16] George Washington to Thomas Jefferson, July 18, 1793, in **Jefferson Papers** 26: 537-538.

[17] Thomas Jefferson to the Justices of the Supreme Court, July 18, 1793. All quotes in this paragraph are from this letter.

[18] The final set of questions appears in **Jefferson Papers** 26: 534-537. The three drafts appear in *id.,* 527-530 (Hamilton), 530-532 (Jefferson), and 532-533 (Knox).

[19] Thomas Jefferson to George Washington, July 18, 1793, in **Jefferson Papers** 26: 537. This letter is Jefferson's response to George Washington to Thomas Jefferson, July 18, 1793, cited *supra,* note 16.

[20] Twohig, ed., *Journal of Proceedings,* 204 (July 19, 1793).

[21] Thomas Jefferson to George Washington, July 19, 1793, in **Jefferson Papers** 26: 541. At this point, the Justices had only Jefferson's summary letter of July 18. *See* note 25.

[22] Justices of the Supreme Court to George Washington, July 20, 1793, enclosed with Justices of the Supreme Court to Thomas Jefferson, July 20, 1793.

[23] George Washington to the Justices of the Supreme Court, July 23, 1793. For Washington's consultations with Jefferson before writing this letter, *see* George Washington to Thomas

Jefferson, July 20, 1793, in **Jefferson Papers** 26: 544; George Washington to Thomas Jefferson, July 22, 1793, in *id.*, 550.

[24] "Rules on Neutrality," August 3, 1793, in **Jefferson Papers** 26: 608-10. Also, on August 3, indicating the severity of the perceived crisis, Washington asked the Cabinet whether he should reconvene Congress. George Washington to Cabinet, August 3, 1793, in *id.,* 611. Jefferson opined that he should. Thomas Jefferson, Opinion on Convening Congress, August 4, 1793, in *id.,* 615. His colleagues disagreed. *Id.*

[25] Chief Justice [John] Jay and Associate Justices to President [George] Washington, August 8, 1793. All quotes in this paragraph come from this letter. Some time during the drafting of their July 20 letter to Washington, the Justices received their copy of the Cabinet's twenty-nine questions, because Jay deleted from his draft a request to see the Cabinet's questions. *See* also Jay's manuscript copy of the list of questions, now in the Eli Lilly Library, Indiana University, Bloomington, Indiana.

[26] George Washington to Catherine Sawbridge Macaulay Graham, January 9, 1790, in W. W. Abbot and Dorothy Twohig, eds., **The Papers of George Washington: Presidential Series,** 6 vols. to date (Charlottesville, VA: University Press of Virginia, 1987—), 4: 551-554 (quote at 552).

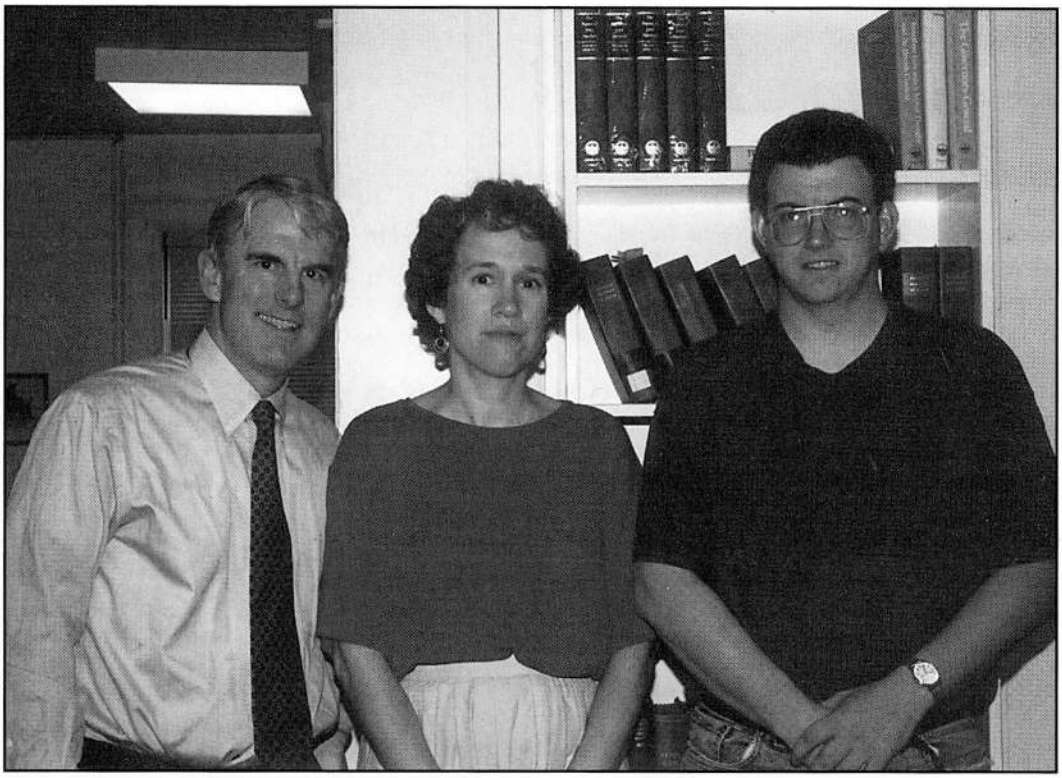
# John Marshall and His Papers

**Charles F. Hobson**

**The Papers of John Marshall** is the first scholarly edition of the correspondence and papers of the eminent jurist who served as Chief Justice of the United States from 1801 to 1835. Sponsored by the College of William and Mary and the Institute of Early American History and Culture, the edition is published by the University of North Carolina Press. The eight volumes published to date record Marshall's life and career through 1819. Another four volumes will complete the series, sometime early in the new century. The first five volumes embrace the period prior to his appointment as Chief Justice; the remaining volumes cover the Supreme Court years.

A point to be emphasized is that the Marshall Papers was never intended to be a documentary history of the Supreme Court for the years 1801 to 1835. Its scope does not entail reprinting all 500 opinions Marshall delivered on the Court, the full texts of which are available in the official **U.S. Reports.** The manuscripts of the great majority of his opinions have not survived, which precludes a more accurate rendering of the texts we already have. Most of the eighty-eight extant autograph opinions, moreover, do not reflect a first or working draft but rather the final version given to the reporter for publication. Yet we never seriously contemplated excluding altogether the Supreme Court opinions from an edition of Marshall's papers. As a workable compromise, the editors adopted a plan of publishing in full most of the constitutional opinions (about thirty), along with a representative sample of nonconstitutional opinions that reflect Marshall's jurisprudence in such fields as international law, contracts and commercial law, procedure, and real property. The edition also presents calendar entries for all the opinions given by the Chief Justice during the years covered by a volume.

More space is given to opinions in the United States Circuit Courts for Virginia and North Carolina. Marshall spent the greater part of his judicial time on circuit—holding court each spring and fall in Richmond and Raleigh, respectively—yet this side of his career is relatively unknown and the documents less accessible. More than sixty manuscript circuit opinions are extant and are being printed in full. An earlier edition of these opinions, published by John Brockenbrough in 1837, is extremely rare. Although Brockenbrough's reports have been reprinted in **Federal Cases**, the alphabetical arrangement of that series scatters Marshall's opinions over many volumes.



**The staff of *The Papers of John Marshall* is pictured above from left to right: Charles F. Hobson, editor-in-chief; Susan Holbrook Perdue, managing editor; and Robert Smith, research assistant.**

Brockenbrough also took certain liberties with Marshall's drafts, regularizing his spelling and punctuation, for example, and occasionally improving what he regarded as infelicitous phrasing. The editors believe that bringing together the circuit court opinions in the present edition and presenting texts that more faithfully adhere to the original drafts serve a sound documentary purpose.

Besides judicial opinions, the other principal category of "papers" published in the edition consists of correspondence. Unfortunately, the assembled Marshall archive is much smaller than one would expect from so eminent a personage. Compared to those of his fellow Virginians George Washington, Thomas Jefferson, and James Madison, the Marshall collection is meager fare indeed. Apparently oblivious of the needs of an inquiring posterity, the Chief Justice seems to have made no attempt to preserve his personal papers. In all likelihood there never was a voluminous collection that was subsequently dispersed or destroyed after his death. No letterbooks containing copies of his letters have been found, and only a handful of letters addressed to him have turned up. The surviving personal correspondence consists principally of recipients' copies of letters he wrote that have been found in widely scattered collections. With numerous and often large gaps, this corpus falls short of providing a full and continuous record of Marshall's life.

Precisely because there is no large body of personal papers, however, it is all the more important that students have convenient access to all available Marshall documents. In making all the extant papers accessible, amplifying their meaning with annotation, and enhancing their usability with detailed yet discriminating indexes, the published edition will facilitate systematic study of the jurist who presided over the Supreme Court for more than three decades—a period in which the Court consolidated its power and successfully asserted its claim to decide cases according to the law of the Constitution. Spotty as it is, a documentary record exists for the astute researcher to make a more sophisticated appraisal than we now have of Marshall's mind

and personality, his methods of legal analysis and reasoning, and his broader views on law, politics, and society.

Perhaps the edition's most valuable contribution to date has been the reconstruction of Marshall's practice as a lawyer in Virginia during the two decades preceding his appointment to the Supreme Court. Although the contents of his law office have largely vanished along with the records of Virginia's higher courts, the project nonetheless succeeded in stitching together a documentary record from an eclectic mix of correspondence, commonplace notes, accounts, opinions, petitions, court records, pleadings and other litigation papers, and reports of cases. Volume 5 contains a selection of cases annotated in a way that anchors Marshall solidly to the broader legal culture of late eighteenth-century Virginia. Apart from what it reveals about Marshall as a legal practitioner, the volume serves as an invaluable introduction to Virginia legal history—for which it has been widely praised by reviewers.

Marshall the jurist emerged from the common law tradition as adapted to his native Virginia. The method of legal reasoning he employed so effectively on the Supreme Court, notably, his tendency to emphasize general principles embodied in law rather than the precedents of particular cases, was perfected over many years at the bar. The appeal to principle to resolve legal questions reflected an ancient distinction between law as a body of principles and the particular cases that illustrated those principles. Neither Marshall nor his fellow counsellors assumed that the most effective case one could make was to pile precedents one upon another. If by modern standards his arguments and opinions seem to contain relatively few references to authorities, this sparseness of citation was not owing to his supposed ignorance of legal literature but to his conviction that principles, not cases, mattered.

The documentary recovery of Marshall's law practice should dispel, once and for all, the myth (popularized by biographer Albert J. Beveridge) that Marshall fashioned his arguments and opinions unencumbered with much legal learning. It is sometimes suggested or implied that his supposed deficiency of law knowledge actually served him well as a jurist, that ignorance of the weight of authority left him freer to practice creative jurisprudence. In truth, Marshall was a master of common law and equity jurisprudence. His great achievement as Chief Justice was to assimilate the familiar methods of interpreting and adjudicating the common law to the novel task of creating a constitutional law for the new nation.

Much of the correspondence published (and to be published) in later volumes (6 through 12) is rich in substance concerning the work of the Supreme Court. One surviving portion from Marshall's first years on the Bench is a remarkable exchange between the Chief and his Brethren about the constitutionality of the repeal of the 1801 Judiciary Act (the act that created the "midnight" judgeships filled by President Adams during his last days in office). Marshall personally believed the repeal was unconstitutional, but he ultimately agreed to abide by the majority's decision to acquiesce.[1] In these communications, the Chief Justice revealed at the outset of his tenure his openness to argument and persuasion and his willingness to subordinate his own views if necessary to obtain a single opinion of the Court—characteristics that were no less essential to his successful leadership than was his formidable intellect. If the Court most often spoke through the Chief Justice, the opinion was the product of collaborative deliberation, carried out in a spirit of mutual concession and accommodation.

Possessing not a trace of vanity about his own considerable abilities or overconfidence in his knowledge of law, Marshall continued to solicit advice from his colleagues throughout his career. Many of his queries concerned cases heard on circuit, where he often sat alone, and which for various reasons could not be brought before the high court. Volumes published to date show the Chief Justice consulting his Brethren about such topics as treason, bankruptcy, patents, piracy, and admiralty law. His principal correspondents, Bushrod Washington and Joseph Story, were not only his professional associates but also his close personal friends. The learned Story, a New Englander, could dispense expert advice on any legal topic but was particularly relied on for his knowledge of admiralty proceedings, a field in which the Chief Justice was admittedly "not versed."[2]

One of the most important discoveries of recent years has been Marshall's authorship of

newspaper essays defending the Supreme Court's opinion in *McCulloch v. Maryland* (1819).[3] Dismayed by mounting criticism of the decision, which he regarded as the entering wedge of a meditated attack upon the Constitution and Union, the Chief Justice took the unprecedented step of intervening personally (albeit, anonymously) in the controversy. The essays, with accompanying explanatory annotations and interspersed with letters to Washington and Story, provide ample documentation of this critical episode in Court history.

Over the years, previously unknown Marshall documents have been added to a collection that remains disappointingly small. These include a series of letters written to Bushrod Washington between 1814 and 1821, which had been in private possession until recently put up for sale. Although he rarely reflected on constitutional law in private correspondence, in one of these communications Marshall pondered whether a state bankruptcy law violated that clause of the Constitution prohibiting the states from "impairing the obligation of contracts." His comments are significant not only in regard to this particular question, which he was to consider judicially in *Sturges v. Crowninshield* (1819) and again in *Ogden v. Saunders* (1827), but also as encapsulating his general approach to the question of "intention" in constitutional construction. The Contract Clause, he admitted, "was probably intended to prevent a mis-

**Off the Bench Chief Justice John Marshall spent time farming his land on the Chickahominy River (pictured above in an 1872 engraving) outside Richmond. He was also involved in a complex land deal in Virginia's Northern Neck that demanded his attention from the 1790s until his death in 1835.**

chief very different from any which grows out of a bankrupt law." The "mind of the convention" was directed toward more flagrant abuses such as paper money, installment, and tender laws. "Yet," said Marshall, "the words may go further; if they do on a fair & necessary construction, they must have their full effect."[4] Eventually, he decided that the clause did embrace bankruptcy laws, just as in *Dartmouth College v. Woodward* (1819) he concluded that it also protected corporate charters against legislative infringement. When invoking the "intention of the Framers" in construing the Contract Clause, Marshall did not mean "intention" in an "originalist" sense that would confine the clause in question to the particular abuses complained of at the time the Constitution was ratified. Rather, he understood it to mean a collective intention, derived solely from the words of the Constitution, to establish a broad general principle to preserve the sanctity of contracts against any form of abuse that legislative ingenuity might devise.

Another recently discovered letter, written to Henry Clay in 1823, shows the Chief Justice brilliantly exercising his persuasive powers to defeat legislation that would have increased the number of Supreme Court Justices and required the concurrence of a supermajority on constitutional questions. Observing that it was "among the most dangerous things in legislation to enact a general law of great and extensive influence to effect a particular object," Marshall pointed out that such a law would in effect prevent the Court from exercising judicial review of legislation. Yet, he continued, it was "difficult to read [the Constitution] attentively without feeling the conviction that it intends to provide a tribunal for every case of collision between itself and a law, so far as such case can assume a form for judicial enquiry; and a law incapable of being placed in such form can rarely have very extensive or pernicious effects."[5] Because of Congress's virtually complete power to regulate the Supreme Court's appellate jurisdiction, that tribunal was constantly vulnerable to attack from the legislative branch. As Chief Justice, Marshall had to walk a fine line between activism and restraint in exercising judicial power. Owing in no small measure to his superb political skills, neither this proposal nor other attempts to curb the Court's power were enacted into law during his Chief Justiceship.

Marshall's correspondence and papers reflect the private person as much as they do the statesman and jurist. The edition's coverage of his nonjudicial activities provides a broader perspective and context for understanding Marshall the Chief Justice. Although he attended four circuits and one Supreme Court Term a year, Marshall had ample time for other pursuits. In the midst of the so-called "judiciary crisis" of his first years on the Bench, for example, Marshall wrote the **Life of George Washington**, a massive history published in five volumes between 1804 and 1807. His correspondence with Caleb P. Wayne, the Philadelphia publisher of the work, constitutes an illuminating source for the history of book publishing in the early republic. In 1812, as chairman of a state commission to survey a route to connect the eastern and western regions of Virginia, the fifty-seven-year-old jurist undertook an arduous journey of 250 miles by water and land to the falls of the Great Kanawha River in present-day West Virginia. Marshall's subsequent report, weaving together facts, figures, and observations in a felicitous narrative, laid the foundation for Virginia's program of internal improvements undertaken after the War of 1812.[6]

Marshall's one great business venture was the purchase of the Fairfax estate in Virginia's Northern Neck, a project that occupied his attention from the 1790s to the end of his life. His efforts to defend the purchasers' title to this estate involved him in protracted litigation. One of the suits, which had begun in a state court in 1791, culminated in 1816 in the notable Supreme Court decision of *Martin v. Hunter's Lessee*. New material that has come to light makes it possible to clarify the nature of this complicated litigation and of Marshall's involvement in it (*see* the next article).

Other activities that kept the Chief Justice busily employed included working on a revised edition of the **Life of George Washington,** preparing an edition of Washington's correspondence, and farming his land on the Chickahominy River outside Richmond. At the same time he acted as family chieftain, patriarch of an extended clan living in various areas of Virginia and Kentucky. In this capacity he experienced the vexations of a parent whose children strayed from the path of correct behavior (in 1815 his son was dismissed from Harvard).

He dispensed advice about the education and careers of his sons and nephews and sought to alleviate the distressed circumstances of a widowed sister and her son. Marshall gave as close and devoted attention to family responsibilities as he did to his judicial duties.

In the case of Marshall's papers, the expansion of the documentary base has perhaps been less important than the consolidation of materials from many different depositories scattered throughout the United States and abroad. The mere assembling of this archive and others devoted to the history of a particular institution or the life and career of a prominent person has in itself been a boon to scholarship, a major if somewhat undervalued benefit provided by editorial enterprises. The worth of these undertakings does not lie solely in the published volumes, which cannot be produced quickly enough to satisfy scholarly demand. Editorial offices serve as research centers open to serious scholars whose own projects draw them to the resources gathered there. Savvy students of the early national Supreme Court know that the most efficient way to conduct their research is to consult the files and collections of the Jay, Marshall, and Documentary History of the Supreme Court projects.

## Endnotes

[1] Charles F. Hobson and Fredrika J. Teute, ed., **The Papers of John Marshall**, vol. 6 (Chapel Hill, NC, 1990), 105-21.

[2] Charles F. Hobson, ed., **The Papers of John Marshall**, vol. 8 (Chapel Hill, NC, 1995), 314.

[3] Credit for this find belongs to Professor Gerald Gunther, who first published the new material in 1969 as a result of his research for a history of the Marshall Court. *See* Gerald Gunther, **John Marshall's Defense of *McCulloch v. Maryland*** (Stanford, CA, 1969).

[4] Hobson, ed., **Marshall Papers**, 8: 34-35.

[5] Marshall to Henry Clay, December 22, 1823, Gilder Lehrman Collection, Pierpoint Morgan Library, New York City.

[6] Charles F. Hobson, ed., **The Papers of John Marshall**, vol. 7 (Chapel Hill, NC, 1993), 355-79.

# John Marshall and the Fairfax Litigation: The Background of *Martin v. Hunter's Lessee*

**Charles F. Hobson**

John Marshall, a biographer has aptly remarked, led "a life in law."[1] As a lawyer and jurist he achieved renown as "the great Chief Justice." A less familiar side of his life in law is his role as a private litigant. In this capacity Marshall was prominently identified with the notable case of *Martin v. Hunter's Lessee,* decided by the Supreme Court in 1816, which culminated more than two decades of litigation in the state courts of Virginia and in the Supreme Court of the United States. What began in 1791 as a suit to try title to a tract of land in Shenandoah County, Virginia, had been transformed into a contest to determine whether the federal Supreme Court could exercise appellate jurisdiction over the Virginia Court of Appeals.

Apart from the constitutional question, at issue in this case and its immediate predecessor, *Fairfax's Devisee v. Hunter's Lessee* (1813), was title to the Fairfax estate in the Northern Neck of Virginia, the region lying between the Potomac and Rappahannock Rivers, which that family had held as proprietors since the time of Charles II. As one of the purchasers of a large portion of the Fairfax estate, Marshall of course did not sit in these cases. This judicial disqualification, however, did not prevent him from taking an active role as an interested party. Since the 1780s, long before he became Chief Justice, Marshall had been closely associated with efforts to establish clear legal title to this immense and valuable landed property. Research undertaken by the Marshall Papers project in the Virginia state archives, in various county courthouses, and in the Supreme Court's appellate case files in the National Archives, has turned up new documents about the Fairfax cases. The accession of this new material makes possible a more complete as well as more accurate account of an episode that is of engaging interest from the point of view of both biography and legal history.[2]

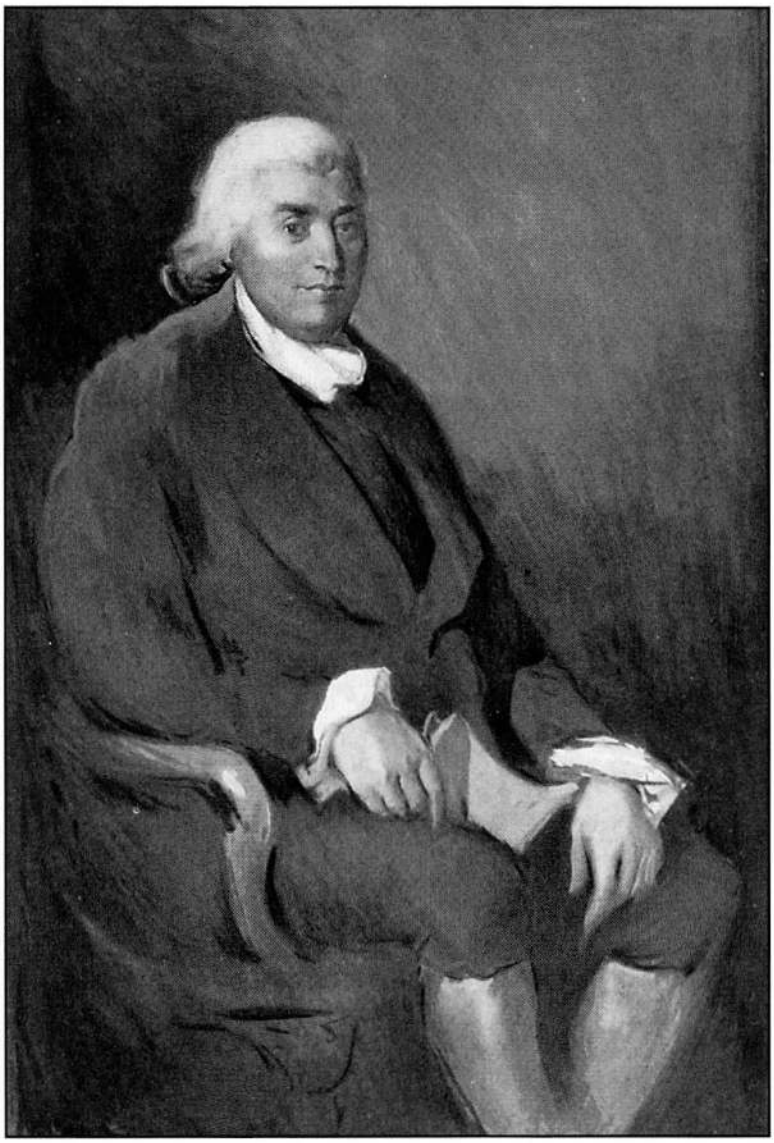
## The Northern Neck Proprietary

In order to understand the complex Fairfax litigation, it is necessary to describe the distinctive land system that operated in the Northern Neck during the colonial period up to the death of Thomas, sixth Lord Fairfax, in 1781.[3] Until that time grants for lands in the region were issued in the name of the proprietor from his land office located near Winchester. The rules and regulations for obtaining land were not part of the land laws of the colony but were drawn up

and published separately by the proprietor. As proprietor of the Northern Neck, Lord Fairfax did not derive income from the actual sale of lands but rather from collecting quitrents on tracts that he had granted in fee simple. These grants were made from the "waste and unappropriated" lands and produced no revenue until they were settled and patented.

One who wished to acquire land in fee simple from among the vacant lands of the proprietary first made an entry for the desired tract and obtained a warrant from the proprietary land office to survey the land. After the survey was returned and the office fees and "composition" (about thirteen shillings per hundred acres) were paid, the applicant received a patent. Once the grant had been made, the proprietor retained no further interest in the land except the right to collect annual quitrents (at the rate of one shilling for every fifty acres) and the right to resume possession of the land if the owner was in default of paying his quitrents for two years or more.

In addition to granting vacant lands in fee simple, Lord Fairfax reserved large tracts of land for his own use and for the benefit of his heirs. On these reserved tracts, or "manors," the proprietor made long-term leases, most commonly for the period of three lives—that of the lessee and two persons named by him (wife and child, for example). Lessees held their land subject to payment of an annual rent of twenty shillings per one hundred acres. The largest of the Fairfax



**Thomas, Sixth Lord of Fairfax , was born at Leeds Castle, Kent County, England, in 1693. His father, Thomas the Fifth Baron of Cameron, had obtained the Northern Neck Proprietary through his marriage to Catherine Culpeper, an heir to the original grant made by Charles II in exile in 1649 to seven friends, including two Culpeper cousins. When Thomas emigrated to Virginia in 1747, he was the only English proprietor to reside in northern Virginia. Young George Wahington, a neighbor, was invited to be a member of the surveying party for part of his lands, which totalled more than 5,200,000 acres.**

manors was Leeds, consisting of 160,000 acres in the counties of Fauquier, Loudoun, Frederick, and Shenandoah. The next largest was South Branch, a tract of 56,000 acres situated on the southern branch of the Potomac River in the counties of Hardy and Hampshire in present-day West Virginia.

In order to set off the manors as his private property, as distinguished from his proprietary ownership of the Northern Neck, Lord Fairfax himself took on the status of a grantee, employing the method of conveyance and reconveyance. That is, he granted the land surveyed as a manor to his nephew, Thomas Bryan Martin, who soon after reconveyed the land to him. The distinction between the manors—lands the proprietor had appropriated for his own use—and the so-called "waste and unappropriated" lands of the proprietary took on major significance in the subsequent history of the dispute over legal title to the Northern Neck.

## The Legal Status of the Proprietary in the 1780s

Lord Fairfax remained in peaceable possession of his estate until his death in December 1781. Although born in England, he had settled permanently in Virginia in 1747 and lived the last thirty years of his life in plain simplicity at Greenway Court Manor near Winchester. Throughout the Revolutionary War he was regarded as a loyal citizen of Virginia. During the fifteen years following his death, the legal status of the Northern Neck lands remained ambiguous. By his will Lord Fairfax, who died unmarried, devised his interest in the remaining vacant lands as well as his private estates to his nephew Denny Martin. Martin, a British subject, subsequently adopted the Fairfax name as required by the devise and began to press his claims as Lord Fairfax's devisee. The legal obstacle posed by the state of Virginia to these claims was that as an alien Denny Martin Fairfax was by the common law incapable of holding lands in the commonwealth. The lands devised to him were accordingly liable to "escheat," that is, to revert back to the state.

By the laws of escheat it was necessary for the state to take legal steps to perfect its title to escheatable land either by a formal "inquest of office" or by some equivalent legislative act. Since Virginia did not in the years immediately following Lord Fairfax's death proceed against his estate by inquest of office, the question arose whether the state took possession by various laws enacted during the 1780s. It should be noted that a general law of 1779 confiscating all British property within the boundaries of the commonwealth did not apply to Lord Fairfax, who was then still living and was considered a loyal citizen. Moreover, legislation dealing with the Northern Neck adopted soon after his death concerned only the vacant lands of the proprietary and did not affect the Fairfax manors. The first such act, approved at the October 1782 session, sequestered quitrents then due to the late proprietor and exonerated Northern Neck landowners from future claims for quitrents. Another act of the same session declared that entries made with surveyors in Northern Neck counties and returned to the proprietary land office should be "held, deemed, and taken, as good and valid in law as those heretofore made under the direction of the said Thomas Lord Fairfax, until some mode shall be taken up and adopted by the general assembly concerning the territory of the Northern Neck." Neither of these acts in terms vested possession of the vacant proprietary lands in the commonwealth.[4]

In 1785 the legislature enacted a law "for safekeeping the land papers of the Northern Neck." It provided for the transfer of the Northern Neck land records to the state land office in Richmond; subjected the unappropriated lands in that region to the same regulations as those applying to the other unappropriated lands belonging to the state; and exonerated Northern Neck landholders from the payment of composition money and quitrents.[5] This legislation came as close to being an outright confiscation of the former proprietary as any adopted by the General Assembly. Its validity as an act of confiscation, however, was brought into question by the Treaty of Peace between Great Britain and the United States, ratified in September 1783 and confirmed by the Virginia legislature in October 1784. The sixth article of the treaty stipulated that there should be no future confiscations made against any person or persons "for, or by reason of the part which he or they may have taken in the present war."

By the mid-1780s all the elements were present to construct opposing legal arguments

over title to the Northern Neck proprietary. Those claiming lands under grants from the state, as noted, asserted the commonwealth's title on the ground that Denny Fairfax was an alien and that the lands devised to him were escheatable to the state. They further contended that certain legislative acts had vested title to the lands in the state; that the peace treaty of 1783 did not apply to the ordinary laws of escheat by reason of alienage; and that, even if the treaty did apply, title had vested in the commonwealth before the treaty's ratification. The Fairfax interest combated this assertion by contending that if the Northern Neck lands were escheatable, the commonwealth could acquire title only by inquest of office or by an explicit legislative act; that no title had thereby vested prior to 1783; and that the peace treaty, in the language of law, "cured the defect of alienage" and accordingly protected Denny Fairfax's estate from any future confiscation whatever, including proceedings by escheat.

## Early Litigation: Caveat, Ejectment, and Escheat

On the advice of his lawyers (one of whom was John Marshall), Denny Fairfax initiated litigation to defend his title in 1788.[6] He eventually became a party to three distinct types of legal proceedings: actions of caveat, ejectment, and escheat. His first step was to enter caveats against the issuing of patents to David Hunter, a leading citizen of Berkeley County. Somewhat analogous to an injunction in equity, a caveat prevented the issuing of a patent until judicial proceedings determined which of the parties had the better claim. Although Hunter was only one of numerous speculators who sought patents from the state for ungranted Northern Neck lands, the decision to contest his claims in particular was probably a calculated one. Most of the early state patents for these lands merely completed title proceedings that had begun in the old proprietary office. Hunter was among the first to purchase warrants from the state land office in Richmond and thus to derive his title solely from the commonwealth. The grand scale of his operations is evident from an inspection of the land office papers, which record his purchase in January 1788 of warrants for surveys in Berkeley, Shenandoah, and Hampshire Counties, totalling more than 9,000 acres. At a price of twenty-five pounds for one hundred acres, these purchases represented a sizable investment.

Fairfax took out caveats only against Hunter's Berkeley surveys, evidently because he claimed these lands not only under the devise but also in virtue of a previous appropriation by the late proprietor. In other words, a patent should not issue because these were manor lands, not part of the waste and unappropriated lands that the commonwealth now presumed to grant. The caveats came up for a hearing at the Winchester District Court in April 1790 and were then adjourned for "novelty and difficulty" to the General Court in Richmond. That court dismissed them on a technicality in June 1791, but new ones were filed immediately. Another hearing took place in Winchester in September 1791, and again the caveats were adjourned for difficulty to the General Court. Arguments were heard there in November 1792, though no decision was reached for lack of a quorum of judges. Marshall appeared for Fairfax on this occasion, having earlier received a fee of twenty-eight pounds. The caveats remained undecided for many years thereafter, no doubt because of their close connection to the suit that became *Martin v. Hunter's Lessee.*

While the caveats were pending, Hunter in April 1791 began his own suit in ejectment against Fairfax in the district court at Winchester. His case concerned a tract of 739 acres in Shenandoah County, for which he had obtained a patent from the state in 1789, and was intended to be a test case for the commonwealth's title to the vacant lands and for all grantees claiming under the commonwealth. Ejectment was the common law action for trying title to land. One who reads the original pleading in this case may wonder at its strange tale of "Timothy Trytitle," Hunter's lessee, being forcibly ousted from possession of his land by "Thomas Scapegallows," Fairfax's lessee. This narrative was an elaborate fiction, perhaps the most famous of those devised by the common law to reach a desired result while preserving traditional forms. In form, ejectment was a personal trespass action brought by an ousted leaseholder for the recovery of his lease and the damages suffered by the loss. Its true function was to enable a freeholder to recover real property by trying the merits of his title against those of another claimant. Because of its procedural advantages, ejectment

virtually supplanted the old proprietary and possessory actions as the means of trying title to real property.

For the purposes of his case Hunter fabricated an imaginary lease to the imaginary Trytitle, who was subsequently "ejected" by the imaginary Scapegallows. Scapegallows, the "casual ejector," then wrote an imaginary letter to the real occupants of the land, who happened to be tenants of Denny Fairfax, notifying them of the action. As their landlord, Fairfax was entitled to make himself defendant and accordingly did so. The fictional plaintiff Trytitle had to prove four points to succeed: (1) the title in his lessor, Hunter; (2) Hunter's lease to him; (3) his entry under that lease; and (4) his ouster by Scapegallows. On receiving notification of the action, Fairfax, like all other defendants in ejectment, confessed to the second, third, and fourth points, which of course were fictions, so that trial could proceed on the question of title only. What in form appeared to be only a collateral issue, the lessor's title, was in fact the real point of the suit. Courts allowed this pretense only where the situation described could actually have existed, that is, where the real plaintiff had a right of entry and could grant a valid lease. In Virginia, characters such as Trytitle, Goodtitle, and Seekright continued to bring complaints against Scapegallows, Plunderer, Thrustout, and Notitle until the mid-nineteenth century, when the fictions were abolished by statute.

Like other ejectments, *Hunter v. Fairfax* proceeded on an agreed statement of facts, in which the contending parties entered on the record documents and other information to enable the court to decide who had the superior title claim. The statement in this case among other things recited the several royal grants by which the Northern Neck was vested in Lord Fairfax, David Hunter's patent from the state of Virginia, various legislative acts dealing with the Northern Neck, and the peace treaty of 1783. Fairfax was represented on this occasion by Charles Lee, a close associate of John Marshall and future U.S. Attorney General. In April 1794 Judges St. George Tucker and William Nelson upheld Fairfax's title. In an elaborate opinion Tucker declared that Lord Fairfax held an absolute fee simple title to the entire Northern Neck, not merely to the manor lands, and that Denny Fairfax was capable of taking the lands by the devise. Although as an alien the devisee could be divested of his lands by formal inquest of office, both parties had agreed that no such common law escheat proceedings had taken place. Tucker conceded that the legislature could have effected this by special legislation but had not done so in any of its postwar acts concerning the Northern Neck. The peace treaty, moreover, appeared to be a bar to any general act vesting the lands in the commonwealth.[7]

Although the Winchester judgment was a victory for the Fairfax interest, Tucker's opinion seemed to acknowledge Virginia's right to escheat the Fairfax property by common law means (inquest of office) notwithstanding the peace treaty. Indeed, shortly before the court's decision, the commonwealth formally became a party to the Northern Neck litigation by instituting escheat proceedings against the manor lands, which until then had been left undisturbed. This development was particularly disturbing to John Marshall, who in February 1793, in association with his brother James M. Marshall and others, had contracted with Denny Fairfax to purchase Leeds and South Branch Manors for £20,000 sterling.[8] Having grown up in Fauquier County, where much of Leeds Manor lay, John Marshall fully recognized the potential of the manors as a source of steady income from rents and as a place to settle his sons when they came of age. From the outset he believed that Denny Fairfax's title was good at law and fully protected by the peace treaty of 1783, and it was this belief that induced him to become a prospective purchaser.

To vindicate the Fairfax title and thus to clear the way for the sale and purchase of the manors, Marshall had to muster all of his formidable legal and legislative skills. In the summer of 1794 a Fauquier inquest found for the commonwealth as to that part of Leeds Manor lying within the county, a finding that was sustained by the district court at Dumfries in October of the same year. Fairfax then appealed to the state Court of Appeals—precisely at the time the state legislature was considering the proposed Eleventh Amendment to the Constitution, which threatened to prevent an ultimate appeal to the federal Supreme Court on Fairfax's part. In these circumstances the state was in no hurry to proceed with the appeal, which remained undecided at the time a legislative settlement took place in 1796.

While all this litigation was pending—the caveats brought by Fairfax, the ejectment by Hunter, and the escheat actions by the commonwealth—Marshall in the spring of 1795 filed on Fairfax's behalf an ejectment against Hunter in the federal circuit court. This suit concerned a tract of 400 acres in Hampshire County and was entirely separate from the ejectment Hunter had brought four years earlier in the Winchester court, though the issues were the same.[9] All along Marshall's aim had been to get the question of the Fairfax title before the Supreme Court of the United States, in particular so it could declare the meaning of the peace treaty in relation to this question. By initiating a new action in the federal court, Marshall could forestall the possibility that the appeal route to the Supreme Court for those cases then in the state court would be closed off. Recognizing its material interest in this case, the state of Virginia hired eminent counsel to represent Hunter at the hearing that took place in June 1795. After Judges James Wilson and Cyrus Griffin ruled in favor of Fairfax, the governor and counsel took out an appeal on Hunter's behalf to the Supreme Court. The legislature soon dropped its support, however, protesting the jurisdiction of the federal courts in such cases. Hunter then continued the appeal on his own but eventually dropped it in 1797 after a compromise concerning the Northern Neck lands was adopted by the legislature. Thus no decision on the Fairfax title by the Supreme Court was pronounced at this time.

## The Compromise of 1796 and the Purchase of the Residuary Estate

Although Marshall had enjoyed some success in securing judicial recognition of the Fairfax title, the commonwealth had obtained judgments on escheat proceedings against the manor lands. The upshot of this inconclusive legal maneuvering was a mutual disposition to come to an accommodation and avoid further costly litigation. A compromise based on the old distinction between the vacant lands and the manor lands was enacted into law in December 1796. Marshall, on behalf of the purchasers of the Fairfax estate, relinquished Fairfax's claim to those lands that were "waste and unappropriated" at the time of Lord Fairfax's death, and the commonwealth relinquished its claim to lands "specifically appropriated" by Lord Fairfax "to his own use by deed or actual survey."[10]

By the compromise of 1796 the Marshalls gained what they most wanted: clear title in Denny Martin Fairfax to the manor lands. Fairfax could now sell and they could purchase South Branch and Leeds secure in the knowledge that this transaction would meet with no legal challenge. From the time they contracted to purchase the manors in 1793, Marshall and his brother James intended to sell South Branch Manor for revenue needed to obtain the richer prize, Leeds. The Marshalls paid £6,000 pounds in February 1797 to gain title to South Branch. In 1801 and 1802 they sold off most of this manor to the tenants holding long-term leases. By 1806 they were able to pay the final installment on the £14,000 for Leeds.[11]

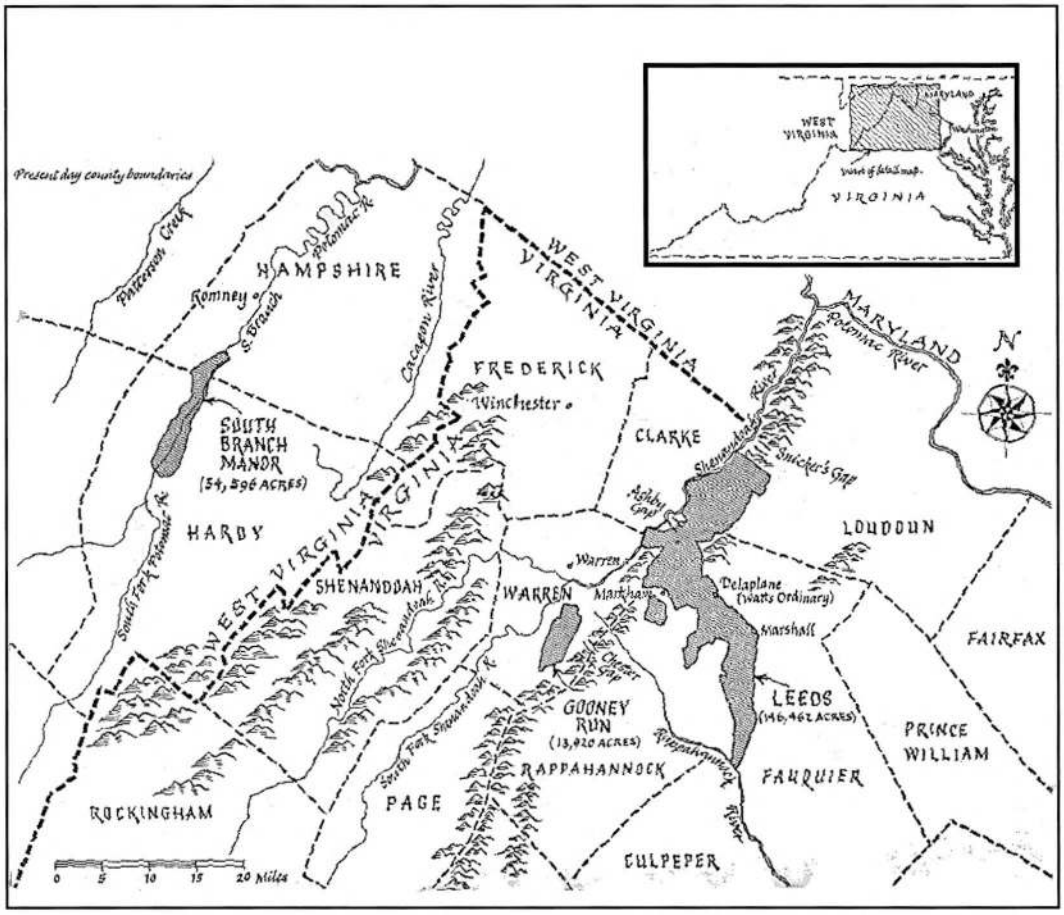
After the 1796 compromise a definitive Supreme Court ruling on the Fairfax title was no longer of crucial importance to Marshall. He may well have preferred to have his title founded on a judicial pronouncement rather than on a legislative enactment, but there is no indication that he was concerned about a possible repeal of the 1796 agreement. In this unlikely event the vested rights acquired under that act would be protected by the contract clause of the Constitution. Yet Marshall had other reasons for continuing to believe that a Supreme Court opinion affirming the Fairfax title on the basis of the peace treaty of 1783 would be desirable.

The compromise was intended to put an end to pending legal cases and forestall future disputes. The commonwealth dropped its attempt to escheat the manor lands. Hunter did not further prosecute the appeal of the federal court judgment against him, presumably on the understanding that this judgment would not be enforced. In other respects, however, the compromise did not prevent further litigation. Most prominently, Hunter's appeal of the Winchester case remained on the docket another fourteen years. It was argued in the Court of Appeals in May 1796, a few months before the compromise. It was reargued in October 1809 and finally decided in April 1810, the court reversing the Winchester judgment and upholding Hunter's claim to the land. Why did this appeal remain alive after the compromise? One of the agreed facts of the case was that the disputed land fell within

that part of the Northern Neck designated as waste and ungranted. The compromise gave title to the waste and ungranted lands to the commonwealth and to those (like Hunter) claiming under patents from the state. Why did the Court of Appeals not immediately reverse the Winchester judgment and award the land to Hunter on the basis of the compromise?

To answer this question it is necessary to examine certain features of the compromise that have been overlooked or not fully understood in previous accounts of the Fairfax litigation.[12] The 1796 act of compromise was carried into effect by two deeds. In the first, dated August 30, 1797, Denny Fairfax conveyed to James M. Marshall all his residuary estate in the Northern Neck proprietary except Leeds Manor (already under contract to be sold to the Marshalls), quitrents, and one small tract of 100 acres. The second, dated October 10, 1798, and signed by James M. Marshall and his wife, Hester, conveyed the waste and ungranted lands to the commonwealth. This transaction was not simply a transfer of title to the unappropriated lands from Fairfax to James Marshall and then from Marshall to the commonwealth. In fact, the net result of these two deeds was that James Marshall, on behalf of the syndicate, acquired the remaining Fairfax manor lands, those Lord Fairfax had appropriated for himself "by deed or actual survey." The deed from Denny Fairfax to James Marshall was given for a consideration of £2,625, undoubtedly the price agreed upon for the additional manor lands.

By a subsequent deed of partition, dated June 24, 1799, the Marshall brothers—James, John, Charles, and William—and their brother-in-law Rawleigh Colston divided up an estimated 12,500 acres lying in Hampshire, Berkeley, Shenandoah,




**This map of the Fairfax Proprietary of the Northern Neck of Virginia shows the approximate location of the Manor Lands of the Marshall Syndicate. Drawn by Richard J. Stinely, for volume two of *The Papers of John Marshall*, it was adapted from Josiah Look Dickinson, *The Fairfax Proprietary: The Northern Neck, the Fairfax Manors, and Beginnings of Warren County in Virginia* (Front Royal, VA, 1959), and the Deed Books of Hardy and Hampshire Counties, West Virginia. It is reprinted with permission.**

and Fauquier plus smaller tracts in and around the towns of Bath (Berkeley Springs, West Virginia), Romney, and Winchester. All of the Marshalls' litigation occurring after the compromise of 1796 arose from disputes concerning the lands acquired by the deed of August 1797. This additional purchase also embraced the lands on which Denny Fairfax had brought caveats against David Hunter ten years earlier and the 1789 patent on which Hunter had brought ejectment against Fairfax in 1791.

## Renewal of Litigation

The Marshalls may have already known at the time of purchase that portions of this newly acquired real estate had previously been granted out by the commonwealth as unappropriated lands to various individuals. Beginning in 1798, they brought suits in their names in the state High Court of Chancery against holders under the commonwealth whose patents conflicted with their purchase. In each of these cases they contended that the lands in question had been reserved by Lord Fairfax for his personal use and were not grantable by the state. The reserved, or appropriated, lands fell into two categories, those set aside "by deed" and those set aside "by actual survey." That Lord Fairfax adopted these two modes of appropriation evidently arose from the circumstance that he held the proprietary as an entailed estate (descendible only to heirs of his body) with a power to grant lands in fee simple. As Marshall explained, when the proprietor "wished to liberate lands from the entail," he granted the land to a relative who in turn conveyed it back to him. Otherwise, Lord Fairfax simply set apart land for himself by survey. Land appropriated by either method, said Marshall, "was incapable of being acquired by any individual in the common mode, & was known to be withdrawn from the general mass of lands which was for sale as waste & vacant by warrant."[13]

Much the greater part of the Marshalls' claim under the Fairfax title, including the principal manors of South Branch and Leeds, belonged to the category of lands that had been appropriated by the method of conveyance and reconveyance. The boundaries of these tracts were well established by the public records in the state land office and were largely exempt from legal challenge. The additional lands acquired from Denny Fairfax in 1797 and subsequently partitioned among the brothers, however, had been appropriated by survey rather than by deed. Although confident that their title to these lands was good under the compromise, the Marshalls encountered difficulties in the state courts in proving that a given tract belonged to them on the basis of a survey made on behalf of Lord Fairfax. In some cases the best proof they could offer of a survey was a private memorandum book of the proprietor or of one of his surveyors. Their opponents contended that the only admissible evidence of an appropriation to Lord Fairfax's use was the survey books formerly kept in the proprietor's office and subsequently transferred to the state land office. The compromise, they insisted, was intended to embrace only those surveys that were duly recorded in land office books. The state court was inclined to support this narrow construction of the compromise, as shown by the dismissal of bills in chancery brought by the Marshalls against Abraham Brewbaker and others, David Hunter and Philip Pendleton, and William Janney.[14]

In one instance the state Court of Appeals did uphold James Marshall's right under the compromise to rents on lots in the town of Winchester. This case, *Marshall v. Conrad* (1805), produced a notable dissent from Judge Spencer Roane that evinced his inveterate hostility to the purchasers' claims under the Fairfax title. As far as Judge Roane was concerned, the only way Lord Fairfax could appropriate lands to his private use was by conveyance and reconveyance. "I can take no notice of any alleged acquisition by survey," he said, "even were that survey for lord Fairfax's own use." He accused the Marshalls of trying to "revive upon the people of the Northern Neck, a partial proprietorship," contrary to the terms of the 1796 compromise. Their "rapacity," he scornfully remarked, "might have been well satisfied with the enormous grant of 300,000 acres of perhaps the best lands in the Northern Neck."[15]

Despite the victory in *Marshall v. Conrad,* John Marshall was not sanguine that Virginia courts would fully vindicate the Fairfax purchasers' rights under the 1796 compromise. "I begin to fear the event of every suit however clear the merits may be in my estimation," he confided to his brother. Notwithstanding the *Conrad*

decision, James Marshall faced the prospect of continued costly litigation to collect rents from the Winchester townspeople. "If you get once more into the court of appeals your case will I fear be desperate," wrote the Chief Justice. Referring to a ruling of the Winchester District Court judge in another of his brother's suits, Marshall commented: "I am confident that it is absolutely impossible to make your present case one which can be decided in your favor by the person who has given the opinion which has been rendered." As for his own problems with tenants who refused to pay rent, Marshall concluded he would "have to try in the federal court the validity of our title under the treaty for I am sure that clear as my title is under the compromise the state courts will decide against me."[16]

Marshall believed that a Supreme Court decision declaring the Fairfax title valid under the treaty of 1783 would strengthen the purchasers' cases in the state courts. He had always maintained that this title derived not from the compromise but from the treaty. Under this assumption, Fairfax and the purchasers had voluntarily relinquished title to the unappropriated Northern Neck lands. Marshall fretted that the state courts would construe the act of 1796 as if the commonwealth had legal title to the Northern Neck and voluntarily waived its title to the manor lands. By this construction the courts would be inclined to presume that the commonwealth (and those claiming under it) regained every right not explicitly surrendered. Although he believed the purchasers' rights were secure—or should have been secure—under the compromise, a Supreme Court decision might compel the state courts to interpret the compromise more liberally in their favor. The burden of proof would fall on claimants under the commonwealth to show that their patents embraced lands that were truly vacant and had not been previously appropriated by Lord Fairfax.

The Supreme Court's exposition of the treaty should be binding on the state courts, said Marshall, even if the federal tribunal did not possess appellate jurisdiction over them. "The principle is," he explained, "that the courts of every government are the proper tribunals for construing the legislative acts of that government. Upon this principle the Supreme Court of the United States, independent of its appellate jurisdiction, is the proper tribunal for construing the laws & treaties of the United States; and the construction of that court ought to be received every where as the right construction." Consequently, if that court upheld the Fairfax title on the basis of the 1783 treaty, the "effect of the principle" was that "we hold not under the compromise but under the treaty, and the question is what does the compromise take from us?"[17] In his mind the correct interpretation of the compromise was that it confirmed the purchasers' claims to all Northern Neck lands not expressly renounced.

## David Hunter's Patent and James Marshall's Survey

The Marshalls' difficulties in establishing their rights to the additional lands acquired in 1797—lands the former proprietor had appropriated by survey rather than deed—provides the essential context for understanding the continuation of the appeal of *Hunter v. Fairfax* and the long delay in deciding it. Among the lands conveyed by Denny Fairfax in the 1797 deed was a tract of 1,000 acres lying on Cedar Creek in northern Shenandoah County, near Strasburg. In the subsequent partition among the syndicate this land was allotted to James Marshall. David Hunter's 1789 patent from the commonwealth described a tract containing 739 acres also lying on Cedar Creek. That Hunter's grant fell within the larger survey partitioned to James Marshall can be inferred from this coincidence and is confirmed by other evidence. Hunter paid taxes on his 739 acres from 1790 through 1805. Thereafter, neither land tax records nor deed books contain any mention of his name in connection with this property, though he continued to be a party to the suit. There is no evidence that either Hunter or tenants holding under him ever occupied this tract.[18]

Hunter's 1791 declaration in ejectment listed the then occupants of the Cedar Creek tract described in his patent from the commonwealth. These names also appear on deeds from James Marshall conveying various "tenements" on Cedar Creek, virtually conclusive evidence that Hunter's patent overlapped with James Marshall's Cedar Creek survey. In 1799, 1800, and 1807 Marshall sold his Cedar Creek survey lands to four different purchasers. The titles of present-day owners of property on Cedar Creek derive from these deeds executed by James Mar-

shall. According to the deeds, the Cedar Creek tract had been laid out and surveyed into five tenements during Lord Fairfax's lifetime.[19] In a fragment of an argument he subsequently drafted for the appeal to the Supreme Court, John Marshall stated the real matter in dispute between Hunter and the claimants under Fairfax, namely, that the Cedar Creek survey "was in fact set apart by Lord Fairfax for his own use & was at the time occupied by his tenent [*sic*] to whom the lands have since been actually conveyed in fee."[20]

That Hunter's warrant and survey for the Cedar Creek lands was allowed to proceed to patent in 1789 was evidently owing to ignorance or inattention on the part of Denny Fairfax and his lawyers. Or, as was said in connection with another case, the patent might have been "obtained by a concealment of the truth which was very practicable as the Survey might not on the face of it show its interference with land previously Surveyed for the said Lord Fairfax."[21] Had he been aware of the conflict, Denny Fairfax undoubtedly would have taken out a caveat, as he had done with other surveys made on Hunter's behalf. The problem for the Marshalls was that in one of the stipulated "facts" of the Winchester ejectment case both parties agreed that Hunter's patent embraced waste and ungranted lands. This fact was placed on the record to show that the issuing of the patent complied with the 1785 act by which the commonwealth assumed the right to grant the unappropriated lands of the Northern Neck. That Charles Lee, Fairfax's lawyer, agreed to this fact was of little consequence at the time, for the distinction between appropriated and vacant lands did not assume legal significance until the 1796 compromise. The 1794 decision affirmed Fairfax's title to the entire proprietary in fee simple, manor as well as unappropriated lands, and accordingly awarded the Cedar Creek tract to Fairfax.

With the enactment of the compromise, Hunter apparently expected to have his title under the commonwealth declared to be good. If his patent truly embraced waste and ungranted lands, then the dispute was at an end, for by the terms of the compromise the purchasers of the Fairfax estate were to relinquish title to these lands to the commonwealth. Upon discovering that their Cedar Creek survey encompassed Hunter's patent, the Marshalls refused to let Hunter take advantage of the compromise to defeat their title acquired through purchase of Denny Fairfax's residuary estate. They believed the appeal of the Winchester judgment should be decided solely on the facts agreed to in 1793—as if the compromise adopted three years later had never taken place. The compromise, wrote Marshall in his subsequent argument for the Supreme Court appeal, was not part of the record and should not be "considered by any court." If a court permitted the compromise to be considered, then it should also allow the claimants under Fairfax to present evidence showing that the disputed tract had been previously appropriated by Lord Fairfax. "The offer to try this cause on its real merits in a new ejectment has been repeatedly made by the party claiming the Fairfax title & repeatedly rejected," the Chief Justice noted. "He may therefore properly say now that the compromise forms no part of this case but will appear in a new ejectment if one should be brought."[22]

## From the Virginia Court of Appeals to the Supreme Court

Rather than become party to a new suit, Hunter apparently preferred to take his chances with the Court of Appeals, even though that court as constituted in 1796 and for some years thereafter was not likely to support his claim. After the first argument in the spring of 1796, nothing further happened until November 1803, when Hunter revived the appeal, which had abated on Denny Fairfax's death in 1800, against General Philip Martin, Denny Fairfax's brother and heir. Martin, of course, was only a nominal party to this litigation, which was directed entirely through his Virginia agents, the Marshall brothers. Having attended to the procedural requirements for keeping the appeal alive, Hunter seemed content to let the case continue from term to term.

In the meantime, the retirement of one judge and the death of another appeared to brighten Hunter's prospects. When the appeal was reargued in October 1809, the Court of Appeals consisted of three judges: William Fleming, Spencer Roane, and St. George Tucker. Fleming, the aged president, was the sole survivor of the three-judge majority that had decided *Marshall v. Conrad* in 1805. Roane, the dissenter in that

case, could be counted on to rule in Hunter's favor. Tucker, elevated to the appellate bench in 1804, had decided against Hunter at the district court in 1794. He did not sit in *Marshall v. Conrad* because his son, Henry St. George Tucker, was a resident of Winchester and interested in the outcome. As it happened, Tucker also disqualified himself in *Hunter v. Fairfax's Devisee,* this time because his son was married to David Hunter's daughter.

Roane and Fleming, then, were the two judges who decided *Hunter v. Fairfax's Devisee* in April 1810. Roane, as expected, upheld Hunter's claim, principally on the ground that the state, having acquired valid title to the waste and ungranted lands of the Northern Neck as a result of Denny Fairfax's alienage, was competent to issue the patent to Hunter. The peace treaty, he said, had "nothing to do with the laws of alienage," but even assuming its application to this case, he contended that the commonwealth had completed its title before the treaty was ratified. As for the compromise, Roane pointed out that it was intended to settle cases of this kind and expressed his surprise that the appellees, having already benefited greatly from that act, would not submit to its terms and give up their claim to this land. Contrary to Roane, Fleming upheld the Fairfax title, but agreed with his fellow judge that the compromise settled the matter in Hunter's favor. The ground of the decision, then, was the compromise act of 1796, the only point on which both judges concurred.[23]

Marshall decided to carry the case to the Supreme Court, personally attending to the forwarding of the record in hopes of having the appeal argued at the ensuing term. *Fairfax's Devisee v. Hunter's Lessee* was filed in July 1810, but lack

**Spencer Roane (above, left) and William Fleming (left) were the two judges on the Virginia Court of Appeals who decided *Hunter v. Fairfax's Devisee* in 1810. St. George Tucker (right), the third judge on the bench, disqualified himself because his son was married to David Hunter's daughter.**

of a quorum in 1811 postponed argument until the 1812 Term. Although Marshall saw the appeal as an opportunity to obtain a Supreme Court decision on all the questions relating to the Fairfax title, the case at this stage remained a live dispute over a particular parcel of land in Shenandoah County. In no sense was the appeal contrived to be a test case for determining the extent of the Supreme Court's appellate jurisdiction over the state judiciaries. That it became a landmark case in constitutional law was, so far as Marshall was concerned, an unforeseen and unintended consequence. His primary aim was to secure his brother's title to valuable acreage along a creek in the lower Shenandoah Valley. Nor were the Marshalls trying to execute a legal end run around the compromise of 1796. Taking the case to the Supreme Court did not signify an intention to lay claim to the waste and ungranted lands of the Northern Neck. The real dispute with Hunter was whether the Cedar Creek patent embraced waste and ungranted lands or was part of a larger tract that had previously been appropriated by Lord Fairfax.[24]

The Chief Justice believed the case would also "probably form a precedent" for the long-pending caveat actions brought by Fairfax against Hunter and others in 1788. The dispute in these was exactly the same as in Hunter's ejectment, namely, whether the tract in question belonged to the vacant or appropriated lands. "The decision of the supreme court if against us," wrote Marshall in 1810, "will save the expence of further litigation on the points decided; if in our favor it will I presume be respected by the state courts or if not, it will ascertain the points on which we may rely on an ultimate determination in favor of our title."[25] As these remarks indicate, Marshall did not seem particularly concerned about an adverse ruling. As he viewed it, a Supreme Court decision on the title question—either for or against those claiming under Fairfax—was preferable to continuing legal uncertainty.

Justice Story delivered the opinion in *Fairfax's Devisee v. Hunter's Lessee* in March 1813.[26] The Court reversed the decision of the Virginia Court of Appeals and affirmed the original judgment of the Winchester District Court in favor of Fairfax's title. To Marshall's consternation, however, this decision was not based on the peace treaty of 1783. Although counsel Charles Lee and Walter Jones devoted their argument almost entirely to the effect of the peace treaty, Story considered this point unnecessary to decide because Fairfax's estate was fully protected by the Jay Treaty of 1794. That treaty permitted British subjects then holding lands in the United States to continue to enjoy their estates and to dispose of them in the same manner as American citizens. In order to bring the case within the Jay Treaty, Story construed the various acts of Virginia on the subject of the Northern Neck and, like Judge Tucker in 1794, concluded that none of them vested title in the commonwealth to the vacant lands of the former proprietary.

Such a decision was not likely to be of much use to the Marshalls in the Virginia courts. It not only did not settle the title question to the Chief Justice's satisfaction but may have introduced greater confusion. Years later he remarked that the 1813 case was "very absurdly put on the treaty of 94."[27] That treaty, he might well have thought, should not have entered into the decision at all, since, like the compromise of 1796, it was not part of the original stipulation of facts. Moreover, placing the Fairfax title under the protection of the later treaty was risky, for it hinged on the construction of the 1785 act "for safe keeping the land papers of the Northern Neck" under which the commonwealth began to issue patents to the vacant lands. Although admitting that this act "presented some difficulty, if it stand[s] unaffected by the treaty of peace," Story maintained that its terms did not manifest the legislature's intention to vest title to the vacant lands in the commonwealth.[28] Marshall evidently viewed this act in a different light. Either the act was a confiscation barred by the peace treaty, or, if not a confiscation, this construction of the act was plausible only because of the treaty. In short, considered on its own terms independent of the treaty, the 1785 act amounted to a legal assumption of title to the Northern Neck. To Marshall, therefore, the treaty of 1783 was essential to establishing the Fairfax title. A Supreme Court opinion embodying this view of the application of the peace treaty to the title question, he believed, would have to be respected by the state courts. On the other hand, those courts would not consider as binding Story's construction of a state legislative act. In this respect, then, *Fairfax's Devisee v. Hunter's*

*Lessee* was for Marshall a disappointment, a missed opportunity.

The title dispute now receded to the background as the case assumed the broader dimension of a constitutional controversy concerning the nature and limits of the Supreme Court's appellate jurisdiction. A mandate directing the Virginia Court of Appeals to execute the judgment in *Fairfax's Devisee v. Hunter's Lessee* was sent out in August 1813. More than two years later, in December 1815, the state appeals court announced its refusal to carry out the mandate, declaring that the Supreme Court's appellate power did not "extend to this court" and that section 25 of the Judiciary Act of 1789, which authorized the Supreme Court to issue writs of error to the highest state courts, was unconstitutional. Judge Roane, the dominant voice of the Court, seized this opportunity to deliver a political treatise on the nature of the federal union as essentially a confederacy of sovereign states whose governments "remain in full force, except as they are impaired, by grants of power, to the general government."[29]

The Virginia Court of Appeals' challenge to the Supreme Court's appellate jurisdiction produced an application for a second writ of error, this one drawn up by Chief Justice Marshall himself. Unsigned but in his hand, the petition is part of the appellate case file of *Martin v. Hunter's Lessee,* as the case was now styled. Marshall probably wrote the petition as soon as he learned of the Court of Appeals' decision. He then forwarded it to Justice Bushrod Washington, who allowed the writ and issued a citation to David Hunter summoning him to appear. The case was filed in the Supreme Court in early February 1816, soon enough to put the case on the docket for that Term. Around this time, if not earlier, Marshall drafted the argument referred to above, which he apparently drew up for the use of counsel. Most of the argument deals with the jurisdictional issue, with the Chief Justice contending that the case was properly within the Supreme Court's appellate jurisdiction according to both the Constitution and section 25 of the Judiciary Act.[30]

On March 20, 1816, Justice Story delivered the opinion in *Martin v. Hunter's Lessee,* reversing the Virginia Court of Appeals' judgment on the mandate and (as in the 1813 case) affirming the 1794 judgment of the Winchester District Court.[31] He firmly established his credentials as a judicial nationalist by arguing that the nature and logic of the Constitution, if not any specific textual provision, conferred upon the Supreme Court the right to review decisions of state courts. Section 25 of the Judiciary Act was therefore constitutional. Years later Story wrote that Marshall "concurred in every word" of his opinion. No doubt the Chief Justice was in complete agreement with his younger colleague on the issue of appellate jurisdiction, but the notion that he stood over Story's shoulder and dictated the opinion is without foundation. Story was fully capable of composing ringing nationalist pronouncements without assistance from Marshall or anyone else.

Although *Martin v. Hunter's Lessee* yielded a masterly statement on the nature and extent of the appellate jurisdiction of the Supreme Court, the case did not finally settle the question of whether appellate supervision of state courts would become a permanent feature of the American constitutional system.[32] If inconclusive on this important constitutional question, *Martin* did put an end to further litigation about who had superior title to the Cedar Creek tract in Shenandoah County. The mandate reversing the Court of Appeals and giving judgment for Martin was turned over to James Marshall. He did not have to take any further legal steps, since the effect of the decision was to confirm possession in those who had purchased from him years earlier. For his part, Hunter presumably sought compensation from the state for the money he paid in the purchase of his patent and in paying taxes on the land for fifteen years.

Both the autograph remnant of an argument and petition for a writ of error testify to Marshall's continuing active involvement in the Fairfax litigation as it was being considered by the Supreme Court. Did his actions violate prevailing canons of judicial behavior? One recent historian of the Marshall Court, focusing on the unsigned petition for a writ of error, spins an elaborate argument that the Chief Justice "surreptitiously intervened in the judicial process to secure appellate jurisdiction." The personal and political stakes were so high in this case that Marshall, it is speculated, risked having his involvement disclosed to the public while taking steps to minimize that risk. While conceding the possibility that the Chief Justice may not have regarded his actions "as outside the ambit of"

judicial propriety, this commentator portrays him as deviously acting behind the scenes to manipulate the judicial process to his advantage.[33]

There was nothing improper about Chief Justice Marshall's personal involvement in the appeal of *Martin* and certainly no attempt on his part to conceal it from public view. That Marshall acted as his own lawyer in drafting the writ of error petition was not a matter of great moment, for he could just as easily have had this service performed by another lawyer without delaying the appeal. As a judge, he was sensitive to the conflict of interest posed by the Fairfax cases and routinely withdrew from hearing them when they came before him either in the high court or on circuit. Indeed, he went even further and refused to sit not only in cases where he or his near relations had a personal interest but in any case where the Fairfax title might be implicated. In the Granville case of 1805, for example, Marshall declined to decide the main question because it involved the same point respecting the treaty of peace as that arising in the Fairfax disputes. So firm was his opinion on this subject, he said, "that he did not believe he could change it; and as that opinion was formed when he was very deeply interested (alluding to the cause of Lord Fairfax in Virginia) he should feel much delicacy in deciding the present question."[34] Similar considerations undoubtedly prevented him from participating in the decision of *Smith v. Maryland* (1810) and *Orr v. Hodgson* (1819) in the Supreme Court.[35] In the spring of 1823 he informed Judge Tucker that the U.S. Circuit Court docket for that Term contained "three ejectments in which though neither myself nor any of my connexions are interested I cannot sit because the Fairfax title is implicated on them."[36]

Chief Justice Marshall clearly recognized and scrupulously adhered to a code of appropriate judicial behavior. At the same time this code did not prevent him from taking an active part as a litigant so long as he withdrew from the case in his judicial capacity. A Supreme Court Justice, like any other party in a case before that tribunal, had a perfect right to act on behalf of his own cause. In cases where he or his brother were parties (in their own names or as Martin's agent), Marshall, long after becoming Chief Justice, continued to perform such lawyerly services as preparing pleadings and taking depositions. Although most of these cases were brought in state courts, in at least one instance he drew a bill in chancery on behalf of Philip Martin for presentation in his own U.S. Circuit Court at Richmond.[37] Another Supreme Court case in which the Chief Justice had a personal interest was *FitzSimons v. Ogden,* decided in 1812.[38] While this case was pending, Thomas FitzSimons sought Marshall's advice about hiring counsel and about when a decision might be expected. He apparently took this liberty on the very assumption that the Chief Justice would not sit in the case. For his part, Marshall betrayed no hint of awkwardness or impropriety in discussing "our case" with FitzSimons as a fellow party.[39]

As a principal partner with James Marshall in the purchase of the Fairfax manor lands, Chief Justice Marshall was directly interested in the cases of 1813 and 1816. In no sense, however, did the success or failure of his huge investment in these lands hinge on the Supreme Court's decision. After the compromise of 1796, such a decision could not affect the main portion of the purchase, Leeds and South Branch Manors. Still, he continued to believe that a definitive ruling by the Court on the peace treaty could serve a limited purpose by placing the Marshalls' rights to the additional lands purchased in 1797 on a more secure foundation. Neither *Fairfax's Devisee v. Hunter's Lessee* nor *Martin v. Hunter's Lessee,* though favorable to the Marshall interest, provided useful precedents in this respect.[40]

## Endnotes

[1] Leonard Baker, **John Marshall: A Life in Law** (New York, 1974).

[2] For previous discussions of the Fairfax cases, *see* Albert J. Beveridge, **The Life of John Marshall** (4 vols.; Boston, 1916-19), 2: 203-11; 4: 145-66; H.C. Groome, **Fauquier During the Proprietorship** (Richmond, VA, 1927), 218-43; William Winslow Crosskey, **Politics and the Constitution in the History of the United States** (2 vols.; Chicago, IL, 1953), 2: 785-817; John Alfred Treon, "*Martin v. Hunter's Lessee*: A Case History" (Ph.D. diss., University of Virginia, 1970); F. Thornton Miller, "John Marshall v. Spencer Roane: A Reevaluation of *Martin v. Hunter's Lessee*," *Virginia Magazine of History and Biography*, 96 (1988): 297-314.

[3] My description is derived from Groome, **Fauquier During the Proprietorship**, 55-57, 69-81.

[4] For the various acts referred to, *see* William Waller Hening, ed., **The Statutes at Large; Being a Collection of All the Laws of Virginia** (13 vols.; 1819-23; Charlottesville, VA, 1969 reprint), 10: 66-71; 11: 128-19, 159-60.

[5] *Ibid.*, 12: 11-13.

[6] The following paragraphs are based on the editorial note and documents in Charles F. Hobson et al., eds., **The Papers of John Marshall**, Vol. 5 (Chapel Hill, NC, 1987), 228-56. *See* this work for a full citation of the sources. *See* also the editorial note in Charles T. Cullen and Herbert A. Johnson, eds., **The Papers of John Marshall**, Vol. 2 (Chapel Hill, NC, 1977), 140-49.

[7] The case is reported in Tucker's manuscript casebook, Special Collections, Swem Library, College of William and Mary (Hobson et al., eds., **Marshall Papers**, 5: 248-49n).

[8] Cullen and Johnson, eds., **Marshall Papers**, 2: 150-56.

[9] The state and federal ejectments are sometimes mistakenly considered as the same case. *See*, for example, Charles Warren, **The Supreme Court in United States History** (2 vols.; Boston, 1926), 1: 445; Francis N. Stites, **John Marshall: Defender of the Constitution** (Boston, 1981), 54.

[10] Samuel Shepherd, **The Statutes at Large of Virginia** (3 vols.; 1835; New York, 1970 reprint), 2: 22-23.

[11] Charles F. Hobson and Fredrika J. Teute, eds., **The Papers of John Marshall**, Vol. 6 (Chapel Hill, NC, 1990), 543-45.

[12] The remainder of this article draws principally on information presented in an editorial note and documents in Charles F. Hobson, ed., **The Papers of John Marshall**, Vol. 8 (Chapel Hill, NC, 1995), 108-26.

[13] Hobson and Teute, eds., **Marshall Papers**, 6: 472.

[14] Hobson and Teute, eds., **Marshall Papers**, 6: 94-97, 122-24, 202-206. The original suit papers are in the clerk's office of the Augusta County Circuit Court, Staunton, VA. This material was unknown to previous writers on the Fairfax cases.

[15] *Marshall v. Conrad*, 5 Call 364, 386, 392-93, (VA Court of Appeals, 1805). Roane was referring to South Branch and Leeds Manors, whose purchase was secured under the compromise.

[16] Hobson and Teute, eds., **Marshall Papers**, 6: 277, 426; Charles F. Hobson et al., eds., **The Papers of John Marshall**, Vol. 7 (Chapel Hill, NC, 1993), 186.

[17] Marshall to James M. Marshall, July 9, 1822, William Keeney Bixby Collection, Olin Library, Washington University.

[18] Treon states erroneously that "at no time after 1796 was David Hunter *not* in actual possession of the land he was suing for." This error results in a major misunderstanding of why the appeal was continued (Treon, *Martin v. Hunter's Lessee,* 116).

[19] Hobson, ed., **Marshall Papers**, 8: 126 n. 10. These deeds are in the Frederick County Superior Court Deed Books, clerk's office, Frederick County Circuit Court, Winchester, VA.

[20] Hobson, ed., **Marshall Papers**, 8: 124-25. This document is in the appellate case file of *Fairfax's Devise v. Hunter's Lessee,* No. 456, Record Group 267, National Archives. The argument fragment and the other documents mentioned above—the 1797 deed conveying the remaining manor lands, the 1799 partition deed, and the deeds from John Marshall—have been overlooked in previous accounts but provide the key to understanding the nature of the legal dispute. No one had established the connection between Hunter's patent and James Marshall's Cedar Creek survey, though Beveridge, who was aware of the additional purchase in 1797, correctly surmised that Hunter's grant lay within these lands (Beveridge, **Life of John Marshall**, 4: 148-51).

[21] James Marshall's amended bill in chancery, July 25, 1804, *Marshall v. Brewbaker,* clerk's office, Augusta County Circuit Court, Staunton, VA.

[22] Hobson, ed., **Marshall Papers**, 8:124-25.

[23] 1 Munford 218 (VA Court of Appeals, 1810).

[24] Treon grossly misreads the nature of the dispute between the Marshalls and Hunter. Miller offers a corrective but is off the mark in other respects (Treon, *Martin v. Hunter's Lessee,* 114-119; Miller, "John Marshall v. Spencer Roane," 306-8).

[25] Hobson et al., eds., **Marshall Papers,** 7: 246-47.

[26] 11 U. S. (7 Cranch) 603 (1813).

[27] Marshall to James M. Marshall, July 9, 1822, William Keeney Bixby Collection, Olin Library, Washington University.

[28] 11 U. S. (7 Cranch) 603, 624 (1813).

[29] *Hunter v. Martin,* 4 Munford 1, 30 (VA Court of Appeals, 1815).

[30] For the petition and argument, *see* Hobson, ed., **Marshall Papers**, 8: 121-26.

[31] 14 U. S. (1Wheat.) 304 (1816).

[32] It would be reopened five years later in *Cohens v. Virginia,* 19 U. S. (6 Wheat.) 264 (1821).

[33] G. Edward White, **The Marshall Court and Cultural Change, 1815-35** (New York, 1988), 165-73. On the whole this book is an outstanding work of scholarship, but this particular section is riddled with errors and unfounded suppositions.

[34] Hobson and Teute, eds., **Marshall Papers**, 6: 400.

[35] 10 U. S. (6 Cranch) 286 (1810); 17 U. S. (4 Wheat.) 465 (1819).

[36] Marshall to St. George Tucker, May 27, 1823, Tucker-Coleman Papers, Swem Library, College of William and Mary.

[37] Hobson and Teute, eds., **Marshall Papers**, 6: 94-95, 96-98, 122-23, 202-5, 472-75.

[38] 11 U. S. (7 Cranch) 2 (1812).

[39] Hobson et al., eds., **Marshall Papers**, 7: 188- 90, 224-25, 241-42, 261-62, 271.

[40] The first clear precedent upholding such titles on the basis of the 1783 treaty was *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819).

# Documenting Judicial History: The Supreme Court of the United States, 1789-1800[1]

**Maeva Marcus**

**The Documentary History of the Supreme Court of the United States, 1789-1800**, a project sponsored by the Supreme Court and the Supreme Court Historical Society, began in 1977 as an effort to fill a gap in our knowledge about the Court in its critical formative years. At that time, only two books about this period existed, and both were marred by inaccuracies. Further, as work on the project progressed, the editors discovered that Alexander J. Dallas, the unofficial reporter for the Supreme Court in its first decade, "not only omitted cases from his reports but took certain liberties with those he did include."[2] Clearly, the Court's early history warranted additional study.

The importance of the cases brought before the Court corroborates the need to correct the record. During its initial years, the Court considered questions central to the creation of a workable national government out of the constitutional blueprint. The Court decided issues bearing upon the nature of the federal relationship, the meaning of separation of powers, the foreign policy of the United States, the definition of war, the supremacy of national treaties over state laws, the essence of citizenship, and the relationship between the common law of England and the laws of the United States.

Until the publication of **The Documentary History of the Supreme Court,** historians interested in the operation of the federal judicial system during its initial decade had been faced with a paucity of accurate, accessible published primary materials with which to examine the period. But now this multivolume series will provide scholars and lawyers with the first authoritative account of all cases heard by the Supreme Court from 1790 through 1800. It also presents an ample selection of contemporary comment about the Justices and their duties, the business of the Court, and the function of the Court in the constitutional framework. A compilation of official records, private papers, and other primary sources, the series brings together and makes readily available hitherto unpublished materials. They document the Court's primary role in creating administrative procedures for the American judicial system and establishing the legal precedents that enabled the new government to prosper.

To assemble as complete a collection as possible, the editors of the Documentary History

Project conducted a massive search. More than 20,000 documents have been culled from more than 100 repositories in the United States and England. All of these documents cannot be published; we would need dozens of volumes to accommodate them. We plan to produce eight volumes, five of which have already appeared.

The series is organized topically. Volume 1, "Appointments and Proceedings," reproduces the official records of the Court from 1789 to 1801 and deals with all the material bearing on the appointments made to its Bench in that decade. The complicated story behind the Senate's rejection of John Rutledge as Chief Justice, for example, is set forth in great detail, and the documents relating to this episode have been cited by numerous authors since the volume appeared. In addition, citations to an article by the coeditor of this first volume, the late James R. Perry, titled "Supreme Court Appointments, 1789-1801: Criteria, Presidential Style, and the Press of Events," have cropped up in several recent historical works.[3] Scholars and journalists interested in analyzing the "advice and consent" role of the Senate found Volume 1 an invaluable source. Moreover, in the contests over Supreme Court nominations waged since the book was published in 1985, participants on both sides used its material to further their respective causes.

Volumes 2 and 3 cover the activities of the Justices on circuit. Chief Justice William H. Rehnquist observed in the foreword to the second volume that these two books gave "scholars their first opportunity to delve deeply into one of the most intriguing and least studied aspects of the early Court: the extensive and often arduous circuit-riding duties of the Justices." He con-

**The staff of the Documentary History Project is pictured above in 1993 at the publication party for Volume 4. From left to right are Natalie Wexler, Robert Frankel, Jr., James Brandow, and Stephen Tull. Maeva Marcus (above left) has been the editor of the project since its inception in 1977.**

cluded that "the documents assembled in this volume and the subsequent one provide us not only with a vivid picture of the Justices' lives on the road, but also with insights into the role of the circuit courts in the early history of the Republic. The Justices' often lengthy charges to circuit court grand juries, along with the presentments and other responses of those juries, give us some fascinating glimpses both into the workings of the lower courts and into the relationship between the judicial system and the larger society."[4]

Many Americans are unaware that the Justices of the Supreme Court used to ride circuit in addition to performing their duties at the Court. Circuit riding was mandated by the Judiciary Act of 1789—the key piece of legislation that fleshed out the Constitution's limited provisions for the third branch of government. The act divided the United States into thirteen judicial districts, eleven of which were separated into three circuits: the Eastern, the Middle, and the Southern. It required that two circuit courts be held annually in each district—one in the spring and the other, six months later, in the fall—and that the court consist of two Justices of the Supreme Court and the district judge. (The law was later changed to allow the attendance of just one Justice of the Supreme Court.[5])

The circuit courts stretched the length of the eastern seaboard from Portsmouth, New Hampshire, in the north to Savannah, Georgia in the south, and the documents disclose that traveling to them over muddy, rutted roads and frozen rivers was difficult, not to mention dangerous. Along the way, Justices occasionally stayed with friends or with people to whom they had been recommended, although fear of creating a perception of conflict of interest made them reject many invitations. Frequently, they lodged in taverns or public houses, where drink, conviviality, and rough company combined to provide little relief from the rigors of the road. Associate Justice William Cushing once shared a room with twelve other men, and Justice James Iredell was compelled to sleep beside "a bed fellow of the wrong sort."[6]

These hardships were compounded by health and personal problems, and no one's woes are captured more clearly in Volume 3 than James Wilson's. The accomplishments of this most brilliant lawyer and political theorist are well known; less well known is Wilson's fall from grace—a descent that our documents record in heart-rending detail. In the 1780s and '90s, Wilson had borrowed heavily to speculate in undeveloped western lands, but his investments did not pay off. By the mid-1790s, he began to default on his loans. With creditors hounding him, Wilson left Philadelphia during the summer of 1797 and failed to appear at the August Term of the Supreme Court, causing Justice Iredell to comment, "All the Judges are here but Wilson who unfortunately is in a manner absconding from his creditors. . .What a situation!"[7] In September, two of his creditors caught up with him in Burlington, New Jersey, and had him arrested and thrown in jail. With the help of his son, Wilson managed to pay his debts to these two and get released. He headed to North Carolina to assess his property and to try to reorganize his finances, but by June 1798, he ran out of clothes and money. Stuck in a hot, tiny tavern room in Edenton and feeling intense legal and financial pressure, Wilson contracted what we think was malaria and died on August 21.

While Volumes 2 and 3 help to illuminate the lives of the Justices, as well as the general social history of the early republic, they also contain much that is new about the relationship between the state and federal judiciaries. Volume 2 traces the evolution of a case in the North Carolina state courts that became a cause of contention when Philadelphia financier Robert Morris, the defendant, tried to remove his suit to the new federal circuit court in North Carolina, under the authority of the Judiciary Act of 1789. Three Supreme Court Justices signed a writ of *certiorari* to remove the case. When the state judges refused to honor the writ, a constitutional crisis could have occurred. But events moved slowly in the late eighteenth century. After reading the response of the North Carolina court and the state's legislature as well, at least one of the federal judges involved began to question whether their action had been correct. John Blair, one of the Justices who had signed the writ, wrote to James Wilson, another signer,

> Is there not weight in the reasons assigned by the Judges of that State for their refusal to comply with the mandatory writ issued by our fiat. Should that be the case, & we appear to have

> been hasty in directing it, no doubt we should be willing to correct our error, not only for the sake of truth & propriety, but because it would be more convenient to acknowledge our faults than to plunge deeper in it. And, possibly, our destination may be such as to make it our duty to decide judicially upon the return of the Judges. If the opinion should then be, that the Judges ought to have obeyed the certiorari, what step is to be [t]aken to compel them? In the contrary event, I suppose the court's order would be to quash the certiorari, as having issued erroneously. [*Emphasis in original.*]

Before the Justices had resolved their doubts, however, Morris withdrew his request, and the situation was defused.[8]

The grand jury charges that appear in both Volumes 2 and 3 may be some of the most important hitherto unpublished sources for analysis of the legal views and governmental philosophy of the Supreme Court Justices during the first decade of that institution's history. Scholars—Wythe Holt, Stewart Jay, and Kathryn Preyer, for example—had been mining these charges in our office even before they were published. Since their pioneering work, others have discovered the value of this material when writing about the late eighteenth century.[9]

Volume 4, **Organizing the Federal Judiciary,** presents a collection of documents that together form a history of the statutory development of the federal judiciary from 1789 to 1801. Lack of an understanding of the political background of the various statutes that created the federal court system has made it difficult to comprehend the decision-making process of the Supreme Court in its early years. The Court, as Chief Justice Jay stated, was a novel entity. It had no precedents to guide its rulings. Knowledge of the Constitution and the process of its adoption, familiarity with the legislation enacted in the initial decade of the federal government's existence as well as with state legal process and procedure, and experience as members of the revolutionary generation—these were the ingredients that informed the judgments of the first Supreme Court Justices. The Court, moreover, did not operate in isolation. The larger part of its caseload was appellate; thus, the Justices had to acquaint themselves with all the rules and regulations affecting lower federal courts. And Congress gave the Justices an even better reason for immersing themselves in the entire judicial system by its assignment of circuit-riding duties. This fourth volume tells the story of the establishment of a new court system, the problems it encountered, and the perceived need for legislative correction.[10]

Volume 5 treats the cases in which states were sued in federal court and the Eleventh Amendment. The issue of state suability has long been a matter of controversy and debate. Eight suits were brought against states by individuals from different states and foreign nations in the Supreme Court during the course of the 1790s. One of those suits, *Chisholm v. Georgia*, provided the occasion for the Supreme Court's ruling in 1793 that federal jurisdiction extended to suits brought by individuals against states. The Eleventh Amendment was proposed and ratified in order to overturn that decision.

That much scholars agree on. But the circumstances that gave rise to the amendment and its broader meaning and purpose have been a subject of intense debate, especially in recent years. Perhaps it is true that, as one scholar has written, "The search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire."[11] In Volume 5, the "faithful" should find a wealth of material illustrating both the wide range of opinion in the 1790s concerning the subject of state suability and the diverse reactions of the six states that were sued. These documents probably will not finally resolve the debate, but they should clarify, to some extent, the circumstances surrounding the Supreme Court's ruling in *Chisholm* and the subsequent ratification of the Eleventh Amendment. We know that some members of the current Supreme Court found the volume useful, for it is cited by Justice David Souter, in dissent, in *Seminole Tribe of Florida v. Florida*—a case decided in the October 1995 Term.[12]

The final three volumes, arranged chronologically, will focus on all the Supreme Court

cases decided between 1790 and 1801, except for those covered in Volume 5. These volumes will be the most challenging to produce. While obviously building on the previous volumes, we have found ourselves, in dealing with the cases that came before the Court in its early years, treading upon largely uncharted territory. Because legal history has become a fertile field for scholarship only in the last few decades and the late eighteenth century remains relatively unexplored, few secondary works exist for us to consult. Thus, we must do a huge amount of original research, using rather esoteric sources, to begin to understand most of the cases that the Supreme Court decided. When these final volumes are completed—Volume 6 will be published shortly, and the others will be out by the end of the decade—they will contribute uniquely to our knowledge of law and legal practice in the first decade of government under the Constitution.

Already several scholarly works based on sources printed in the **Documentary History** series have received favorable notice. Among them is William Casto's major interpretive monograph, **The Supreme Court in the Early Republic,** which relies, as reported in its editor's preface, on "the great contributions" of the **Documentary History**.[13] Some articles that have employed **Documentary History** materials as well are Robert P. Frankel, Jr., "The Supreme Court and Impartial Justice: The View from the 1790s";[14] Maeva Marcus and Robert Teir, "*Hayburn's Case:* A Misinterpretation of Precedent";[15] and Susan Low Bloch and Maeva Marcus, "John Marshall's Selective Use of History in *Marbury v. Madison.*"[16] The project's editors cannot help but believe that the hope expressed by Chief Justice Warren E. Burger when Volume 1 appeared, "that the publication of this unique series will stimulate interest in the history of the Third Branch of government and inspire additional studies of our early federal court system," has begun to be fulfilled.[17]

## Endnotes

[1] Parts of this essay are taken from the introductory matter contained in various volumes of **The Documentary History of the Supreme Court of the United States, 1789-1800,** and, with his permission, from a paper prepared by Mark Hirsch, a former associate editor of the series.

[2] Warren E. Burger, "Foreword," in Maeva Marcus and James R. Perry, eds., **The Documentary History of the Supreme Court of the United States, 1789-1800,** vol. 1 (New York: Columbia University Press, 1985), p. xxxv.

[3] *Journal of the Early Republic,* 6 (Winter, 1986):371-410. Another article written wholly from the materials contained in volume 1 of **The Documentary History of the Supreme Court** is: James R. Perry and James M. Buchanan, "Admission to the Supreme Court Bar, 1790-1800: A Case Study of Institutional Change," in *Supreme Court Historical Society, Yearbook 1983,* pp.10-16.

[4] William H. Rehnquist, "Foreword," 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), p. xxv.

[5] "An Act to establish the Judicial Courts of the United States" (Judiciary Act of 1789), September 24, 1789, in 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. 39-108; "An Act in addition to the Act, entitled, An Act to establish the Judicial Courts of the United States" (The Judiciary Act of 1793), March 2, 1793, *ibid.*, pp. 203-11.

[6] James Iredell to Hannah Iredell, October 2, 1791, in Marcus, ed., **Documentary History**, vol. 2, p. 212.

[7] James Iredell to Hannah Iredell, August 11, 1797, in Marcus and Perry, eds., **Documentary History,** vol. 1, p. 856.

[8] John Blair to James Wilson, February 2, 1791, in Marcus, ed., **Documentary History,** vol. 2, p. 128; John Sitgreaves to James Iredell, August 2, 1791, in *ibid.*, p. 196. Blair's letter continues at length with a discussion of the jurisdiction of state and federal courts under the new Constitution, as well as with a consideration of the propriety of issuing a certiorari to a state court. Wythe Holt and James R. Perry, in their article "Writs and Rights, 'clashings and animosities': The First Confrontation between Federal and State Jurisdictions" (*Law and History Review*, 7 (Spring, 1989):89-120), used all the relevant documents from volume 2 of the **Documentary History** to examine the implications of this case, *Morris v. Allen.*

[9] Among the numerous scholarly works that simply could not have been written had these volumes not appeared—ranging from law student notes to law faculty articles to essays in books—is one by Maeva Marcus and Emily Van Tassel, "Judges and Legislators in the New Federal System, 1789-1800," which has caught the attention of many federal judges. The essay is contained in Robert A. Katzmann, ed., **Judges and Legislators: Toward Institutional Comity** (Washington, D.C.: The Brookings Institution, 1988), pp. 31-53.

[10] An article that relies heavily on the documents in volume 4 is Henry J. Bourguignon, "The Federal Key to the Judiciary Act of 1789," *South Carolina Law Review,* 46 (Summer, 1995):647-702. In it, Professor Bourguignon commented: "Previous studies of the Judiciary Act of 1789 have provided valuable, original insights from a limited range of documents. Thanks to the splendid editorial work of . . . [the Documentary History] staff, we now have access to a vastly broader array of documents, correspondence, and newspaper articles on the debates over the drafting of the Judiciary Act of 1789. This treasure trove of information will provide whatever meat there is in what follows. [footnotes omitted]" *Ibid.*, p. 667.

Another article based on the documents in volume 4 is Maeva Marcus and Natalie Wexler, "The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation?" in Maeva Marcus, ed., **Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789** (New York: Oxford University Press, 1992), pp. 13-39. One can find sprinkled throughout these essays citations to volumes 1, 2, 3, and 4 of the **Documentary History.**

[11] John V. Orth, **The Judicial Power of the United States: The Eleventh Amendment in American History** (New York: Oxford University Press, 1987), p. 28.

[12] No. 94-12, Oct. 1995 Term, slip op. at 13 and 13n (J. Souter, dissenting), (decided March 27, 1996). *See* also Maeva Marcus and Natalie Wexler, "Suits Against States," *Journal of Supreme Court History 1993,* pp. 73-89.

Lawyers seem to have found our volumes useful as well, for the **Documentary History** has been cited in various briefs in recent years.

[13] University of South Carolina Press, 1995, p. xii.

[14] *Journal of Supreme Court History 1994,* pp. 103-16.

[15] *Wisconsin Law Review,* 1988, pp. 527-46. The third edition of Hart and Wechsler's **The Federal Courts and the Federal System** (Westbury, NY: Foundation Press, 1988, p. 93n) cites this article positively.

[16] *Wisconsin Law Review,* 1986, pp. 301-37. This last will be included in a set of the best articles on the Supreme Court, which will be edited by Kermit Hall and published by Carlson Publishing, Inc. Also forthcoming is an essay by Maeva Marcus, "Judicial Review in the Early Republic," in **Launching the "Extended Republic": The Federalist Era,** Ronald Hoffman, ed., University Press of Virginia.

[17] "Foreword," in Marcus and Perry, eds., **Documentary History,** vol. 1, p. xxxvi.

# *Georgia v. Brailsford*

**Maeva Marcus**

More than fifty years after the case of *Georgia v. Brailsford* was decided in the Supreme Court, Justice Benjamin R. Curtis had occasion to refer to it in an opinion he wrote on circuit. He discussed Chief Justice John Jay's charge to the trial jury as reported by Alexander J. Dallas, the unofficial reporter of Supreme Court decisions during its first decade.[1] Dallas recorded that Jay had instructed the jury that "both law and fact are lawfully within their power of decision." In a tone of wonderment, Curtis confessed: "I cannot help feeling much doubt respecting the accuracy of this report. . . . I can scarcely believe that the [C]hief [J]ustice held the opinion that, in civil cases, and this was a civil case, the jury had the right to decide the law." "Indeed," the Justice continued,

> the whole case is an anomaly. It purports to be a trial by jury, in the supreme court of the United States, of certain issues out of chancery. And the [C]hief [J]ustice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say, it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the supreme court for many years.[2]

But Justice Curtis would have been surprised if he had investigated further, for he would have found that the elements of *Brailsford* that he had questioned were indeed reported correctly by Dallas. Over the course of two years, 1792-1794, the case of *Georgia v. Brailsford* had offered the Justices the opportunity to explore for the first time the relation between the law and equity sides of the Supreme Court's jurisdiction. Begun in the United States Circuit Court for the district of Georgia, a simple suit between individuals for recovery of a debt turned into a more difficult case involving a state and eventually led to the first jury trial to be held in the Supreme Court of the United States.[3] Justice James Iredell, who presided at the fall 1791 session of the circuit court in Georgia, realized that the *Brailsford* case would have to be treated in a novel manner, because, it

seemed to him, neither federal statutes nor the common law adequately provided for all the parties with a claim to the debt to be represented in court. In outlining the case in a letter to President George Washington, he explained,

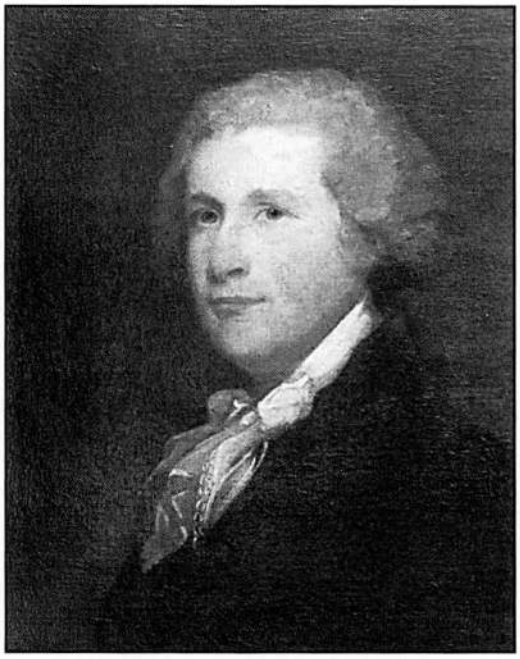
> I have been thus particular in stating this interesting subject, because it appears to me of the highest moment, although I believe it would be difficult to devise an unexceptionable remedy. But the discussion of questions wherein are involved the most sacred and awful principles of public justice, under a system without precedent in the history of Mankind, necessarily must occasion many embarrassments which can be much more readily suggested than removed.[4]

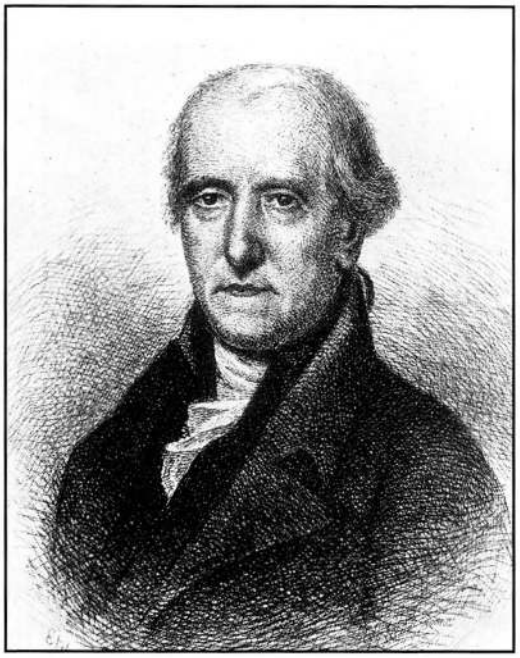
From the founding of the Republic, repayment of debts owing to British creditors promised to be a ticklish problem, particularly in the South. Because Article 4 of the Definitive Treaty of Peace (1783) provided that no "lawful" impediments be placed in the way of recovery of existing debts,[5] repayment became a public as well as a private issue and pitted the interests of the federal government against those of the states. Federal courts served as the only mechanism for enforcing Article 4, and they were available only to British creditors who could meet the jurisdictional amount-in-controversy requirement.[6] Although Virginia was the state whose citizens were most heavily burdened by British debts and thus most likely to furnish the prototype debt case,[7] the *Brailsford* suit from Georgia reached the Supreme Court first and became the vehicle for the earliest pronouncements by that Court on the debt question.[8]

*Georgia v. Brailsford* grew out of a private suit instituted by Samuel Brailsford, for himself as well as his fellow merchants Robert William Powell and John Hopton, against James Spalding, who, with his partners Roger Kelsall and Job Colcock, owed the Brailsford group £7,058.11.5 sterling on a bond dated September 21, 1774.[9] As early as November 2, 1790, an attorney for Brailsford, Powell, and Hopton had petitioned the federal circuit court in Georgia to issue process against Spalding, but that suit was discontinued.[10] At the next term of the circuit court, April 1791, Brailsford reinstituted his suit, and this time his attorney, in addition to describing Brailsford, Powell, and Hopton in the prayer for process as "Merchants," included the important words, "aliens, and subjects of his Brittannick Majesty."[11]

The citizenship of Brailsford, Powell, and Hopton was a critical factor in the decisions rendered in *Brailsford v. Spalding* and *Georgia v. Brailsford*. Throughout the litigation Brailsford was referred to as an alien, but a letter from his son, written in the context of an earlier suit, tells a different story:

> My Father is one of the Partners of the House of Powell Hopton & Co. and was the Original Founder of it. . . .My Father is not a British Subject, but a Citizen of this Country_ He went to England in 1767 for the extension of his Business and the Benefit of his Health and where he has continued ever since_ At the Commencement of the War, when he was on the point of returning here, his Creditors absolutely made him give Security not to leave Great Britain, and the possibility of making Remittances, being then at an end, he was detained in England during the whole Contest_ His Principles were however universally known in this State,[12] and to every American in Europe, to be faithful to the Interests of his Country, for which line of Conduct he underwent severe Persecution_ He occasionally sent to America very useful Information in a regular Correspondence with some of the most leading and Popular Characters in this State, and such was the Sense of the Legislature here of his Zeal and Services, that they never ordered his return home, or ever seized upon any part of his Property, an Instance of Confidence, and Regard that may be almost said to be confined to himself_ However Sir, to put that point out of the possibility of Doubt, I enclose you Governor Guerards[13] Certificate which must annihilate every difficulty on those Grounds. My Father is also soon





**Alexander Dallas (left) served as counsel to the state of Georgia in the difficult case of *Georgia v. Brailsford* (1794). He hired Jared Ingersoll (right) to assist the state in the presentation of its case before the Supreme Court. The case marked the first jury trial before the high court.**

> expected over here, but has long since taken all the necessary Oaths in Europe.[14]

None of this information, if true, appears to have been revealed as *Brailsford v. Spalding* and *Georgia v. Brailsford* made their way through the courts, and Brailsford was treated as a British subject legally. The courts, however, considered Powell and Hopton, South Carolina natives who refused to take the oath of allegiance to the United States, to be citizens.[15]

Upon receipt of Brailsford's prayer for process, the circuit court ordered Spalding or his attorney to appear on October 15, 1791, and bail was set.[16] When the October term opened, Spalding was in custody, because he had been unwilling or unable to make bail.[17] On October 17, Matthew McAllister, the attorney who represented Spalding as well as other defendants in similarly circumstanced debt cases,[18] before he put in Spalding's plea, "craved oyer," that is, he asked the court to order that the bonds on which the debt actions were based be read so that he might know all their terms and conditions, not just those disclosed in Brailsford's pleadings. Instead of this traditional common law remedy, the court went further and ordered that copies of the bonds be provided to McAllister and gave him "leave to plead to the present Term."[19]

*Brailsford v. Spalding* next turns up in the minutes of the circuit court for Georgia on April 28, 1792, when argument between the parties took place.[20] But much had happened at the previous term of court that the minutes did not record. From correspondence and notes of Justice Iredell, we learn that the state of Georgia tried to interplead in *Brailsford* and the other comparable debt cases, leading to a "circumstance of great importance" though of not "so easy a remedy."[21] The defendants, Iredell stated, had put in pleas that did not deny that their debts existed, but maintained that they were under no obligation to pay the plaintiffs, because the state of Georgia had a right to recover them under statutes passed by the legislature before the Treaty of Peace ending the war with Great Britain was signed.[22] Georgia's attorney general and solicitor general wished to interplead. They wished to have Georgia admitted to the case as a party so that the state's interests could be directly represented rather than having to rely on counsel for the defendants and, more important, so that both sets of claims to the money—the state's and the

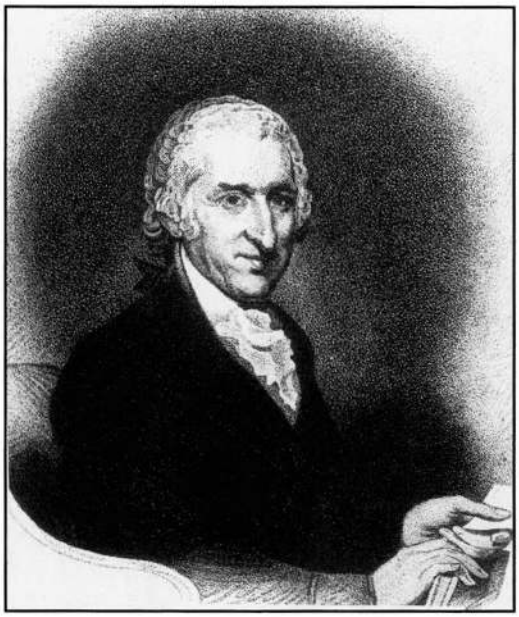
British creditors'—might be settled in a single lawsuit. According to Iredell, however, the defense counsel would not allow it. Nor could the court grant the state's application to interplead, because the judges "could find no instance where an Interpleader in a Court of Law was directed, but on an application of a Defendant, much less against his consent."[23] The court sympathized with Georgia's desire to be heard, believing that the state had a claim that at the least should be examined before a ruling was made solely on the basis of the private parties' claims. Every remedy Iredell and his fellow circuit judge Nathaniel Pendleton considered, however, came up against some obstacle. A bill of interpleader in equity, as opposed to law, for example, might have been feasible, but Georgia had not brought one. Moreover, even if the state had filed such a bill, the circuit court could not entertain it, because the judges believed that the Constitution gave the Supreme Court original jurisdiction in all cases in which a state was a party; the Supreme Court was the only federal forum in which the state's case could be heard.[24] Thus, the court, though fully cognizant that all relevant claims would not be considered, heard argument in *Brailsford v. Spalding* and decided the case "as stated and admitted in the Pleadings" filed by the plaintiffs and the defendant. Georgia's views had to be excluded.[25]

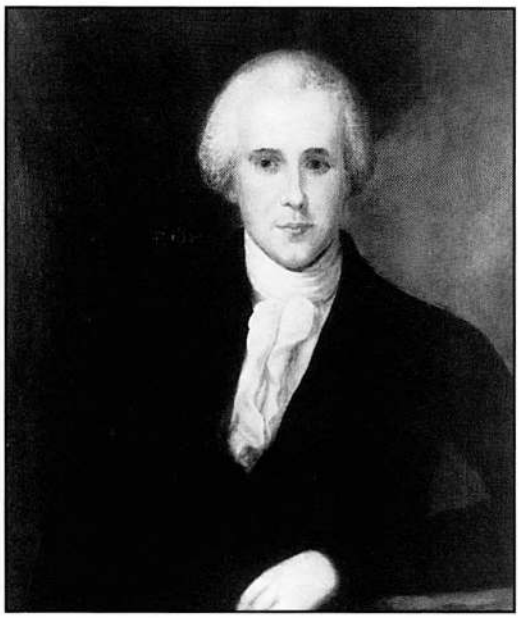
Although Iredell and Pendleton had had more than six months to think about *Brailsford v. Spalding* before a hearing was held in April 1792, they did not announce a decision immediately upon the close of argument. They took several days "to consider,"[26] and on May 2, delivering their opinions *seriatim*, ruled unanimously against Spalding.[27] Though their opinions differed in style and emphasis, the judges nevertheless came to similar conclusions.[28]

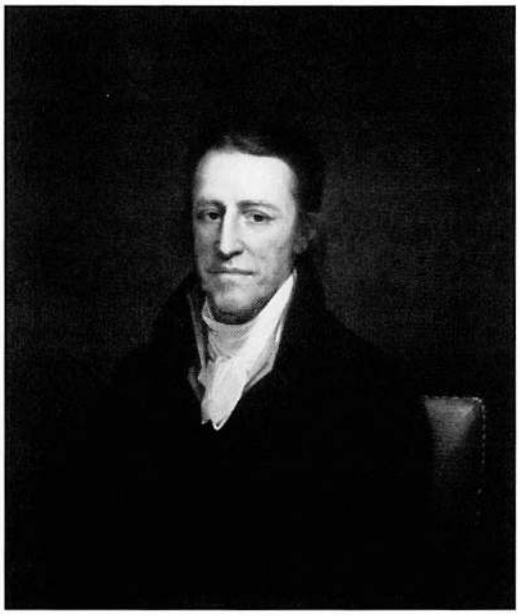
Justice Iredell began his opinion by stating that the question to be answered was a narrow one: whether the plaintiffs had a right to recover their debt in the specific circumstances set out in the pleadings. With regard to Powell and Hopton, whom the court deemed citizens of South Carolina, Iredell found it easy to conclude that the pertinent Georgia act, dated May 4, 1782, could not have confiscated their debts. That statute required confiscation of Georgia property belonging to citizens of other states "in the like manner and form of forfeiture as they were subjected to in the State of which they respectively were Citizens."[29] South Carolina expressly exempted debts from confiscation;[30] therefore, nothing barred Hopton's and Powell's recovery of their debt in Georgia. Regarding Samuel Brailsford, Iredell determined that the relevant section of the 1782 Georgia act merely sequestered the debts owing to British merchants, and "left to the future discretion of the Legislature" the question of whether those debts would eventually be forfeited to the state. Not only had the statute failed to effect a confiscation of Brailsford's debts, but also, Iredell asserted, the Treaty of Peace rendered the sequestration provision obsolete. He concluded that the fourth article of the treaty, providing that "no lawful impediment" be placed in the way of creditors seeking to recover "Debts heretofore contracted,"[31] together with the Supremacy Clause of the Constitution,[32] required the judges to interpret the sequestration clause of the act as no bar to Brailsford's action. With Judge Pendleton setting forth comparable views, the court ruled that judgment should go to the plaintiffs.[33]

Georgia, fearful that Brailsford might be repaid before the state's claim to the debt could be heard,[34] filed a bill in equity against him and his partners and Spalding in the Supreme Court. The bill recited Georgia's belief that the act of May 4, 1782, transferred the debt from the "obligees and vested [it] in the State," and that the state "had never relinquished its claim to this debt, but, on the contrary, had asserted it by divers acts of the Legislative, Executive, and Judicial departments." Specifically, Georgia had ordered its attorney general to intercede in any court in which a case involving debts covered by the 1782 act was instituted. But in *Brailsford v. Spalding*, and other suits involving debts to British merchants, the federal circuit court had refused the attorney general's application for the state to be admitted as a party. As a result, in *Brailsford* and the other cases, "recoveries were had against citizens of the state by British merchants. . .upon the sole principle of debtor and creditor, and without any reference to the right and claim of the state." The bill noted that execution had been issued, and asked the Court that

> any monies already raised, or that may be raised thereon, may be stayed







**William Bradford, Jr., Edward Tilghman, and William Lewis (clockwise from left) represented the defendants, all merchants and debtors, in the case that bears the name of one—Samuel Brailsford. Bradford had just been appointed Attorney General and dominated the oral argument, which lasted four days. He argued that the 1782 Georgia Confiscation Act did not apply to the debt owed by two of the merchants, Robert William Powell and John Hopton, and that Brailsford's debt was only sequestered. Further, he made the case that the sequestration was not relevant because the Treaty of Peace effectively repealed the act.**

in the hands of the marshall of the said Circuit court, by an injunction from this honorable court. And that the said marshall be directed to pay such sum, or sums, raised as aforesaid, to the treasurer of the said State of Georgia, to and for the use of the same, and that the said James Spalding be decreed to pay to the said treasurer the balance which may be due on the bond aforesaid for the use aforesaid. And that the said State may be farther or otherwise relieved, in all and singular the premises, as the nature and circumstances of the case shall require, and as to the court shall seem meet.[35]

The bill in equity, accompanied by Georgia state agent John Wereat's affidavit swearing to the truth of its contents, was filed in the Supreme Court on August 8, 1792. Alexander Dallas, counsel to Georgia, moved that the injunction prayed for in the bill be issued.[36]

Characterized by Wereat as "lengthy," the argument on Georgia's motion for an injunction lasted almost two hours on August 8 and more than five hours on August 9.[37] From Justice Iredell's sketchy notes, we have some idea of what occurred in the courtroom. Dallas appears to have led off by suggesting that the state of Georgia had a right to the debt, that the Treaty of Peace did not affect that right, and that the state had no way of recovering the debt at common law. Randolph, representing Brailsford, Hopton, Powell, and Spalding as a private attorney, answered that the debt did not belong to the state, for it had taken no action to complete the confiscation procedure. Georgia, therefore, should not interfere in the suit between Brailsford and Spalding. Dallas countered by reiterating that the debt had indeed vested in the state and by reviewing for the Court how no other remedy but a bill in equity would allow Georgia to assert its claim.[38]

Jared Ingersoll, whom Dallas and Wereat hired to assist in the presentation of the state's case,[39] followed with a more detailed demonstration of why the debt belonged to the state. He discussed the legality of Georgia's confiscation act and how the fourth article of the Treaty of Peace could not have invalidated it. But no action at law, Ingersoll seemed to be saying, could help the state to assert its claim to the debt effectively. Only the equitable interposition of the Court could achieve that.

Before the case was submitted, Randolph and Dallas each had one more opportunity to press their views, but that appeared to be insufficient for the Justices to make up their minds. The Court did not rule on Dallas's motion until August 11, when the Justices directed an injunction to issue but only to the extent of instructing the marshal not to disburse without further orders any monies already received by him or to be received in the future as a result of executing the judgment in *Brailsford*.[40]

Delivering their opinions in the inverse order of their seniority, the Justices divided four to two on the question of whether an injunction was warranted.[41] Justices Thomas Johnson and William Cushing declared, in a very straightforward manner, that Georgia was not entitled to the equitable intercession of the Court, because the state's right to the debt, if valid, could "be enforced at common law." On a motion for an injunction, Johnson stated, the petitioner must convince the court that he has a good chance of succeeding on the legal merits of his case—in this instance, Georgia's claim to the debt should appear to be very strong—and also that he will be irreparably damaged if a court of equity does not intervene before his legal right is settled. Georgia's bill in equity failed on both counts. Cushing further pointed out the precise way in which Georgia could sue Brailsford after he had received the money from Spalding. Both Justices believed that the bill had not established "a sufficient foundation for exercising the equitable jurisdiction of the court."[42]

The Justices in the majority thought that granting an injunction at this point provided the only viable procedure for giving the Court more time to decide how to get all the parties with claims to the debt before the Court. Indeed, this seemed to be Justice Iredell's chief concern. He explained, as he had in his letter to President Washington, that in his view Georgia could not be admitted, even voluntarily, as a party to the suit in the court below, because "whenever a State is a party, the Supreme court has exclusive jurisdiction of the suit." Yet, Iredell continued, "Every principle of law, Justice, and honor, . . .seem to require, that the claim of the State of *Georgia* should not be, indirectly, decided, or defeated, by a judgment pronounced between parties, over whom she had no controul, and upon a trial, in which she was not allowed to be heard." The only solution was for the Supreme Court to devise a procedure that would be "in strict conformity with the practice and principles of equity." Hence the Court, according to Iredell, "ought now to place the State upon the same footing, as if a bill of interpleader had been regularly filed here; which can be done by sustaining the present suit; and when the parties are all before us, we may direct a proper issue to be formed, and tried at the bar."[43]

Of the other Justices voting to grant an injunction, John Blair appeared to be the most favorably inclined toward Iredell's solution. In Blair's mind, Georgia's right to the debt could not be overthrown "in law" until it had "an opportunity to support it." Moreover, the state had met the criteria for equitable intervention by the Court. It had shown a "colorable title" to the debt: "The State of *Georgia* has set up her confiscation act, which certainly is a fair foun-

dation for future judicial investigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, till we are enabled, by a full enquiry, to decide upon the whole merits of the case."[44]

Associate Justice James Wilson seemed less certain of the propriety of the use of an equitable remedy. "If *Georgia* has a right to the bond, it is strictly a legal right; but to enforce a strictly legal right, the present seems, at the first blush, to be an awkward and irregular proceeding." Wilson, contrary to Iredell, believed that Georgia voluntarily could have appeared in the lower court: "It is true, that, under the Federal Constitution, an inferior tribunal cannot compel a State to appear as a party; but it is a very different proposition to say, that a State cannot, by her own consent, appear in any other court, than the Supreme court." Wilson was content, however, "in the existing circumstances of the case," to permit the injunction to issue until "we can better satisfy ourselves both as to the remedy and the right."[45]

Speaking last, the Chief Justice had the least to say. He began by informing everyone that he had at first opposed Dallas's motion but had changed his mind after listening to the discussion in court. Jay stated that it was a legitimate question whether Spalding owed the debt to Brailsford or to the state. As Brailsford already had won a judgment in his favor, it seemed to Jay the equitable thing to do "to stay the money in the hands of the marshall, 'till the right to it is fairly decided; and so avoid the risque of putting the true owner to a suit, for the purpose of recovering it back." The money "should remain in the custody of the law, till the law has adjudged to whom it belongs." The injunction was granted.[46]

As soon as the Court ruled in favor of Dallas's motion, subpoenas issued to Brailsford, Powell, Hopton, and Spalding.[47] Dallas informed John Wereat, Georgia's agent in Philadelphia, that his purpose in having the subpoenas authorized was to gain a "trial of the right of the State of Georgia, at the Bar of the Supreme Court, upon an issue directed from the Equity side of the Court._" This seemed to Dallas the best route to "a full discussion and satisfactory decision upon the merits."[48] Wereat forwarded a copy of the injunction and the subpoenas to Governor Telfair with the admonition that they be acted on promptly.[49] Before the Supreme Court's next term, a subpoena was served on Brailsford, and subpoenas were shown to the defendants' attorneys in Georgia, Thomas Gibbons (representing Brailsford), Matthew McAllister, and Joseph Clay (representing Spalding). Because Spalding apparently could not be located, McAllister accepted the subpoena directed to Spalding. Powell and Hopton were said to be out of the country.[50]

On the first day of the February 1793 Term, the defendants demurred to the bill in equity, claiming that if the state of Georgia had any right to the debt—and this the defendants denied—a complete remedy could be had at law and that therefore the equitable interposition of the Court was unwarranted.[51] The Justices set February 6th for argument.[52]

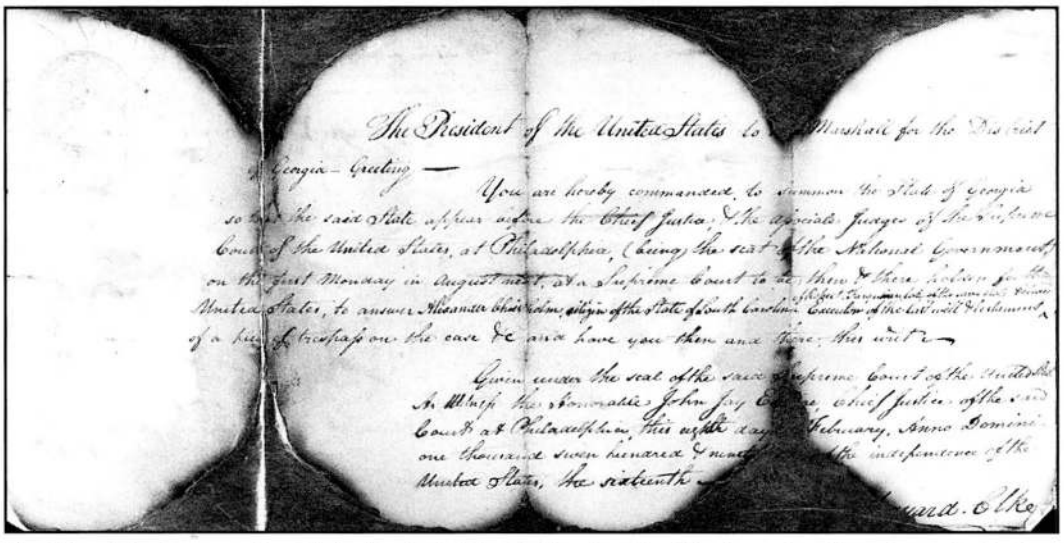
For four days counsel for the state and for the defendants reviewed all the issues in the case, repeating for the most part what had been said before the court in the original argument on Georgia's motion for an injunction. As best as can be ascertained from Justice Iredell's cryptic notes, Dallas began with a rebuttal of the points made in Brailsford's demurrer. Georgia had a valid title to the debt, Dallas claimed, by virtue of the Georgia Confiscation Act of 1782. The Treaty of Peace in 1783 did not negatively affect its title; in fact, the "Treaty implicitly ratifies the Confiscation Acts." Because Georgia had no adequate remedy at law, the state merited the intervention of a court of equity to substantiate her right.[53] Dallas did not conclude this part of his presentation until some time on February 7, when Edmund Randolph tried to convince the Justices that the injunction should be dissolved, because Georgia had no legitimate claim to recover the debt at common law and was not entitled to equity under the Constitution and laws of the United States.[54]

The oral argument continued on February 8 with Jared Ingersoll spending the whole day in a demonstration of legal reasoning, replete with numerous learned citations, that attempted to reinforce Dallas's points of the previous two days. Ingersoll discussed the relationship between the confiscation acts of South Carolina and Georgia in order to persuade the court that the fact that the debts owing to Hopton and Powell had not been confiscated in South Carolina did not mean that Georgia had to treat them similarly. The

words of the 1782 act, Ingersoll asserted, referred only to the "Manner & form of forfeiture" used in South Carolina, not to the degree of punishment Georgia might mete out. Georgia had legally appropriated the debts owing to Brailsford, Hopton, and Powell and no further action needed to be taken to complete the forfeiture, Ingersoll maintained. Moreover, Article 4 of the Treaty of Peace did not comprehend debts covered by the state confiscation acts, so nothing stood in the way of Georgia's legal title to the debt. The judgment in the court below, however, had created an obstacle to the state's right, and the only way Georgia could assert her claim was through the equitable intervention of the Supreme Court. According to Iredell's notes, it seems that Ingersoll concluded the argument by showing that English precedents indicated that this intervention was proper.[55]

On Saturday, February 9, Randolph revisited a number of topics in "a speech of considerable length which appeared. . . to be rather in the dictatorial way," according to Wereat. It seemed the attorney general wanted to refute again the claim made by Georgia's attorneys that the state was entitled to equitable consideration. He lectured the Justices on the history of the English court of chancery and pointed out a number of common law remedies that were available to Georgia. Dallas replied to Randolph's remarks, and the oral argument was closed, apparently to the relief of Iredell, who commented from the Bench that "the Atty General might have spared great part of his observations" on that Saturday morning. No ruling was pronounced immediately.[56]

The Court did not issue its decision until February 20, an indication that the Justices may have had some difficulty in arriving at a consensus.[57] When the opinions were delivered, the Court proved to be divided chiefly over the extent of its equity jurisdiction.[58] All the judges believed that Georgia had a right to test its claim to the debt; their disagreement was over how that was to be done. The minority, composed of Justices Iredell and Blair, thought that some kind of equitable intervention by the Supreme Court was necessary in order to do justice in this case. Iredell observed, "it is obvious to me, either that the state can have no remedy at law, or at least that the remedy at law will not be 'plain, adequate, and complete'" and proceeded to prove, to his own satisfaction, why this was so.[59] When all his reasons had been given, Iredell concluded that Georgia, indeed, had no remedy at law. "[I]t is sufficient for an incipient exercise of the [*equity*] jurisdiction of this Court," he declared, "that she has shewn a color of title to recover the money, and that the money is in danger of being paid to another claimant. . . . If the bill is sustained, the money will be preserved in neutral hands; and the Court may direct an issue to be


The President of the United States to the Marshal for the District of Georgia — Greeting —

You are hereby commanded to summon the State of Georgia so that the said State appear before the Chief Justice & the associate Judges of the Supreme Court of the United States, at Philadelphia, (being the seat of the National Government) on the first Monday in August next, at a Supreme Court to be then & there holden for the United States, to answer Alexander Chisholm, Citizen of the State of South Carolina, Executor of the last will & Testament of a late Citizen of the same State, in a plea of trespass on the case &c and have you then and there this writ —

Given under the seal of the said Supreme Court of the United States, the Honorable John Jay Esquire, Chief Justice of the said Court at Philadelphia, this eighth day of February, Anno Domini one thousand seven hundred & ninety [illegible] of the Independence of the United States, the sixteenth

**The delay of the Supreme Court in issuing its decision in *Georgia v. Brailsford* may have been due to the Justices' difficulty in arriving at a consensus. Another factor may possibly have been the Court's desire to deal with *Chisholm v. Georgia*—the case that raised the question of whether states could be sued by citizens of other states in federal court—before announcing the results in *Brailsford*. Above is a summons issued in 1792 for the *Chisholm* case.**

tried at the bar, in order to ascertain, whether the State of *Georgia*, or *Brailsford*, is the right owner."[60]

Justice Blair's rationale for keeping the case on the equity side of the Court differed dramatically from Iredell's. Blair assumed that Georgia had a remedy at law and refuted some of Iredell's analysis to the contrary. Given that assumption, Blair had decided that "there was no ground for the interference of this Court, as a Court of Equity." But upon hearing Iredell's opinion, a very practical consideration occurred to Blair that would have justified the Court's acting in equity: "if *Brailsford*, who is a *British* subject, should get the money, under the present judgment, and leave the country, there would be great danger of a failure of justice." Blair explained his reasoning and declared,

> Since, therefore, there is no other Court, that can bring all the parties before them, and do general and complete justice, it is my opinion, that the bill in equity ought to be sustained; and that the subject should be no further referred to a Court of law, than to obtain an opinion upon the legal title to the debt in controversy.[61]

The majority of the Justices seemed to be convinced by the point emphasized in the defendants' demurrer that section 16 of the Judiciary Act of 1789 did not permit suits in equity "where plain, adequate and complete remedy may be had at law."[62] The Chief Justice, who spoke for himself, William Cushing, and James Wilson, ruled that if Georgia had "a right to the debt, due originally from *Spalding* to *Brailsford*, it is a right to be pursued at common law." But the Court averred that the reason for its grant of an injunction the previous Term remained: the money involved in the debt should not change hands until its rightful owner was determined. The Court decided, therefore, to "continue the injunction 'till the next Term; when, however, if *Georgia* has not instituted her action at common law, it will be dissolved."[63]

Although the Court majority seemed confident that "a plain, adequate and complete" common law remedy existed, the nature of that remedy was not at all clear to the minority Justices, nor to the attorneys who had to figure out how to proceed with Georgia's case.[64] The lawyers in Augusta and Savannah discussed various strategies for filing a common law action, but none was wholly satisfactory.[65] The state's counsel in Philadelphia, however, apparently concluded that the best way Georgia's right to the debt could be tested before a jury was for the parties to agree to a fictional set of facts that would eliminate any procedural issues and allow this legal question to be cleanly presented. Brailsford cooperated—probably because he wanted all the legal issues settled as quickly as possible—and an amicable action on the case was created by his admitting that he already had received the money that Spalding owed him.[66] In the pleadings, Georgia claimed that Brailsford had promised to pay that money to the state, but upon request he had refused to do so. Brailsford asserted that he had never promised any such thing. Thus, issue was joined and the question of to whom, Georgia or Brailsford, the money belonged was ready for a jury trial. The state of Georgia, complying with the Supreme Court's order of February 20, 1793, filed the requisite papers before the August 1793 Term, but the Court sat only two days in August and the case was continued to the next Term.[67]

Before Court opened on February 3, 1794, a special jury had been summoned to appear, and all was ready for the trial of *Georgia v. Brailsford*.[68] As no quorum was present on the third of February, the session did not begin until the fourth. First on the Court's calendar for that Term, the case attracted much public attention[69] and the services of five eminent lawyers: Alexander Dallas and Jared Ingersoll, representing the state, and William Bradford, Jr., Edward Tilghman, and William Lewis for the defendants. The attorneys took four days for argument, going over much the same legal ground as had been discussed in these litigants' previous appearances before the Court. Counsel for Georgia made the points that the state had the authority to transfer the debt owed to Brailsford and his partners to itself and had done so in the confiscation law. The fact that the debt was only sequestered made no difference, because Georgia chose to treat it like a confiscation. The Peace Treaty of 1783 had no effect on the state's right: Article 4, as interpreted by Dallas and Ingersoll, meant only that "the war, abstractedly considered, shall make no difference in the remedy, for the recovery of *subsisting* debts" but did not explain which debts

were "subsisting." That article did not treat laws of confiscation and sequestration in any event; it was Article 5 that pledged Congress "to recommend" that the states revise those laws. Although the Constitution made the treaty the supreme law of the land, according to the state's counsel "it furnishes no rule for construing the meaning of the parties to that instrument."[70]

For the defendants, Bradford, the new Attorney General of the United States,[71] apparently covered all the points necessary to counter the state's argument, but it seems that Tilghman and Lewis spoke as well.[72] Bradford organized his presentation to answer two questions: Did the facts in this case establish that the Georgia Confiscation Act encompassed Brailsford, Powell, and Hopton, and if it did, what effect did the Treaty of Peace have on the operation of that act? Bradford concluded that the confiscation act did not apply to the debt owed Powell and Hopton, and with respect to Brailsford, the debt was only sequestered. Regardless of whether confiscation or sequestration took place, however, the treaty, Bradford continued, "totally" repealed the act. The Attorney General then launched into a very detailed explication of the truth of these statements, covering many tangential points of law such as the effect of joint obligees being treated differently under the confiscation act, the relationship of the law merchant to the questions under discussion, and how peace affects the forfeiture of choses in action. He ended his presentation, it appears, with a statement that the peace alone revived the creditor's right to the debt, but the treaty ensured that every impediment to implementing that right was removed.[73]

On February 7, the Chief Justice, cognizant of the effect of four days of argument, delivered a brief charge to the jury. Noting that counsel had argued the cause with "great learning, diligence, and ability," Jay found it "unnecessary. . . to follow the investigation over the extensive field, into which it ha[d] been carried." He needed only to inform the jury of the Court's unanimous opinion of what was the law governing the facts of the case. In the Court's view, the 1782 Georgia act did not confiscate the debt due to Powell and Hopton, because the South Carolina act, in the sections applicable to South Carolina citizens (and Powell and Hopton were South Carolina citizens in the eyes of the Court), had specifically excepted debts. The Georgia statute enacted "precisely the like and no other degree and extent of confiscation and forfeiture with that of South-Carolina," so the debt due them had not been confiscated in Georgia either. As to Brailsford, whom the Court considered "a British subject residing in G. Britain," the Georgia confiscation act merely sequestered the debt owing to him, which meant that when the war ended, Brailsford's right to recover was restored by the "law of nations and the treaty of peace."[74] The Chief Justice concluded his statement of the law by reminding the jury that it was "the good old rule, that on questions of fact, it is the province of the Jury, on questions of law, it is the province of the Court, to decide." Jay further observed, however, that "by the same law, which recognizes this reasonable distribution of jurisdiction," the jury is permitted "to judge of both, and to determine the law as well as the fact in controversy." But he confidently asserted that the jury would defer to the view of the law enunciated by the Court, who "are the best judges of law."[75]

From the account in *Dunlap's American Daily Advertiser*, it appeared that the men of the jury did not understand the legal opinion that the Chief Justice had given them. They interrupted their deliberations to ask the Court two questions, which Jay answered, but not without pointing out, according to the newspaper report, that he thought that his charge had covered those issues already. The jury wished to know whether the Georgia Confiscation Act vested the debts of the defendants in the state. Jay replied that it was the unanimous belief of the Court that the act did not do so.[76] He also easily dispatched the second inquiry, which was, "If the Sequestration was complete, did the Treaty of peace or any other cause Revive the defendents right to recover."[77] Brailsford, the Chief Justice declared, was the "real owner of the debt" at the peace as he had been during the war. Although the Georgia legislature by its act had kept the defendants from recovering their debt for the duration of the war, their property had never been taken from them, and "the mere restoration of peace, as well as the very terms of the treaty, revived" their right of action. Moreover, Jay continued, "if it were otherwise, the sequestration would certainly remain a lawful impediment to the recovering of a bona fide debt, due to a British creditor, in di-

rect opposition to the 4th article of the treaty." After the Chief Justice had finished his explanation, the jury never resumed its deliberations. The jury members immediately "returned a *Verdict for the Defendants*."[78] Some days later, on February 14, the Court, on motion of Edward Tilghman, dismissed Georgia's bill in equity and dissolved with costs the injunction that had been granted. The Court also ordered that judgment be entered for the defendants in the amicable action at law.[79]

The conclusion of the jury trial marked the end of the Supreme Court's part in deciding the legal and equitable rights contested by Georgia, Brailsford and his partners, and Spalding. But Samuel Brailsford's attempts to satisfy the judgment awarded to him did not terminate. At least through May 1800, he continued his endeavors in the federal circuit court for the district of Georgia to obtain writs for the sale of Spalding's property.[80] That he achieved only partial payment of the full value of the debt owed to him is apparent from the succession of writs issued by the court.[81] Brailsford's suit against the state of Georgia, instituted in the Supreme Court in February 1798, may possibly have been a further step to recover all the money owing to him.[82] That too failed, because the Supreme Court, after passage of the Eleventh Amendment, ordered that the suit be discontinued for lack of jurisdiction.[83] Although the time, money, and effort expended by the parties, the attorneys, the judges, and other officials connected with the federal judicial system may not have produced much in the way of pounds sterling for Samuel Brailsford, the litigation surrounding the recovery of his debt enabled the Supreme Court to grapple with the limits of its equitable and common law jurisdictions, to make its first pronouncements on treaties as the supreme law of the land, and to establish precedents for dealing with similar questions in the future.

## Endnotes

[1] 3 U.S. (3 Dall.) 1, 4 (1794).

[2] *U.S. v. Morris* (1851), 26 **Federal Cases** 1323 at 1334. *See* text and notes surrounding note 75 for discussion of Jay's charge. I am indebted to John R. Gordan, III, Esq., for bringing the *Morris* case to my attention.

[3] 2 U.S. (2 Dall.) 402-9 (1792), 415-19 (1793); 3 U.S. (3 Dall.) 1-5 (1794).

[4] James Iredell to George Washington, February 23, 1792, in Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789-1800,** vol. 2 (New York: Columbia University Press, 1988), p. 242.

[5] The exact words of the treaty stated: "It is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bone fide Debts heretofore contracted." Hunter Miller, ed., **Treaties and other International Acts of the United States of America,** vol. 2 (Washington, DC: GPO, 1931), p. 154.

[6] 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 (1984): 176, 181.

[7] Emory G. Evans, "Planter Indebtedness and the Coming of the Revolution in Virginia," *William and Mary Quarterly*, 3d ser. 19 (1962): 511.

[8] *Ware v. Hylton*, the British debt case that originated in Virginia, was not decided until 1796. The Supreme Court disposed of *Georgia v. Brailsford* in 1794. Because *Ware* came within the appellate jurisdiction of the Court, the Justices had a greater opportunity to spell out their views on the legal questions involved. *Brailsford* was a suit instituted in the Supreme Court under its original jurisdiction and involved a jury trial, allowing the Justices less chance to discuss matters of law. The Court's charge to the petit jury is the only expression of the Justices' official position. Moreover, when looking at the Court's observations on the British debt question, the factual circumstances underlying the Court's rulings in each of these cases should be taken into account. Hylton pleaded payment of the debt—into the Virginia state treasury; Spalding, the debtor in the *Brailsford* case, did not. 3 U.S. (3 Dall.) 199-200 (1796); 2 U.S. (2 Dall.) 402-4 (1792).

[9] Prayer for process, April 25, 1791, *Brailsford, et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR. Brailsford sued only James Spalding, because Kelsall was deceased, and, as revealed in a subsequent suit, Brailsford had settled with Colcock secretly in 1788. Also revealed in this suit is the fact that the bond was given for the purchase of a "cargo of negroes." Plea and Answer of Samuel Brailsford, September 25, 1797, *Pierce Butler v. Samuel Brailsford, ibid.* In a letter to Gideon Pendleton, Pierce Butler stated that Colcock's release from the debt to Brailsford was "absolute" and supplied names of witnesses who could corroborate that fact. Pierce Butler to Gideon Pendleton, January 28, 1794, Pierce Butler Letterbook, ScU.

[10] Prayer for process, November 2, 1790, *Brailsford, et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR. Nathaniel Pendleton, United States judge for the district of Georgia, noted on the cover to the summons that accompanies the prayer that he had ordered the marshal to take bail. Upon returning the summons, the deputy marshal stated, "Copy Served; Bail Demanded which was Refused and being denied the use of the Goal, I Protest against being answerable for the appearance of the Defendant."

[11] Prayer for process, April 25, 1791, *ibid.* By the time this suit was instituted, James Spalding, a native of Scotland who came to Georgia in 1760 or earlier and became a successful trader and landholder, had been granted citizenship. A Loyalist whose property had been confiscated during the Revolution, Spalding decided to stay in Georgia and petitioned the legislature to remove him from the confiscation list. His request was granted in 1783; by 1787 legislation allowed him to exercise all civil and political rights. E. Merton Coulter, **Thomas Spalding of Sapelo** (University, LA: Louisiana State University Press, 1940), pp. 1-3, 5-9.

[12] South Carolina.

[13] Benjamin Guerard, governor of South Carolina from 1783 to 1785. Walter B. Edgar and N. Louise Bailey, eds., **Biographical Directory of the South Carolina House of Representatives, vol. 2, The Commons House of Assembly, 1692-1775** (Columbia: University of South Carolina Press, 1977), pp. 294-95.

[14] William Brailsford to ?, April 12, 1784, Robinson Family Papers, ViHi.

[15] James Iredell's Circuit Court Opinion, May 2, 1792, Charles E. Johnson Collection, Nc-Ar; 3 U.S. (3 Dall.) 1, 4 (1794). But in a letter to Thomas Jefferson, Thomas Pinckney wrote that Powell and Hopton had left the United States during the Revolution and were now British subjects. Pinckney also noted that Brailsford had lived in England during the war, but had returned to South Carolina. Thomas Pinckney to Thomas Jefferson, May 9, 1792, in Charles Cullen, ed., **Papers of Thomas Jefferson,** vol. 23 (Princeton, NJ: Princeton University Press, 1990), p. 489. The Board of Commissioners appointed under Article 6 of the Jay Treaty to deal with the question of debts owed to British creditors reported that it had dismissed the claim of Samuel Brailsford, who admitted that he had become an American citizen on June 6, 1794. Commissioners' decree in the case of Samuel Brailsford, February 20, 1799, AE 35215 b LF, "Board of Commissioners under Article 6th. November 19, 1794," CSmH. It is possible that Brailsford wanted it both ways: While he wished to be considered an American citizen by his family and friends in South Carolina, he needed to remain a British subject, the better to pursue legally the recovery of his debts from American citizens or from any governmental commission that might be established to consider compensation for British creditors. By June 1794 Brailsford may have felt free to become an American citizen, because his involvement in the litigation with Spalding and Georgia was over.

Robert William Powell and John Hopton had both been members of the South Carolina legislature, Powell in 1776 and Hopton as late as 1779-1780, but both served the British during the occupation of Charleston and left the state when the British departed. N. Louise Bailey and Elizabeth Ivey Cooper, eds., **Biographical Directory of the South Carolina House of Representatives, vol. 3, 1775-1790** (Columbia: University of South Carolina Press, 1981), p. 582; N. Louise Bailey, Mary L. Morgan, and Carolyn R. Taylor, eds., **Biographical Directory of the South Carolina Senate, 1776-1985,** 3 vols. (Columbia: University of South Carolina Press, 1986), 2:747-48.

[16] Summons, April 25, 1791, *Brailsford, et al. v. Spalding*, Court Records-Civil, CCD Georgia, RG 21, GEpFAR.

[17] *Ibid.* The marshal's return of the summons read: "Executed as within commanded and I have the Body of Js. Spalding in Custody_ 26th April 1791." Apparently, the marshal found a jail he could use this time.

Spalding evidently complained to the grand jury convened for the October term of the circuit court, because its presentment included as a grievance "that the Citizens of this State, should be held to bail on Account of monies due to British subjects whose debts or property are confiscated for the use of this state. Mr. James Spalding informed the Grand Jury he stands in this predicament." Marcus, ed., **Documentary History**, vol. 2, p. 224.

[18] These were cases where debts were owed by Georgians to British creditors, who were included in "An act for inflicting penalties on, and confiscating the estates of, such persons as are therein declared guilty of treason, and for other persons therein mentioned," passed by the Georgia legislature on May 4, 1782 (hereafter, the Georgia Confiscation Act of 1782). Matthew McAllister to Edward Telfair, May 21, 1793; George Walker to Edward Telfair, May 22, 1793 (I); and George Walker to Edward Telfair, May 22, 1793 (II), in Telamon Cuyler Collection, GU.

[19] Minutes, October 17, 1791, CCD Georgia, RG 21, GEpFAR.

[20] Minutes, April 28, 1792, CCD Georgia, RG 21, GEpFAR.

[21] James Iredell to George Washington, February 23, 1792, in Marcus, ed., **Documentary History**, vol. 2, p. 241.

[22] Although Iredell mentioned statutes in his letter to Washington, the Justice realized that there was only one applicable statute, the Georgia Confiscation Act of 1782, when he later wrote his circuit court opinion. *Ibid.*; James Iredell's Circuit Court Opinion, May 2, 1792, Charles E. Johnson Collection, Nc-Ar.

[23] James Iredell to George Washington, February 23, 1792, in Marcus, ed., **Documentary History**, vol. 2, p. 241. Interpleader is a device usually employed by defendants who, acknowledging that they owe money, are uncertain which of two or more claimants they ought to pay.

[24] *Ibid. See* also James Iredell's Notes on Interpleader [October 1791]; James Iredell's "Observations as to an Interpleader" [October 1791], Charles E. Johnson Collection, Nc-Ar; and James Iredell to Edmund Randolph, January 1792, James Iredell Sr. and Jr. Papers, NcD.

[25] James Iredell's Circuit Court Opinion, May 2, 1792, Charles E. Johnson Collection, Nc-Ar.

The case was heard on demurrer. The plaintiffs demurred—"they Say that the Said Plea is not Sufficient in Law to bar them from having their Said action against the Said James"—raising a question of law to be determined by the court. Replication and Demurrer, May 2, 1792, *Brailsford, et al. v. Spalding*, Court Records-Civil, CCD Georgia, RG 21, GEpFAR; Joseph H. Koffler and Alison Reppy, **Handbook of Common Law Pleading** (St. Paul, MN: West Publishing, 1969), p. 387.

[26] Minutes, April 28, 1792, CCD Georgia, RG 21, GEpFAR.

[27] Minutes, May 2, 1792, CCD Georgia, RG 21, GEpFAR; Final judgment on demurrer, May 2, 1792, *Brailsford, et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR.

[28] James Iredell's Circuit Court Opinion, May 2, 1792, Charles E. Johnson Collection, Nc-Ar; Nathaniel Pendleton's Circuit Court Opinion, May 2, 1792, *The Case of Messrs. Brailsford and others versus James Spalding, in the Circuit Court for the District of Georgia* (Savannah: James and Nicholas Johnston, 1792), Evans Imprint 24353; and *Georgia Gazette* (Savannah), May 3, 1792.

[29] Georgia Confiscation Act of 1782, section 4. Cushing, *First Laws of the State of Georgia*, p. 245.

[30] "An act for disposing of certain estates, and banishing certain persons therein mentioned, /x" section 2, February 26, 1782, John D. Cushing, comp., **The First Laws of the State of South Carolina**, part 2 (Wilmington, DE: Michael Glazier, 1981), p. 307.

[31] Miller, ed., *Treaties*, 2:154.

[32] Article VI, clause 2.

[33] James Iredell's Circuit Court Opinion, May 2, 1792, and Nathaniel Pendleton's Circuit Court Opinion, May 2, 1792. On June 21, a pamphlet containing the decision of the circuit court was published in Savannah: *The Case of Messrs. Brailsford and others versus James Spalding, in the Circuit Court for the District of Georgia* (Savannah: James and Nicholas Johnston, 1792), Evans Imprint 24353. Nathaniel Pendleton to James Iredell, June 22, 1792, James Iredell Sr. and Jr. Papers, NcD.

[34] On June 1, 1792, the circuit court had indeed issued a *fieri facias* (writ) ordering the marshal to satisfy the judgment against Spalding by selling his "goods and Chattels lands & Tenements" to make up the sum of £7,058.11.5 sterling that Spalding owed Brailsford, plus three pounds for damages sustained by the plaintiffs, because of the delay in the recovery of the debt as well as the costs of the suit. The deputy marshal returned the writ on November 20, 1792, with the notation "Nulla Bona"—no goods. *Fieri facias*, June 1, 1792, *Brailsford, et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR; *"Fieri Facias"* in **Black's Law Dictionary**, 6th ed. (St. Paul, MN: West Publishing, 1990), p. 627.

[35] The editors have been unable to find, if it still exists, the bill in equity. It is partially reproduced and paraphrased, however, in 2 U.S. (2 Dall.) 402-5 (1792).

[36] Affidavit of John Wereat, August 8, 1792, Original Jurisdiction Records, RG 267, DNA; Minutes of the Supreme Court, August 8, 1792, in Maeva Marcus and James R. Perry, eds., **The Documentary History of the Supreme Court of the United States, 1789-1800**, vol. 1 (New York: Columbia University Press, 1985), p. 203.

On August 7, 1792, Edmund Randolph, apparently anticipating the filing of Georgia's bill in equity, had asked the Court to inform him what "the system of practice by which the attornies and counsellors of this Court shall regulate themselves" would be. Chief Justice Jay, on August 8, announced that the Court "consider the practice of the Courts of Kings Bench and of Chancery in England as affording outlines for the practice of this Court and that they will from time to time make such alterations therein as circumstances may render necessary." Marcus and Perry, eds., **Documentary History**, vol. 1, pp. 202, 203.

[37] John Wereat to Edward Telfair, August 10, 1792, Edward Telfair Papers, NcD; James Iredell's Notes of Arguments in the Supreme Court, August 8, 1792, and James Iredell's Notes of Arguments in the Supreme Court, August 9, 1792, Charles E. Johnson Collection, Nc-Ar. In the minutes of the Supreme Court for August 8, the clerk wrote that argument was postponed until August 9, but it is clear from Iredell's notes and from the letter of John Wereat, who was present in court, that argument occurred on both days. Minutes of the Supreme Court, August 8 and 9, 1792, in Marcus and Perry, eds., **Documentary History**, vol. 1, pp. 203, 204.

[38] James Iredell's Notes of Arguments in the Supreme Court, August 8, 1792, Charles E. Johnson Collection, Nc-Ar.

[39] John Wereat to Edward Telfair, August 10, 1792, Edward Telfair Papers, NcD.

[40] Minutes of the Supreme Court, August 9 and 11, 1792, in Marcus and Perry, eds., **Documentary History**, vol. 1, pp. 204, 205-6. James Iredell's Notes of Arguments in the Supreme Court, August 9, 1792, Charles E. Johnson Collection, Nc-Ar;

and John Wereat to Edward Telfair, August 10, 1792, and August 11, 1792, Edward Telfair Papers, NcD.

It is interesting to note that while the injunction was in force, the marshal continued his efforts, by order of the court, to sell Spalding's lands and goods to make up the sum that he owed Brailsford. In his return of the writ, the marshal noted the various properties owned by Spalding. Second *fieri facias*, January 8, 1793; Return of second *fieri facias*, April 18, 1793, *Brailsford, et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR.

[41] 2 U.S. (2 Dall.) 405-9 (1792).

[42] *Ibid.*, pp. 405, 408.

[43] *Ibid.*, pp. 405-6.

[44] *Ibid.*, pp. 406-7.

[45] *Ibid.*, pp. 407-8.

[46] *Ibid.*, pp. 408-9.

[47] Subpoena, August 11, 1792, Original Jurisdiction Records, RG 267, DNA.

[48] John Wereat to Edward Telfair, August 14, 1792, Telamon Cuyler Collection, GU.

[49] John Wereat to Edward Telfair, August 14 and 31, 1792, Telamon Cuyler Collection, GU. Governor Telfair received these papers, although it seems he did not act that promptly. Extract from the *Journal of the Proceedings of the Executive Department of Georgia*, January 2, 1793, Early State Records microfilm.

[50] Return of service, November 8, 1792; Affirmation of service of labels of writ of subpoena on Matthew McAllister and Joseph Clay, November 10, 1792; and Affirmation of service of writ of subpoena directed to James Spalding on Matthew McAllister, [after November 15], 1792, *Georgia v. Brailsford, et al.*, Original Jurisdiction Records, RG 267, DNA. On November 16, 1792, James Jones, clerk of the United States district and circuit courts in Georgia, certified that Thomas Gibbons and Matthew McAllister were the attorneys of record for Brailsford and Spalding. Certification of attorneys, November 16, 1792, *ibid.*

Spalding eventually received the subpoena, for on January 1, 1793, he swore before a Georgia justice of the peace that he had been served but was too ill to go to Philadelphia for the Court's February Term. Affidavit of James Spalding and his physician, January 1, 1793, *ibid.* The affidavit was filed in the Supreme Court. Minutes of the Supreme Court, February 4, 1793, in Marcus and Perry, eds., **Documentary History**, vol. 1, p. 207.

[51] Demurrer, February 4, 1793, Original Jurisdiction Records, RG 267, DNA. In the Court of Chancery in England, if a defendant filed a demurrer to a bill in equity, the pleadings were ended, and argument proceeded only on the points contained in the demurrer. W. S. Holdsworth, **A History of English Law**, vol. 9 (Boston: Little, Brown, 1926), p. 387. Following the procedure of the English chancery court, which the Supreme Court had declared it would do in August 1792, no other pleadings were filed at this stage of the *Brailsford* case.

[52] Docket of the Supreme Court, Marcus and Perry, eds., **Documentary History**, vol. 1, p. 487.

[53] James Iredell's Notes of Arguments in the Supreme Court, [February 6-9, 1793], Charles E. Johnson Collection, Nc-Ar.

[54] *Ibid.*; John Wereat to Edward Telfair, February 14, 1793, Edward Telfair Papers, GHi.

[55] James Iredell's Notes of Arguments in the Supreme Court, [February 6-9, 1793], Charles E. Johnson Collection Nc-Ar. Iredell's notes indicate that Chief Justice Jay and Justice Cushing asked Ingersoll several questions from the Bench.

[56] John Wereat to Edward Telfair, February 14, 1793, Edward Telfair Papers, GHi; and James Iredell's Notes on Arguments in the Supreme Court, [February 6-9, 1793], Charles E. Johnson Collection, Nc-Ar.

[57] Another factor possibly contributing to the delay, however, was the Court's desire to deal with *Chisholm v. Georgia*—the case that raised the question of whether states could be sued by citizens of other states in federal court—before announcing the result in *Brailsford*. *Chisholm* was argued on February 5, 1793. The Court handed down its decision on February 18 and issued orders in the case on February 19. Minutes of the Supreme Court, Marcus and Perry, eds., **Documentary History**, vol. 1, p. 209, 214-15.

[58] The opinions are reproduced in 2 U.S. (2 Dall.) 415-19 (1793). First to speak, Justice Iredell, according to this report, assumed that he was the lone dissenter. Justice Blair, who spoke next, stated that until that moment he had been with the majority but had changed his mind. *Ibid.*, pp. 415, 417-18.

[59] For the content of Iredell's opinion according to his own notes, *see* James Iredell's Draft Notes for a Supreme Court Opinion, [February 1793], Charles E. Johnson Collection, Nc-Ar; and James Iredell's Notes for a Supreme Court Opinion, [before February 20, 1793], Charles E. Johnson Collection, Nc-Ar.

[60] 2 U.S. (2 Dall.) 415, 416-17 (1793).

[61] *Ibid.*, p. 418.

[62] Judiciary Act of 1789, section 16, Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States, 1789-1800,** vol. 4 (New York: Columbia University Press, 1992), p. 73.

[63] 2 U.S. (2 Dall.) 415, 418-19 (1793).

[64] Had the Court ruled that it had subject matter jurisdiction in equity, the Justices, as Iredell had suggested, could have directed an issue—whether Georgia had a right to the debt—to be tried by a jury. But by ordering Georgia to pursue its right at common law, the Court signaled its desire both to limit the equity jurisdiction of the Court and to have the substantive question be tried by a jury. Though the result may have been the same whichever route was followed, it appears to have been of great importance to the Court at this early moment in its history to begin to define the boundaries of its law and equity jurisdictions.

[65] Matthew McAllister to Edward Telfair, May 21, 1793, Telamon Cuyler Collection, GU; George Walker to Edward Telfair, May 22, 1793 (II), Telamon Cuyler Collection, GU; and John Y. Noel to Edward Telfair, May 28, 1793, Telamon Cuyler Collection, GU.

[66] Agreement of parties, June 3, 1793, Original Jurisdiction Records, RG 267, DNA.

[67] Docket of the Supreme Court, Marcus and Perry, eds., **Documentary History**, vol. 1, p. 492; Minutes of the Supreme Court, February 20, 1793, August 5 and 6, 1793, *ibid.*, pp. 216, 217-19. The injunction remained in effect while Georgia prepared her case, but Brailsford's attorney in Georgia kept obtaining writs that would allow the marshal for the district to try to collect enough money from the sale of Spalding's goods and property to satisfy the amount of the circuit court judgment, even though whatever was obtained would remain in the court's possession until the Supreme Court handed down a decision. Third *fieri facias*, July 20, 1793, *Brailsford, et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR.

[68] Dallas calls the jury "special" in his reports. 3 U.S. (3 Dall.) 1 (1794). The procedure used to form the jury supports the assertion that it was "special": A list of forty-eight names, labeled "State of Georgia vs. Brailsford & al" and bearing the notation "To be struck at [the] office of the Clk. of t[he] Sup.

Court on mon[day] 13 Jany. 1794 at 10 o'[clock] A. M.," appears in the records of the Supreme Court. On the face of the document is written "Struck Jany 13th 1794." The document is severely damaged so that much of it is missing, but it is signed by Benjamin R. Morgan, counsel for Georgia, and John Hallowell for the defendants. From the information on the document, it seems that each attorney struck twelve names, leaving twenty-four jurors to be summoned from among whom twelve would compose the trial jury (*Georgia v. Brailsford, et al.*, Original Jurisdiction Records, RG 267, DNA). This procedure to form a special jury appears to be the same as that followed in the English common law courts in the second half of the eighteenth century (James Oldham, **The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century**, 2 vols. (Chapel Hill: University of North Carolina Press, 1992), 1:95). According to Professor Oldham, "By the early eighteenth century, the term 'special jury' became synonymous with 'struck jury.'. . . Struck juries did not always require men of above-average property holdings, high social standing, or particular knowledge or expertise. Rather, the formation procedure, allowing each party to strike twelve prospective jurors from a panel of forty-eight names, was the consistent distinctive characteristic" ("The Origins of the Special Jury," *University of Chicago Law Review* 50 (1983): 176.)

[69] In a letter to Ephriam Kirby, Uriah Tracy styled *Georgia v. Brailsford* "the famous Georgia Case." February 24, 1794, Ephriam Kirby Papers, NcD. Since the decision of the United States circuit court in the case had become known, it was discussed in various contexts in the newspapers. For examples: *Columbian Herald* (Boston) July 25, 1793; *Dunlap's American Daily Advertiser* (Philadelphia), February 5, 1794 (extra).

[70] The state's argument is summarized in 3 U.S. (3 Dall.) 1-3 (1794).

[71] Bradford's commission appointing him Attorney General on January 28, 1794, was read in court on February 4. Minutes of the Supreme Court, February 4, 1794, Marcus and Perry, eds., **Documentary History**, vol. 1, p. 220.

[72] *See* William Bradford's Notes for Argument in the Supreme Court, February 4, 1794, Tilghman Family Papers, MdHi. 3 U.S. (3 Dall.) 3 (1794). Edward Tilghman spoke on February 5. Minutes of the Supreme Court, Marcus and Perry, eds., **Documentary History**, vol. 1, p. 222.

[73] William Bradford's Notes for Argument in the Supreme Court, February 4, 1794, Tilghman Family Papers, MdHi.

[74] Unanimity may have been easier to achieve because Justice Iredell was absent from the February 1794 Term of Court (Minutes of the Supreme Court, February 3-18, 1794, Marcus and Perry, eds. **Documentary History**, vol. 1, p. 219-29). From a later account of Iredell's interpretation of his decision in *Brailsford v. Spalding* in the circuit court, however, it seems likely that Iredell would have joined his Brethren in the charge to the jury. Luther Martin, the attorney general of Maryland, while arguing a case concerning a British creditor and an American debtor before the Maryland Court of Appeals, reported that Judge Iredell had informed him that in the *Brailsford* case, "the debtor never had paid it [*the debt*] into the treasury in *Georgia*, or done those acts which the law would have authorized him to have done, and was exactly in the case of a man in this state, who might have paid into the treasury, but did not do it. Judge *Iredell* told me the decision was on the principle that no act had been done under the law while it existed, that is, antecedent to the operation of the treaty." In *Georgia v. Brailsford*, Martin continued, the Supreme Court "determined, as the state of *Georgia* had not confiscated, but only sequestrated the debt, the state since the treaty could not be entitled to it; and as the defendant had not paid it to the state, of course he was obliged to pay it to his creditors." Comparing Iredell's opinion in *Ware v. Hylton* with the Court's legal conclusions in *Georgia v. Brailsford*, it appears that Iredell would have found them unexceptionable. *Dulany v. Wells*, Thomas Harris, Jr., and John McHenry, *Maryland Reports*, 3:77, 79; 3 U.S. (3 Dall.) 199, 256-80 (1796).

[75] *See Dunlap's American Daily Advertiser* (Philadelphia), February 17, 1794, for John Jay's charge to the trial jury.

Despite some scholarly comment to the contrary, Jay's discussion of the jury's power to find the law appears to be an accurate description of the state of affairs in the 1790s. William E. Nelson, **Americanization of the Common Law** (Cambridge: Harvard University Press, 1975), pp. 28-9, 165-66; John D. Gordan, III, "Juries as Judges of the Law: The American Experience," *Law Quarterly Review* 108 (April 1992): 272-74; Julius Goebel, **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), p. 746n.

[76] *See Dunlap's American Daily Advertiser* (Philadelphia), February 17, 1794.

[77] Questions proposed by petit jury to the Supreme Court, [February 7, 1794], Original Jurisdiction Records, RG 267, DNA.

[78] *Dunlap's American Daily Advertiser* (Philadelphia), February 17, 1794. In the docket of the Supreme Court, the clerk mistakenly entered the jury verdict under the date of February 8, 1794. Marcus and Perry, eds., **Documentary History**, vol. 1, p. 493.

It is interesting to compare the newspaper report of the jury's questions with the actual draft of them that appears in the Supreme Court records. If the draft was accurate, the inquiries were not as simple-minded as they seem. They indicate some confusion on the part of the jury as to the legal consequences of sequestration as opposed to confiscation, which Jay did not cover in any detail in his charge. He merely stated that the debt had been sequestered, not confiscated. *Dunlap's American Daily Advertiser* (Philadelphia), February 17, 1794; Questions proposed by petit jury to the Supreme Court, [February 7, 1794], Original Jurisdiction Records, RG 267, DNA. Dallas prints a version of Jay's charge to the jury and the questions the jury raised that is virtually the same as the one that appeared in the newspaper. 3 U.S. (3 Dall.) 1, 3-5 (1794).

[79] Minutes of the Supreme Court, February 14, 1794, Marcus and Perry, eds., **Documentary History**, vol. 1, p. 227; Docket of the Supreme Court, February 14, 1794, *ibid.*, p. 493.

[80] Some obstacles other than Spalding's inability to pay were put in his way. At the first term of the United States circuit court in Georgia held after the Supreme Court decision, Spalding filed a bill in equity against Brailsford, praying for an injunction to stop payment on the judgment. It appears that Spalding tried to set up Brailsford's secret settlement with Colcock as nullifying the judgment handed down in *Brailsford v. Spalding* (*see* note 9 above). The court granted the injunction based on an affidavit of Gideon Pendleton and Thomas Young, the former of whom we know was privy to the information about the secret settlement (Pierce Butler to Gideon Pendleton, January 28, 1794, Pierce Butler Letterbook, ScU). The injunction was to remain in effect until Brailsford filed a "satisfactory answer." A year later, however, the injunction was dissolved because of the death of Spalding (Minutes, April 29, 1794, May 1, 1794, May 2, 1794, and April 30, 1795, CCD Georgia, RG 21, GEpFAR). In the suit against Brailsford subsequently filed by Pierce Butler, Brailsford noted in his

plea and answer that the representatives of James Spalding never revived his bill in equity, "being persuaded that the grounds on which it had been originally filed were founded on mistake and misrepresentation." Brailsford also questioned Butler's standing to renew the proceedings. Plea and Answer of Samuel Brailsford, September 25, 1797, *Pierce Butler v. Samuel Brailsford*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR.

[81] Fourth *fieri facias*, March 3, 1796; Fifth *fieri facias*, June 5, 1797; Sixth *fieri facias*, February 9, 1798; Seventh *fieri facias*, May 7, 1798; Eighth *fieri facias*, February 11, 1799; Tenth *fieri facias*, May 10, 1800, *Brailsford et al. v. Spalding*, Case Records-Civil, CCD Georgia, RG 21, GEpFAR. That the United States marshal was busy trying to sell any property of Spalding's in order to satisfy the judgment can be seen from the advertisements for the sale of this property that the marshal placed in newspapers, *e.g.*, *Georgia Gazette* (Savannah), February 4, 1796, and April 21, 1796.

[82] On January 8, 1798, Governor Jared Irwin reported to the legislature of Georgia that, "Another suit has been instituted in the Supreme court of the United States by Brailsford, indorsee of Spalding, against this State" (*Journal of Proceedings of the Executive Department of Georgia*, January 8, 1798, Early State Records microfilm). The case is docketed in the Supreme Court as "Samuel Brailsford, Indorsee of James Spalding vs. The State of Georgia," and it is noted that a summons was served. No date appears, however. Beneath that entry the clerk wrote "Narr filed," again with no date. (Docket of the Supreme Court, February 1798 Term, Marcus and Perry, eds., **Documentary History,** vol. 1, p. 519.) A very damaged copy of this *narratio* [declaration of the plaintiff] appears in the records of the Supreme Court, but it gives little information other than the amount of the debt Brailsford was claiming, Georgia's repeated refusal to pay it, and the date on which the *narratio* was filed (February 7, 1798) (*Brailsford v. Georgia*, Original Jurisdiction Records, RG 267, DNA). It is pure speculation but not unlikely that Spalding had signed over to Brailsford, as part of the attempt to satisfy the circuit court judgment, a note for money owed Spalding by Georgia.

[83] Minutes of the Supreme Court, February 14, 1798, Marcus and Perry, eds., **Documentary History,** vol. 1, p. 305; Docket of the Supreme Court, February 14, 1798, *ibid.*, p. 519; Maeva Marcus, ed., **The Documentary History of the Supreme Court of the United States**, vol. 5 (New York: Columbia University Press, 1994), pp. 604, 604n.

# Oliver Ellsworth

**William R. Casto**

*"I have sought the felicity and glory of your Administration."*

In March 1797 President George Washington retired from public office, and Oliver Ellsworth, the Chief Justice of the United States, bid the President a cordial farewell. In a private letter, Chief Justice Ellsworth noted that he had sought with "ardour . . . the felicity and glory of your Administration."[1] Undoubtedly Ellsworth was referring in part to his service in the Senate from 1789 to 1796, but he penned these words at the end of his first year as Chief Justice. Surely no Justice of today's Supreme Court would claim to have sought with ardor the felicity and glory of a particular President's administration. Chief Justice Ellsworth, however, probably did not distinguish in this regard between his legislative and judicial service. Certainly his letter contains not the slightest hint of such a distinction. As a Senator and then as Chief Justice, he consciously sought to support the Federalist administrations of George Washington and John Adams.

This theme of support was an omnipresent facet of Ellsworth's chief justiceship. Just five days after being sworn into office, he wrote a detailed private advisory opinion on President Washington's legal obligation to comply with a request by the House of Representatives for confidential papers related to the Jay Treaty. Similarly, he had no qualms about advising Cabinet-level officers on issues related to criminal and civil litigation impressed with a national interest. Moreover, Ellsworth—like his fellow Federalist Justices—used grand jury charges to deliver lectures on politics and to provide public advisory opinions on pressing issues of the day. Finally, he assumed without objection a number of minor nonjudicial duties and spent the last year of his chief justiceship in Europe as a commissioner to negotiate an end to the undeclared Quasi-War with France.[2]

## Ellsworth's Personal and Intellectual Background

Ellsworth's long career of public service and support for the establishment began in Connecticut, where he was born in 1745 in the wake of the Great Awakening. As a consequence of the Great Awakening, Connecticut was riven by a struggle between conservative Old Lights, who essentially opposed change, and evangelical New Lights, who sought to reinvigorate Calvinism.

Among other things, the New Lights emphasized the importance of receiving grace in an actual and personal regenerating experience with God. Ellsworth was the second son of a prosperous (but not wealthy) New Light farming family, and his parents intended that he should enter the ministry. Following this plan, he received his college preparatory education from Joseph Bellamy, the colony's leading New Light minister, and attended Yale College for two years. He then attended the College of New Jersey (Princeton), where he was graduated in 1766. After graduation he returned to Connecticut and spent a year under the tutelage of John Smalley, a respected New Light minister known for preparing graduates for the ministry. Ellsworth decided, however, against the ministry and after a brief stint as a teacher turned to the law.[3]

Although Ellsworth became a lawyer rather than a minister, he was a deeply religious individual who cleaved to his parents' and teachers' strict Calvinism throughout his life. As a young man, he personally experienced God's grace and made a public profession of his regeneration. He never ceased being a serious student of religion, and in later years as the head of his family he presided over daily prayer meetings within the privacy of his home. Shortly after Ellsworth's retirement from the federal bench, a young Daniel Webster noted with obvious respect that Ellsworth was "as eminent for piety as for talents" and that his piety made him an "ornament" to the profession.[4]

Ellsworth was trained in the strict Calvinist tenets of the Westminster Confession of Faith —the same creed that Max Weber posited as the purest basis for the Protestant work ethic. He epitomized this work ethic, but his calling was more in public service than in commerce. Because the Westminster Confession attained a certain amount of gloss throughout the eighteenth century, the most reliable sources for the substance of Ellsworth's faith are found in two bookends to his adult life. At the end of his life stands **A Summary of Christian Doctrine and Practice,** written by Ellsworth and fellow members of the Connecticut Missionary Society. At the beginning of his life is the work of Joseph Bellamy, especially **The Wisdom of God in the Permission of Sin.**[5]

The Westminster Confession, Joseph Bellamy, and **A Summary of Christian Doctrine** all envisioned an all-powerful God and a thoroughgoing doctrine of predestination. At the same time, "men. . . are totally depraved; and, in themselves, utterly helpless." Individuals cannot earn their salvation. They can only hope that God will unilaterally pardon their inherent sinfulness. Even those whom God elects for salvation are personally undeserving "because, the personal ill-desert of believers remains. . .and [even] faith itself, which interests them in it, is the gift of God."[6]

This rigorous, unbending model of God's pervasive omnipotence combined with man's inherent depravity had obvious implications for the governance of human society. In 1790, Nathan Strong, who had been Ellsworth's minister when Ellsworth lived in Hartford, noted that "human nature must be taken by the civil governor as he finds it." Ten years later, Ellsworth reiterated this idea when he insisted in a conversation with a French philosopher that any comprehensive plan of government must take into account "The Selfishness of Man." This concern about selfishness is little more than a restatement of the Calvinist doctrine that condemned humankind as inherently depraved. Even the phraseology is taken from the New Lights' Calvinism that defined sin exclusively in terms of selfishness.[7]

Among other things, Ellsworth's Calvinist pessimism about human nature lead him to distrust democratic institutions. At the Constitutional Convention, he favored the election of Senators by state legislatures because "more wisdom [would] issue from the Legislatures; than from an immediate election of the people." Similarly, he initially favored the idea that the Constitution should be approved by the state legislatures rather than by the people in conventions because "more was to be expected from the legislatures than from the people." This pervasive distrust of the general populace surfaced again while he was drafting the Judiciary Act of 1789. In private conversations he expressed a dislike for using random ballots to select juries because "a very ignorant Jury might be drawn by Ballot."[8]

At first glance, the doctrine of inherent depravity presents immense obstacles to good government. After all, rulers are themselves human beings. Calvinist theology, however, provided an escape from this cul de sac. Ellsworth's teacher at Princeton, his former pastor in Con-

necticut, and other Calvinist theologians took the position that righteous rulers were personally selected to their positions by God. This theology of divine appointment was embraced by Ellsworth in senate debates. Therefore, good government was possible, but good government came from God's intervention rather than from the good works of men.[9]

In theory Ellsworth's firm belief in and strict compliance with this rigid, monolithic theology might have made him an unbending, true believer who could broker no compromise. In fact, however, he was a gifted politician who thoroughly understood the art and utility of compromise. Therefore, unless he was quite a hypocrite, he must have been able to reconcile his active participation in shaping political compromises with his unbending personal beliefs. The theoretical basis for such a reconciliation is Joseph Bellamy's extended essay, "God's Wisdom," which was published in 1758 immediately before Ellsworth entered Bellamy's tutelage and which Bellamy undoubtedly incorporated into young Oliver's studies. "God's Wisdom" was a rigorously logical theodicy that remained ruthlessly true to Calvinist doctrine in explaining the existence of evil. Bellamy explained that the course of human events follows a perfectly predestined plan conceived by a perfect God to craft the best possible world. This plan, however, is "as absolutely incomprehensible by us as it is by children of four years old." As part of this plan God had decided that the permission of sin is the best method for instructing man in God's perfection and man's imperfection. Only individuals who thoroughly understand their sinfulness are fit to be saved by God. Thus, Bellamy's basic message was optimistic. We should not be disheartened by the presence of evil in the world. To the contrary, sin is part of God's plan, and all will come right in the end.[10]

The skeptical optimism of **God's Wisdom** provides a wondrously flexible tool for comprehending life's travails. Inevitable tribulations are accepted on faith as part of God's unknowable plan. In the political arena, a politician who is, himself, saved may nevertheless deal freely with the unsaved and even participate in apparently sinful compromises with the confident faith that all is part of the plan. These implications are consistent with the history of Connecticut politics in the wake of the Great Awakening. Initially the colony's New Lights were persecuted in the 1740s by the Standing Order, but the New Lights quickly became effective manipulators of the political system. They were careful to distinguish themselves from the radical separatists and Baptists and made it clear that they were Calvinists who intended to work within the existing religious and political order. By the end of the 1760s, they had effective political control of the colony and retained this control throughout Ellsworth's life.[11]

In 1762, the New Lights' growing political power was recognized when Bellamy was chosen to deliver the colony's annual election sermon. In his sermon, Bellamy advocated religious tolerance and expressly assured Anglicans that if fellow colonists "desire to declare for the Church of England, there is none to hinder them." Four years later, the Old Light Calvinists lost control of the government in the election following the Stamp Act crisis. As part of the political maneuvering, the New Lights struck a deal with the Anglicans in which William Samuel Johnson became the first Anglican elected to the upper house of the colony's legislature in return for Anglican support of New Light candidates. The Johnson deal and similar arrangements in other elections established a pragmatic approach to the allocation of political power within the colony. These were the rules of the game that Ellsworth learned as he climbed the ladder of political success in Connecticut's New Light-dominated Standing Order.[12]

## Ellsworth's Early Political Career and Service in the Senate

After terminating his postgraduate religious studies, Ellsworth read law and was admitted to the bar in 1771. His first few years of practice were a financial disaster, but his prospects improved when he married into one of Connecticut's most influential families. With this entree into the colony's power structure, Ellsworth was almost immediately elected to the General Assembly and became a justice of the peace. During the Revolutionary War, he progressed from obscure but important administrative assignments to becoming one of the state's most important young political leaders. By 1780, at age thirty-five, he was state's attor-


**Chief Justice John Jay was burned in effigy after signing a treaty with the British settling lingering issues over unpaid debts, sequestration of Loyalist estates, and trading rights, because many believed he had granted too many concessions. Oliver Ellsworth, upon succeeding Jay as Chief Justice in 1796, became embroiled in the fallout over the treaty and wrote a formal advisory opinion on its merits to Congress.**

ney for Hartford County and a member of the upper house of the state legislature and the Council of Safety. He also was a delegate to the Continental Congress.[13]

Ellsworth thrived in the Continental Congress and had no qualms about the moral ambiguities of power politics. In 1779 the minister of his church evidently complained to him about the Revolutionary War's impact upon the world's "moral State." Consistent with Calvinist theology, Ellsworth wrote from Philadelphia that he did not know "the design of Providence in this respect," but he conceded that "the powers at war have very little design about [the world's moral state] and terminate their views with wealth and empire, leaving religion pretty much out of the question." He then concluded with a mild rebuke to his doubting minister. Restating the central theme of **God's Wisdom**, Ellsworth noted, "it is sufficient, dear Sir, that God governs the world, and that his purposes of Grace will be accomplished."[14]

After the war, Ellsworth was appointed to the Connecticut Superior Court, the state's highest judicial court, and served until 1789. During this service, he also represented Connecticut at the Constitutional Convention in Philadelphia and played a significant role in crafting the Constitution. In the Convention's plenary sessions, he helped shape the Constitution on comparatively minor points like enlarging Congress's authority to define crimes and the election of senators by state legislatures rather than popular vote. More significantly, he was one of the five-person Committee of Detail that wrote the working draft of the document finally adopted by the Convention.[15]

Ellsworth also played a significant role in brokering some of the Convention's most important compromises. He was a leading proponent of the compromise on the importation of slaves and was similarly involved in resolving

the dispute over whether states would be represented in Congress on an equal footing or proportionally by population. As a small-state delegate, he was dead set against proportional representation, but he was also a skilled politician who understood the value of compromise. He clearly participated in shaping the Grand Compromise that gave the big states control of the House but provided for equal state representation in the Senate. He was the delegate who formally moved the adoption of this compromise and subsequently was selected as the only small-state delegate on the Committee of Detail.[16]

In later years James Madison recollected that, "from the day when every doubt of the right of the smaller states to an equal vote in the senate was quieted . . . Ellsworth became one of [the general government's] strongest pillars." In the subsequent ratification process, Ellsworth wrote an influential series of essays entitled **Letters of a Landholder**, and at least one knowledgeable observer commented,"'the Landholder' will do more service . . . than the elaborate works of Publius." At the Connecticut ratification convention, Ellsworth was the Constitution's leading advocate and among other things endorsed the concept of judicial review. He reassured the Convention, "If the general legislature should. . . make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be void." After ratification, Ellsworth was Connecticut's unanimous choice to represent the state in the new federal Senate.[17]

For seven years Ellsworth was the de facto leader of the Federalists in the Senate, and during that time he worked on more committees than any other senator. His best known legislative work is the Judiciary Act of 1789, which he and his Calvinist friend William Paterson of New Jersey drafted. The Constitution created just the barebones of a federal judicial system and left many significant issues to the discretion of Congress. In particular, the Congress was to decide whether the new judicial system would consist of a single, relatively isolated national Supreme Court or whether there would also be a system of lower federal courts distributed throughout the nation.[18]

In crafting the Judiciary Act, Ellsworth brought to bear the full extent of his remarkable ability to broker pragmatic compromises. There was substantial practical and theoretical opposition to the creation of an extensive system of federal courts. At a theoretical level, many were concerned that the federal courts would supplant the state judiciaries. In addition, the Supreme Court's power to review state court decisions made conflicts between the Supreme Court and state courts inevitable. These theoretical objections were directly implicated by a massive number of pre-Revolutionary War contracts between American debtors and British creditors. In the Treaty of Paris, the United States had agreed that the British creditors "shall meet with no legal impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted." Many states, however, had notoriously refused to enforce this treaty obligation and had in effect closed their courts to British creditors. When the first Congress was convened, many members—particularly southern members—were adamantly opposed to using the new federal courts to enforce this treaty obligation.[19]

Ellsworth's approach to this opposition was masterful. He insisted upon a complete system of federal trial courts distributed throughout the United States and supervised by the Supreme Court. At the same time he agreed to limit the federal courts' jurisdiction to comparatively narrow groups of cases in which the federal interest was clear and immediate. The federal trial courts were given plenary power over the enforcement of federal revenue statutes and federal criminal law. They were also given complete authority to resolve prize cases that so frequently involved foreign relations.[20]

Under Ellsworth's plan, litigation that demanded immediate, day-to-day attention was entrusted to a federal district court that would be staffed by a resident federal district judge in each state. In particular, these district courts were vested with jurisdiction over admiralty cases, which included prize cases, and the enforcement of federal revenue laws. In addition he created a system of federal circuit courts that were given appellate authority over the district courts and original or trial jurisdiction over criminal prosecutions and civil cases involving aliens or citizens of different states. The expectation was that these circuit courts would be the principal federal trial courts for civil and criminal litigation other than prize and revenue cases.[21]

The circuit courts, which were to be located

in each state, were to be staffed by the local federal district judge and circuit-riding Supreme Court Justices. The theory behind this innovative arrangement was that the circuit-riding Justices would provide some uniformity of decision throughout the nation, lend weight and dignity to the federal trial courts, and obviate the need for appeals to the distant capital. In practice, these objectives were largely attained, but the Justices came to hate the rigorous and onerous travel required by circuit riding.[22]

The circuit courts' alienage jurisdiction obviously included British creditors' claims and therefore might have been quite controversial. But Ellsworth defused this potential problem by limiting alienage and diversity jurisdiction to cases involving more than $500. As a practical matter this amount in controversy requirement barred the great majority of British claims from the federal trial courts because most of the claims were for less than $500. In other words, Ellsworth acquiesced in the ongoing violations of the Treaty of Paris in order to obtain an extensive system of federal trial courts with complete jurisdiction over the essential categories of prize cases, revenue cases, and criminal prosecutions.[23]

Ellsworth was equally pragmatic in limiting the Supreme Court's appellate jurisdiction over state courts' judgments. There was substantial opposition to the Court's power to review state courts' determinations of facts, but Ellsworth mooted this objection by stripping the Court of this power. Undoubtedly this compromise was made easier by the existence under his plan of federal trial courts to conduct fact finding in litigation affecting the federal government's vital interests. In addition to eliminating the appellate review of facts, Ellsworth's plan limited the Supreme Court's power to review legal determinations. In cases appealed from the state courts, the Supreme Court could consider only specific issues governed by positive, written federal laws—specifically, "the constitution, treaties or laws of the United States . . . or [a federal] commission."[24]

These and other compromises defused most of the congressional opposition to an extensive federal judicial system. Ellsworth's plan passed both houses of Congress by large majorities and even received a majority of southern votes in each house. As a result, the judicial branch was launched with comparatively little controversy and a clear consensus of approval.[25]

## Ellsworth's Appointment and Service as Chief Justice

Ellsworth continued to serve ably in the Senate until 1796, when, as part of the Jay Treaty's fallout, he became the Chief Justice of the United States. The Jay Treaty was a national political watershed that enabled the Jeffersonian Republicans to focus upon their disappointments with Federalist policy and to solidify their coalition of interests into a loose organization resembling an opposition political party. Before the Treaty, the Republicans more or less deferred to George Washington's Federalist administration. The Treaty, however, convinced the Republicans of the need for firm and open opposition.

In the early spring of 1794, an effective British maritime campaign against American commerce in the West Indies brought the two countries to the brink of war. While the Congress was enacting legislation to prepare for war, a small group of influential senators, including Ellsworth, decided that war could be best averted by sending an envoy to England to adjust the countries' differences. Ellsworth went to President Washington as the group's representative and proposed the mission. The President agreed, and in the spring of 1794 Chief Justice Jay was despatched as special envoy to Great Britain. Jay returned in the next year with a treaty and almost immediately resigned his chief justiceship to become governor of New York. President Washington then offered the position to John Rutledge of South Carolina.[26]

Meanwhile the Jay Treaty was being considered by the Senate in a secret executive session, where it met severe opposition from southern Senators. Despite this opposition, the Federalists, led by Ellsworth, approved the Treaty by a vote of 20-10. When the terms of the Treaty were published, the nation was furious. Britain had prevailed on virtually every issue in controversy. From the American point of view, the best that could be said was that the Treaty avoided a war and established a diplomatic precedent that under certain circumstances Britain was willing to enter into a treaty with the United States.

Many viewed the Treaty as a national humiliation. Laborers demonstrated on the Fourth of July in Philadelphia, the nation's capital. They burned John Jay in effigy, and overpowered a force of cavalry called out to quell the "riot." Alexander Hamilton was stoned in New York. In the midst of these ignominious affronts to Federalist policy came a hubbub in Charleston, South Carolina. Mobs rioted for two days in opposition to the Treaty, and on the third day at a public meeting John Rutledge vehemently attacked the Treaty and Jay. Unfortunately for him a detailed account of his intemperate speech was published in newspapers throughout the nation, and his appointment was doomed. Although he served briefly under a recess appointment as the second Chief Justice of the United States, the Senate rejected his nomination in December of 1795.[27]

Rutledge was, above all else, a gentleman whom Washington trusted. After Rutledge was rejected by the Senate, the President turned to another trusted personal acquaintance—Patrick Henry—but Henry declined. The President wrote that this inability to find a new Chief Justice was "embarrassing in the extreme," and perhaps in desperation he nominated William Cushing, who was the Court's senior Associate Justice. But Cushing also declined. Finally Washington turned to Ellsworth as his fourth choice.[28]

Ellsworth was nominated on March 3, 1796, and confirmed by the Senate the next day. Almost immediately he became embroiled in another facet of the general controversy over the Jay Treaty. As a practical matter, the Treaty could not be implemented without money, and opponents seized upon the appropriations process in the House of Representatives as an opportunity to reconsider the Treaty's merits. Ellsworth was keenly aware of these legislative maneuvers, and just a few days before he became Chief Justice he wrote his wife, "[T]here remains yet to be made one violent effort in the House of Representatives to destroy the Treaty." He believed, however, "that the effort will be unsuccessful and that the Treaty will be carried into effect, which the honor and interest of this Country very much requires."[29]

On March 7, 1796, the day before Ellsworth took his oath of office as Chief Justice, the House demanded that the President turn over all documents relevant to the Treaty's negotiation. Today most Justices would remain aloof from this kind of controversy between the executive and legislative branches, but Ellsworth apparently saw no reason for restraint. On March 13, five days after becoming Chief Justice, he wrote a detailed private advisory opinion on the House's authority to demand the documents.[30]

Ellsworth's opinion is found in a nine-page letter to Connecticut Senator Jonathan Trumbull and clearly was intended to be an advisory opinion. Senator Trumbull had discussed the Treaty a few days earlier with President Washington, and after that discussion Trumbull asked Ellsworth for a legal analysis of the issues. Ellsworth's letter contains no chit-chat and no customary closing enquiry about the well-being of Trumbull's family or mutual friends. Instead the letter is devoted exclusively to the legal questions presented by the House's demand for documents. Ellsworth predictably concluded that the House lacked authority either to reject the Treaty or to demand the documents. Although the letter was addressed to Senator Trumbull, it wound up in President Washington's files docketed under the subject "treaty making power." Whether Ellsworth knew that his opinion would be passed on to the President is not known to a certainty, but as a shrewd and knowledgeable politician he must have known or anticipated this event. In any case the letter obviously was intended by the Chief Justice as a detailed advisory opinion on a hotly debated constitutional controversy.[31]

Almost as soon as Ellsworth delivered his advisory opinion, he wrote his wife with "some pain" that he had to ride the Southern Circuit that spring and preside over the federal circuit courts in each southern state. A month later he convened the court in Savannah, Georgia, and delivered a grand jury charge that was published in at least twelve newspapers in eight different states. Following the custom of the times, Ellsworth's charge was not so much an explanation of criminal law as it was a political essay extolling the federal government's virtue. In particular, he explained that

> The national laws are the national ligatures and vehicles of life. Tho' they pervade a country, as diversified in habits, as it is vast in extent, yet they

> give to the whole, harmony of interest, and unity of design.

This emphasis upon "harmony of interest, and unity of design" is a restatement of the Calvinist vision of a perfect society, and in the next sentence he expressly affirmed that the federal government was part of God's plan. The national laws, he said, "are the means by which it pleases heaven to make of weak and discordant parts, one great people."[32]

While Ellsworth was penning this grand jury charge, he was undoubtedly concerned about the Jay Treaty's fate in the House of Representatives. In the charge he applauded the wisdom of distributing legislative power to two "maturing and balancing bodies, instead of the subjection of it to momentary impulse, and the predominance of faction." In this regard he probably considered the Senate to be "maturing and balancing" and the House to be subject to "momentary impulse, and... faction." Notwithstanding his concern about the Treaty's fate, his private conviction was that the treaty would be funded, and on April 30 the House approved the required funds by a close vote of 51-48.[33]

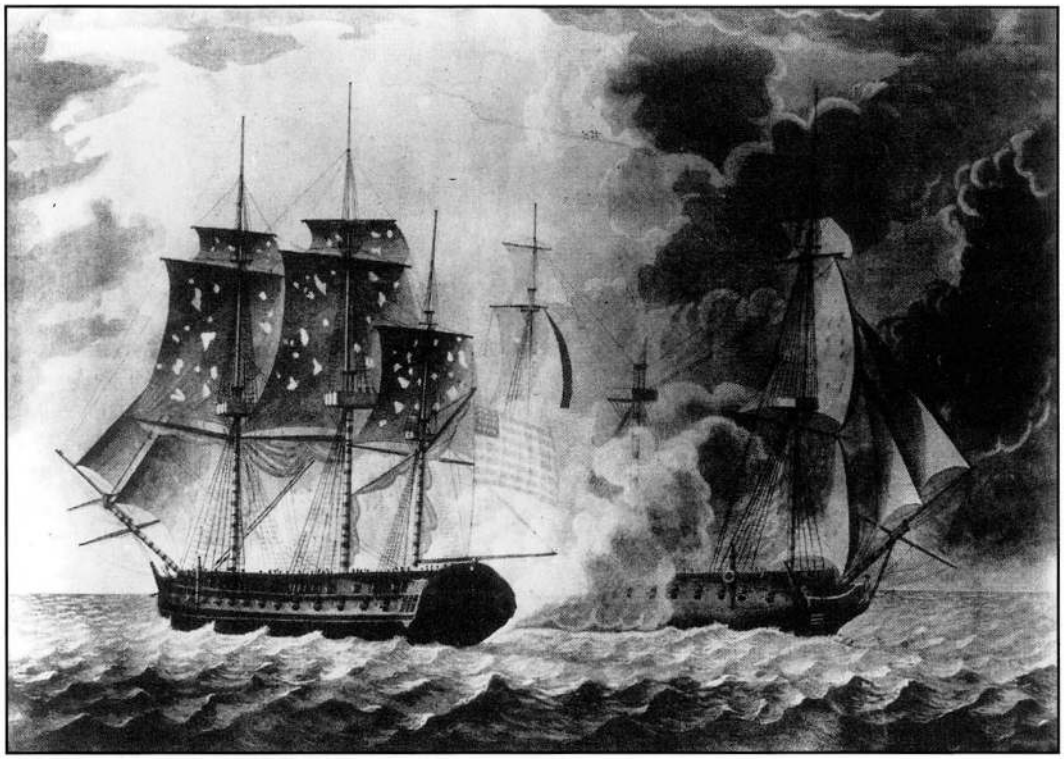
This legislative victory confirmed Ellsworth's Calvinist understanding of government under the relatively new Constitution. Soon after learning about the Jay Treaty's victory in the House, he reiterated the basic principle of **God's Wisdom** to his son-in-law, Ezekiel Williams. "Of politicks," he wrote Williams, "I will converse with you when I come, and am satisfied in the mean time that God governs the world, & will turn all the wrath & folly of men to good account." At about the same time, he reassured President Washington that "the publick mind, as well Southward as elsewhere, is pretty tranquil, and much more so than it would have been had our Country [, through a failure to fund the Treaty,] been dishonored and exposed by a violation of her faith."[34]

After defending the wisdom of the federal government in his charge to the Georgia grand jury, Ellsworth proceeded from Savannah to South Carolina, where he dealt with the important neutrality question of whether the Jay Treaty forbade the French to sell British prizes in American ports notwithstanding an ambiguous provision possibly to the contrary in the Treaty of Alliance with France. The British Consul in Charleston initially asked the local Federal District Judge to rule on this issue, but the judge, who usually ruled against the British, seized upon a technicality and refused to decide the matter. As soon as Chief Justice Ellsworth arrived in town, the Consul renewed his petition, and Ellsworth immediately heard the case and gave full effect to the Jay Treaty.[35]

Later that spring the Chief Justice held court in North Carolina and in *Hamiltons v. Eaton* addressed a conflict between British creditors' treaty rights to recover debts and a North Carolina statute designed to impede those rights. Ellsworth had not participated in the Supreme Court's earlier decision in *Ware v. Hylton* that national treaties override state laws, so he used the North Carolina case to pronounce his views on the subject and to reaffirm the supremacy of federal law over state law. Among other things, he brushed aside the defendant debtor's argument that the Treaty of Paris was an improper taking of the defendant's private property. Ellsworth met this argument head on and bluntly ruled, "It is justifiable and frequent, in the adjustments of national differences, to concede for the safety of the state, the rights of individuals."[36]

When the Chief Justice arrived in Philadelphia for the Supreme Court's August Term of 1796, he was presented with yet a third opportunity to decide a case in a manner that would support the national government. In the 1790s about ninety percent of the federal government's revenues came from the impost, and federal admiralty courts, which did not use juries, were used to enforce the impost. In *United States v. La Vengeance,* the Court was called upon to decide whether there was an entitlement to a jury trial in cases governed by laws like the impost statute. Although traditional principles of admiralty law clearly indicated that a jury should be used in these cases, Chief Justice Ellsworth delivered a majority opinion that ignored the traditional principles and denied a right to trial by jury. Years later Justice Chase recalled that the Court was motivated by "the great danger to the revenue if such cases should be left to the caprice of juries."[37]

Although President Washington finally decided that summer not to seek a third term of office, Ellsworth's faith in the federal government was not shaken. In the fall of 1796, he optimistically wrote a good friend and fellow



**In *United States v. La Vengeance* (1796), Ellsworth wrote an important opinion extending federal admiralty jurisdiction beyond the confines of British law. His opinion ignored traditional principles by denying the right to trial by jury in admiralty cases. Above is an engraving of the *Constellation* capturing a French ship, *L'Insurgente*, having earlier captured its sister, *La Vengeance*.**

Calvinist that "we may however yet hope that the gates of Hell will not prevail." This reference to the Book of Matthew 16:18 was used by Connecticut Calvinists to assure themselves and others that God was looking after their institutions. Ellsworth continued in this Calvinist strain by immediately "pray[ing] especially that good men everywhere may make their Election sure." Ellsworth was clearly writing about politics, but he could not have meant the word "Election" to refer specifically to the coming political elections because all "good men everywhere" were not running for election. Instead, he was referring to God's election of good men for salvation. In Ellsworth's mind, God's elect were supporters of the federal government, and they made their personal election sure by voting properly in the November elections. When the Fifth Congress was convened in 1797, the Federalists had a majority in both houses. Moreover, John Adams, whom Ellsworth had fully supported, continued the Federalists' control of the presidency.[38]

Notwithstanding these Federalist electoral triumphs, 1797 was a bad year for Ellsworth. The Supreme Court was convened in early February, but Ellsworth could not attend because he was sick. He probably was suffering from gout and gravel. This extremely painful illness usually appears in middle age and is caused by either a hereditary metabolic disorder or excessive accumulations of lead in the body (among eighteenth-century English-speaking people typically from drinking large quantities of port wine). The illness is not degenerative, but it afflicted him with sporadic bouts of intense pain until he died in 1807. By the middle of March he reported to his son-in-law that his health was "pretty well restoring," and he was ready to ride the Eastern Circuit.[39]

While Ellsworth was recovering from his illness, he and other Federalists were deeply disturbed by a worsening of relations with France and the impact of Franco-American relations upon domestic American politics. The previous year the French had unsuccessfully attempted to bring about the election of Thomas Jefferson to

the presidency. After John Adams was elected, they refused to accredit a new American minister to France and increased their maritime depredations on American commerce. These affronts caused the Federalists to believe that war with France was likely. At the same time Jeffersonian Republicans seemed to support France.[40]

The Republicans' domestic support for French misconduct outraged New England Federalists. In early April, Ellsworth's friend, Connecticut Senator Uriah Tracy, wrote, "I presume we shall see at the coming Session of Congress the humiliating spectacle of a considerable number of the members of the Government take side with France & justify all the depredations." Tracy continued, "if we must suffer the French Nation to interfere with our politics—by reason of a Geographical division of Sentiment, perversely bent on humiliating their own government to a foreign one—why then, Sir, I hesitate not a moment in saying a separation of the Union is inevitable."[41]

On the same day that Senator Tracy was speculating about a "separation of the Union," Chief Justice Ellsworth delivered an embarrassing grand jury charge in New York. The combination of his painful kidney ailment and uncertainty about the impact of relations with France upon domestic politics caused him to rail against "the baleful influence of those elements of disorganization, & tenets of impiety." He warned the nation that there were "impassioned" and "impious" people who are "radically hostile to free government." Even worse, this "disaffection . . .opens a door to foreign [i.e., French] influence, that 'destroying angel of republics.'" All in all, the charge verged upon disjointed hysteria.[42]

A writer in the New York *Argus* disliked the religious undertone of Ellsworth's charge and wrote, "I like neither his politics nor his religion." After reading the charge, Abigail Adams was so exasperated that she wrote her husband, "Did the good gentleman never write before? can it be genuine? . . . . I am Sorry it was ever published." Perhaps during this time Ellsworth—like his friend Senator Tracy—began to have serious doubts about the viability of the new federal government. Within three years the Chief Justice was privately stating "that there is in a government like ours a natural antipathy to system of every kind." These are strong words indeed for a man who idealized system and order.[43]

If Ellsworth was pessimistic as early as 1797 about the federal government's basic viability, his doubts were temporarily abated by a speech that President Adams delivered to a special session of Congress in the middle of May. To counter the French depredations, Adams chose the same strategy that Ellsworth had recommended to President Washington three years earlier during the war scare with Great Britain. Adams committed the nation to attempt an "amicable negotiation" with France and simultaneously urged Congress to enact "effectual measures of defense." This strategy received immediate widespread public approval, and by the end of May Ellsworth was feeling "triumph[ant]" that the President's speech had strengthened the Federalists' "political faith."[44]

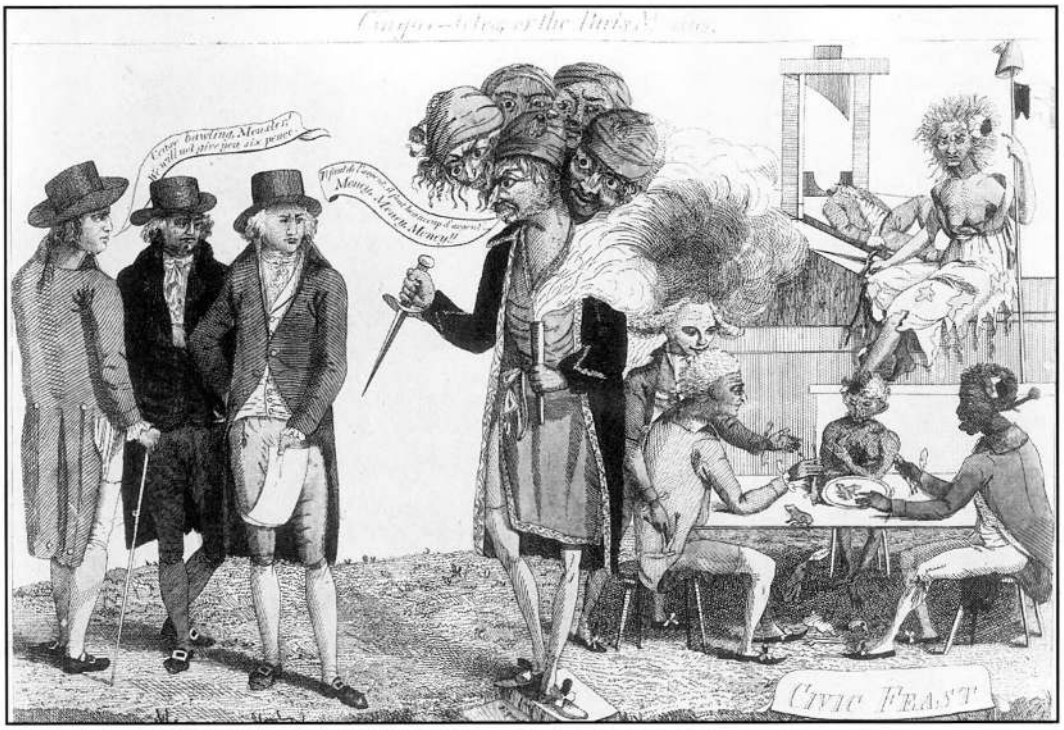
The next winter of 1798 brought a recurrence of Ellsworth's painful illness. In January he was "considerably unwell." By February he was somewhat better but reported that his "want of health. . . requires that my movements should be gentle & cautious." The illness continued into March, and he determined to ride a reduced circuit comprising only the states of Vermont and New Hampshire. He asked his Calvinist friend, Justice Cushing, to take Massachusetts and Rhode Island and offered "to furnish a little money for [Cushing's] expenses." Ellsworth explained that he was offering money "as it may never be in my power to repay you in kind [i.e., by riding circuit for Cushing]." This ominous explanation indicates that as early as April 1798, Ellsworth was contemplating vacating his position by resignation or possibly death.[45]

There is no evidence that Ellsworth's illness recurred in the winter of 1799, and that year he was able to preside over the Supreme Court's February Term for the first and only time during his chief justiceship. With his health restored, he bent to the wheel of government and vigorously participated in attempts to resolve domestic and foreign policy issues arising from the ongoing dispute with France. Ellsworth had been pleased with President Adams' decision in 1797 to attempt an "amicable negotiation" of the two nations' differences, but the upshot of the negotiation was disastrous. When the American diplomatic mission arrived in Europe the next year,

the French demanded bribes as a condition to opening formal negotiations, and the mission fell through. This failure, which became known as the XYZ Affair, exacerbated the rift in Franco-American relations. Relatively minor maritime skirmishing in the West Indies was escalated to a limited Quasi-War, and on the domestic front Congress enacted the Sedition Act to discourage criticism of the government. Ellsworth began 1799 by writing private and public advisory opinions calculated to establish the Act's constitutionality. He finished the year on a diplomatic mission to Europe to negotiate an end to the war.[46]

When the Sedition Act was initially debated in Congress, the measure's opponents vehemently attacked the proposal as unconstitutional, and the Federalists responded that the Act would be a proper use of the Constitution's "necessary and proper" clause to protect the federal government. In addition, the Federalists had a powerful argument based upon the federal courts' preexisting authority to try common-law crimes. This idea of common-law crimes was based upon a natural-law belief that certain activities were inherently criminal even in the absence of a statute formally declaring them to be criminal. These activities included conduct like counterfeiting, bribing a public officer, and obviously seditious libel. Because the existence of the common-law doctrine of seditious libel was not seriously controverted, the only issue was whether common-law crimes against federal interests should be tried in state courts or federal courts. The Federalists argued that common-law crimes against the federal government already could be tried in federal court. Therefore the Sedition Act was constitutional because it was essentially a codification of a common-law authority that the federal courts already had.[47]

Because the logic of this constitutional argument was unassailable, the opponents of the Sedition Act had to attack the argument's underlying premise. The opposition could not deny the existence of common-law crimes without appearing foolish or ignorant, so they were forced to deny that the federal courts had authority to punish them. Presumably they would have conceded that the state courts had such authority. The opposition's arguments, however, were unavailing, and Congress passed the Sedition Act




**Ellsworth spent the end of 1799 on a diplomatic mission to Europe trying to patch up differences in severely strained Franco-American relations. An amicable negotiation in 1797 had ended in disaster when the three American envoys were asked for tribute money just to open discussions. This cartoon shows the Paris monster demanding money from the three diplomats as the Revolution's guillotine continues its work in the background.**

in the summer of 1798.[48]

In the 1790s, Cabinet responsibility for supervising the U.S. Attorneys' criminal prosecutions in the various states was allocated to the Secretary of State rather than the Attorney General, and Secretary of State Timothy Pickering evidently had some concerns about the Sedition Act. In 1796 Secretary Pickering had noted in official correspondence that on "weighty points" of law he could consult Supreme Court Justices, whom he called "our first law-characters," and the Attorney General. Moreover, that same year Pickering actually sought Chief Justice Ellsworth's legal advice in coordinating ongoing litigation in the federal courts. Consistent with this prior practice, the Secretary evidently sought the Chief Justice's advice on the Sedition Act's constitutionality. In any event, in a letter penned to Secretary Pickering in December 1798, Ellsworth opined that the Act was constitutional. Like other Federalists, the Chief Justice believed that because the Act was a codification—actually, an amelioration—of the federal courts' pre-existing authority to punish common-law seditious libel, the Act's constitutionality was not subject to serious dispute. Ellsworth evidently had no qualms about giving an advisory opinion on a statute that he might subsequently have to administer in a criminal trial.[49]

This remarkable advisory opinion did not end the Chief Justice's *ex parte* defense of the Sedition Act. In early 1799, the Act's opponents unveiled a new argument. The linchpin of the constitutional argument in favor of the Act's constitutionality was the federal courts' pre-existing authority over common-law crimes. During a congressional reconsideration of the Act in February of that year, Representative Wilson Cary Nicholas challenged the federal courts' pretension to common-law jurisdiction as a dangerous arrogation of federal authority. Because the common-law was "a complete system" that regulated all human relations, the federal courts' jurisdiction must extend to all human conduct, and Congress's legislative authority must be equally comprehensive. In other words, Nicholas argued that the constitutional implication of the Federalists' position was to consolidate virtually all state authority into the federal government.[50]

Chief Justice Ellsworth almost immediately began writing another advisory opinion to counter this new argument, and in May he presented his comprehensive analysis of federal common-law crimes in a charge to a grand jury in South Carolina. The charge was published in at least eleven newspapers in eight different states. Ellsworth used a traditional natural-law analysis to establish the fundamental validity of the doctrine of federal common-law crimes. Like Representative Nicholas and virtually all American lawyers, Ellsworth assumed that the common law—like the law of gravity—existed in nature independent of government. Representative Nicholas had argued that to recognize a federal common-law jurisdiction would give the federal courts complete power over all human affairs, but Ellsworth emphatically rejected this idea. Given the fact that the common law of crimes already existed in nature, the federal courts seemed to be the most appropriate forum for punishing crimes against the national government. Ellsworth advised the jury (and the nation) that the doctrine was limited to acts "manifestly subversive of the national government" and emphasized that he said "*manifestly* subversive, to exclude acts of doubtful tendency, and confine criminality to clearness and certainty."[51]

In addition to explaining the substantive limits of this unwritten criminal law, Ellsworth saw the grand jury process itself as a procedural limit to common-law prosecutions. He cautioned the grand jurors that an indictment must not "be founded on *suspicion*; and much less on *prepossession*" and concluded by emphasizing that grand jurors should not investigate "the *opinions* of men, but their *action;* and weigh them, not in the scales of *passion*, or of *party*, but in a *legal* balance—a balance which is undeceptive—which vibrates not with popular opinion; and which flatters not the pride of birth, or encroachments of power."[52]

At the same time that the Chief Justice was defending the Sedition Act and the doctrine of federal common-law crimes, he was participating directly in efforts to resolve the diplomatic impasse between the United States and France. The previous fall, France intimated to William Vans Murray, the United States Minister Resident to The Hague, that a new diplomatic mission to France for the resolution of the nations' differences would be received favorably. President Adams kept this overture secret because his

Secretaries of State, War, and Treasury were High Federalists. They deferred to Alexander Hamilton, abhorred Adams' moderation, and sought war with France. In February of 1799 Adams nominated Murray to be Minister Plenipotentiary to France without prior cabinet consultation. This surprise nomination was dead on arrival. As one High Federalist wrote, when the proposal was made public, "Surprise, indignation, grief & disgust followed each other in quick succession in the breasts of the true friends of our country." A Select Committee was appointed by the Senate to consider the matter, but a private meeting between the Senators and the President degenerated into a shouting match.[53]

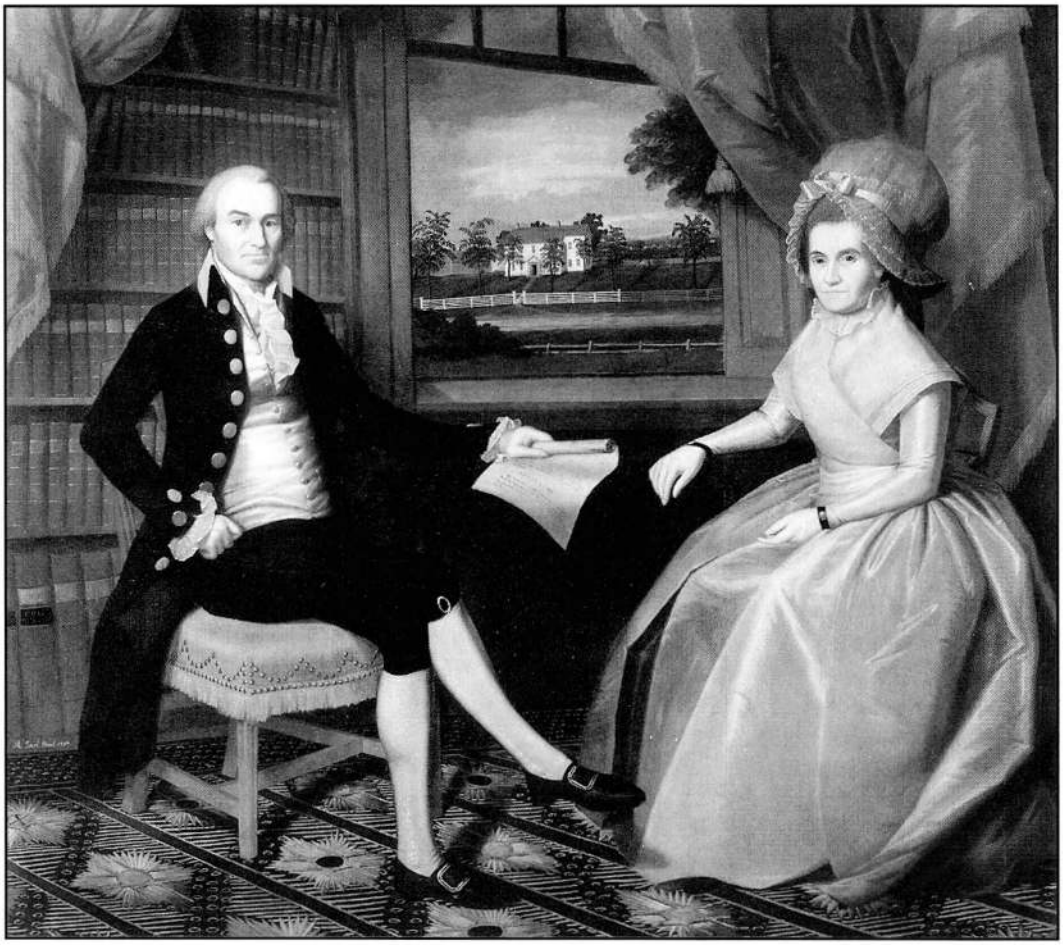
Although Chief Justice Ellsworth was quite friendly with and respected by most of the High Federalists, he was not one himself. He had been a firm supporter of President Adams from the beginning. In addition, Ellsworth was philosophically inclined to seek political compromises. He was in the capital when Murray's name was submitted to the Senate and undoubtedly was appalled by the explosive shouting match between the President and the Select Committee. After this disaster, he reportedly took it upon himself to speak privately with the President and managed to convince Adams to appoint three ministers instead of one. The basic idea was that the three would represent different interests and guarantee that peace would be negotiated on acceptable terms.[54]

The President decided to name Ellsworth and Patrick Henry as the two additional nominees, and Ellsworth was in no position to refuse. Patrick Henry, however, did refuse, and the President subsequently had a number of conversations with Ellsworth in which either Ellsworth or Adams mentioned Governor William Davie of North Carolina as a possible replacement. When Ellsworth rode the southern circuit that spring, he consulted with Davie and recommended his appointment. Following this recommendation, the President then formally nominated Davie.[55]

Ellsworth did not really want to go to France and feared that the voyage would bring him illness. Nevertheless, he told the President to "disregard any supposed pains or perils that might attend me from a voige at one season more than another." Finally he and Davie set sail in early November and after a rough passage of twenty-four days made a landfall in Portugal. Unfortunately, however, his journey to Paris was not even halfway through. From Portugal they set sail for France, "but were 10 days in getting out of the harbour owing to contrary winds, and were afterward 25 days at sea in a succession of storms one of which lasted 8 days, and were after all obliged to put into. . . a port in Spain about. . . 900 [miles] from Paris." Then they traveled overland in the dead of winter. After a journey of nine weeks in which their carriages broke down and they wound up on horseback, they arrived in Paris in early March.[56]

During this arduous trip by sea and land, Ellsworth's painful kidney ailment recurred and continued throughout the negotiations with the French government. This personal catastrophe, however, did not keep him from playing a leading role in the negotiations, and after six months, a compromise was reached. The naval war in the West Indies was terminated, and the two countries formally agreed to suspend embarrassing Franco-American treaties dating from the Revolutionary War and the period of the Confederacy. These aspects of the compromise were all well and good, but Ellsworth and his fellow commissioners had been instructed to insist that the French government compensate the United States for almost $20 million in spoliations against American commerce. As his opinion in *Hamiltons v. Eaton* indicates, Ellsworth was perfectly willing to override individual property rights to secure safety for the nation. To obtain peace, he agreed to drop this important claim.[57]

Ellsworth knew that the abandonment of the spoliation claims would outrage his High Federalist friends who were opposed even to the idea of negotiating with France, but he did not care. He had been a politician for nearly his entire adult life and was satisfied that "more could not be done without too great a sacrifice, and. . . it was better to sign a convention than to do nothing." Moreover, his righteous self-confidence gave him the inner strength to accept the High Federalists' inevitable snide attacks with equanimity. "If," he wrote, "there must be any burning on the occasion, let them take me, who am so near dead already with the gravel & gout in my kidnies, that roasting would do me but little damage."[58]



**Ralph Earl (1751-1801) painted this portrait of Oliver Ellsworth and his wife Abigail Wolcott Ellsworth in 1792, four years before Ellsworth became Chief Justice. The couple is seated in the library at Elmwood, their home in Windsor, Connecticut, which is cleverly pictured through the open window. Ellsworth holds the Constitution in his left hand.**

## Ellsworth's Resignation

In addition to accepting full political responsibility for the treaty, Ellsworth did something quite uncharacteristic. He resigned his chief justiceship. The traditional explanation for this resignation is that "the ministerial journey to the continent broke his health," and undoubtedly his recurring sickness played a significant role in motivating his resignation. But his gravel and gout do not completely explain the matter.[59]

Gravel and gout are very painful diseases, but they are not degenerative. Ellsworth had already endured at least three and a half years of this recurring pain without resigning. Nor did his illness seem to have much impact upon him after his resignation. He continued to be mentally and physically active. For example, upon returning to Connecticut he insisted on walking a little over a mile to church each week rather than riding a carriage. The winter after his return from Europe he invited five young men to study with him as law clerks, and in 1804 he began a regular series of essays and notes on agricultural topics in the *Connecticut Courant*.[60]

More significantly, his 1801 resignation was by no means a retirement from public life. He retired from the national political arena but continued to play an active role in Connecticut public life until a few months before he died. In 1802 he was elected to the upper house of the state legislature and was re-elected each year for the rest of his life. As the leading member of that body, he chaired and played an active role in the 1802 attempt to resolve the Baptist Peti-

tion movement. In 1805 he led the upper house's consideration of and personally drafted the resolutions rejecting two proposed amendments to the United States Constitution. That same year he served on the three-person committee charged with remodeling the state's judiciary system.[61]

In addition to his legislative services, Ellsworth's position in the legislature automatically made him an appellate judge, because in Connecticut the upper house also was the Supreme Court of Errors. Ellsworth was a dominant member of this tribunal's considerations and personally wrote many of its opinions. Although *Day's Reports* does not tell who wrote the opinions, surviving dockets assigning opinion-writing responsibility for the court's June terms of 1803 and 1804 indicate that only one member of the court wrote more opinions than Ellsworth.[62]

Although Ellsworth's illness clearly played a significant role in his resignation from the Supreme Court, his health was hardly broken. The illness, however, probably made him unusually susceptible to a growing suspicion that the federal government was no longer a milestone on the direct path to a graceful national order. In 1796, he had confidently pronounced that the federal government would give "harmony of interest, and unity of design" to the country. But by 1800 he was thinking "that there is in a government like ours a natural antipathy to system of every kind." If the federal government was not to play a direct positive role in God's plan, Ellsworth, who knew himself to be one of God's elect, would have found continued federal service to be galling and surely would have preferred devoting himself to his orderly and righteous state of Connecticut. At the same time, however, there was something inherently dishonorable about quitting. In early middle age, Ellsworth had described himself as a soldier in public service and affirmed that "when a soldier goes forth in publick service he must stay until he is discharged, and though the weather be stormy and his allowance small yet he must stand to his post." This unbending noblesse oblige may have caused Ellsworth to place inordinate emphasis upon his illness as the reason for not standing to his post. Certainly a good soldier in public service could not be criticized if a serious illness beyond his control forced his discharge.[63]

Shortly after Ellsworth resigned, John Adams' loss in the 1800 presidential election confirmed Ellsworth's Calvinist pessimism about the national government. On hearing of Jefferson's victory, Ellsworth compared the task of governing under the Constitution to the legend of Sisyphus. "So," he wrote, "the Antifeds are now to support their own administration and take a turn at rolling stones up hill." This legend would have been particularly appealing to a Calvinist like Ellsworth, who believed generally in predestination and specifically that governments were part of God's plan. Sisyphus was a clever ruler who tricked and betrayed the gods and who, as an exemplary punishment, was doomed by the gods to his eternal task. Like Sisyphus, Jefferson was a clever ruler, and New England Calvinists believed that he had betrayed God. By suggesting that Jefferson was as certainly doomed as Sisyphus, Ellsworth was reaffirming that the federal government with Jefferson at the helm was part of God's plan.[64]

Notwithstanding this pessimism, the essential optimism of **God's Wisdom** prevailed as Ellsworth regained his health. Shortly after writing about "rolling stones up hill," he commented that

> Jefferson. . .dare not run the ship aground, nor essentially deviate from that course which has hitherto rendered her voyage so prosperous. His party also must support the Government while he administers it, and if others are consistent & do the same, the Government may even be consolidated & acquire new confidence.

Later he confided to his son-in-law that "Mr. Jefferson's Presidency may be turned to good account if people will let their reason & not their passions, tell them how to manage."[65]

## Concluding Thoughts

Twentieth-century analyses of Chief Justice Ellsworth and his fellow Justices tend to be slightly out of focus because our modern understanding of what Supreme Court Justices do has been shaped by 200 years of evolution in the judicial process. Today we view the Court as a

unique political institution whose power is more or less limited to the resolution of specific judicial cases and controversies. Consistent with this understanding, most modern analyses of the Court place predominant—even inordinate—emphasis upon the Justices' opinions in individual cases. This modern understanding, however, becomes anachronistic when it is transported to the late eighteenth century. The Justices of the early Supreme Court simply did not view their positions the way modern Justices do.

In his first grand jury charge, Chief Justice Jay had viewed separation of powers and judicial independence as a doctrine in evolution. He frankly admitted that "there continues to be great Diversity of opinions [about] how to constitute and balance [the] Executive legislative and judicial." In his mind, the nation was embarking upon a "Tryal," and the doctrine's contours would have to be worked out "by Practice." Chief Justice Jay's approach to separation of powers was pragmatic, and Chief Justice Ellsworth continued in that tradition.[66]

As a teenager Ellsworth had been instructed that a good public official is a righteous ruler whose obligations and actions are ordained by God. Moreover, he understood that there was no room for discord or even disagreement in a righteous nation. While Ellsworth was studying with Joseph Bellamy, Bellamy had emphasized that in a righteous or perfect nation "there are no sects, no parties, no division." Likewise, unrighteous nations are "all riot and confusion." This same monolithic understanding of society and government is implicit in **The Summary of Christian Doctrine and Practice,** written some forty years later by Ellsworth's committee at the Connecticut Missionary Society. According to the **Summary**, "The design of all government is to make every one feel the relation in which he stands to the community, and to compel him to conduct as becomes that relation." Similarly, in his first grand jury charge Ellsworth affirmed that the federal government would give "harmony of interest, and unity of design" to the nation. In contrast to this ideal of a monolithic society, the concept of separation of powers is designed for a society in conflict—one in which there is disorder and confusion. Therefore, Ellsworth must have been mentally predisposed to reject separation of powers.[67]

As Chief Justice, Ellsworth probably did not view himself as much a judge as a righteous ruler who happened to be serving as a judge. He wrote judicial opinions in support of the Washington and Adams administrations, but he was equally willing to support these two Presidents in a nonjudicial capacity. He wrote private advisory opinions for the President and the Secretary of State. He actively defended the Sedition Act. He even went to Europe as a diplomat. Therefore his letter assuring President Washington that he had "sought the felicity and glory of your Administration" is not surprising. All of his actions were part of a seamless web of support for good government.

## Endnotes

[1] Oliver Ellsworth to George Washington, Mar. 6, 1797, George Washington Papers, Library of Congress, Washington, DC.

[2] William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (Columbia: University of South Carolina Press, 1995), 97-98, 115-17, 149-52, 174, & 119-19.

[3] William G. Brown, **The Life of Oliver Ellsworth** (New York: Macmillan, 1905), 12-21. For the Great Awakening in Connecticut, *see* Richard L. Bushman, **From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765** (Cambridge: Harvard University Press, 1967), ch. XII-XIV. As the century progressed, the New Light ministers who worked within Connecticut's Standing Order elaborated a theology known as New Divinity Calvinism. This New Divinity theology was heavily influenced by Jonathan Edwards but founded and led by Joseph Bellamy, who was young Oliver Ellsworth's teacher, and Samuel Hopkins. *See* Sydney E. Ahlstrom, **A Religious History of the American People** (New Haven: Yale University Press, 1972), ch. 25; Joseph A. Conforti, **Samuel Hopkins and the New Divinity Movement** (Washington, D.C.: Christian University Press, 1981).

[4] William R. Casto, "Oliver Ellsworth's Calvinism: A Biographical Essay on Religion and Political Psychology in the Early Republic," *Journal of Church and State* (1994), 36:508; Brown, **Oliver Ellsworth** 328; Daniel Webster to Thomas A Merrill, Jan. 4, 1803, in **Papers of Daniel Webster, Legal Papers**, eds. A Konefsky & A. King (Hanover, N.H.: University Press of New England, 1982), 1:19-20.

[5] Missionary Society of Connecticut, **A Summary of Christian Doctrine and Practice: Designed Especially for the Use of the People in the New Settlement of the United States of America** (Hartford, CT: Hudson & Goodwin, 1804) (Ellsworth's authorship explained in Casto, "Oliver Ellsworth's Calvinism," 511 n.23); Joseph Bellamy, **The Works of Joseph Bellamy,** 2 vols., ed. Tryon Edwards (Boston, MA: Doctrinal Tract and Book Society, 1853).

[6] **Summary of Christian Doctrine**, ch. V, VIII, XIV; Joseph Bellamy, "True Religion Delineated" (1750), in Bellamy, **Works,** 1:1-361; Westminster Confession of Faith (1648), in Williston Walker, **The Creeds and Platforms of Congregationalism** (New York: Scribner, 1893), 367-402.

[7] Nathan Strong, **A Sermon Delivered in the Presence of His Excellency Samuel Huntington, Esq. L.L.D. Governor, and the Honorable the General Assembly of the State of Connecticut** (Hartford, CT: Hudson and Goodwin, 1790) 14 (Evans No. 22913); Oliver Ellsworth Papers, Bancroft Transcript, New York Public Library, 63 (emphasis original).

[8] **Records of the Federal Convention of 1787,** ed. Max Farrand (New Haven: Yale University Press, reprint ed. 1966), 1:406, 2:91; William Laughton Smith to Edward Rutledge, August 9, 1789 (quoting Ellsworth), in *South Carolina Historical Magazine* 69 (1968), 23.

[9] Strong, *Sermon,* 20; Samuel Finley, **The Curse of Meroz; the Danger of Neutrality, in the Cause of God, and our Country** (Philadelphia: James Cattin, 1757), 10 (Evans No. 7893); Casto, "Oliver Ellsworth's Calvinism," 513-14.

[10] Joseph Bellamy, "The Wisdom of God in the Permission of Sin," in Bellamy, **Works**, 2:1-155.

[11] Bushman, **From Puritan to Yankee**, ch. XV & XVI.

[12] Joseph Bellamy, "An Election Sermon," in Bellamy, **Works**, 1:577-96; Bushman, **From Puritan to Yankee**, ch. XV; Bruce Steiner, "Anglican Officeholding in Pre-Revolutionary Connecticut: The Parameters of New England Community," *William and Mary Quarterly,* 3rd ser. 31 (1974), 369, 381-87.

[13] Ronald J. Lettieri, **Connecticut's Young Man of the Revolution: Oliver Ellsworth** (Hartford, CT: American Revolution Bicentennial Commission of Connecticut, 1978), ch. II & III.

[14] Oliver Ellsworth to Theodore Hinsdale, Jan. 26, 1779, in **Letters of Delegates to Congress, 1774-1789**, ed. Paul Smith (Washington, DC: Library of Congress, 1985), 11:518-19. For another letter expressing similar sentiments, *see* Oliver Ellsworth to Jonathan Trumbull, March 18, 1780, in *ibid.*, 14:548-49.

[15] Farrand, **Records of the Federal Convention**, 1:466, 2:97, 316.

[16] Lettieri, **Connecticut's Young Man**, ch. V.

[17] *Ibid.*; Farrand, **Records of the Federal Convention,** 4:88-89; **The Documentary History of the Ratification of the Constitution,** ed. Merrill Jensen (Madison, WI: State Historical Society of Wisconsin, 1978), 3:553 (judicial review); Rufus King to Jeremiah Wadsworth, Dec. 23, 1787, in Jensen, **Documentary History**, 15:70-71.

[18] Roy Swanstrom, **The United States Senate, 1787-1801**, (Washington, DC: U.S. Government Printing Office, 1985), 268-69 (Senate Doc. 99-19); Casto, **Supreme Court**, ch. 2.

[19] *See* generally, Wythe Holt, "'To Establish Justice': Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts," *Duke Law Journal* (1989) 1989: 1421-1531; Casto, **Supreme Court**, 8-9, 29-31.

[20] *Ibid.*, 31-33.

[21] *Ibid.*, 38-41, 44-46.

[22] *Ibid.*, 45, 55.

[23] *Ibid.*, 46-47.

[24] *Ibid.*, 33-38.

[25] *Ibid.*, 50-51.

[26] *Ibid.*, 87-90.

[27] Jerald A. Combs, **The Jay Treaty** (Berkeley: University of California Press, 1970), 159-62; **Annals of Congress**, 4:862-63; Casto, **Supreme Court,** 90-94; Ronald Schultz, **The Republic of Labor: Philadelphia Artisans and the Politics of Class, 1720-1830** (New York: Oxford University Press, 1993), 137-39.

[28] Casto, **Supreme Court**, 95; George Washington to Henry Lee, Jan. 11, 1796, in **Documentary History of the Supreme Court of the United States, 1789-1800**, eds. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 1:829.

[29] Combs, **Jay Treaty**, 171-87; Oliver Ellsworth to Abigail Ellsworth, Feb. 26, 1796, Oliver Ellsworth Homestead, Windsor, Connecticut.

[30] Combs, **Jay Treaty**, 175-77; Oliver Ellsworth to Jonathan Trumbull, March 13, 1796, George Washington Papers, Library of Congress, Washington, DC.

[31] **Documentary History of the Supreme Court,** 3:88 n.7;

Oliver Ellsworth to Jonathan Trumbull, March 13, 1796, George Washington Papers, Library of Congress, Washington, DC.

[32] Oliver Ellsworth to Abigail Ellsworth, March 20, 1796, in **Documentary History of the Supreme Court,** 3:99-100; Oliver Ellsworth, "Charge to the Grand Jury of the Circuit Court for the District of South Carolina," April 25, 1796, in *ibid.*, 3:119-20.

[33] *Ibid.*; Oliver Ellsworth to Abigail Ellsworth, Feb. 26, 1796, Oliver Ellsworth Homestead, Windsor, Connecticut; **Annals of Congress** 5:1291.

[34] Oliver Ellsworth to Ezekiel Williams, Jr., May 29, 1796, Williams Family Papers, Trinity College, Hartford, Connecticut: Oliver Ellsworth to George Washington, June 19, 1796, George Washington Papers, Library of Congress.

[35] *See* Casto, **Supreme Court,** 115-17; Alexander DeConde, **Entangling Alliance: Politics & Diplomacy under George Washington** (Durham, NC: Duke University Press, 1958), 437-38.

[36] *Hamiltons v. Eaton*, 11 F. Cas. 336, 340 (C.C.D.N.C. 1796) (No. 5980); *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796); Casto, **Supreme Court,** 98-101.

[37] *United States v. LaVengeance*, 3 U.S. (3 Dall.) 297 (1796); *United States v. The Schooner Betsy,* 8 U.S. (4 Cranch) 443, 446n. (1808) (Chase, J.); Casto, **Supreme Court**, 105-09.

[38] Oliver Ellsworth to Caleb Strong, Oct. 25, 1796, Caleb Strong Papers, Forbes Library, Northampton, Massachusetts. The phrase "gates of Hell" is explained in Casto, "Oliver Ellsworth's Calvinism," 520 n.74. For Ellsworth's support of John Adams, *see* Oliver Wolcott, Sr., to Oliver Wolcott, Jr., Dec. 12, 1796, Wolcott Papers, Connecticut Historical Society, Hartford, Connecticut.

[39] Oliver Ellsworth to Ezekiel Williams, Jr., March 16, 1797, Conarroe Collection, Pennsylvania Historical Society, Philadelphia, Pennsylvania.

[40] *See* DeConde, **Entangling Alliance,** ch. XIV; Alexander DeConde, **The Quasi-War: The Politics and Diplomacy of the Undeclared War with France 1797-1801** (New York: Scribner's, 1966), ch. I.

[41] Uriah Tracy to Samuel Dana, April 1, 1797, Pennsylvania Historical Society, Philadelphia, Pennsylvania.

[42] Oliver Ellsworth, "Charge to the Grand Jury of the Circuit Court for the District of New York," April 1, 1797, in **Documentary History of the Supreme Court,** 3:158-60.

[43] *Argus*, April 11, 1797; Abigail Adams to John Adams, April 17, 1797, in **Documentary History of the Supreme Court**, 3:161-62; Alexander Hamilton to James McHenry, Feb. 19, 1800 (quoting Ellsworth), in **The Papers of Alexander Hamilton,** ed. Harold Syrett (New York: Columbia University Press, 1976), 24:237-38.

[44] James D. Richardson, ed., **Messages and Papers of the Presidents** (Washington, DC, 1897), 1:233-39; George Cabot to Oliver Wolcott, Jr., May 31, 1797, in Cabot Letters, 139-140; Oliver Ellsworth to Oliver Wolcott, Jr., May 29, 1797, in **Documentary History of the Supreme Court**, 3:182.

[45] Frederick Wolcott to Oliver Wolcott, Jr., Jan. 23, 1798, in *Ibid.*, 1:857; Oliver Ellsworth to William Cushing, Feb. 4, 1798, in *Ibid.*, 1:857; Abigail Adams to Hannah Cushing, March 9, 1798, in *Ibid.,* 1:859; Oliver Ellsworth to William Cushing, April 15, 1798, in *Ibid.,* 3:251.

[46] DeConde, **Quasi-War**, ch. II-III.

[47] *See* James Morton Smith, **Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties** (Ithaca: Cornell University Press, 1956), ch. VII-VIII.

[48] *See* Casto, **Supreme Court**, 148-50; 155-62.

[49] *Ibid.*, 116-17, 149; Timothy Pickering to Ambassador Rufus King, July 27, 1796, King Papers, Huntington Library, San Marino, California; Oliver Ellsworth to Timothy Pickering, Dec. 12, 1798, Pickering Papers, Massachusetts Historical Society, Boston, Massachusetts, excerpted in Henry Flanders, **The Lives and Times of the Chief Justices of the Supreme Court of the United States** (New York: James Cockcroft, 1875), 2:193-94.

[50] Casto, **Supreme Court** 149-50.

[51] Oliver Ellsworth, "Charge to the Grand Jury of the Circuit Court for the District of South Carolina," May 7, 1799, in **Documentary History of the Supreme Court,** 3:357-59 (emphasis in original); Casto, **Supreme Court**, 149-52.

[52] Oliver Ellsworth, "Charge to the Grand Jury of the Circuit Court for the District of South Carolina," May 7, 1799, in **Documentary History of the Supreme Court**, 3:357-59 (emphasis in original).

[53] DeConde, **Quasi-War**, ch. V-VI; George Cabot to Rufus King, March 10, 1799, in **The Life and Correspondence of Rufus King,** ed. Charles R. King (New York: G.P. Putnam's Sons, Da Capo Press ed. 1971), 2:551-52.

[54] DeConde, **Quasi-War,** 185.

[55] DeConde, **Quasi-War** 185-87; Oliver Ellsworth to Timothy Pickering, March 21, 1799, William R. Davie Papers, North Carolina State Archives, Raleigh, North Carolina; John Adams to Timothy Pickering, May 8, 1799, in **The Works of John Adams**, ed. Charles F. Adams (Boston: Little Brown, 1863), 8:641.

[56] Oliver Ellsworth to John Adams, Sept. 26, 1799, Adams Manuscript Trust, Massachusetts Historical Society, Boston, Massachusetts; Oliver Ellsworth to Abigail Ellsworth, Feb. 10, 1800, Oliver Ellsworth Papers, Connecticut Historical Society, Hartford, Connecticut.

[57] *See* Peter P. Hill, **William Vans Murray Federalist Diplomat: The Shaping of Peace with France 1797-1801**, (Syracuse: Syracuse University Press, 1971), ch. 14-15. For the Hamiltons Case, *see* footnote 35 and accompanying text.

[58] Oliver Ellsworth to Oliver Wolcott, Jr., Oct. 16, 1800, in George Gibbs, **Memoirs of the Administrations of Washington and John Adams** (New York: W. Van Norden, 1846), 2:434; Oliver Ellsworth to Elias Perkins, Oct. 10, 1800, New London Historical Society, New London, Connecticut.

[59] **Documentary History of the Supreme Court**, 1:118; Michael Kraus, "Oliver Ellsworth," in **The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions,** eds. Leon Friedman and Fred L. Israel (New York: Bowker, 1969) 1:234; Lettieri, **Connecticut's Young Man**, 88; *Connecticut Courant,* Dec. 9, 1807, 3.

[60] Brown, **Oliver Ellsworth,** 332-38.

[61] For the Baptist Petition, *see* William McLoughlin, **New England Dissent, 1630-1833** (Boston: Harvard University Press, 1971), 2: ch.47-50; Casto, "Oliver Ellsworth's Calvinism," 521-25. For the Constitutional amendments, *see Connecticut Public Records,* 12:221-22; Connecticut Archives: Civil Offices, 2d ser., pp. 24-26 (manuscript resolutions in Ellsworth's hand and marginalia noting his leadership in the upper house) Connecticut State Library, Hartford, Connecticut. For the state judicial system, *see Connecticut Public Records,* 12:xl-xli.

[62] Brown, **Oliver Ellsworth** 331-33. Accord Anonymous Bench Notes, 1802-03, RG3, box 5, Connecticut State Library, Hartford, Connecticut; Supreme Court of Errors Docket, 1803 & 1804, Oliver Wolcott Jr. Papers, Connecticut Historical Society, Hartford, Connecticut.

[63] *See* footnotes 32 & 43 and accompanying text; Oliver Ellsworth to David Ellsworth, March 24, 1780, in Brown,

**Oliver Ellsworth,** 74.

[64] Oliver Ellsworth to Rufus King, Jan. 21, 1801, Rufus King Papers, Huntington Library, San Marino, California; Casto, "Oliver Ellsworth's Calvinism," 509, 520-21.

[65] Oliver Ellsworth to Rufus King, Jan. 24, 1801, Rufus King Papers, Huntington Library, San Marino, California; Oliver Ellsworth to Ezekiel Williams, March 20, 1801, Connecticut Historical Society, Hartford, Connecticut.

[66] John Jay, "Charge to the Grand Jury of the Circuit Court for the District of New York," April 12, 1790, in **Documentary History of the Supreme Court**, 2:25-30.

[67] Joseph Bellamy, "An Election Sermon," in Bellamy, **Works,** 1:583 & 586; **Summary of Christian Doctrine**, 54; *see* note 32 and accompanying text. Stephen Presser has capably demonstrated that Justice Chase had a similar, monolithic understanding of human society. Stephen B. Presser, The Original Misunderstanding (Durham, NC: Carolina Academic Press, 1991).

# Cardozo and the Criminal Law: *Palko v. Connecticut* Reconsidered*

**Richard Polenberg**

As a judge on the New York State Court of Appeals from 1914 to 1932, Benjamin N. Cardozo issued rulings in many criminal cases involving issues of search and seizure, the privilege against self-incrimination, and due process. He usually took a strong law-and-order stand. In *People v. Defore* (1926), for example, he held that the prosecution might introduce evidence procured by a warrantless search even though the Supreme Court had rejected the use of such evidence in federal trials on Fourth Amendment grounds.[1] Writing two months after the Supreme Court decision in *Agnello, et al. v. United States* (1925),[2] Cardozo complained that the Justices had valued the rights of the accused over the protection of society. Cardozo construed the decision to mean that "the criminal is to go free because the constable has blundered."

The views he expressed after his appointment to the Supreme Court in 1932 were consistent with this conservative approach. Cardozo's reputation as a liberal rests largely on his sympathy for Franklin D. Roosevelt's New Deal. Indeed, as the constitutional historian Richard D. Friedman has said: "Nobody on the Court was more consistently hospitable to broad assertions of governmental power to regulate economic matters."[3] But Cardozo was equally hospitable to broad assertions of governmental power when it came to cracking down on crime. The liberal-conservative split on the Court, so evident on social welfare issues, was not apparent in cases involving the rights of accused criminals.

Nothing better illustrated this than the first of two major criminal justice cases in which Cardozo wrote the majority opinion: *Snyder v. Commonwealth of Massachusetts* (1934).[4] The question before the Court was whether a defendant in a murder case, Herman Snyder, had been denied due process of law under the Fourteenth Amendment when the trial judge refused to allow him to be present (along with the judge, the jury, and the attorneys for both sides) at a viewing of the crime scene. The Court handed down its decision on January 8, 1934, rejecting Snyder's appeal by a 5-4 vote. Cardozo wrote the majority opinion, supported by Chief Justice Charles Evans Hughes and Associate Justices Harlan Fiske Stone, James C. McReynolds, and Willis Van Devanter. Justice Owen Roberts wrote the dissent, joined by Justices Pierce Butler, George Sutherland, and Louis D. Brandeis. Of

the Court's archconservatives—the Four Horsemen, as they were known—two, McReynolds and Van Devanter, sided with Cardozo, and two others, Butler and Sutherland, with Brandeis.

Roberts' dissent maintained that a view is a part of a trial, and that the right to be present during every stage of a trial "is of the very essence of due process." The accused must be permitted personally to "see, hear and know all that is placed before the tribunal having power by its findings to deprive him of liberty or life." In any such proceeding, "the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life." To assert that Snyder had not suffered any harm because his presence at the viewing would not have altered the jury's verdict was beside the point, Roberts maintained, for "the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way."[5]

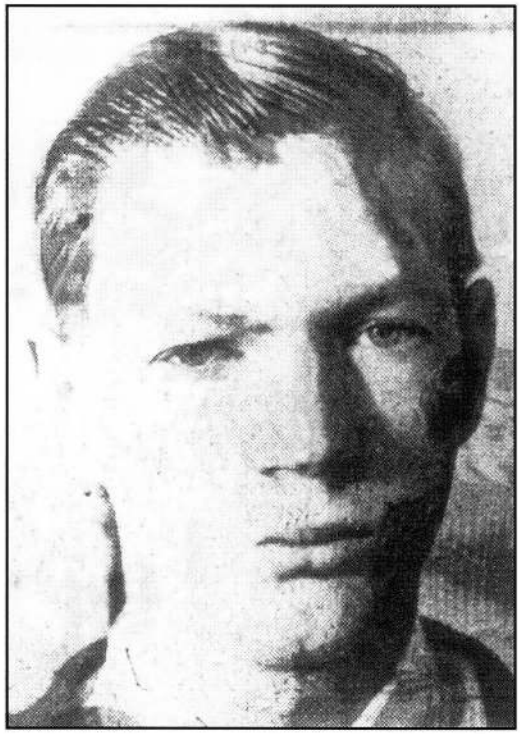
To counter Roberts' argument, Cardozo asserted that the Supreme Court should not hold that a state's trial procedures violated the Fourteenth Amendment "because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Rather, a state was entitled to establish its own procedures "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Some things surely were fundamental, Cardozo admitted, such as the opportunity to be heard in one's own defense. Other things were not, including trial by jury, grand jury indictments, and the privilege against self-incrimination. With respect to a jury view, the Fourteenth Amendment only meant that the accused had a right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." There was no such privilege "when presence would be useless, or the benefit but a shadow."

So Cardozo thought he had found a way to reconcile individual rights with social needs. On one side: "Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof." On the other: "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." The law risked being discredited "if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Cardozo's opinion expressed the pre-eminent value he attached to social order. It also reflected many of the same assumptions that led him to approve New Deal social welfare legislation: an inclination to defer to legislative or judicial bodies unless a statute or procedure was "flagrantly unjust"; a tendency to conceive of differences in terms of degree, not kind; an unwillingness to construe constitutional doctrine too rigidly (he said in *Snyder*: "A fertile source of perversion in constitutional theory is the tyranny of labels"); and a realization that his conceptions of right and wrong were only his and not necessarily everyone else's. As he put it, "Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* . . . wherever the good life is a subject of concern."[6]

## The Story of Frank Palka

Cardozo's second major criminal justice opinion, *Palko v. Connecticut,* was the last he ever read from the Bench. He delivered it on December 6, 1937, and shortly afterward suffered a heart attack and stroke that left him incapacitated. In many respects *Palko* was an appropriate farewell message, for it encapsulated the major themes of his judicial career. The case involved a man convicted by a Connecticut court of second-degree murder. The state, alleging errors by the judge, proceeded to try him again, this time obtaining a verdict of first-degree murder, punishable by death. The Supreme Court had to decide whether this constituted double jeopardy and, if so, whether the Fourteenth Amendment "incorporated" the Fifth Amendment's guarantee against double jeopardy so as to bind the states as well as the federal government. It will come as no surprise that Cardozo ruled against the defendant whose name, in a twist of fate, was mis-spelled in a document



**Frank Szryniawski (left) and his roommate Frank Palka (right), both twenty-three-year-old aircraft riveters, were arrested for the murders of Patrolman Wilfred Walker and Sergeant Thomas J. Kearney in 1935. Palka confessed to the double slaying and implicated Szyrniawski, alias Frank Burke, in the burglary of a music store in Bridgeport, Connecticut, that preceeded the shootings.**

somewhere along the way. He was Frank Palka—not Palko—and his story begins late on a cool September evening in 1935.

At a few minutes after midnight on Monday, September 30, two men approached a music store in Bridgeport, Connecticut, owned by Joseph Gilman. One of the men smashed the plate-glass window with the butt of a .32 calibre Colt revolver, snapping its black handle grips, which fell to the ground. Each of the men grabbed a radio and then took off in different directions. A woman living nearby, hearing the glass shatter, called the police, who dispatched two patrol cars. Sergeant Thomas J. Kearney and Patrolman Wilfred Walker were in one of them. Spotting one of the thieves, Walker jumped out, reached for the man, and said, "Where are you going with that radio, bud?" while Kearney approached from the other side. Suddenly, the man fired at Walker, hitting him, then turned toward Kearney and shot him, too. He had run only a short distance when the second police car arrived. There was an exchange of gunfire but no one was hit. Dropping the stolen radio, the man vanished into a maze of buildings and backyards. Patrolman Walker died two hours later, and Sergeant Kearney the next day.

It was the first time a Bridgeport policeman had been murdered in the line of duty in twenty-five years. And not just one officer, but two, both of them well known and popular—Kearney had been on the force for twenty-two years, Walker, for nineteen—had been killed. The city's entire 260-man force launched "the greatest manhunt in the city's history" to avenge their fallen comrades. Detectives scoured the neighborhood for clues, and, hoping to find the murder weapon, "enlisted the aid of dump scavengers, rag pickers and junk men who might uncover information of value to them." The department rounded up "known criminals" and "suspicious characters," but all of them seemed to have airtight alibis. Rewards totaling $2,500 were offered. Police Superintendant Charles A. Wheeler made it known that the second burglar, if he came forward to identify the murderer, would be

charged only with robbery and could expect lenient treatment.

There was one eyewitness, Joseph Schwimer, a police reporter for the Bridgeport *Telegram,* who was riding with the officers in the second car and had gotten a good look at the man. But the only physical evidence the police had to go on were the handle grips, the bullets, and a faint, badly smudged fingerprint on the radio. Seeking the help of the Federal Bureau of Investigation, Wheeler wrote to Director J. Edgar Hoover, describing the print, enclosing contact photographs, and asking the FBI to search its files for a match. Hoover responded by sending a crack forensic expert to Bridgeport, but the fingerprint later turned out to be only that of a careless policeman. Meanwhile, Lieutenant James Bray, a Bridgeport detective, took charge of the investigation.

A few weeks passed, and then a lead developed: a woman reported overhearing that a young airplane mechanic, who lived in a rooming house, had suddenly quit his job, and that his roommate was acting peculiarly and also preparing to quit. This led the police to arrest one Frank Szryniawski, age twenty-three, who went by the name of Frank Burke, and who had two roommates, one of them Frank Palka. (Ironically, both Burke and Palka had been awakened and questioned within two hours of the murders but had convinced the police they had been asleep the whole while.) The murderer, Burke said on being apprehended, was Palka, his accomplice in the robbery, who had recently gone to Buffalo. A quick check by the Bridgeport police revealed that Palka, whom the FBI identified as a paroled ex-convict, had failed to report to his parole officer, left his job, closed his bank account, and skipped town.[7]

Bridgeport detectives rushed to Buffalo, where on the afternoon of October 29 they arrested Palka. The newspapers reported that they spotted "the tall, muscular and well dressed young man in the Riverside Park section and leaped from their car to overpower him."[8] He was carrying a loaded .38 calibre pistol, a blackjack, $500 in cash, and a letter to friends in Bridgeport, reading in part, "Hello everyone. Just arrived and safe. Nothing new here. I didn't see anyone yet, but believe me when I passed the old homestead I sure wished I was there."[9] He offered no resistance. Handcuffed and taken to headquarters, he was grilled for five hours by Lieutenant Bray. He confessed orally to the murders of Kearney and Walker, saying he fired at them because he feared being sent back to New York to face charges of violating his parole if caught burglarizing the store. He refused, however, to sign a written confession. Extradition was arranged, and by November 5 he was back in Bridgeport, "sullen and with a worn look on his face," in solitary confinement.[10]

Frank Palka was twenty-three years old. The oldest of four children of Julia and Andrew Palka, he was described by Bray as "the 'black sheep' of an honest Polish American couple."[11] The family had always resided in Buffalo, where the father worked as a steam shovel operator. Frank had not completed high school but early on ran afoul of the law. In May 1928, he was given three years' probation as a juvenile delinquent. Then he got into more serious trouble. In May 1931, he was convicted of statutory rape and sent to the Elmira Reformatory for a term of eighteen months to ten years. He was paroled in September 1932, on condition that he report to his parole officer every week and be at home by ten o'clock every night. In April 1935, he moved to Bridgeport where he shared an apartment with his friends, Szryniawski and Thomas Iwanicki. While the former called himself Frank Burke, the latter went by the name of Tommy Evans. Palka got a job as a riveter in the wing shop of the Sikorski Aircraft Corporation, in nearby Stratford, where Burke and Evans also worked.

Palka's trial opened on January 14, 1936, in the Criminal Superior Court for Fairfield County. He was charged with first-degree murder in the death of Officer Kearney, presumably because the firing of the second shot presented the issue of premeditation most clearly. The presiding judge was John A. Cornell. To defend Palka, the court appointed David Goldstein, a thirty-seven-year-old graduate of New York University Law School who had represented Bridgeport in the state senate for six years. He had recently taken on an associate, George A. Saden, only twenty-five, one year out of Harvard Law School. The prosecutor was William H. Comley. Sixty years of age, a graduate of Yale College and Yale Law School, he had formerly served as a city court judge in Bridgeport and was now state attorney. Lorin W. Willis assisted him.

The prosecution's case relied heavily on the

testimony of Palka's roommates, Evans and Burke, and Burke's brother Jack (Casimir Srzyniawski), who lived with his wife in the apartment below theirs. They sounded a single theme with only slight variations. Frank Burke alleged that Palka had entered the apartment about one o'clock on Monday morning, September 30, and blurted out that he had killed two policemen. Evans claimed he had returned to the apartment shortly thereafter (he had been visiting a woman friend) and found Palka in the bedroom, holding the gun, with the grips missing. Evans further claimed that Palka had said he killed the policemen, and that he had been stopped just before entering the apartment by two other officers and would have killed them, too, had they attempted to arrest him, but they drove off. Jack Burke said he had gone with Palka to the music store, had stolen a radio and run home, but had been too drunk to remember anything else. Later that week, however, he had heard Palka admit responsibility for the murders. The three witnesses reported that they had gone to work on Monday morning with Palka, who disposed of the revolver by throwing it into a creek behind the factory. Later, as he prepared to leave town, Palka had given Evans a code to use in writing to him, and also had Evans send him his Certificate of Baptism, on which he promptly altered his name to Leanard Adamski.

In questioning the three men, Goldstein implied that they had concocted their story and rehearsed it down to the last detail in order to frame Palka and protect the real murderer, Frank Burke. When Palka took the stand, he told a story consistent with this theory. He and Burke had purchased two quarts of rye whiskey on Sunday afternoon, he said, and spent most of the day polishing them off, although he found the time to stop in two bars, having two beers in each. By nine in the evening, Palka continued, he was so drunk he passed out, and remembered nothing until some time after two in the morning when he was awakened by the police and briefly questioned. In the morning, Tommy Evans told him that he and Burke were involved in a break-in and murder. Over the next few days, Palka talked to Evans and the Burkes, and, as Palka said: "Well, Jack Burke thought that it was all my fault that his brother Frank got into trouble, and after talking things over I told him to not worry, that I would assume all responsibility for whatever may happen, if anything happened."[12] It was simple enough, Palka said, to fabricate a story based on the newspaper reports.

The whole truth about what happened on that tragic evening will never be known. A considerable amount of evidence pointed to Palka's guilt. First, although the murder weapon was never recovered, the deadly bullets had come from a .32 calibre Colt revolver, the same make as the one Palka had stolen; he did not deny that the black handle grips found at the scene came from that weapon. Second, Palka had shown a consciousness of guilt by closing out his bank accounts, disposing of the gun, altering his baptismal certificate, asking that letters to him be written in code, and leaving town for two days after the killings. Third, neither the owner nor either of two clerks in the drug store where Palka said he purchased the two quarts of rye whiskey could remember him. Fourth, the newspaper reporter, Joseph Schwimer, made a positive identification.

But none of this necessarily proved guilt beyond a reasonable doubt. When Goldstein asked Schwimer, "Is it possible that you might be wrong in definitely stating that this man was Palka? Is there a possibility, that is all I am going to ask you?" the reply was: "There may be."[13] Since it was illegal to sell liquor on a Sunday, those who worked in the drug store had plenty of reason to say they could not remember having sold anyone two quarts of rye whiskey. The defense not only offered a reasonable explanation for Palka's behavior in the days following the crime, but noted that by the middle of the week he had returned to his full-time job at the aircraft plant, hardly the actions of a man who had murdered two policemen. Although Palka testified that he kept the gun in a strong box in his room, he said that the key was readily accessible.

There were also serious inconsistencies in the prosecution's case. Schwimer's published account of the incident stated explicitly that one of the detectives fired first at the gunman, who then shot back, but the detective testified that the gunman had fired first, an important point for the prosecution since it suggested premeditation. The judge directed the jury's attention to an "entirely erroneous" aspect of Evans' testimony, also relating to the issue of premeditation. According to Evans, Palka told him that he would have shot the policemen who drove by

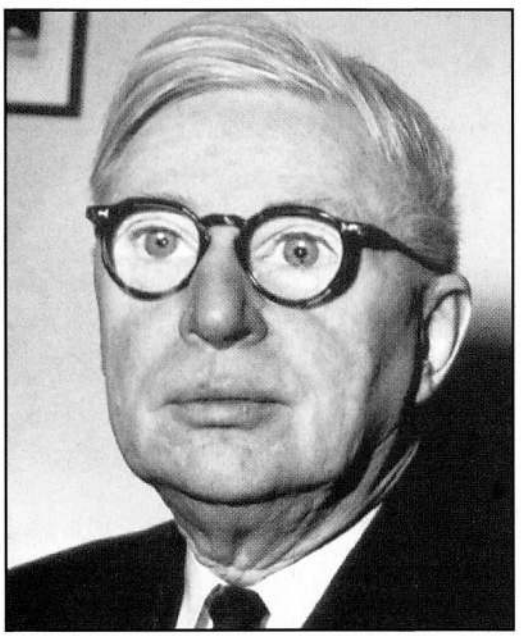
as he approached his apartment if they had tried to stop him. As Judge Cornell pointed out, "That event could not have happened" because there was no squad car in the vicinity at the time.[14]

During the trial, Judge Cornell made three crucial rulings, all favorable to the defense. First, he excluded the oral confession Palka made to Bray while in custody in Buffalo. Bray admitted outside the jury's presence that he had not informed Palka he had a right to refuse to make a statement, and, worse yet, had lied to Palka by telling him that the Bridgeport police had arrested Jack Burke, his wife Helen, and Tommy Evans, and that they had told the whole story. Second, the judge would not permit Evans to testify that Palka had stolen the .32 calibre Colt revolver from a tavern two months before the murders. Persuaded by Goldstein that the testimony would only "inflame the jury," Cornell admonished the prosecution: "You must be very careful here not to bring in evidence of unconnected crimes unless they come in almost of necessity in proving the case."[15] Third, Cornell refused to allow the arresting officer in Buffalo to testify that Palka was carrying a loaded .38 revolver, information that the defense argued was immaterial and prejudicial since he did not attempt to resist.

But it was the charge to the jury that most troubled the prosecution. To prove murder in the first degree, the judge explained, the state had to show beyond a reasonable doubt that the defendant had acted "willfully, premeditatedly, deliberately and with malice aforethought." Defining the terms, Judge Cornell said that premeditation "requires that between the time that the perpetrator forms an intention to kill and the instant when he carries out such intention, there be an interval of time during which he gave thought to and reflected upon his purpose sufficiently to know what he was doing and what the probable effect of his doing it would be upon his victim." How much time had to elapse between intention and action was for the jury to say, "provided that the time between the two be such that opportunity is afforded the perpetrator to give sufficient thought to the purpose in his mind so that he realizes what he is about to do and that his design, if carried out, will probably kill or fatally wound the person against whom his intention is directed." Deliberation, the judge added, meant that the intent to kill "be carrried out without haste or inconsiderately, but coolly."[16]

On January 24, 1936, after deliberating for two and a half hours, the jury reached a verdict. Judge Cornell, moved by the distraught appearance of Palka's mother, who had faithfully attended the trial, suggested that "it might be easier for her not to be present" and so she waited in the sheriff's office.[17] The jury then announced that it had found her son guilty of murder in the second degree, which meant mandatory life imprisonment. On January 28, the judge imposed that sentence, recommending that Palka never be pardoned or paroled. But the prosecutor, dismayed at not obtaining a conviction for first-degree murder, obtained the judge's permission to appeal the verdict. Connecticut law permitted such an appeal to the Supreme Court of Errors "upon all questions of law arising on the trial of criminal cases."[18]

In their arguments to that Court, Comley and Goldstein presented radically different views of Judge Cornell's exclusion of the oral confession, disallowance of certain testimony, and instructions to the jury; both sides were able to cite Connecticut precedents in support of their claims. Yet more was at stake: conflicting conceptions of individual rights and social needs. To



**Judge John A. Cornell presided over Palka's first trial on January 14, 1936, in the Criminal Superior Court for Fairfield County. He made several rulings favorable to the defense, including disallowing testimony that Palka was armed at the time of his arrest and excluding his oral confession.**

Goldstein, the mantle of the law protected everyone: "However depraved or vicious a defendant may be, whatever his mental tendency to commit other crimes . . . , he is entitled to be tried only for the crime charged against him and upon the issues presented by his plea of not guilty, and only such evidence as is relevant thereto should be admitted."[19] To Comley, however, there was a more pressing concern. The case, he said, involved "the most serious of all crimes," and went beyond "the private injuries that are involved in the taking of a human life to the very foundations of peace and security of life and property in the community."[20]

The Supreme Court of Errors heard argument in June and handed down its decision on July 30, 1936. The five judges agreed that Judge Cornell had committed reversible error and that the state was entitled to a new trial. The judges were unanimous on the issue of jury instructions. Although Cornell's charge was technically correct, since premeditation ordinarily required an interval between intention and action, it was a mistake to have told the jurors that

> in the case of an armed burglar who is stopped in his efforts to escape with the stolen property, in determining whether or not there was premeditation they are to regard only the incalculable moment between his realization of the threat of arrest and the pulling of the trigger ready to his hand for that very purpose.

The judges also agreed that the prosecution should have been allowed to cross-examine Palka concerning his theft of the .32 calibre revolver, since by taking the stand he had waived certain privileges, and burglary went to the issue of moral turpitude.

On two other matters, however, the judges were divided. A 3-2 majority upheld Judge Cornell's decision to exclude testimony that Palka was armed at the time of his arrest. But a 3-2 majority ruled against Cornell on the critical issue of the admissibility of Palka's oral confession. Even though Lieutenant Bray had failed to inform Palka of his right to remain silent, and had purposely misled the defendant, he had not made any threats, and "The test of admissibility is whether the confession was voluntary, and not whether the accused was well advised." Judges George E. Hinman and Christopher L. Avery sided with the defense on both issues, while Chief Judge William M. Maltbie and Judge Allyn L. Brown sided with the prosecution. The swing vote, therefore, was provided by Judge John W. Banks.[21]

These disagreements notwithstanding, state attorney Comley had gotten what he wanted, and Palka's second trial for the murder of Officer Kearney opened on October 8, 1936, in the same court before a new judge, Arthur F. Ells. This time around, however, Lieutenant Bray was permitted to describe Palka's oral confession and, to refresh his memory, refer to the unsigned written version. According to Bray, Palka said:

> While I was going along the street a police car came up in back of me and the officer nearest to the curb got out and grabbed me by the shoulders. I don't know whether I had the gun in my hand or in my pocket but I remember the officer going 'Ugh' . . . and I remember another officer coming out of the same side of the car and he got very close to me. . . . My mind went blank. I cannot tell what happened.

He added, "If it was not for my parole I would never have shot him."[22] When Palka took the stand he testified that one Buffalo policeman had threatened, "I will knock your teeth out," but that the confession"was a story just the way we made up from the newspapers and with the assistance of Frank, Jack, Steve, and Tommy."[23]

On October 15, the jury returned a verdict of murder in the first degree, and Judge Ells imposed the death sentence. Now it was the defense's turn to appeal, and so David Goldstein and public defender Johnson Stoddard petitioned the Supreme Court of Errors. They made a number of arguments, but none so important as the one concerning double jeopardy, which they now raised for the first time on appeal. True, the Supreme Court of Errors had already upheld the statute under which the state had appealed. But protection against double jeopardy was "a doctrine so deeply rooted in the very heart of our legal tradition" and "so fundamental to every conception of English and American justice,"

David A. Goldstein (above) was a thirty-seven-year-old graduate of New York University Law School who had represented Bridgeport in the state senate for six years when he was appointed to defend Palka. He submitted the brief to the Supreme Court in 1937, although it was largely written by George A. Saden, his young associate.

Lorin W. Willis (above) assisted state's attorney William H. Comely in his prosecution of Palka before the state court. In their brief before the Supreme Court, Willis, now state's attorney, and Comely tried on behalf of Connecticut to refute the double jeopardy argument.

they maintained, that its denial violated the Fourteenth Amendment.[24]

Comley offered a double-barreled rebuttal: this kind of retrial did not constitute double jeopardy—but, even if it did, it was permissible. The Connecticut courts had already held that "no double jeopardy is involved in a retrial" because in such a situation "the accused has never escaped from the first jeopardy in which he stood." Besides, the Fourteenth Amendment did not prohibit states from subjecting their citizens to double jeopardy. The claim that Connecticut was precluded from doing so rested on the "remarkable proposition" that the state "has set up a process of criminal law which so violates our fundamental notions of justice and humanity as to be beyond the pale of 'due process.'" To ramble on about the principles of the English common law tradition was pointless, Comley said, for those principles, "about which so many rhapsodies have been composed, took form in an age when the great objective was to protect the innocent against political persecution and are now almost invariably invoked by the guilty to defeat what most people regard as the proper ends of justice."[25]

On March 4, 1937, the Supreme Court of Errors ruled unanimously against Palka. In a case such as his, where error is committed, "there is but one jeopardy and one trial. . . . [T]he second trial is not a new case but is a legal disposal of the same original case, tried in the first instance." Moreover, past Supreme Court decisions made it clear that "[t]he privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the power of the federal government."[26] And so the stage was finally set for the Supreme Court to consider the issue. On November 12, 1937—more than two years after the murders of Kearney and Walker, more than a year after Palka's second conviction, and eight months after the date first scheduled for his execution—Benjamin Cardozo and his fellow Justices heard argument in *Palko v. Connecticut,* the case involving a man who, for legal purposes, was known by a name other than his own.

## "Ordered Liberty:" *Palko v. Connecticut*, 1937

The brief David Goldstein and George A. Saden submitted to the Supreme Court, written largely by Saden, did, in fact, point out that the appellant's name "is properly spelled 'Palka'."[27] This having been said, his attorneys, in a seventy-five-page document, did not mention his name again. The opposing brief, prepared by Lorin W. Willis, by now the state's attorney, and William H. Comley also used "Palko" only once and thereafter merely referred to the "appellant." Nor would Cardozo's decision mention the man whose life was at stake. In the Supreme Court, issues pertaining to the trial, the testimony, the confession and the evidence no longer mattered, but only questions relating to double jeopardy and the meaning of the Fourteenth Amendment.

Saden was on solid ground in arguing that the Justices had before them a classic example of double jeopardy. The Court had said as much in a 1904 case involving a lawyer, Thomas E. Kepner, charged with embezzlement. Kepner, who practiced in Manila, was acquitted in a trial before a judge; the United States appealed to the supreme court of the Philippine Islands, which reversed the verdict; a second trial led to a guilty verdict and a jail sentence. Kepner appealed to the Supreme Court of the United States, citing the Fifth Amendment's Double Jeopardy Clause. The government claimed that Spanish law, which prevailed before the United States acquired the Islands, ought to govern the proceedings, but the Supreme Court disagreed, holding instead that Congress intended the Constitution, and, of course, the Bill of Rights, to apply to the Philippines. Finding in Kepner's favor, although by a slender 5-4 vote, the Court held that "a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him certainly so after acquittal." The Fifth Amendment offered protection not against "the peril of second punishment, but against being again tried for the same offense."[28]

Saden ventured onto less secure terrain, however, when he argued that the Fourteenth Amendment's Privileges and Immunities Clause and Due Process Clause incorporated this same right against the states, a point *Kepner*, a federal case, had not addressed. Seeking any foothold, however precarious, he turned first to history. He wished, he said, to submit "a scholarly document which, to counsel's knowledge, has not hitherto been called to the court's attention." It was Horace E. Flack's **The Adoption of the Fourteenth Amendment**, published in 1908 by The Johns Hopkins University Press. After combing through the congressional debates of 1866, Flack had reached an "inexorable conclusion:" that "the effect and purpose of the [F]ourteenth Amendment was to incorporate the first eight amendments of the federal constitution under the due process clause of the Fourteenth [A]mendment so as to make them applicable to the states."[29]

Granted, the Supreme Court had not accepted this doctrine of full incorporation, but—and here Saden took the next tentative step—it had surely recognized that some elements of the Bill of Rights, notably freedom of speech, applied to the states as well as the federal government. In 1932, moreover, in *Powell v. Alabama,* a case growing out of the notorious trial and conviction of the "Scottsboro boys," the Court had applied the Sixth Amendment right to benefit of counsel in capital cases (and effective counsel, at that) to the states. Was the rule against double jeopardy any less vital, any less national in scope, indeed any less "sacred"? Not to Saden, who declared: "The right against double jeopardy is a right so fundamental that it ought once and forever to be placed beyond the control of governmental action."[30]

Willis and Comley endeavored on behalf of Connecticut to refute the double jeopardy argument. They contented themselves, however, with citing Justice Oliver Wendell Holmes Jr.'s dissent in *Kepner,* where he said that "logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." The prosecutors further contended that the rule against double jeopardy was not "a fundamental principle of justice" and therefore did not deserve the special status the Court had accorded freedom of speech and the right to counsel. The rule, in fact, had lost whatever value it historically once had. A long time ago, in England, it had served as a check on Stuart despotism. "But this is another day and another generation; and as in those days the problem was to

secure justice against political autocracy, so in this day a very pressing problem is how better to secure decent law abiding citizens against the growing threat of daring and defiant crime."[31]

This argument would certainly appeal to Cardozo, especially when presented as a means of liberating the present from the dead hand of the past. Comley and Willis shrewdly claimed that the Connecticut statute permitting a retrial on the state's initiative showed "that the public policy of one generation may not, under changed conditions, be the public policy of another." But it was another phrase in the state's brief that captured Cardozo's attention. The prosecutors noted that the Connecticut courts' prior approval of the statute "contains no disparagement of the spirit of ordered liberty."[32] Striking language, to be sure, although hardly original. Herbert Hoover had mentioned "ordered liberty" in campaign speeches in 1928 and again in 1932. But the symmetry of the phrase, its apparent reconciliation of incongruous concepts, was perfectly suited to Cardozo's outlook, to his life-long quest for the happy mean.

Cardozo's opinion in favor of Connecticut, which was joined by all the Justices save Pierce Butler, who dissented but gave no reason, takes up only slightly more than eight pages in the Supreme Court's **U. S. Reports**. It revealed many of Cardozo's strengths as a judge and most of his weaknesses. His admirers maintain that *Palko* preserved the delicate balance between communal values and individual liberties. "Acting his part in the constitutional distribution of authority," John T. Noonan, Jr., has written, "Cardozo had let the community vindicate its officers."[33] On the other hand, John Raeburn Green has characterized Cardozo's opinion as a "belletristic essay, which gave the scantiest consideration to profoundly important matters."[34] Whatever the disagreements, for more than thirty years Cardozo's opinion served as a canonical text for judges and legal scholars who favored selective incorporation, the doctrine that under the Fourteenth Amendment's Due Process Clause only some of the provisions of the Bill of Rights, not all of them, applied to the states.

At the outset, Cardozo summarized the facts of the case and the lower court rulings, and then immediately announced the Court's decision: "The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution." Even before presenting the defense's argument, therefore, he had signalled that it was not going to be found persuasive. That argument, Cardozo continued, was that the retrial, "though under one indictment and only one," constituted double jeopardy and that "whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also." This represented only one aspect of Saden's full incorporation theory, but the aspect—concerning double jeopardy—that Cardozo wished to address first. In fact, he wanted to find a way to employ the Court's decision in *Kepner,* which seemed to bolster the defense, to support an opposite result.

He began this way: "We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions." He noted that the issue had been "much considered" in *Kepner* and decided "by a closely divided court." He then summarized the majority view, which forbade jeopardy in the same case if the new trial was at the instance of the government, and conceded that "all this may be assumed for the purpose of the case at hand." That is, the federal government would not have been able to do to Palka what Connecticut had done to him. Nevertheless, the dissenting opinions in *Kepner*

> show how much was to be said in favor of a different ruling. Right-minded men . . . could reasonably, even if mistakenly, believe that a second trial was lawful. . . . Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind.

So the lesson to be drawn from *Kepner* was not that the kind of double jeopardy to which the Manila lawyer had been exposed violated the Fifth Amendment; rather, it was that intelligent people could reasonably disagree about what constituted double jeopardy. Cardozo now felt confident in applying this lesson to the Connecticut case: "Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states?" Not at all, because the consciences of at least

four Justices, all of them right-minded, found it acceptable. Cardozo had imperceptibly reformulated the issue, for the division in *Kepner* was over whether a certain procedure constituted double jeopardy, not over whether the immunity from double jeopardy was repugnant to the conscience of mankind.

Now he was ready to take on the full incorporation argument. The defense contended, he said, that "whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule." To demonstrate this, Cardozo recapitulated prior Supreme Court rulings. On the one hand, the Court had refused to apply certain features of the Bill of Rights to the states, such as the Fifth Amendment provisions for a grand jury indictment and protection against self-incrimination and the Sixth Amendment right to trial by jury. On the other hand, the Court had employed the Due Process Clause to protect freedom of speech and the press, the free exercise of religion, the right of peaceable assembly, and the right to benefit of counsel in certain cases. He concluded:

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Cardozo's classification of prior decisions was technically correct but somewhat misleading. The cases involving the "unincorporated" rights had arisen in the period between the Civil War and World War I, those involving the "incorporated" rights in the decade from 1925 to 1935. True enough, the more recent decisions had affected rights under the First, not the Fifth Amendment, and in that sense the Court was being asked to do something quite novel. Yet the Justices had shown a willingness to amplify the individual rights that were protected against state action. The issue before the Court in 1937 was whether the protection against double jeopardy should be added to that list. Cardozo made it appear as if the issue was whether the protection against double jeopardy fell on one side or another of a fixed line.

That line, Cardozo wrote, "may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence." The incorporated rights, he said, "may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty." To abolish trial by jury and grand jury indictments would not violate those principles of justice, and here he quoted his own opinion in *Snyder v. Commonwealth of Massachusetts*, "so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental." A "fair and enlightened system of justice" would still be possible without them. The same was true of the immunity from compulsory self-incrimination. "This too might be lost, and justice still be done." Some even considered the immunity "a mischief rather than a benefit," and would abolish it. "No doubt there would remain the need to give protection against torture, physical or mental," he conceded, adding: "Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry." So the line of division between the two sets of rights had been "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."

Turning to those liberties which the Court had placed under the shield of the Fourteenth Amendment, Cardozo said that "neither liberty nor justice would exist if they were sacrificed." This was true of freedom of thought and speech: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." So, too, the Court had protected "liberty of the mind as well as liberty of action." A rejoinder to this argument, one Cardozo chose not to address, could be found in Saden's brief on behalf of Frank Palka. Since the right against double jeopardy "protects life itself as well as liberty," Saden asserted, it should be considered "paramount" to any other: "Free speech, a free press, peaceable assembly, the aid of counsel, and just compensation for property are of little value to a dead man."

Cardozo faced one final hurdle: the Court's position, and his own vote, in *Powell v. Alabama.* Why, after all, should the Sixth Amendment's right to benefit of counsel in capital cases apply to the states, but not the Fifth Amendment's immunity from double jeopardy? The nine black youths who had been accused of raping two white women in Scottsboro, Alabama, had been provided with a lawyer, although not one capable of mounting an adequate defense. The Supreme Court had held that the failure "to make an effective appointment of counsel" was "a denial of due process within the meaning of the Fourteenth Amendment."[35] Cardozo plausibly maintained that the right to counsel protected in *Powell* did not derive from incorporation of the Sixth Amendment but rather from the phrase "due process" in the Fourteenth Amendment. He offered the following explanation:

> The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

The way was now clear for Cardozo to relate his general argument to the specific case before him. There was a dividing line, he reiterated, which, "if not unfaltering throughout its course, has been true for the most part to a unifying principle." On which side of the line did *Palko* fall? "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it?" This formulation represented a dramatic verbal escalation: Cardozo had first talked about a practice repugnant to conscience; then about a practice that violated fundamental principles of justice; and now about a practice that created an unendurably acute and shocking hardship. Phrased that way, the question was an easy one: "The answer surely must be 'no.'"

Cardozo conceded that the answer might be different if the state were seeking to retry a person after a trial free from error, but that was not the situation presented to the Court.

> The state is not attempting to wear the accused out by a multitude of cases with acccumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. . . . This is not cruelty at all, nor even vexation in any immoderate degree.

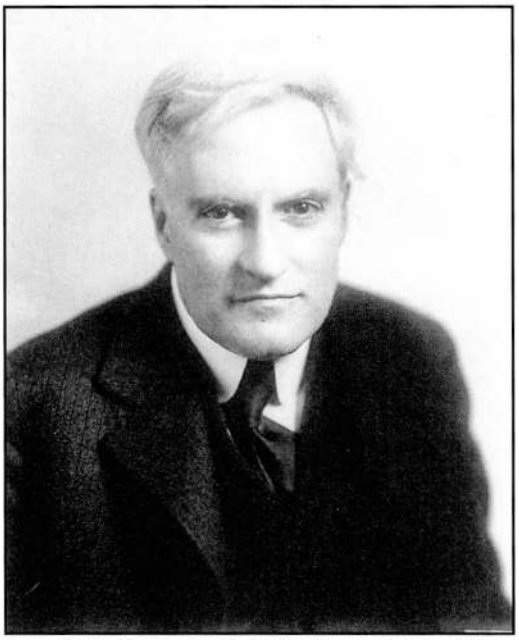
The state merely sought the same right to appeal a verdict based on error that defendants already had. "There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before."[36] On April 12, 1938, Frank Palka, playing his part in maintaining that edifice, went to the electric chair "without the slightest faltering or tremor or word."[37]

As John Raeburn Green has pointed out, Cardozo was saying in effect that "the rights of the accused guaranteed by the Bill of Rights were nice things to have, no doubt, but luxuries, not necessities."[38] In one way or another he had been saying the same thing in *Defore* and *Snyder.* Yet Cardozo presented a more elaborate theoretical justification for his position in *Palko,* which therefore raised thornier problems than the earlier cases. Cardozo was maintaining three related propositions: that there was an agreed-on hierarchy of rights, a rational way of determining where in that hierarchy a given right stood, and a bright line between rights that were and were not "of the very essence of a scheme of ordered liberty." But Cardozo's "vague formulations," as Richard C. Cortner has said, furnished no reliable criteria for making any of those determinations.[39]

Nevertheless, in later years Cardozo's decision became the lodestar for those who supported the doctrine of selective incorporation. *Palko* pointed the way for Justice Felix Frankfurter, the most ardent champion of that doctrine, when he voted against applying the right to counsel and the privilege against self-incrimination to the states.[40] Ironically, Justice Hugo L. Black, who had voted with Cardozo in 1937, emerged as the harshest critic of *Palko.* By 1942 he was saying that "the Fourteenth Amendment made the Sixth applicable to the states" and citing the same Horace E. Flack whose work Palka's lawyers had first brought to the Court's attention. In 1947

Black proposed a theory of total incorporation, claiming that it provided the only alternative to "the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights." The original purpose of the Fourteenth Amendment, he declared, was "to extend to all the people of the nation the complete protection of the Bill of Rights."[41]

The Supreme Court never accepted this in theory, but it did what Black would see as the next best thing: it accepted it in practice. The process of incorporating the criminal justice provisions of the Bill of Rights began with *Mapp v. Ohio* in 1961 and culminated in *Benton v. Maryland* in 1969. In that case the Court expressly rejected the *Palko* doctrine of the inapplicability of double jeopardy to the states. Justice Thurgood Marshall spoke for the majority: "We today find that the double jeopardy prohibition of the Fifth Amendent represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amenment." The Court, as Marshall explained, was rejecting in its entirety *Palko's* "approach to basic constitutional rights." The validity of a defendant's claim could no longer be judged, Marshall said, "by the watered-down standard enunciated in *Palko*."[42]



**In *Palko* Justice Benjamin N. Cardozo maintained three related propositions: that there was an agreed-on hierarchy of rights, a rational way of determining where in that hierarchy a given right stood, and a bright line between rights that were and were not "of the very essence of a scheme of ordered liberty."**

Justice John Marshall Harlan, joined by Justice Potter Stewart, dissented, with Harlan, the most notable defender of the Cardozo-Frankfurter approach, complaining: "Today *Palko* becomes another casualty in the so far unchecked march toward 'incorporating' much, if not all, of the Federal Bill of Rights into the Due Process Clause." That march, Harlan argued, threatened to destroy the principle of federalism. He had high praise for the decision Thurgood Marshall so brusquely dismissed:

> More broadly, that this Court should have apparently become so impervious to the pervasive wisdom of the constitutional philosophy embodied in *Palko,* and that it should have felt itself able to attribute to the perceptive and timeless words of Mr. Justice Cardozo nothing more than a 'watering down' of constitutional rights, are indeed revealing symbols of the extent to which we are weighing anchors from the fundamentals of our constitutional system.[43]

So the Supreme Court eventually expanded the rights of defendants in state criminal trials. But in 1937 it was logical to assume that *Palko* would lead to a further limitation of those rights. Writing in *The Atlantic Monthly,* George W. Alger, a New York City lawyer, praised Cardozo for favoring a system "in which the rights of the law-abiding are preserved and maintained, and crime both punished and repressed." Alger particularly noted Cardozo's comment that immunity from compulsory self-incrimination was not part of a scheme of ordered liberty. That opened the door for states to require such testimony under proper safeguards. The *Palko* decision, Alger said, was "written in that extraordinarily luminous English with which this Rembrandt of judicial statement expressed the logic of justice."[44] An artistic decision, perhaps, but it was a narrow palette Cardozo brought to his rendering of the Fourteenth Amendment. A later generation of jurists would have a keener appreciation of the creative possibilities implicit in its texture and design.

*Note: *This essay is excerpted from Richard Polenberg,* ***The World of Benjamin Cardozo: Personal Values and the Judicial Process,*** *to be published in September 1997 by Harvard University Press.*

## Endnotes

[1] *People v. John Defore*, 242 N.Y. 13, 17-18 (1926).
[2] 269 U.S. 19 (1925).
[3] Richard D. Friedman, "On Cardozo and Reputation: Legendary Judge, Underrated Justice?" *Cardozo Law Review*, 12 (1991), 1939.
[4] 291 U.S. 97 (1934).
[5] *Ibid.*, 123-138.
[6] *Ibid.*, 102-122.
[7] The murders and investigation were fully covered in *The Bridgeport Post, The Hartford Daily Courant,* and *The Waterbury Republican,* September 30-October 3, 1935.
[8] *Hartford Daily Courant,* October 30, 1935.
[9] *State of Connecticut v. Frank Palko*, Case and Points, Trial Transcript, p. 323.
[10] *Waterbury Republican,* November 6, 1935.
[11] *Bridgeport Post,* October 30, 1935.
[12] Case and Points, Trial Transcript, p. 335.
[13] Case and Points, Trial Transcript, p. 305. This testimony comes from the second trial, but undoubtedly was the same as that given at the first.
[14] *Ibid.*, "Plaintiff's Appeal," pp. 37-38.
[15] *Ibid.*, pp. 66-67.
[16] *Ibid.*, pp. 33-34.
[17] *Hartford Daily Courant,* January 24, 1936.
[18] General Statutes, Connecticut, Sec. 6494, Rev. 1930.
[19] Case and Points, "Brief for Appellee," p. 39
[20] *Ibid.*, "Brief for the State (Appellant)," p. 25.
[21] *State of Connecticut v. Frank Palko,* 121 Conn. 669, 670-682 (1936).
[22] *State of Connecticut v. Frank Palko*, Case and Points, Trial Transcript, p. 284.
[23] *Ibid.*, pp. 281, 355-356. Steve Burke was the third brother.
[24] *Ibid.*, "Brief for the Appellant (Accused)," p. 11-12.
[25] *Ibid.*, "Brief for the State of Connecticut," pp. 6-11.
[26] *State of Connecticut v. Frank Palko,* 122 Conn. 529, (1937) 530-542.
[27] *Palko v. Connecticut,* "Brief for the Appellant (Accused)," p. 3.
[28] *Thomas E. Kepner v. United States,* 195 U.S. 100 (1904).
[29] "Brief for the Appellant," pp. 31, 40.
[30] *Ibid.*, p. 69.
[31] "Brief for the State of Connecticut," pp. 6-7, 35.
[32] *Ibid.*, pp. 22-23, 35.
[33] John T. Noonan, Jr., "Ordered Liberty: Cardozo and the Constitution,"1*Cardozo Law Review*, 256, 282 (1979).
[34] John Raeburn Green, "The Bill of Rights, the Fourteenth Amendment and the Supreme Court," 46 *Michigan Law Review,* 869, 876 (1948); reprinted in Robert G. McCloskey, ed., **Essays in Constitutional Law** (New York, 1957), p. 392. *See* also Jay A. Sigler, **Double Jeopardy: The Development of a Legal and Social Policy** (Ithaca, NY, 1969).
[35] *Powell v. Alabama* 287 U.S. 45 (1935). *See* William E. Leuchtenburg, "The Birth of America's Second Bill of Rights," in **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York, 1995), p. 248.
[36] *Palko v. Connecticut,* 302 U.S. 319 (1937).
[37] *Bridgeport Post*, April 13, 1938.
[38] Green, "The Bill of Rights," p. 392.
[39] Richard C. Cortner, **The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties** (Madison, WI, 1981), p. 131.
[40] The cases were *Betts v. Brady* 316 U.S. 455 (1942) and *Adamson v. California* 332 U.S. 46 (1947).
[41] Cortner, **The Supreme Court and the Second Bill of Rights,** pp. 138ff.
[42] *Benton v. Maryland,* 395 U.S. 784, 793-796 (1969).
[43] *Ibid.*, 808-809.
[44] George W. Alger, "The Passing of the Alibi," *The Atlantic Monthly,* 164 (July, 1939), 105-110.

# Appealing Supreme Court Decisions: Constitutional Amendments as Checks on Judicial Review

**David E. Kyvig**

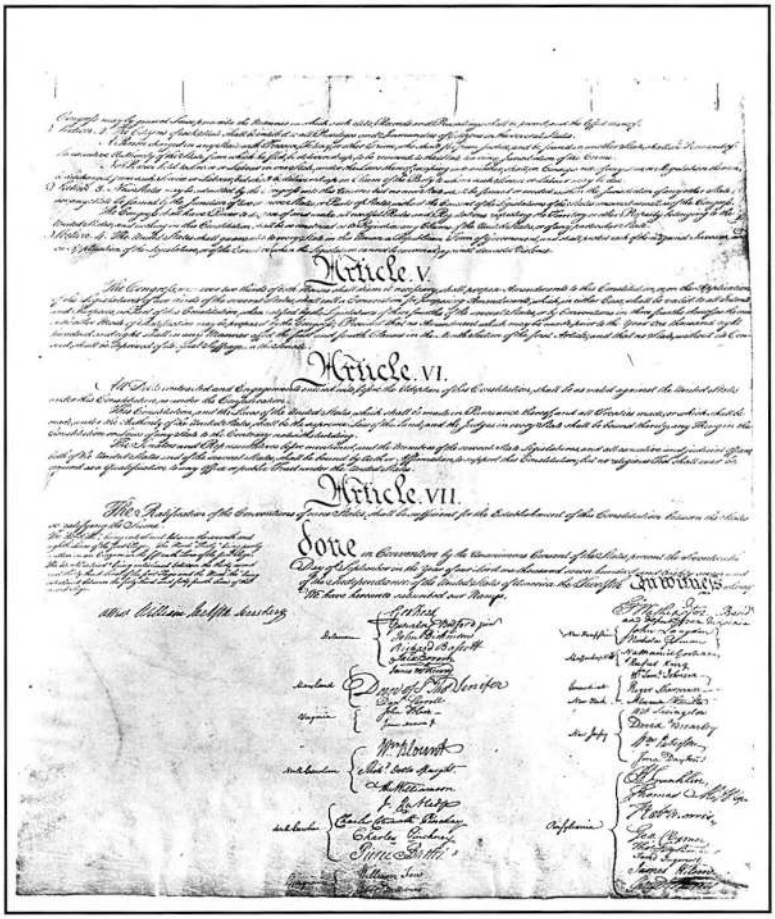
The duty of the federal judiciary "must be to declare all acts contrary to the manifest tenor of the constitution void," proclaimed Alexander Hamilton in **Federalist 78** as part of the newspaper campaign he, James Madison, and John Jay waged for the Constitution's ratification.[1] Since **The Federalist Papers** helped win acceptance of the 1787 Constitution, the view has been widely held that the Supreme Court speaks the final word on what is or is not constitutionally acceptable in the United States. John Marshall's masterful defense of judicial review furthered this notion, and it continued to spread thereafter. Abolitionists in the 1850s, populists in the 1890s, and New Dealers in the 1930s decried the Court's power to declare reform laws unconstitutional, a power they all regarded as misused but indisputable. Conservatives rail in the 1990s, as they have since the 1950s, against "judicial dictatorship" in general as well as individual Court decisions they find calamitous.[2] Across the political generations and spectrum Americans have regularly expressed anxiety at the prospect of a Court dominated by Justices of contrary views. Apprehensions about the effect of judicial rulings stem in no small part from the belief that the Court, or perhaps even a single Justice in an otherwise evenly divided Court, can irrevocably determine the powers, responsibilities, and limitations of the federal government.

This perception of ultimate judicial authority ignores the language of the 1787 Constitution, the intentions of its drafters, and more than two centuries of constitutional development. Hamilton himself acknowledged near the end of **Federalist 78** that a judicial ruling was binding only "[u]ntil the people have, by some solemn and authoritative act annulled or changed the established form."[3] The Founders, he understood though perhaps did not emphasize sufficiently, made constitutional amendment available as a final appeal of judicial interpretations of the Constitution. Hamilton's contemporaries were well aware of this means of constitutional clarification and adjustment. In state conventions called to ratify the Constitution, delegates repeatedly lauded the Article V amendment mechanism as insurance that the untried instrument could be made to function satisfactorily. They understood equally well that the absence or failure of efforts to reform the Constitution would sanction its existing terms as interpreted by the judiciary. During the state ratification conventions those who spoke of the amendment process talked of its vir-

tues as a device for constitutional adjustment.[4] James Wilson told the Pennsylvania ratification convention that Article V was "a principle of melioration, contentment, and peace."[5] In his 1796 farewell address, President George Washington extolled Article V as a means to make or alter the terms of government through "an explicit and authentic act of the whole people."[6] Subsequently, however, the role of constitutional amendment as a final check on judicial review appears often to have been lost from view.

A modern scholar troubled by inattention to constitutional amending, Bruce Ackerman of Yale Law School, has argued forcefully for its reconsideration. "Article V is *the* most fundamental text of our Constitution, since it seeks to tell us the conditions under which all other constitutional texts and principles may be legitimately transformed," he observes. "Rather than treating it as a part of the Constitution's code of good housekeeping," Ackerman insists, "we should accord the text of Article V the kind of elaborate reflection we presently devote to the First and Fourteenth Amendments."[7] Good reasons exist to support Ackerman's contention that the amending process, whether successful or not, should be accorded a place at the very heart of American constitutionalism.

The amendment process has served repeatedly as the ultimate appeal of judicial decisions. Usually amending efforts have failed and thereby solidified the authority of Supreme Court rulings. Of the thousands of amendments proposed, many have sought to reverse Court rulings; a mere handful have been approved. Those occasional exceptions deserve attention, however. They should serve as reminders that the Court's power has never been absolute. At the same time, even failed amending efforts should demonstrate that sanction for Court rulings rests on more than the judiciary's claims of jurisdiction. Bringing the historical relationship between the Supreme Court and the constitutional amending process into focus is not likely to put an end to overheated political rhetoric, but it should allow thoughtful citizens to evaluate


Article. V.
Article. VI.
Article. VII.
Done in Convention by the unanimous Consent of the States present the seventeenth
In Witness

**Article V of the United States Constitution—which provides for constitutional amendments—has served repeatedly as the final appeal of judicial decisions. The author seeks to make the case that it merits as much attention as more widely discussed amendments, such as the First and Fourteenth.**

claims of "judicial dictatorship."

In setting forth Article V, the architects of the Constitution displayed their quintessential thinking. First and foremost, the delegates to the Philadelphia convention perceived the necessity for written constitutions to define the powers of government. Concurrently, they believed it vital to strike a balance between a government stable enough to endure a crisis yet one flexible enough to adjust to new circumstance. Above all, the framework of government must remain responsive to the sovereign power of the people expressed in a republican manner. Whatever else they might have felt about the 1787 plan of government, most of the delegates subscribed to the Lockean notion that a constitution ultimately rested on popular sanction.[8] Provision for initial ratification and subsequent amendment to keep the Constitution in tune with that sovereign will was assumed from the outset to be an utmost necessity. Experience with the Articles of Confederation's flaws and the difficulty of remedying them persuaded the Founders of the need to establish amending rules different from the Articles' rigid requirement of unanimous state approval. The Philadelphia convention clearly did not wish the current combination of constitutional inadequacy and inflexibility ever repeated.

In the opening days of the Philadelphia meeting, the Virginia delegation's bold proposal for a new constitution contained a provision for easier amendment. At first some delegates failed to see the need for such a mechanism. Virginia's George Mason promptly rose to declare, "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."[9] Little more discussion about amending was felt necessary until the waning days of the convention, when the delegates readily accepted a provision for constitutional amendment when proposed by two-thirds of Congress and ratified by three-fourths of the states through legislatures or conventions.

Discussion of amendment methods was hardly at an end, however. Mason expressed fear that as matters stood, "No amendment of the proper kind would ever be obtained by the people, if the Government should become oppressive." Gouverneur Morris and Elbridge Gerry, sharing Mason's concern, proposed that the plan be revised to require that a convention be held to propose amendments on the application of two-thirds of the states. The delegates promptly and unanimously adopted the proposal, which, although never formally employed, nevertheless shifted the balance of political power in a democratic direction.[10]

With last-minute concessions to slave and small states, the convention completed defining the amending system. With that the Founders had very nearly finished their larger task.[11] At their last meeting on September 17, the delegates, with few exceptions, endorsed the result of their collective effort. The Constitution that they offered the country incorporated its entire complex plan of government into only seven articles. After the first four established provisions for the federal legislature, executive, and judiciary and for federal-state relations, Article V set forth the amending process and Article VI declared the supremacy of the Constitution once adopted by the terms laid out in Article VII. The arrangement of the various articles can be seen as underscoring the Founders' intent that amendment be available to over-rule judicial authority as well as alter specific constitutional arrangements. In the event of fundamental dis-satisfaction, amendment represented the final resort for a fuller articulation and ultimate maintenance of the supreme law of the land.

The amending system worked out in Philadelphia acknowledged that disputes might arise over the Constitution. Delegates did not believe it necessary to spell out in detail their assumption that the judiciary could settle most conflicts, but they did feel compelled to provide a last-resort process of resolution through amendment. Article V reflected the thinking of most delegates about a reasonable process of constitutional reconsideration. As finally set forth, Article V rested squarely on the belief that authority ultimately lay with the sovereign people to set new terms for their government if they wished. Changing the Constitution, though it did not require either congressional or state unanimity, did call for the highest degree of consensus demanded for any federal action. Thereby even a Supreme Court ruling regarding the supreme law of the land could be overturned. By ratifying the Constitution the state conventions explicitly

acknowledged that, unless a supermajority consensus for change emerged, states would accept the constitutional status quo.

The first Article V appeal from a judicial decision occurred only a short time after the 1787 Constitution went into force. The very first case entered on the Supreme Court's docket in 1791 raised the question of whether a citizen of another state or country could sue a state in the federal courts without the state's permission. The long-standing English common law doctrine of sovereign immunity created a complex legal problem in the U.S. federal system. Revolutionary war debt and property claims brought the issue before the Supreme Court. In *Chisholm v. Georgia*, the Court in February 1793 rejected a claim of state sovereign immunity and allowed South Carolinian Alexander Chisholm to sue the state of Georgia over an unpaid bill.[12]

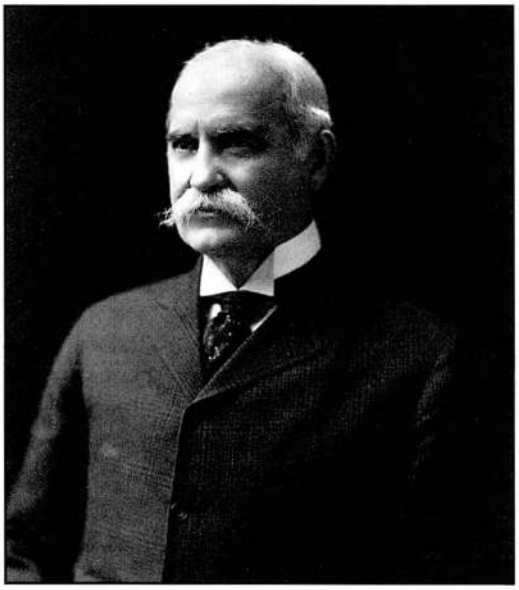
Georgia reacted by seeking a constitutional amendment to guard against "civil discord and the impending danger." State governments in New York, Virginia, and Massachusetts, all facing similar litigation, also sought an amendment to clarify state sovereignty. By the time the Third Congress convened in December 1793, a majority of states were on record favoring amendment. After little more than a day's debate the next month, the Senate adopted the resolution 23 to 2. Seven weeks later, after another short debate, the House of Representatives concurred 81 to 9. Ratification quickly followed. The legislatures of New York and Rhode Island approved the same month. Connecticut, New Hampshire, and Massachusetts acted before the end of June. Vermont, Virginia, Georgia, Kentucky, and Maryland all ratified during the fall. Delaware and North Carolina completed the process in the first weeks of 1795.[13] Less than two years after the Court ruled, its decision had been appealed and definitively reversed.

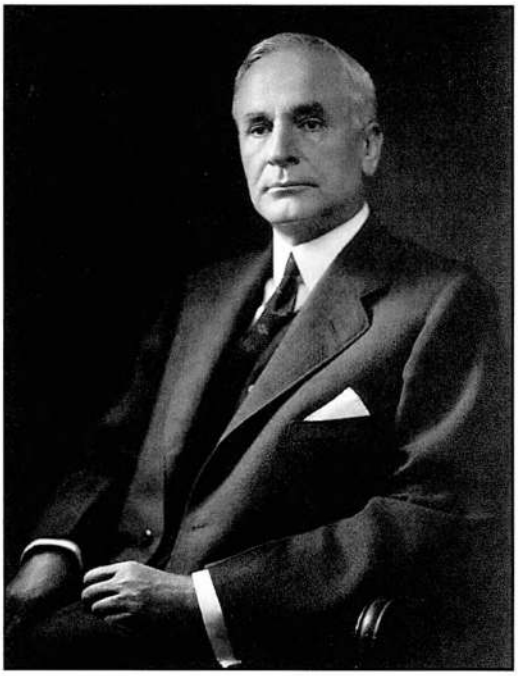
More than sixty years would pass before another Court ruling stirred such a widespread sense of a case wrongly decided. Again amendment resolved the issue, but this time the appeal process was neither simple nor smooth. In 1857 when the Court in *Dred Scott v. Sandford* held legislative restrictions on slavery unconstitutional, no remedy could be immediately agreed upon. It took a Civil War to resolve the complex issues of state sovereignty and slavery. The northern triumph and the accompanying sense that the Constitution had been maintained brought a felt need for a definitive constitutional statement of the victors' achievement. The Civil War amendments, in particular the Thirteenth abolishing slavery, specifically reversed the *Dred Scott* decision. The Thirteenth Amendment enunciated new social policy, overturned the Court's 1857 doctrine, and placed the federal government on the side of human rights rather than what had been understood to be private property rights; it also marked a dramatic federal entry into the realm of individual state authority. Therefore, it is not surprising that a constitutional amendment was believed necessary to assure its legitimacy and supersede judicial claims. What is noteworthy is that once a military resolution had been achieved, the process of amending the Constitution and reversing the Supreme Court's ruling took even less time than the earlier, less momentous achievement of the Eleventh Amendment.

Abraham Lincoln made it clear from the outset that he believed himself only empowered to emancipate slaves in rebellious states. Slavery abolition could not, in the President's view, be constitutionally imposed on loyal states such as Delaware and Kentucky against their will. While the war hung in the balance, the issue remained unresolved. As the fortunes of war turned in the Union's favor, however, northern desire increased for a complete and constitutional resolution. Once the 1864 election secured Republican power and manifested spreading antislavery sentiment, momentum for a constitutional solution accelerated. On January 31, 1865, the House of Representatives approved an amendment resolution earlier adopted by the Senate. State endorsement proceeded rapidly. Eight states ratified within a week; ten more completed action before the end of February. By July 1, nineteen northern states and four defeated secessionist states had approved the amendment. Four additional southern states acted by December 6, when the process was declared completed. Five more states, four of them northern, added their endorsements within the next seven weeks. The Supreme Court's *Dred Scott* decision had been decisively over-ruled.[14]

The Fourteenth Amendment overturned another antebellum judicial decision, though less definitively for the moment. The Court ruled in *Barron v. Baltimore* in 1833 that the Bill of

Rights applied only to the federal government, not to the states.[15] While the intent of the drafters of the Fourteenth Amendment has long been disputed, recent scholarship supports the view that the amendment was intended to impose upon state governments the obligation to honor the Bill of Rights. In a speech to the House on January 9, 1866, Representative John Bingham of Ohio disparaged the notion of independent state authority and proposed a constitutional amendment explicitly treating the privileges and immunities of all citizens as a national matter. "[H]ereafter," Bingham declared, "there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union."[16] Bingham's direct approach to a grant of federal authority, together with his forceful oratory and influential position, put his proposal in the forefront during the long and difficult drafting of the Fourteenth Amendment. Unfortunately, committee debate was not recorded, and, as a result, questions remain about what led to the final choice of language. Yet on its face the amend-





**When Congress took up tariff reform in 1909, Tennessee Representative Cordell Hull (below) championed the income tax as the most equitable system of taxation. He wanted Congress to adopt a new income tax and employ the pressure of public opinion to force the Court to reverse the 1895 *Pollock* decision declaring the tax unconstitutional. North Carolina Senator Joseph W. Bailey (above right) took up the fight, introducing a virtual copy of the invalidated 1894 Income Tax Act. This strategy troubled President William Howard Taft, exposed party infighting, and directly challenged the authority of the judiciary. Senator Nelson Aldrich of Rhode Island (above) proposed an income tax amendment that he thought was bound to fail in order to protect the Court from having to reverse itself. He miscalculated state support: the amendment was passed in the wake of sweeping Progressive reforms following the 1912 election.**

ment that emerged embodied a national guarantee of equality before the law for all citizens; it was a statement of principle upon which more than two-thirds of Republicans could agree.[17] The first section of the proposed amendment only slightly modified Bingham's original language banning state abridgment of individual rights and denial of equal protection or due process. During floor debate and again in an 1871 speech to the House, Bingham asserted that he had drawn this sentence so as to make the Constitution's first eight amendments binding on the states, explicitly reversing the *Barron v. Baltimore* declaration that they were not.[18]

In Bingham's mind no reason existed for later doubts as to whether the Fourteenth Amendment incorporated the Bill of Rights into the equal protection and due process obligations placed upon the states. Modern arguments to the contrary fail to account for Bingham's clearly stated and widely heard declarations.[19] Nevertheless, from the 1870s to the 1890s, a series of Supreme Court decisions construed the Fourteenth Amendment very narrowly. Not until the 1920s were First Amendment requirements held to bind the states, and it would be the early 1970s before the Court completed the piecemeal incorporation of the Bill of Rights upon the states. In so ruling, it should be noted, the Supreme Court repeatedly acknowledged that the Fourteenth Amendment invalidated *Barron v. Baltimore* and imposed a new constitutional arrangement.[20]

In 1895 a particularly controversial Supreme Court decision provoked another appeal to Article V. Congressional adoption of a federal income tax in 1894 prompted a swift, shrewd, and successful counterattack in the form of a cleverly orchestrated law suit. Ruling with unusual haste in *Pollock v. Farmers Loan and Trust*, the Supreme Court held an income tax to be unconstitutional. The decision focused public attention on the High Court's determined defense of an unrestricted laissez-faire economy. No Court decision since *Dred Scott* was so widely condemned, observed one legal scholar twenty years later. "It took hold of the popular imagination," he concluded, and fostered the impression that the rich were escaping the burden of paying taxes. The ability of the Court to frustrate a legislative and popular majority provoked great unhappiness. The income tax became a major 1896 election issue and remained a constant topic of political discussion thereafter.[21]

When Congress took up tariff reform in 1909, the income tax soon emerged as a central issue. Tennessee Representative Cordell Hull championed it as "the fairest, the most equitable system of taxation that has yet been devised." Pessimistic about obtaining a constitutional amendment to over-rule *Pollock,* Hull was ready to adopt a new income tax and employ the pressure of public opinion to force the Court to reverse itself. North Carolina Senator Joseph W. Bailey took up the fight, introducing a virtual copy of the 1894 act. This strategy troubled President William Howard Taft, exposing a fundamental division within his party and directly challenging the authority of the judiciary. Taft believed only the prior passage of an authorizing constitutional amendment would permit a federal income tax to be adopted without damage to the Court.

Senate Republican leader Nelson Aldrich, a determined opponent of the income tax, sought to play on Taft's desire to protect the Court. Aldrich proposed that, if Taft would endorse less-objectionable tax levies for the moment, he in turn would support Senate passage of an income tax amendment. Aldrich obviously thought that an income tax amendment would fail to win ratification. Such a defeat would strengthen the view that an income tax was constitutionally unacceptable. The shrewd Aldrich offer, which Taft accepted, stunned income tax advocates, who recognized it for the ploy it was. Yet Aldrich had placed income tax supporters in an awkward position. They could hardly vote against an amendment that would, in a constitutionally proper fashion, give them exactly what they sought. The Aldrich plan won quick congressional approval.

Aldrich miscalculated the willingness of states to ratify the proposed amendment. Although the process got off to a slow start, the 1910 elections manifested such an outpouring of support for Progressive reform that prospects brightened considerably. The sweeping Democratic-Progressive victories of 1912 put the amendment over the top. By March 1913, forty-two states had ratified, six more than required. In the end, neither partisan, sectional, nor economic divisions could thwart the amendment's broad popular appeal. Congress lost little time adopting a graduated income tax in 1913. Soon

called upon to review this legislation, the Supreme Court, in a transparent effort to save face, declared that the Sixteenth Amendment conferred no new taxing power on Congress; it merely restored a power that the Congress had held before 1895.[22] Even this lame confession underscored the manner in which the *Pollock* decision had been appealed to higher authority.

A Court ruling that took longer to over-rule through an Article V appeal than *Pollock* was *Minor v. Happersett*.[23] In this 1875 case, the Court unanimously rejected the argument that the Fourteenth Amendment's citizenship and privileges and immunities clauses conferred upon female citizens the right to vote. At the time of the Court's ruling, women's rights advocates held out some hope that suffrage could be judicially achieved. Foiled by the *Minor* decision, suffragists began uniting behind an Article V appeal. Within three years they succeeded in introducing into the U.S. Senate the Susan B. Anthony amendment to prevent denial or abridgment of the right to vote on account of sex. Forty-two years and a great deal of suffrage agitation would be required before the measure was enacted as the Nineteenth Amendment, but in 1920 the nation's highest judicial authority was once again clearly and decisively reversed on appeal.[24]

When the Eighteenth Amendment providing for national prohibition of alcoholic beverages was added to the Constitution in 1919, it faced immediate judicial challenge on both substantive and adoption procedure grounds. The Supreme Court quickly and decisively upheld the amendment in a series of rulings.[25] Thereafter rising sentiment throughout the 1920s for repeal of the Eighteenth Amendment represented an appeal from the Court's decisions as well as a manifestation of shifting public policy preferences. The 1933 reversal of the prohibition amendment by the adoption of another, the Twenty-first, represented a unique episode in the history of amending, but it was less unusual as a rejection of the federal judiciary's last word.[26]

Nearly forty years lapsed before relief from a Supreme Court decision by means of Article V was again successfully sought. This time action was unusually swift as well as decisive. When a December 1970 Court ruling created a gigantic electoral headache, it took little more than five months to adopt the Twenty-sixth Amendment to overcome the problem. The fastest ever process of constitutional amending represented yet another appeal of an unpopular judicial determination.

As the Vietnam War grew increasingly controversial, the military draft, for which all males became eligible at eighteen, provoked discussion of lowering the voting age. Despite mixed signals from state actions on suffrage age reduction, the Congress in June 1970 altered the 1965 Voting Rights Act to protect the right to vote of all citizens eighteen and over.[27] In October the Supreme Court heard arguments as to whether states or the federal government had authority over suffrage. Two months later the Court announced its decision in *Oregon v. Mitchell*. Four Justices concluded that Congress had power to set suffrage standards; four others disagreed. Given the even division, the view of the ninth Justice, Hugo L. Black, proved decisive. Black and consequently the Court ruled that Congress had authority to stipulate the voting age for federal elections but that states retained the power to determine the age for their own contests.[28]

While in keeping with previous Court judgments, *Oregon v. Mitchell* created the prospect of immense electoral complications. Eighteen- to twenty-year-olds could vote in federal contests but, unless states individually changed their suffrage requirements, these young citizens would be barred from simultaneous state balloting. A nightmare of election day confusion and extra expense loomed unless Congress either withdrew the eighteen-year-old voting provision or moved ahead with a constitutional amendment to define voting age on a national basis. Withdrawal would anger young people who would inevitably become eligible to vote within a short while; it presented a politically unpalatable option. Amendment, on the other hand, would have to be completed before the 1972 federal election to avoid *Oregon v. Mitchell*'s consequences. Faced with this dilemma, Congress and state legislatures expedited their Article V appeal of the Court's judgment.

An amendment resolution to extend suffrage to eighteen-year-olds was introduced in the U.S. Senate with eighty-seven cosponsors on January 25, 1971. The Judiciary Committee endorsed it on March 4, and the Senate gave approval 94 to 0 on March 10. Thirteen days later, the House concurred 401 to 19. Almost every state legislature was in session at the moment, and,

catalyzed by the specter of electoral confusion, they rushed to ratify the remedy. Five states acted on the very day the amendment passed Congress. The necessary thirty-eight states completed ratification in ninety-seven days.[29]

The voting age amendment won rapid adoption despite substantial evidence of public opposition. Voting age reduction had appeared on sixteen state ballots in 1969 and 1970, meeting rejection more often than not. Among the states ratifying the Twenty-sixth Amendment were eight of the ten in which voters had recently rejected lowering the suffrage age. When Congress and state legislatures rushed to approve the amendment, they challenged the prevailing belief that only constitutional changes enjoying manifestly overwhelming popular acceptance stood any chance of success. What caused law makers to abandon their usual caution was, without question, their eagerness to remedy an unpalatable Supreme Court decision by the only constitutional means available, an appeal to Article V.[30]

In all, more than forty percent of the post-Bill of Rights amendments to the Constitution, seven of the seventeen to date, involved direct reversals of Supreme Court decisions. The importance of the amending process as an appeal from judicial review ought, therefore, to be recognized. To the extent that this has not occurred, the explanation lies amidst the loud complaints about judicial authority from those pursuing an Article V remedy and particularly those who sought but failed to attain one. Appeals for amendment to over-rule controversial Court decisions have usually been rejected, often quite soundly. In such circumstances, the amending mechanism functioned to provide sanction for Court rulings that were not universally popular. Most often it became apparent that only a minority, albeit a vocal one, of the electorate or their representatives strenuously opposed the Court's position. In a few instances, a political majority favored amendment, but that majority fell below the level of support mandated for constitutional change. Such instances produced understandable frustration among critics of the judiciary even as they showed that either a majority or a significant minority, one constitutionally endowed with the power to block change, stood be-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hind the Court's ruling.

Throughout American history amendments have been seriously but unsuccessfully proposed to negate Court rulings. In an effort to end the uproar over slavery provoked by *Dred Scott*, Congress in March 1861 approved an amendment to guarantee the continuation of slavery in states where it currently existed. The Civil War nevertheless erupted, and the amendment was quickly abandoned.[31] In the 1920s, fury over the *Hammer v. Dagenhart* and *Adkins v. Children's Hospital* decisions led Congress in 1924 to approve a child labor amendment. The Court's change in direction after 1937 ended the perceived need for this amendment, but not before twenty-eight states had ratified it.[32]

In recent decades Article V appeals of Supreme Court decisions in particular have become common. The 1960s produced multiple attempts to reverse judicial decision; several made significant progress before failing. Reaction to *Brown v. Board of Education* prompted an attempt to secure a trio of amendments to enhance state power to resist the federal judiciary. Later, Court rulings on the apportionment of legislative districts led opponents to pursue amendment. Likewise, decisions declaring school prayer and Bible reading violations of the First Amendment generated amendment demands. Unhappiness with a major Supreme Court decision invariably provoked discussions of overturning it through Article V. However, when amending efforts to reverse judicial rulings failed, Court decisions gained greater authority.

Unhappiness with extensions of federal power, especially those beginning with *Brown* that required states to reform their racial practices, led state rights defenders to seek constitutional change. The Court's 1962 *Baker v. Carr* decision, declaring state legislative apportionment subject to judicial review, enlarged the controversy.[33] *Brown* and *Baker* discontent led the Council of State Governments, an organization established in 1933 to promote cooperation among governors, legislators, judges, and other state officials, to launch an Article V appeal. The Council proposed three state rights amendments designed to reverse the trend toward centralization of power in federal hands. State legislatures were urged to seek a federal convention to secure adoption of the three state rights amendments unless Congress approved them promptly. Half of the states' legislatures considered the trio of amendments in 1963. While not accorded an overwhelming endorsement, the state rights amendments did receive support from sixteen legislatures.[34] Chief Justice Earl Warren warned that the amendments "could radically change the character of our institutions."[35] Thereafter, hostile reactions to the state rights amendments stalled their momentum.

With the collapse of the Council of State Governments' initiative, attention narrowed to legislative apportionment. In 1964, the Court, in a series of decisions clarifying and extending *Baker v. Carr*, displayed a firm commitment to the principle of "one man, one vote."[36] White southerners and rural dwellers throughout the country realized that they were about to lose their favored political position unless they took action. Ten state legislatures asked Congress to propose a constitutional amendment empowering a state to use any criteria it wished in apportioning one house of its legislature; twelve other legislatures called on Congress to convene a constitutional convention for the same purpose.[37]

Senate Republican minority leader Everett Dirksen diligently pursued the quest for an amendment to protect state control of apportionment. He cleverly maneuvered to get his measure to the Senate floor in August 1965, where it fell seven votes short of the two-thirds required for passage. After a second Senate defeat the next session, Dirksen encouraged every state legislature that had not already done so to call for a constitutional convention. State rights proponents across the country responded, and in March 1967, a front-page *New York Times* story reported that thirty-two states had requested a convention. The *Times* exaggerated in claiming that the convention campaign was "nearing success," since not all of the petitions were consistent or had even been delivered to Congress.[38] Nevertheless, congressional speeches and press editorials at once began either applauding or warning that if only two more states took action, the two-thirds threshold of Article V would be met. As the implications of an unrestricted constitutional convention called under the terms of Article V began to sink in, even states' rights conservatives began to worry.

As the number of state requests for a constitutional convention increased, so too did legislative reapportionment. Changes in the

distribution of legislative power and rising apprehension about a constitutional convention slowed and then stopped Dirksen's crusade. Already stalled, the antireapportionment amendment effort collapsed entirely upon Dirksen's death in September 1969. The "one man, one vote" principle, at first so much resisted in some quarters, rapidly became embedded in the national sense of democratic values.

Hostile reaction to a cluster of early 1960s Supreme Court rulings against religious oaths for state employees, school prayer, and Bible reading stirred another amending initiative.[39] Many American Christians were angered at having what they regarded as modest and appropriate religious rituals banned from the schoolhouse. They appealed the Court's rulings through Article V. Not as well organized, able to agree on language, or tactically clever as the attempt to overturn the apportionment decisions, the campaign for an amendment to return prayer to public school classrooms repeatedly fell short of its goal.

President John Kennedy's gentle suggestion that religious activity could go on without state support failed to assuage zealous Christians offended by the Court's ruling. House Judiciary Committee Chairman Emanuel Celler received, and for twenty-two months resisted, a flood of calls for amendment. When hearings finally began in April 1964, 117 Representatives had introduced 154 resolutions proposing thirty-five different constitutional amendments. At first Celler simply allowed amendment advocates to vent their unhappiness. Then he began raising questions about how a school prayer amendment would be worded and how it would work. As the hearings proceeded, Celler elicited statements from national and local religious groups opposed to an amendment. Religious decisions by local majorities, it became clear, would work against the interests of nearly every denomination somewhere in the country.[40] By the time the hearings concluded, awareness of the prayer amendment's liabilities was mounting and congressional enthusiasm for a vote on the issue was rapidly waning. The House concluded that it was best to do nothing.

Senator Dirksen kept the prayer issue alive by introducing an amendment resolution to allow administrators of schools and other public buildings to permit voluntary prayer but prohibit them from prescribing the form or content of the prayer. The Senate held six days of hearings on Dirksen's amendment in August 1966. Dirksen overcame an unsympathetic Judiciary Committee to obtain a Senate vote on his amendment the following month. Although the resolution carried 49 to 37, the majority fell twelve votes short of the necessary two-thirds for adoption.[41]

Ohio Republican Representative Chalmers Wylie attempted to revive the prayer amendment in 1971. He enlisted a House majority to petition for discharge of an amendment resolution from the committee where it lay buried. Finally compelled to vote, the House registered a 240 to 163 majority in favor of the measure. The tally fell a substantial twenty-eight votes short of the two-thirds required for passage.[42] Confirming the absence of supermajority congressional support, the House vote ended prayer amendment agitation for the time being.

Although no school prayer amendment emerged from Congress, the discussion of one contributed to a public perception that the school prayer question remained unresolved. Especially in the South and East, where schoolhouse Bible reading and prayer had been much more common than in the Midwest and West, the practice continued. Even where schools complied with the Court decisions, resentment toward the rulings remained high.[43] To the legally and constitutionally unsophisticated, the Supreme Court had suppressed rather than protected free religious expression. Their inability to overturn the Court's decision through amendment strengthened their view of judicial authority as unrestrainable.

The *Roe v. Wade* decision of 1973 stirred similar resentment against the Court. After his inauguration in 1981, President Ronald Reagan lost no time in meeting with leaders of the "Right to Life" movement whose cause he had embraced and who had helped him attain the presidency. He pledged support for an antiabortion constitutional amendment, and Utah Senator Orrin Hatch, a long-standing abortion opponent, promptly offered one. Hatch sought to disarm criticism by presenting his amendment as a means of making abortion a question of states' rights and democratic will, but his characterization was immediately disputed. The requirements of Article V rendered constitutional amendment impossible without a national con-

**In the mid-1960s, Senate Republican minority leader Everett Dirksen diligently pursued the quest for an amendment to protect state control of apportionment. His crusade stalled without the requisite two-thirds vote needed for an amendment and ended with his death in 1969.**

sensus against abortion that simply did not exist. Surveys of public opinion indicated that nearly three-fourths of Americans agreed that women should have a legal right to abortion, although a substantial portion of this support was reluctant and qualified. Opposition, on the other hand, stayed absolute and passionate. Compromise on abortion, around which a constitutional consensus could assemble, remained out of reach. Orrin Hatch won unanimous subcommittee approval for his proposed amendment and a less clear-cut 10 to 7 endorsement from the full Judiciary Committee. However, in the full Senate the Hatch amendment went down to defeat 49 to 50.[44]

The 1982 defeat of the antiabortion amendment was much more severe than it appeared. The failure to achieve even a majority, much less the necessary two-thirds supermajority, for a relatively mild antiabortion amendment deflated the attempt to reverse *Roe v. Wade* through Article V action. Hatch found no support for his effort to revive the amendment in 1983. Not only the Reagan administration but also its like-minded successor declined to invest more energy in pursuing a goal that appeared unattainable. Instead, they pursued the more modest objectives of denying federal funds for abortions and naming federal judges who might overturn *Roe*. However, as decisions mounted in which even Reagan- and Bush-appointed judges upheld *Roe*'s central conclusion that women possessed a private right of choice concerning their own bodies, even though that right had to be weighed against the responsibilities of the state and the rights of spouses and fetuses, the significance of the 1982 defeat became ever clearer. While a constitutional amendment proposal might rally a political movement, failure to come within reach of an Article V supermajority could cause a substantial interest group to decline in stature and, conversely, reinforce the power of the Court's ruling.[45]

Ronald Reagan again struck the pose of constitutional reformer in May 1982. Acknowledging his support among conservative Christians, Reagan revived the amendment to allow prayer in public schools. The day after the President's appeal, Strom Thurmond and Orrin Hatch offered the measure to the Senate. The same questions that had stymied its proponents in the 1960s quickly resurfaced. How was the character of prayer to be determined? How could a right be protected not to conform to whatever prayer ritual was established? The proposed amendment sought to resolve these questions by declaring prayer to be voluntary, but objections persisted that locally dominant sects would determine the nature of prayers and that children of other or no faith would feel pressure to conform.

The Reagan administration displayed less interest in resolving the complex constitutional questions raised by the prayer issue than in demonstrating its support for school prayer. An assistant attorney general appeared before the Senate Judiciary Committee to testify, "I really see nothing wrong whatsoever with teaching minorities that they ought to respect the views of the majority in matters of prayer and other things."[46] This attitude came to trouble even Orrin Hatch, whose Mormon church was dominant in his home state of Utah but a minority almost everywhere else. Hatch eventually embraced a Judiciary Committee compromise on a narrowly drawn amendment authorizing only silent prayer or meditation in public schools.[47] In the absence of enthusiasm or consensus among potential supporters, this compromise amendment died. In 1995 a new generation of Republican leaders spoke enthusiastically of a "religious equality amendment," but old concerns about minority rights remained formidable obstacles to any consensus

on constitutional change.[48]

The Supreme Court in 1989 decided that laws prohibiting flag desecration were unconstitutional because they infringed protected symbolic expression. Within a day, the Senate, by a 97 to 3 vote, expressed "profound disappointment." Not to be outdone, President George Bush called for a constitutional amendment to overturn the decision. The right to protest government action must be protected, he said, but flag-burning "goes too far." Congress found itself caught between fear that opposing such a popular position invited severe defeat and distaste for action that would, thoughtful conservatives as well as liberals warned, alter the Bill of Rights.[49]

By mid-July 1989, as House hearings on a flag desecration amendment began, passions already appeared to be cooling while doubts grew about the wisdom of such an amendment. Still, fears lingered that opposing the flag-burning prohibition would be seen as unpatriotic and bear harmful political consequences. Senate Judiciary Committee chair Joseph Biden crafted a flag-burning statute as an alternative to a constitutional amendment. Supported as a means to avert an amendment, the statute quickly won overwhelming congressional approval despite widespread expectation that it would not survive Court review. Demonstrations at the Seattle post office and the Capitol in Washington challenged the statute as soon as it took effect. The Supreme Court soon ruled the flag protection act unconstitutional.[50]

After the second Supreme Court rejection of flag-desecration laws, critics felt their only option was to seek constitutional revision. Within an hour of the decision's announcement, President Bush again called for an amendment. Unexpectedly, flag burning failed to generate the political heat it had produced a year earlier. Within a week, nervous congressmen were reporting that the anticipated public outcry against the latest Court ruling had not materialized, while arguments regarding the need to defend the Bill of Rights had been effective. An effort by amendment supporters to delay a House vote was easily thwarted, after which the amendment resolution fell far short of two-thirds on a vote of 254 to 177. Five days later the Senate likewise defeated the amendment on a 58 to 42 vote.[51]

In spring 1995 another flag amendment was thrust forward by a newly elected Republican majority responding to appeals from fraternal, religious, and military veterans' organizations. The House on June 28 approved the flag-desecration amendment 312 to 120, with Republicans voting 219 to 12 in its favor and Democrats dividing 97 to 107.[52] Senate leaders delayed a vote for more than five months while they sought to enlist support. Democratic Senators John Glenn of Ohio and John Kerry of Nebraska, whose distinguished military service shielded them from political attacks on their patriotism, spoke out forcefully against the amendment as a threat to the First Amendment. Equally important, four Republicans joined the opposition.[53] On December 12, the Senate rejected the flag amendment on a vote of 63 to 36, the closest vote to date but still three votes shy of a two-thirds majority. Caution about constitutional change had again prevailed over popular sentiment.

The failure of attempts to over-ride flag burning, abortion, prayer, apportionment, and federal authority decisions of the Supreme Court by means of constitutional amendment strengthened the constitutional positions articulated by the Supreme Court. These episodes served, just as did successful amendments, to indicate the preferences of the American polity as a whole regarding the Constitution's terms. Appeal to the Article V process made clear whether a constitutional supermajority insisted on change or whether a large enough element of the polity was comfortable with the status quo to reinforce disputed Supreme Court rulings. The 1787 Philadelphia Convention's system of judicial explication of a supreme Constitution and supermajority requirements for amendment effectively met its desire for constitutional stability. Making amendment available but difficult served the Founders' objectives quite well.

Yet Article V's function as a check on judicial power, a device by which Court decisions could be over-ridden, should also be recognized. To a considerable extent, Article V served to support the Court, demonstrate that its rulings usually enjoyed sufficiently broad support as to be beyond effective challenge, or if tested, provoked insufficient opposition to be toppled. Nevertheless, Article V became, in more than one instance, the instrument by which the Supreme Court was overruled. The very existence of the amendment mechanism served as a caution to

the Court, and its use repeatedly provided vivid reminders that the Court's authority was finite. Judicial review could be and sometimes was overridden through a republican process. The appeal from Court rulings to Article V was a shrewd and subtle creation of the Founders that has served to keep judicial review within reasonable bounds while enhancing the authority of the Supreme Court. Ultimately, therefore, Article V has helped assure the durability of the 1787 Constitution.

## Endnotes

[1] Edward Meade Earle, ed., **The Federalist** (New York: Modern Library, 1937), 505.

[2] For a 1996 example, *see The New York Times,* January 30, 1996, B7.

[3] Earle, ed., **The Federalist,** 509.

[4] Jonathan Eliot, ed., **The Debates in the Several State Conventions on the Adoption of the Federal Constitution**, 2d edition, 5 vols. (Philadelphia: Lippincott, 1836-1845), passim.

[5] Quoted in Gordon S. Wood, **The Creation of the American Republic, 1776-1787** (Chapel Hill: University of North Carolina Press, 1969), 614.

[6] George Washington, Farewell Address, September 17, 1796, in James D. Richardson, ed., **A Compilation of the Messages and Papers of the Presidents, 1789-1897** (Washington, DC, 1897), 1:217.

[7] Bruce Ackerman, "Discovering the Constitution," *Yale Law Journal* 93 (1984): 1013, 1058.

[8] Edmund S. Morgan, **Inventing the People: The Rise of Popular Sovereignty in England and America** (New York: W.W. Norton, 1988) provides a splendid discussion of such views.

[9] Max Farrand, ed., **The Records of the Federal Convention of 1787,** revised ed., 4 vols. (New Haven: Yale University Press, 1937), I: 202-3.

[10] *Ibid.,* II: 629-30.

[11] Article V in final form read:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which made be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

[12] *Chisholm v. Georgia,* 2 U. S. (2 Dall.) 419 (1793); Clyde E. Jacobs, **The Eleventh Amendment and Sovereign Immunity** (Westport, CT: Greenwood, 1972), 46-55; John V. Orth, **The Judicial Power of the United States: The Eleventh Amendment in American History** (New York: Oxford University Press, 1987), 12-29.

[13] Jacobs, **The Eleventh Amendment,** 55-67.

[14] For a summary of the development of the Thirteenth Amendment, *see* Earl M. Maltz, **Civil Rights, The Constitution and Congress, 1863-1869** (Lawrence: University Press of Kansas, 1990), 13-28.

[15] 32 U. S. (7 Pet.) 243 (1833).

[16] *Congressional Globe*, 39th Cong., 1st sess., 157-58.

[17] William E. Nelson, **The Fourteenth Amendment: From Political Principle to Judicial Doctrine** (Cambridge: Harvard University Press, 1988), 61; Robert J. Kaczorowski, "Searching for the Intent of the Framers of the Fourteenth Amendment," *Connecticut Law Review* 6 (1972-73): 368-98.

[18] Maltz, **Civil Rights, the Constitution, and Congress,** 114-15.

[19] The fullest rendering of the view that the Fourteenth Amendment should be interpreted narrowly because many who voted for it were negrophobic can be found in Raoul Berger, **Government by Judiciary: The Transformation of the Fourteenth Amendment** (Cambridge: Harvard University Press, 1977); *see* also Alexander M. Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (1955): 1-65. The argument for the contrary, more expansive interpretation is well put in Michael Kent Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham: Duke University Press, 1986). A useful analysis of the controversy that adds weight to Curtis's conclusion can be found in Richard L. Aynes, "On Misreading John Bingham and the Fourteenth Amendment," *Yale Law Journal* 103 (1993): 57-104.

[20] From *Gitlow v. New York* in 1925 through *Furman v. Georgia* in 1972, the Supreme Court reviewed each of the Bill of Rights, guarantees one by one and ruled that they all obligated the states. Despite the majority view in *Palko v. Connecticut* and *Adamson v. California* that the Fourteenth Amendment did not fully incorporate the Bill of Rights as an obligation upon the states, the Court subsequently step by step arrived at essentially that conclusion.

[21] This paragraph and those immediately following are based on David E. Kyvig, "Can the Constitution be Amended? The Battle Over the Income Tax, 1895-1913," *Prologue* 20 (1988): 181-200.

[22] *Brushaber v. Union Pacific Railroad Co.,* 240 U. S. 1 (1916).

[23] 88 U. S. (21 Wall ) 162 (1875).

[24] The best overview of the adoption of the Nineteenth Amendment is still Eleanor Flexner, **Century of Struggle: The Woman's Rights Movement in the United States** (Cambridge: Harvard University Press, 1959).

[25] *Hawke v. Smith* 253 U. S. 221 (1920), *National Prohibition Cases* 253 U. S. 350 (1920), *Dillon v. Gloss* 256 U.S. 368 (1921).

[26] David E. Kyvig, **Repealing National Prohibition** (Chicago: University of Chicago Press, 1979).

[27] Wendell W. Cultice, **Youth's Battle for the Ballot: A History of Voting Age in America** (Westport, CT: Greenwood, 1992), 116-38.

[28] 400 U. S. 112 (1970).

[29] *Congressional Record,* 92d Cong., 1st sess., 5830, 7569-70; *The Constitution of the United States of America: Analysis and Interpretation.* 99th Cong., 1st sess. (Washington: GPO, 1987), 44.

[30] David E. Kyvig, "Amending the U.S. Constitution: Ratification Controversies, 1917-1971." *Ohio History* 83 (1974): 156-69.

[31] R. Alton Lee, "The Corwin Amendment in the Secession Crisis," *Ohio Historical Quarterly* 70 (1961): 1-26.

[32] Walter I. Trattner, **Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America** (Chicago: Quadrangle, 1970), 163-86.

[33] 369 U. S. 186 (1962).

[34] Reports of state legislative action on the state rights' amendments are fragmentary and not always in agreement. William G. Fennell, "The States' Rights Amendments—Debates of the 'Founding Fathers' Cast Doubts on Current Proposals," *New York State Bar Journal* (1963): 466-67, appears the most thorough, though it is sometimes at odds with Paul Oberst, "The Genesis of the Three States-Rights Amendments in 1963," *Notre Dame Lawyer* 39 (1964): 654.

[35] *The New York Times,* May 23, 1963, 1.

[36] *Wesberry v. Saunders* 376 U. S. 1 (1964): *Reynolds v. Sims* 377 U. S. 533 (1964); *WMCA v. Lomenza* 377 U. S. 633 (1964); *Maryland Committee for Fair Representation v. Tawes* 377 U. S. 656 (1964); *Davis v. Mann* 377 U. S. 678 (1964); *Roman v. Sincock* 377 U. S. 695 (1964); *Lucas v. Forty-Fourth General Assembly of Colorado* 377 U. S. 713 (1964).

[37] Apportionment, 87th-91st Congress, Memorials from State Legislatures, Record Group 46, National Archives, Washington, DC.

[38] *The New York Times*, March 18, 1967, 1, 12.

[39] *Torcaso v. Watkins* 367 U. S. 488 (1961); *Engel v. Vitale,* 370 U. S. 421 (1962); *Abington School District v. Schempp* 374 U. S. 203 (1963).

[40] U.S. House of Representatives, Committee on the Judiciary, *School Prayers: Hearing,* 88th Cong., 2d sess., 1964.

[41] U.S. Senate, Committee on the Judiciary, Subcommittee on Constitutional Amendments, *Dirksen School Prayer Amendment August 1966: Hearings* 89th Cong., 2d sess., 1966; *Congressional Record*, 89th Cong., 2d sess., 23556.

[42] *Congressional Record*, 92d Cong., 1st sess., 39886-958.

[43] Kenneth M. Dolbeare and Phillip E. Hammond, **The School Prayer Decisions: From Court Policy to Local Practice** (Chicago: University of Chicago Press, 1971); William K. Muir, Jr., **Prayer in the Public Schools: Law and Attitude Change** (Chicago: University of Chicago Press, 1967).

[44] *Washington Post,* June 8, 1981, A1, 4 and March 11, 1982, A1, 9; U. S. Senate, Committee on the Judiciary, *Human Life Federalism Amendment: Report*, 97th Cong., 2d sess., 1982, 7; Laurence H. Tribe, **Abortion: The Clash of Absolutes** Rev. ed. (New York: W.W. Norton, 1992), 164.

[45] U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Legal Ramifications of the Human Life Amendment: Hearings,* 98th Cong., lst sess., 1983; Tribe, **Abortion**, 167-228.

[46] U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Voluntary School Prayer Constitutional Amendment: Hearings*, 98th Cong., lst sess., 1984, 12.

[47] U.S. Senate, Committee on the Judiciary, *School Prayer Constitutional Amendment: Report*, 98th Cong., 2d sess., 1984.

[48] *Board of Education v. Mergens,* 496 U.S. 226 (1990); Frank Rich, "The God Patrol," *The New York Times,* July 12, 1995, A17.

[49] *Washington Post*, June 23, 1989, A1, 8; June 24, 1989, A17; June 28, 1989, A1, 4-5; July 1, 1989, A4; July 13, 1989, A4; George Bush, **The Public Papers of the Presidents of the United States: 1989** (Washington DC: GPO, 1990), 805-33.

[50] U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings* 101st Cong., 1st sess., 1989; U.S. Senate, Committee on the Judiciary, *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings* 101st Cong., 1st sess., 1989; July 14, 1989, A7; September 13, 1989, A1, 6; October 13, 1989, A21; *Washington Post,* November 1, 1989, A5; February 22, 1990, A5; and March 6, 1990, A4; *United States v. Eichman*, 496 US 310 (1990).

[51] *Congressional Record*, 101st Cong., 2nd sess., H4087-88, S8736-37.

[52] *Congressional Record,* 104th Cong., 1st sess., H6403-46; *The New York Times*, June 29, 1995, A1. Vermont Independent Bernard Sanders voted no.

[53] *The New York Times,* December 9, 1995, A8; December 13, 1995, A1.

# The Fuller Court and Takings Jurisprudence

**James W. Ely, Jr.**

The Supreme Court under Chief Justice Melville W. Fuller gained a deserved reputation as a champion of economic liberty.[1] Most historians have focused on the Court's scrutiny of regulatory legislation under the Due Process Clause, demonstrated by such landmark rulings as *Lochner v. New York*.[2] Yet the Fuller Court made an equally important and more lasting contribution to the evolution of jurisprudence under the Takings Clause of the Fifth Amendment.[3] With the Supreme Court today showing renewed interest in the Takings Clause as a shield for the rights of individual property owners,[4] persons interested in understanding the takings issue might find it profitable to examine the work of Fuller and his colleagues in dealing with this contested area of law.

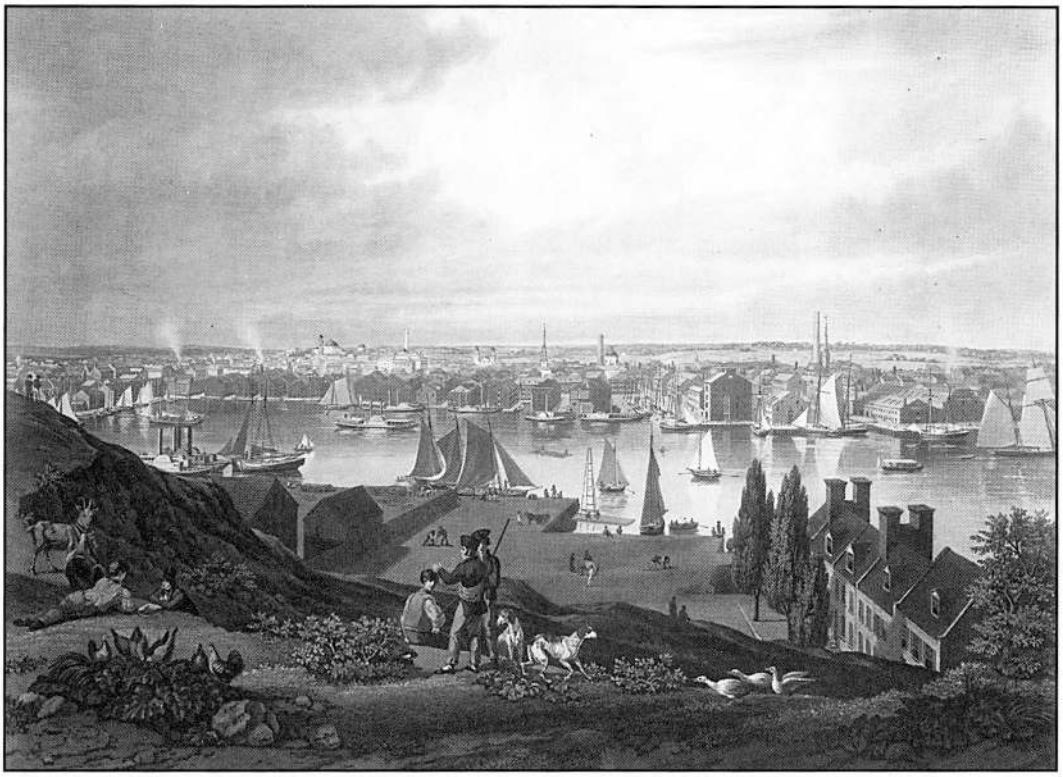
Before 1890 the Supreme Court heard only a handful of cases that turned upon the Takings Clause. Under the ruling in *Barron v. Baltimore*,[5] the Fifth Amendment was binding only on the federal government. The federal government instituted relatively few projects that necessitated taking private property, and consequently the Supreme Court had little opportunity to consider the meaning of the Takings Clause. The states therefore took the lead in fashioning eminent domain law under state constitutional provisions. Antebellum state legislatures saw eminent domain as a vehicle for economic development. They widely conferred eminent domain authority on private corporations for the purpose of constructing canals and railroads. State courts not only upheld such delegations, but initially tended to construe the concept of a "taking" as well as the requirement for "just compensation" narrowly.[6]

Toward the end of the nineteenth century, however, attitudes about eminent domain began to shift in the direction of greater protection for individual owners. Several factors coalesced to prepare the way for a new understanding of the takings question. Eminent domain was increasingly exercised by government itself rather than private enterprise. Historians have debated whether antebellum jurists shaped eminent domain law to curtail recovery in order to guard the slender resources of fledgling private corporations.[7] Such considerations, however, were less compelling with respect to public revenue.

Americans in the late nineteenth century

experienced sweeping social and economic changes. With rapid urbanization, industrial growth, and technological advances, government at all levels interacted with property owners in more complex ways. As government undertook more tasks, it employed eminent domain to achieve an expanding range of projects and enacted regulations that abridged the traditional rights of property owners. The federal government, for instance, undertook extensive river improvement that impaired the use of riparian land. Municipal governments increasingly appropriated property and imposed fledgling land use controls in order to shape the urban environment. To ensure an adequate water supply for their expanding populace, many cities moved toward municipal ownership of the water supply and acquired the facilities of private water companies. City leaders also expressed renewed interest in urban beautification.[8] The campaign to improve American cities necessitated the appropriation of private property for parks, boulevards, and elevated street railroads. Moreover, communities experimented with restraints on urban land use to address specific problems, such as the height of buildings and the preservation of visual harmony.[9] Many of these governmental actions imposed restrictions that markedly reduced the productive use of property. The growth of dense urban areas generated more comprehensive regulation to protect the inhabitants against fire and disease. Advances in scientific knowledge about public health linked spread of disease and slum housing. Concern about the living condition of immigrants and workers sparked a movement to reform tenements.[10] Yet the expense of complying with heightened health and safety measures often placed a heavy financial burden on landowners, and could be viewed as a backdoor taking of property.

At the same time, western states sought to exploit natural resources and hasten economic growth by expansive use of eminent domain. Western lawmakers adopted schemes to facilitate the irrigation of crops and mining of natural resources by authorizing private individuals to employ eminent domain power for private gain.[11]



**In 1833 the Court ruled in *Barron v. Baltimore* that the Fifth Amendment was binding only on the federal government. The case involved a wharf owner who sued the city of Baltimore for economic loss occasioned by the city's diversion of streams, which lowered the water level around his wharves. Above is a view of Baltimore harbor circa 1830.**

Notwithstanding this readiness to exercise governmental authority to alter existing property relationships, the prevailing constitutional philosophy stressed limited government and respect for the rights of property owners.[12] As a manifestation of this protective attitude, many states, starting with Illinois in 1870, amended their constitutions to mandate compensation when property was either taken "or damaged."[13] The obvious purpose was to enhance the rights of owners to recover for loss when government acts indirectly impaired the value of their property. This new constitutional outlook developed hand-in-hand with a more sophisticated concept of property ownership. Property was increasingly understood to encompass not just title to a physical object but beneficial characteristics such as the right to possess, transfer, use, and derive profit from it.[14] As early as 1877 Justice Stephen J. Field declared:

> All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.[15]

The tension arising from the conflict between enlarged governmental activity and heightened respect for the rights of property owners informed the takings jurisprudence of the Fuller Court.

During Fuller's tenure the Justices heard a number of appeals in which property owners claimed the protection of the Takings Clause against governmental intrusion. The Fuller Court was the first to come to grips in a sustained way with the takings issue, and it established the basis for subsequent developments in this field. The Justices never developed an overreaching conception of takings jurisdiction. Rather, they proceeded on a case-by-case basis. The Court's resolution of takings claims did not proceed in a one-dimensional way, nor did the Justices decide every case in favor of property owners. Indeed, the Justices often sided with the government. Yet Fuller and his colleagues tended to strengthen the Takings Clause and enhance the constitutional position of property owners. Moreover, by modern standards the members of the Fuller Court achieved a high degree of agreement in takings cases.

The relationship between the Takings Clause and substantive due process was elusive. Sometimes the Fuller Court conflated taking of property with deprivation of property without due process under the Fourteenth Amendment. Clearly the norm that government could not seize property without compensation shaped thinking about substantive due process rights.[16] Indeed, the Fuller Court analyzed some cases under the due process framework that today would likely be treated as a takings problem. Fuller and his colleagues did not achieve doctrinal precision in their takings jurisprudence, a result that has escaped the grasp of later Justices as well. Despite some uncertainty, however, the Court under Fuller did establish certain fundamental principles to govern application of the Takings Clause.

## Purpose of Takings Clause

An understanding of the purpose behind the Takings Clause may well be a determining factor in the outcome of particular cases. The Fuller Court probed the constitutional underpinnings of this provision on several occasions. In the pioneering case of *Monongahela Navigation Company v. United States*[17] Justice David J. Brewer, writing for a unanimous Court, emphasized that the Takings Clause was an integral part of the Bill of Rights. He also observed that the just compensation principle was grounded in natural law. According to Brewer,

> the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.[18]

To the Fuller Court, then, the Takings Clause served as a vital guarantee of the rights of individuals against abuses of government power. In a classic formulation, Brewer explained that the compensation principle "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."[19]

Fuller and his colleagues reiterated the fundamental importance of the Takings Clause in

*Madisonville Traction Company v. Saint Bernard Mining Company*.[20] Speaking for the Court, Justice John M. Harlan stressed that the just compensation principle "grows out of the essential nature of all free governments."[21]

As the Fuller Court recognized, Anglo-American constitutional thought had long associated security of property ownership with transcendent political values. Although sometimes shrouded in technical doctrine, takings jurisprudence requires the court to balance constitutional guarantees of property with the need to accommodate economic and technological changes. At root is a basic issue for a free society: should individual owners or the general public bear the expense of providing social goods? Put in other words, how far can society single out individuals to contribute a disproportionate amount toward particular governmental programs? The Supreme Court repeatedly grappled with this question during Fuller's tenure as Chief.

## Private Property "Taken"

There are three critical components to takings jurisprudence. The initial inquiry is whether property has been "taken" by the government. A vexing and long-standing problem is the extent to which governmental action, short of outright acquisition of title, effectuates a taking for which compensation must be paid. In Fuller's time a key issue was whether injury to adjacent property owners resulting from flooding or other physical invasion caused by governmental action should be treated as a compensable taking.

In the frequently cited case of *United States v. Welch*[22] the Fuller Court reaffirmed the principle that a permanent flooding of lands that renders them valueless constitutes a taking of property. Such a flooding was in effect an ouster of the owner's possession. The Justices also held in *Welch* that an easement of ingress and egress was a separate property interest within the protection of the Takings Clause. Hence, where governmental action destroyed an easement appurtenant to other lands by flooding the servient estate, the landowner was entitled to a separate compensation for the value of the easement in addition to the loss of land.

More complex issues were presented when the government flooded land in connection with the exercise of its power to control and regulate navigable waters in the interests of commerce. The Court heard a line of cases in which riparian owners suffered damage as a consequence of federal river and harbor improvements. At issue in *Gibson v. United States*[23] was the construction of a dike on the Ohio River that substantially reduced but did not entirely eliminate the claimant's access to the river. Declaring that the title of riparian owners was subject to the navigational servitude in favor of the government, the Court, speaking through Fuller, unanimously ruled that the injury did not amount to a taking of property. Instead, it simply represented the incidental consequence of a proper exercise of governmental authority. Likewise, in *Scranton v. Wheeler*[24] the Court, by a margin of six to three, held that the Takings Clause was inapplicable when a riparian owner lost all access to navigation because of the construction of a pier on submerged land in front of his property. Observing that "what is a taking of private property for public use, is not always easy to determine,"[25] the Justices reasoned that the injury was not a taking of property but merely consequential damage that did not require compensation. The majority pointed out that a riparian owner's right of access to navigable waters was subject to the paramount authority of Congress to improve navigation. Asserting that the right of a riparian owner to reach navigable water constituted private property, the three dissenters denied that the power of Congress over navigation could be exercised "without regard to the right of just compensation when private property is taken for public use."[26] *Gibson* and *Scranton* established the rule that loss of access rights to a navigable river because of governmental action does not necessitate the payment of compensation.

In contrast, when public works caused physical invasion of private property, the Court was more likely to find that there had been a taking. Speaking for a five-to-three majority in *United States v. Lynah*,[27] Justice Brewer ruled that a river navigation project that caused permanent flooding of a rice plantation and rendered it useless amounted to a taking. He treated the flooding as a physical invasion, which destroyed the use of and value of the land even though formal ownership was undisturbed. Yet in *Bedford v. United States*[28] the Justices unconvincingly distinguished *Lynah* and denied recovery for flooding damages resulting from erosion control

by the federal government along the Mississippi River. In *Bedford* the Fuller Court appeared more anxious to facilitate government control over navigable rivers than to safeguard the property rights of individuals.[29] The unsatisfactory upshot was continued confusion over the rights of an abutting owner to compensation for injury caused by navigation projects.

The Fuller Court also dealt with challenges to statutes that mandated expenditures to change existing structures. A contested issue was whether legislation compelling owners to bear the cost of compliance with regulations for public safety and welfare, or to improve navigation, was a taking. These regulations posed in a different form one of the fundamental questions in takings jurisprudence: who may pay for desired improvements?

States were prone to place heavy burdens in this regard on railroads, requiring expensive changes to accommodate street crossings and watercourse improvements. The Justices decided in *Chicago, Burlington and Quincy Railway Company v. Drainage Commissioners*[30] that a state, as part of a drainage project, could compel a railroad to remove an existing bridge and erect a new bridge at its own expense. Brushing aside an argument that this requirement effectuated a taking of property, the Court concluded that the cost of rebuilding was merely an incidental injury resulting from exercise of the police power. Justice Brewer, in a spirited dissent, suggested that it was "a principle of natural justice" that no one should be "compelled to pay out money for the benefit of the public without any reciprocal compensation." Maintaining that the purpose of the drainage project was largely to increase the value of certain privately owned farms, he charged that "the police power has become the refuge of every grievous wrong upon private property."[31] Likewise, in *West Chicago Street Railroad Company v. Chicago*[32] the Court, by a five-to-four

**In 1901 the Court upheld the New York Tenement Act requiring landlords to make improvements to the sanitary conditions of tenement houses such as the one pictured at left. Studies about the social costs of slums caused the Justices to view this measure as a proper exercise of the police power to protect public health. They were less concerned that the law imposed considerable expense on the landowner in order to comply with the regulation.**

vote, upheld a Chicago ordinance requiring a railroad to lower or remove its tunnel under the Chicago River in order to accommodate increased river navigation. The Court reasoned that the railroad was only obligated to remove an obstruction that it had placed in the river, and that such a duty could not be deemed a taking of private property for public use.

Moreover, the Justices allowed localities to impose structural changes on buildings in order to serve public health and safety. In *Tenement House Department of New York v. Moeschen*[33] the Court sustained, in a *per curiam* opinion, New York's pioneering Tenement House Act of 1901. This measure required tenement owners to install improvements on existing structures, such as windows and modern sanitary facilities. Evidently the Justices viewed this measure as a proper exercise of the police power to protect public health, and were untroubled by a law that imposed considerable expense on the landowner in order to comply with the regulation. Widespread concern about the social costs of slums swayed property-conscious Justices to uphold tenement reform.

But Fuller and his colleagues were prepared to restrict state authority to compel the construction of new facilities in some situations. This was demonstrated by *Missouri Pacific Railway Company v. Nebraska*,[34] a case decided late in Fuller's tenure. A state law required railroads, upon application by any person, to build at their expense a sidetrack to reach the applicant's grain elevator. Justice Oliver Wendell Holmes, Jr., speaking for a majority of seven, declared the statute to be an unconstitutional deprivation of property without due process. He noted that "railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away." He questioned why the carriers should be expected to pay for essentially private connections, and found that the statute was void "because it does not provide indemnity for what it requires."[35] In effect, the Court determined that requiring a railroad to spend money for private facilities might represent as much a taking of property as an obligation to part with its land.

In an age before comprehensive zoning, Fuller and his colleagues heard several cases involving early land use controls. The then-recent introduction of steel frame construction made practical for the first time the erection of tall buildings. Skyscrapers captured the public's imagination, but also added to urban congestion and deprived adjacent buildings of light and air. Consequently, many communities enacted new regulations on construction of structures. The Court unanimously upheld in *Welch v. Swasey*[36] a limitation on the height of building in areas of Boston. Rejecting the contention that any regulation that deprived a person of profitable use of his property constituted a taking, the Justices reasoned that the law was a valid exercise of the police power to reduce the danger of fire in residential districts. A year later, in *Laurel Hill Cemetery v. San Francisco*,[37] the Court reaffirmed public control of land usage in broad terms. Declaring that "tradition and the habits of the community count for more than logic,"[38] Justice Holmes, speaking for the Court, found that a municipal ordinance prohibiting burials within the city was constitutional.

Yet there were limits to the Fuller Court's indulgence of land use regulations, particularly when local government disturbed the reasonable expectations of property owners. *Dobbins v. Los Angeles*[39] involved a municipal ordinance fixing the geographic area in which a gasworks might be established. After a landowner obtained a permit and began to construct a works, the city adopted another ordinance that placed the land in a prohibited area. Treating the case under the rubric of due process, the Justices unanimously held that the sudden change of geographic limits amounted to "a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment."[40]

The Fuller Court never had occasion to squarely address the question of whether a regulation could so diminish the value or usefulness of property as to be tantamount to a takings without the acquisition of title.[41] Nonetheless, the modern doctrine of a regulatory taking can be traced to this era. In 1891 Justice Brewer observed that regulation of the use of property might destroy its value and constitute the practical equivalent of outright appropriation.[42] More tellingly, Justice Holmes addressed the boundary between the right of private property ownership and governmental

authority in a 1908 opinion for the Court:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless the rights of property would prevail over the other public interest, and the public power would fail. To set such a limit would need compensation and the power of eminent domain.[43]

This language was dictum in a ruling that concerned the power of states to control natural resources within their boundaries. Yet Holmes, speaking for the Court, clearly recognized that there were limits to the police power justification for economic regulations, and that a regulation that rendered property valueless would necessitate the payment of compensation. Holmes thus anticipated the emergence of the regulatory takings doctrine, which achieved constitutional status in the famous decision of *Pennsylvania Coal Co. v. Mahon*.[44] However tentatively, the Court under Fuller perceived that the consequences of governmental action to the owner, not the means employed, should determine the existence of a compensable taking. This result flowed logically from a broader understanding of property that stressed value, not merely title.

In addition to reviewing land use controls, the Fuller Court wrestled with claims that the deliberate destruction of property by military authorities under wartime conditions was a compensable taking. At issue in *Juragua Iron Company v. United States*[45] was a claim for destruction of certain buildings by the American military in Cuba in order to prevent the spread of yellow fever. The buildings were owned by a Pennsylvania corporation engaged in mining in Cuba. Brushing aside the claimant's argument that the destruction of this property represented a taking, Justice John Marshall Harlan invoked the principle that the government is not responsible for property destroyed in the course of military operations. He further stressed that the property located in a hostile nation, even if owned by an American corporation, could be treated as enemy property subject to confiscation or destruction whenever military necessity so demanded. Although *Juragua Iron* can perhaps be understood as a broad application of the rule governing property losses on the battlefield, Harlan did not provide an adequate analysis of the problem of military destruction. The claimant's property was not destroyed during combat. In some situations courts have recognized that the deliberate destruction of property is a taking. Demolition might persuasively be viewed as the functional equivalent of the requisition of property for military purposes. But Harlan gave no weight to the view that destruction of buildings to prevent the spread of disease might, in fairness, be treated as a compensable taking and the cost shared by the community at large, which benefited thereby.[46]

Most of the takings cases heard by the Fuller Court concerned legislative action. But courts may reshape property law in ways that augment governmental authority and diminish previously recognized attributes of private ownership. This power raises the contested issue of whether court decisions that depart from prior law constitute an unconstitutional judicial taking of property.[47]

Fuller and his colleagues grappled inconclusively with the concept of a judicial taking in *Muhlker v. New York and Harlem Railroad Company*.[48] The case arose out of prolonged litigation over the construction of elevated railroads in New York City. New York state courts initially ruled that the abutting property owners had easements of light, air, and

access in public streets and must be compensated for the loss of these interests. Thereafter, however, in a suit by an adjacent owner seeking compensation, the New York Court of Appeals reversed its earlier decision and held that the owners had no property interests on which the building of an elevated structure in place of a street-level railroad would infringe. In a murky plurality opinion by Justice Joseph McKenna, the Supreme Court concluded that the previously recognized easements were property interests that could not be extinguished without compensation. McKenna indicated that the state courts were not at liberty to diminish property rights by abandoning precedent. He observed that the authority of state courts to declare property rules did not encompass the power "to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States."[49] Although *Muhlker* rested on an imprecise foundation, the Court seemed anxious to protect the claimant's expectations when he acquired the abutting land.

Speaking for himself and three other members of the Court, including Fuller, Justice Holmes dissented. To Holmes the claimant's rights were "a construction of the courts," and he strenuously denied that property owners had a constitutional right to have general legal propositions remain unchanged. Thus the Fuller Court debated but failed to resolve the notion that judicial changes in existing law might constitute a taking of property.

## For "Public Use"

Another subject of contention in takings law is the requirement that private property be taken for public use. It was generally agreed in the nineteenth century that eminent domain could only be employed to acquire property for public benefit. In other words, eminent domain did not empower government to simply take the property of one individual and transfer it to another, even upon payment of compensation.[50] The public use limitation, however, was eroded by judicial deference to legislative findings that a particular appropriation of property served the public interest. Indeed, by treating the exercise of eminent domain as primarily a legislative matter, state and federal courts encouraged an open-ended definition of public use.[51]

The Fuller Court for the most part did not break new ground in its treatment of the public use limitation. On the whole, the Justices deferred to congressional or state determinations as to what should be deemed public use. In one prominent case, *Missouri Pacific Railway Company v. Nebraska*,[52] however, they emphasized that property could not be taken for private purposes. At issue was a Nebraska statute that authorized a state agency to compel a railroad to grant part of its land to private individuals for the purpose of establishing a grain elevator. The law was a response to agitation by farm organizations seeking to control the prices of grain elevators by erecting competing facilities. Noting that there was no claimed public use, the Court decided that taking property for the private use of another was prohibited by the Due Process Clause of the Fourteenth Amendment, even though compensation was paid. In effect, the Justices confined the taking of property by the states to public use. The Court pointed out in several other opinions as well that it was beyond legislative authority to take property for private use.[53]

Notwithstanding these rulings, Fuller and his colleagues were reluctant to treat the public use requirement as a significant restraint on the exercise of eminent domain. This was illustrated by the case of *United States v. Gettysburg Electric Railway*,[54] in which the Fuller Court, in an opinion by Justice Rufus W. Peckham, upheld the congressional legislation authorizing condemnation of the battleground at Gettysburg. The decision turned upon whether preservation of a battle site was a public use within the meaning of the Takings Clause. The outcome had important implications for the power of the federal government to acquire land for parks and conservation purposes. Justice Peckham said that courts commonly accept legislative declarations of what constitutes public use. He had more difficulty, however, in demonstrating that the proposed condemnation was within the enumerated powers of Congress. After stressing the patriotic aspects of the project and likening the battlefield to a military cemetery, Peckham curiously concluded:

> The power to condemn for the purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any

> number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.[55]

Despite this untidy reasoning, the *Gettysburg Electric Railway* broadly interpreted congressional authority to take land for what Congress regarded as a public use.[56] Thereafter the federal government could employ eminent domain in support of authority either expressly or impliedly granted by the Constitution.

Eminent domain continued to be employed most frequently by the states, and as a consequence Fuller and his associates heard a string of cases that questioned whether state condemnation satisfied the public use norm. In *Long Island Water Supply Company v. Brooklyn*[57] the Justices had no difficulty in sustaining municipal acquisition of the property and contracts of a water company. Observing that "[a]ll private property is held subject to the demands of a public use,"[58] the Court readily concluded that the supply of water to a city was a public use within the power of eminent domain. The Justices further ruled that it does not derogate from the public nature of a project if charges are made for service. Thus, the city could charge individuals for the use of water because a public function did not imply free service.

Moreover, in a line of decisions, the Fuller Court sustained the use of eminent domain by the states in a variety of situations, even when the taking was primarily for private advantage and only incidentally for public benefit. In *Fallbrook Irrigation District v. Bradley*[59] the Justices heard a challenge to California's irrigation laws on grounds that the water to be procured was not for a public use but only aided certain landowners. Unanimously rejecting this argument, the Court adopted a generous definition of what makes up a public use. "It is not essential," Justice Peckham observed, "that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use."[60] In reaching this conclusion, he stressed that vast acreage of land would be left arid and worthless unless irrigation was regarded as a public use.

Likewise, the Justices in *Hairston v. Danville and Western Railway Company*[61] found condemnation of land by a railroad for construction of a spur track to satisfy the public use requirement despite the fact that the track was used primarily to reach a particular plant. Distinguishing *Missouri Pacific*, they ruled that the tracks also served the public by providing improved terminal facilities.

The Fuller Court also sustained the exercise of eminent domain by private individuals when it was deemed necessary for economic development. Many states in the Rocky Mountain region conferred the power of eminent domain upon private persons to obtain rights-of-way across the land of others for mining or irrigation. This practice passed constitutional muster in *Clark v. Nash*,[62] which involved an action by an individual under Utah law to condemn a right-of-way through land of another for the purpose of irrigation. Recognizing the unique water problems of the arid and mountainous states, the Court ruled by a vote of seven to two that "the use is a public one, although the taking of the right of way is for the purpose simply of obtaining the water for an individual."[63] The Court was apparently persuaded that the private property was being taken to create some overall resource benefit for public advantage and not solely for the advantage of another individual. But such an analysis might be understood to legitimate any private takeover of property. Accordingly, Justice Peckham, writing for the Court, cautioned, "We do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest."[64] The Justices took the same position in *Strickley v. Highland Boy Mining Co.*,[65] sustaining the condemnation of a right-of-way by a mining company.

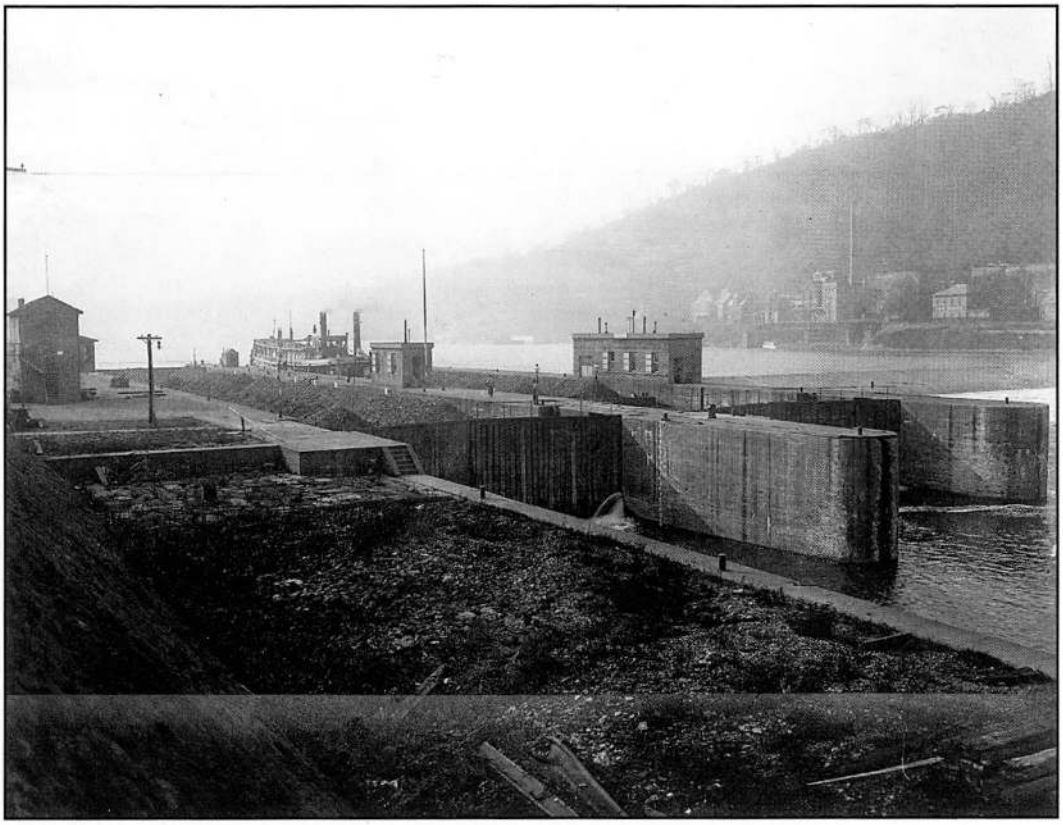
It is remarkable that the Fuller Court, which was not hesitant to employ other legal doctrines to defend property owners against governmental intervention, declined to put any teeth into the public use limitation and attached great weight to the assessment of state legislatures and courts. The record, therefore, warrants a closer look. Fuller and his colleagues repeatedly deferred to state determinations of public use in express recognition of the fact that there was a wide diversity of local conditions and needs across the United States. This unwillingness to impose a rigorous judicial restraint on the exercise of

eminent domain for internal improvements was fully consistent with the Fuller Court's commitment to federalism and state autonomy.[66] By placing its imprimatur on the view that public use did not mean use by the general public, moreover, the Court for all practical purposes sanctioned the transfer of property from one owner to another. Likely the Justices were persuaded that generous understanding of eminent domain encouraged economic growth and resulted in benefit to the public.

There is no doubt that Fuller and his associates left lawmakers with wide discretion and thereby contributed to the process by which the public use limitation was eventually drained of any meaning on the federal level. Still, judicial deference, however strong, was not the same as abdication. The Fuller Court did assess the public use rationale in eminent domain cases, and expressly held open the possibility that a condemnation might be invalidated if the claimed public use lacked an adequate factual foundation. The Justices insisted that the ultimate determination of public use was a judicial question, and declared that a taking that had no substantial relation to public use was unconstitutional.[67]

## "Without Just Compensation"

The third critical element of takings jurisprudence is the requirement of just compensation when property is taken by the government. Insistence upon payment of compensation provides a check against excessive use of eminent domain and vindicates the constitutional policy safeguarding individuals against confiscation of their property for public benefit. Conversely, inadequate compensation tends to undermine the protective function of the Takings Clause. Fuller and his colleagues grappled with the just compensation question in a number of cases and laid the basis for subsequent doctrinal developments.



**When the federal government appropriated a lock and dam on the Monongahela River (pictured) as part of a navigation improvement scheme, the Fuller Court ruled that the right to compensation was an integral part of the Bill of Rights. At issue was whether the company that owned the lock should only be compensated for the loss of tangible property or for the loss of earnings it collected on lock tolls as well.**

In the landmark case of *Monongahela Navigation Company v. United States*,[68] discussed above, Fuller and his colleagues gave an expansive reading to the right of compensation. The federal government appropriated a lock and dam as part of a navigation improvement scheme. Under a franchise granted by the state the company was authorized to collect tolls for use of its lock. The only issue was the amount of compensation, with the government arguing that the owner was entitled to simply the value of the tangible property and not to an award for the loss of the franchise to collect tolls. Justice Brewer established an important principle, declaring that the determination of the amount of compensation was a judicial not a legislative function. "It does not rest with the public," he observed, "taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."[69] Brewer defined just compensation as "a full and perfect equivalent for the property taken,"[70] and ruled that the value of property was determined by its profitableness. It followed, therefore, that just compensation mandated payment for the loss of the tolls under the franchise as well as for the physical property taken. *Monongahela Navigation* stands for the proposition that the market value of appropriated property encompassed the use authorized by a state grant.[71]

A similar result was reached with respect to contract rights in *Long Island Water Supply Company v. Brooklyn*.[72] At issue was the authority of the city to condemn the franchises and contracts to provide water of a private company as well as its physical property. The Supreme Court upheld an award that made a separate valuation for the contracts and other intangible property. The Justices treated the contracts as a form of property subject to eminent domain upon payment of compensation. Thus, *Long Island Water Supply* established the principle that contractual rights are protected by the Takings Clause.[73]

The Court under Fuller emphasized that the test of just compensation was the loss suffered by the owner. In *Boston Chamber of Commerce v. Boston*[74] the Justices reviewed an assessment of damages for the construction of a street over part of a tract owned by the Chamber of Commerce. Since the land in question was encumbered by an easement of way, light, and air in favor of a third party, the city contended that the market value of the land was severely reduced by the servitude. Speaking for a unanimous Court, Justice Holmes ruled that the condition of the title was relevant in determining compensation. An owner, in other words, could not recover full market value for an unencumbered lot when the parcel taken was subject to an easement that diminished its value. The owner could only recover the value of the land with its use restricted. In often-quoted language, Holmes declared:

> [The Constitution] merely requires that an owner of property taken should be paid for what is taken from him. And the question is what the owner has lost, not what the taker gained.[75]

This formulation is important on two counts. Holmes underscores the character of the Takings Clause as a protection not of objects but for individuals who own property. He also made clear that damages should properly be calculated on the basis of the loss sustained by the owner, not the gain to the government. This cardinal tenet of takings jurisprudence has been repeatedly invoked, if sometimes honored more in the breach than the observance.[76]

One of the most vexing issues pertaining to just compensation was the practice of offsetting the imputed benefits from public works against the loss suffered by an owner whose property was taken. Many statutes authorizing the use of eminent domain in the nineteenth century specifically directed the offset of benefits to a landowner from the construction of highways or railroads. Railroads were particularly successful in arguing that the building of rail facilities over part of an owner's land enhanced the value of the remainder, and that such benefits should diminish any condemnation award.[77] Of course, the anticipated benefits of a project were highly conjectural and the result of the benefit-offset principle was often severe undercompensation of the landowner. Moreover, the offset of benefits constituted potentially unfair discrimination against the person whose land was taken. Neighboring landowners would likely also enjoy

land value increase from public works, but they were not obliged to bear the cost by having a portion of their property taken. In effect, the setoff of benefits undercut the just compensation principle because an individual was singled out to suffer a loss that would advantage the public. Public opinion gradually turned against this practice, and in the late nineteenth century a number of states by statute or constitutional amendment provided that an owner of land should recover the full value of property taken irrespective of any supposed benefit.[78]

The Supreme Court under Fuller also helped to rein in the use of the offset practice, and in so doing enlarged the constitutional guarantee of just compensation for owners against public agencies and private entrepreneurs. Fuller and his colleagues distinguished between general and special benefits in determining compensation. Only those owners who received particular gain over and above the general benefit from public projects could have their compensation reduced. As Justice Brewer explained in *Monongahela Navigation Company*, the concept of just compensation "excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated . . . ."[79] It followed that an attempt to pay for appropriated property with general benefits available to the public as a whole was an unconstitutional taking without just compensation. Having ruled out consideration of indirect and general benefits, Brewer left open the question of whether special benefits to the portion of a tract not taken might be a factor in ascertaining compensation.

Indeed, the Fuller Court did not close the door on the offset of benefits in all situations. At issue in the leading case of *Bauman v. Ross*[80] was a congressional statute that authorized the construction of highways in the District of Columbia. This measure directed that where only part of a tract was condemned the assessment of damages should take into account the enhancement of the value of the remainder of the land. The act was assailed as a taking of property without payment of just compensation because Congress attempted to pay partly in contingent benefits. Brushing aside this contention, Justice Horace Gray stressed that both Congress and the states had long provided for the deduction of direct benefits to the property retained against the value of the land appropriated. Hence, if the remaining land was increased in value by a public improvement, the compensation paid could be reduced by that amount. Gray pointed out that the Fifth Amendment did not mandate that an owner receive monetary compensation for the full value of property taken, nor prohibit the consideration of special benefits in estimating just compensation.

The distinction drawn by the Fuller Court between the offset of general and special benefits was imprecise, and left room for condemning agencies to provide less than adequate compensation in some cases. Arguably just compensation should entail full monetary compensation regardless of any benefits supposedly conferred upon the remaining land. Nonetheless, Fuller and his colleagues closed the door on offsetting general benefits to the community at large, and moved to restrict use of the offset principle to undercompensate owners.

In addition to the offset issue, Fuller and his colleagues addressed a variety of other questions pertaining to the just compensation standard. In *Searl v. School District, Lake County*,[81] for instance, the Justices were called upon to determine whether improvements built by an occupier under a good faith mistake as to ownership of the land constituted an element of just compensation for the owner. A school district had constructed a schoolhouse in reliance on an ineffective deed, and thereafter instituted a condemnation proceeding to acquire the property from the true owner. The owner claimed the value of the improvements as well as the land. Writing for a unanimous court, Fuller insisted that the compensation awarded must be "just, not merely to the individual whose property is taken, but to the public which is to pay for it."[82] Fuller ruled that the owner was entitled only to the actual value of the land at the time of the taking, and could not claim additional compensation for the building erected by the school district in the mistaken belief it owned the land in question. Fuller's instincts were sound. The landowner certainly had a right to be made whole for his loss, but could not expect overcompensation based on technical rules of ownership.

While enforcing the constitutional norm of just compensation, the Fuller Court allowed the taking of property before the actual payment or

even the final determination of the amount of compensation. Put another way, it ruled that there was no constitutional right to receive payment prior to surrendering possession provided compensation was secured. The issue of prepayment arose in different contexts. When a private enterprise took property, the owner might understandably be concerned about its ability to pay at some point in the future. In *Cherokee Nation v. Southern Kansas Railway Company*,[83] for instance, Congress authorized the railroad to construct a line across Cherokee territory but did not require payment of compensation before the carrier entered the land. The Court unanimously declared that an owner "is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed."[84] Admitting that this posed a sometimes difficult question, the Justices upheld the scheme because the railroad was obligated to deposit twice the amount of the initial referees' award pending final determination of the compensation on appeal. They brushed aside the possibility that the company might be financially unable to pay compensation in excess of the deposited amount as too remote to invalidate the just compensation mechanism.

Another problem was posed when the statute authorizing the exercise of eminent domain provided that a third party should pay the compensation. This was illustrated in *Williams v. Parker*.[85] A Massachusetts statute limited the height of new buildings on Copley Square in Boston in order to protect the beauty of the park and preserve adequate light. The act provided that owners of uncompleted buildings could recover damages caused by the height restriction against the City of Boston. Treating the statute as an exercise of eminent domain power to acquire


**In the seminal case of *Chicago, Burlington and Quincy Railroad Company v. Chicago* (1903), the Court held that compensation for private property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment. The city contended that the amount of compensation to be awarded the railroad for opening a street across rail land was entirely a matter of local law and raised no federal question.**

rights for the public in the nature of an easement, the Fuller Court took the position that property could be taken pending inquiry as to compensation so long as there was an adequate provision for payment. Justice Brewer, speaking for the Court, concluded that the statute satisfied the just compensation requirement by prescribing a method for recovery from a solvent city.

Nor did the Fuller Court insist upon any particular mode of ascertaining the condemnation award. In a line of cases the Justices held that neither Congress nor the states were obligated to determine the amount of compensation by a jury trial. Rather, such awards could be made by commissioners appointed by a court. Due process simply required that the amount of compensation be settled by a properly constituted tribunal.[86]

## Application to the States

Perhaps the most important contribution of the Fuller Court to takings jurisprudence was the extension of the just compensation requirement to the states. This step both signaled the high standing of the constitutional rights of property owners to the Court and marked the initial acceptance of the view that the Due Process Clause of the Fourteenth Amendment made certain fundamental provisions of the Bill of Rights applicable to state and local government. In the seminal case of *Chicago, Burlington and Quincy Railroad Company v. Chicago*[87] the Justices held that compensation for private property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment. The city contended that the amount of compensation to be awarded the railroad for opening a street across rail land was entirely a matter of local law and raised no federal question.

Writing for the Court, Justice Harlan declared that the mere form of eminent domain proceedings did not satisfy due process unless provision was made for adequate compensation. Harlan viewed the just compensation requirement as a tenet of natural justice. "Due protection of the rights of property," he pointed out, "has been regarded as a vital principle of republican institutions."[88] Although the Court read the Due Process Clause as imposing a substantive restraint on state exercise of eminent domain, the Justices stopped short of making the wording of the Fifth Amendment binding on the states. Instead, the opinion rested on the premise that the right of compensation was a fundamental right inherent in free government. By virtue of *Chicago, Burlington* the Due Process Clause operated as a just compensation requirement imposed on the states. Moreover, the Justices gingerly opened the door to finding that other provisions of the Bill of Rights were also protected by the Fourteenth Amendment.[89]

Despite this path-breaking aspect of *Chicago, Burlington*, there was a troublesome disparity between the Court's broad affirmation of just compensation and the outcome of the case. Harlan surprisingly found that a nominal award made by the trial jury to the railroad represented just compensation under the circumstances. He reached this unsatisfactorily result by holding that, under the Seventh Amendment, the federal courts could not re-examine a factual determination by a jury. The effect, of course, was to rob the decision of practical significance for the claimant railroad. In dissent, Justice Brewer accurately protested that the "abundant promises of the fore part of the opinion vanish into nothing when the conclusion is reached."[90]

## Conclusion

The takings jurisprudence of the Supreme Court under Fuller was shaped by the transformation of American society at the end of the nineteenth century as well as fresh economic and intellectual currents. As with other areas of constitutional law, the Justices were called upon to adapt the Takings Clause to the demands of a new age.

Fuller and his colleagues proceeded in an incremental manner to fashion a muscular Takings Clause that reaffirmed the central place of property rights in the constitutional order. The Fuller Court did not apply the Takings Clause without a share of uncertainty as well as respect for state autonomy regarding the need to exercise eminent domain, but the main thrust of its decisions was clear. The Court shared the conviction of the Framers that preservation of individual liberty was closely associated with respect for the rights of property owners. A more vigorous application of the Takings Clause was consistent with the broader solicitude for economic freedom that characterized the Fuller era.

**Note:** *I would like to thank Jon W. Bruce, J. Gordon Hylton, Walter F. Pratt, Jr., David A. Schultz, and Nicholas Zeppos for helpful comments on an earlier version of this manuscript.*

## Endnotes

[1] *See* James W. Ely, Jr. **The Chief Justiceship of Melville W. Fuller, 1880-1910** (Columbia, SC, 1995); Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910** (New York, 1993).

[2] 198 U.S. 45 (1905).

[3] The Fifth Amendment provides in part: "Nor shall private property be taken for public use without just compensation."

[4] *E.g., Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992); *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994). *See* generally James W. Ely, Jr., "The Enigmatic Place of Property Rights in Modern Constitution Thought," in David J. Bodenhamer and James W. Ely, Jr., eds., **The Bill of Rights in Modern America: After 200 Years** (Bloomington, 1993), 92-99.

[5] 32 U.S. (7 Pet.) 243 (1833).

[6] James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights** (New York, 1992), 76-78.

[7] *Compare* Morton J. Horwitz, **The Transformation of American Law, 1780-1860** (Cambridge, MA, 1977),63-66 with Tony Freyer, "Reassessing the Impact of Eminent Domain in Early American Economic Development," *Wisconsin Law Review* 1263 (1981).

[8] Lawrence M. Friedman, **A History of American Law,** 2nd ed. (New York, 1985), 420.

[9] *See* generally William H. Wilson, **The City Beautiful Movement** (Baltimore, 1989).

[10] For the tenement reform campaign during the Progressive era, *see* Morton Keller, **Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933** (Cambridge, MA, 1990), 173-177.

[11] Gordon M. Bakken, **Rocky Mountain Constitution Making, 1850-1912** (New York, 1987), 29-34; Kermit L. Hall, **The Magic Mirror: Law in American History** (New York, 1989), 193; Lawrence M. Friedman, **Government and Slum Housing: A Century of Frustration** (Chicago, 1968), 30-39.

[12] Ely, **The Guardian of Every Other Right**, *supra*, note 6 at 87-100. *See* also 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).

[13] William B. Stoebuck, "The Property Right of Access Versus the Power of Eminent Domain," 47 *Texas Law Review* (1969), 733, 733-734 ; John Lewis, **A Treatise on the Law of Eminent Domain** (Chicago, 1888), 295-297. In *Chicago v. Taylor,* 125 U.S. 161 (1888) the Supreme Court considered the meaning of the phrase "taken or damaged for public use" in the 1870 Illinois Constitution, and concluded that the wording was intended to give greater security to property owners from consequential damages caused by public improvements.

[14] Lewis, **A Treatise on the Law of Eminent Domain**, *supra* note 13 at 40-46 (noting that the concept of property entails the rights of possession, usage, and disposition, and concluding that "when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed").

[15] *Munn v. Illinois,* 94 U.S. 113, 141 (1877) (Field, J., dissenting).

[16] The Supreme Court's tendency to assimilate due process protection of property rights with a taking of property without just compensation is best illustrated in the railroad rate cases. In a line of rulings decided under the rubric of due process the Justices insisted that state regulation of railroad charges could not deprive the carrier of a reasonable return on its property. The central inquiry was whether rate setting represented a taking of the value of railroad property without compensation. *See* Richard A. Epstein, **Takings: Private Property and the Power of Eminent Domain** (Cambridge, MA, 1985), 274; James E. Ely, Jr., "The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota* and Constitutional Limits on State Regulations," 12 *Great Plains Quarterly* 121, 130 (1992); Lawrence Berger, "Public Use, Substantive Due Process and Takings—An Integration," 74 *Nebraska Law Review* 843, 847 n. 19, 855 (1995).

[17] 148 U.S. 312 (1893).

[18] *Id.* at 324.

[19] *Id.* at 325.

[20] 196 U.S. 239 (1905).

[21] *Id.* at 252.

[22] 217 U.S. 333 (1910).

[23] 166 U.S. 269 (1897).

[24] 179 U.S. 141 (1900).

[25] *Id.* at 153.

[26] *Id.* at 190.

[27] 188 U.S. 445 (1903).

[28] 192 U.S. 217 (1904).

[29] One scholar has criticized the doctrine of navigational servitude as a means to protect the public treasury at the expense of riparian owners. Ellen Frankel Paul, **Property Rights and Eminent Domain** (New Brunswick, 1987), 83-87.

[30] 200 U.S. 561 (1906).

[31] *Id.* at 599-600.

[32] 201 U.S. 506 (1906).

[33] 179 N.Y. 325, 72 N.E. 231 (1904), aff'd without opinion, 203 U.S. 583 (1906). For a discussion of this case *see* Judith A. Gilbert, "Tenements and Takings: *Tenement House Department of New York v. Moeschen* as a Counterpoint to *Lochner v. New York*," 18 *Fordham Urban Law Journal* 437 (1991).

[34] 217 U.S. 196 (1910).

[35] *Id.* at 206, 208.

[36] 214 U.S. 91 (1909).

[37] 216 U.S. 358 (1910).

[38] *Id.* at 366.

[39] 195 U.S. 223 (1904).

[40] *Id.* at 241.

[41] For an insightful discussion of the doctrine of regulatory

takings *see* William A. Fischel, **Regulatory Takings: Law, Economics, and Politics** (Cambridge, MA, 1995). *See* also Epstein, **Takings**, *supra*, note 16 at 100-104.

[42] David J. Brewer, "The Protection of Private Property from Public Attack," 55 *New Englander and Yale Review* 97, 102-105 (1891). For Brewer's role in the evolution of the regulatory takings doctrine *see* Joseph Gordon Hylton, "David Josiah Brewer: A Conservative Justice Reconsidered," *1994 Journal of Supreme Court History* 45, 50.

[43] *Hudson Water Company v. McCarter*, 209 U.S. 349, 355 (1908). *See* Berger, "Public Use, Substantive Due Process sand Takings—An Integration," *supra,* note 16, at 856.

[44] 260 U.S. 393 (1922). The background of this case is ably analyzed in Lawrence M. Friedman, "A Search For Seizure: Pennsylvania Coal Co. v. Mahon in Context," 4 *Law and History Review* 1 (1986).

[45] 212 U.S. 297 (1909).

[46] Destruction of private property in wartime is judiciously examined in Arvo Van Alstyne, "Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction," 20 *Stanford Law Review* 617, 619-622 (1968).

[47] *See* Barton H. Thompson, Jr., "Judicial Takings," 76 *Virginia Law Review* 1449 (1990).

[48] 197 U.S. 544 (1905).

[49] *Id.* at 570.

[50] *E.g., Bonaparte v. Camden and Amboy Railroad Company*, 3 Fed. Cases 821 (Cir. Ct. N.J. 1830); *Beekman v. Saratoga & Schenectady Railroad*, 3 Paige Ch. 45 (N.Y. 1831); James Kent, **Commentaries on American Law**, vol. II, (New York, 1827), 276.

[51] Ely, **The Guardian of Every Other Right**, *supra*, note 6 at 77; Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910" 33 *Journal of Economic History* 232, 239-240 (1973).

[52] 164 U.S. 403 (1896). The history of this case is discussed in Alan Westin, "Populism and the Supreme Court," *Yearbook Supreme Court Historical Society* 1980, 62, 65.

[53] *E.g., Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 161 (1896) ("The use for which private property is to be taken must be a public one . . ."); *Madisonville Traction Company v. Saint Bernard Mining Company*, 196 U.S. 239, 251-252 (1905) ("It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or State, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner").

[54] 160 U.S. 668 (1896).

[55] *Id.* at 683.

[56] On the *Gettysburg Electric Railway* case, *see* John E. Semonche, **Charting The Future: The Supreme Court Responds to a Changing Society, 1890-1920** (Westport, CT, 1978), 78-79; Paul, **Property Rights and Eminent Domain**, *supra,* note 29 at 93-95.

[57] 166 U.S. 685 (1897).

[58] *Id.* at 689.

[59] 164 U.S. 112 (1896).

[60] *Id.* at 161-162.

[61] 208 U.S. 598 (1908).

[62] 198 U.S. 361 (1905).

[63] *Id.* at 369-370.

[64] *Id.* at 369.

[65] 200 U.S. 527 (1906).

[66] Ely, **The Chief Justiceship of Melville W. Fuller,** *supra*, note 1 at 150 (noting "the Fuller Court's profound commitment to federalism").

[67] *See United States v. Gettysburg Electric Railway*, 160 U.S. 668, 680 (1896) (stressing judicial deference to legislative determination of public use "unless the use be palpably without foundation").

[68] 148 U.S. 312 (1893).

[69] *Id.* at 327.

[70] *Id.* at 326.

[71] For a helpful discussion of *Monongahela Navigation* and the franchise component of fair market value see Glynn S. Lunney, Jr., "Compensation for Takings: How Much Is Just?" 42 *Catholic University Law Review* 721, 733-738 (1993).

[72] 166 U.S. 685 (1897).

[73] *See* William K. Jones, "Confiscation: A Rationale of the Law of Takings," 24 *Hofstra Law Review* 1, 24-25 (1995).

[74] 217 U.S. 189 (1910).

[75] *Id.* at 195.

[76] Epstein, **Takings**, *supra,* note 16 at 52.

[77] Scheiber, "Property Law, Expropriation, and Resource Allocation by Government," *supra* note 51 at 237.

[78] Fischel, *supra*, note 41 at 86-90.

[79] 148 U.S. 312, 326 (1893).

[80] 167 U.S. 548 (1897).

[81] 133 U.S. 553 (1890).

[82] *Id.* at 562.

[83] 135 U.S. 641 (1890).

[84] *Id.* at 659.

[85] 188 U.S. 491 (1903).

[86] *E.g., Long Island Water Supply Company v. Brooklyn*, 166 U.S. 685, 694-695 (1897); *Bauman v. Ross*, 167 U.S. 548, 593 (1897).

[87] 166 U.S. 226 (1897).

[88] *Id.* at 235-236.

[89] *See* generally Semonche, **Charting the Future**, *supra* note 56 at 93-97.

[90] 166 U.S. at 259.

# The Demise of an "Extraordinary Criminal Procedure": *Klopfer v. North Carolina* and the Incorporation of the Sixth Amendment's Speedy Trial Provision

**Joseph Mosnier***

**Editor's Note:** *This article is the winner of the 1996 Hughes-Gossett Award for best student paper.*

The circumstances of Peter H. Klopfer's arrest for trespassing during a civil rights demonstration in January 1964 were scarcely unique, given the times. Klopfer, a thirty-three-year-old assistant professor of zoology at Duke University and a Quaker who made no secret of his support for racial integration, was detained along with five other professors and several younger persons after a protest at a segregated restaurant in Chapel Hill, North Carolina. During the prior month more than 100 students, many from local high schools but the majority from the University of North Carolina, the institution around which the small town of 1,500 had grown, had been arrested during a string of similar demonstrations targeting other segregated businesses in Chapel Hill. The number of student arrestees soon climbed to more than 200 as protests continued into February. True, the incident involving Klopfer and the other professors marked the sole occasion on which faculty would contribute their status and prestige to the movement by submitting to arrest. But the charge they faced was simple misdemeanor trespass. In this respect the *Klopfer* case differed not at all from hundreds of others arising in Chapel Hill and in the South in those months and years. Klopfer had no reason to think that the ultimate legal disposition of his case would be more than a matter of local interest.

Peter Klopfer's case soon stood apart from all of the others, however. By April 1964 authorities had concluded court proceedings against the several hundred Chapel Hill demonstrators. All except Klopfer were convicted, faculty members individually and the others after a joint plea bargain arrangement. Tried in March, Klopfer escaped conviction when his jury deadlocked, forcing the judge to declare a mistrial. The local prosecutor did not retry Klopfer but chose instead, after putting the case off for eighteen months, to utilize a procedural device known as the "*nolle prosequi* with leave" (in legal parlance, the "nol pros with leave"). The nol pros with leave caused the outstanding indictment to remain pending indefinitely unless and until the prosecutor, at his discretion, called the case for retrial at some future date. With the statute of limitations suspended by the nol pros, Klopfer thus faced the prospect of an unliquidated criminal charge forever hanging over his head.

Not surprisingly, Klopfer wanted no part of this. Moreover, he believed that two related developments at the federal level in the year and one half that passed between the mistrial and the entry of the nol pros with leave eliminated any chance for the prosecutor to proceed successfully against him. The passage in July of the Civil Rights Act of 1964 and the Supreme Court's subsequent validation of the Act's public accommodation provisions convinced Klopfer of the unsustainability of prosecutions of persons seeking service at places of public accommodation. Yet Klopfer could not compel the local prosecutor, who enjoyed sole discretion in the case, to try him. After a long period of stalemate, Klopfer carried an appeal to the North Carolina Supreme Court. He argued that the application of the nol pros with leave denied him a speedy trial, but the seven justices were unimpressed and unanimously sustained the disposition of his case.

Unsatisfied, Klopfer appealed for relief to the Supreme Court of the United States. Although the Supreme Court had never held the Sixth Amendment's speedy trial provision binding upon the states, Klopfer pinned his hopes on the Warren Court's demonstrated willingness to expand the range of constitutional protections available to criminal defendants at the state level. To accomplish this reform of state criminal proceedings, which ranked among the Warren Court's most ambitious undertakings, the Court since 1961 had incrementally broadened its interpretation of the Due Process Clause of the Fourteenth Amendment, which explicitly enforced obligations upon the states. By the mid-1960s the Warren Court newly construed the Due Process Clause to encompass certain of the major criminal procedure guarantees of the Bill of Rights, and Klopfer reasoned that the Court ought now to add the Sixth Amendment's speedy trial guarantee to this list.

However plain they might have appeared to Professor Klopfer in 1966, the constitutional issues attending construction and application of the Fourteenth Amendment had given rise to nearly a full century of dispute, disagreement, and shifting Supreme Court doctrine.[1] Following the Amendment's ratification in 1868, controversy erupted at once concerning the proper interpretation of the critical second sentence of the Amendment's first section, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

At the heart of the controversy was a single, momentous issue, the extent to which the Amendment's framers intended that this language should apply the Bill of Rights to the states and thus accomplish a profound reordering of federal-state relations.[2] Previously, the Supreme Court had consistently held that none of the guarantees of the Bill of Rights applied to the states, each of which was considered sovereign with respect to its own jurisprudence in all areas other than those the Constitution explicitly made the province of the federal government.[3]

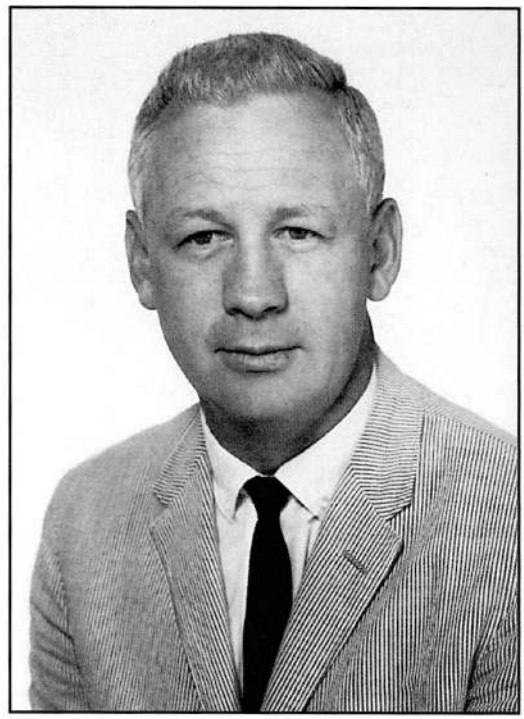
Six decades would pass before the Supreme Court began to give serious attention to the question of nationalization. Following ratification of the Fourteenth Amendment, the Court wasted little time making plain its unwillingness to turn the new Amendment to the service of racial equality and expanded civil liberties. In 1873, the Court declared that the Privileges and Immunities Clause, on its face the component of the Amendment most likely to serve as a vehicle for nationalization, could not be used to apply any or all of the Bill of Rights to the states. Further, the Court concluded that the Equal Protection Clause mandated only that all individuals be treated identically before the law and said nothing about the scope of rights they might enjoy. Hence the Court narrowed the focus exclusively to the Amendment's Due Process Clause as a potential vehicle for nationalization of the Bill of Rights.[4]

Whether the rather unspecific phrase "due process" was properly understood as a shorthand reference to the Bill of Rights, and hence whether any or all of the first eight amendments rightly were to be subsumed within, or "incorporated" into, the meaning of the Fourteenth Amendment's Due Process Clause and thus applied to the states, were questions that divided the Supreme Court across ensuing decades. As a result, the Court's due process jurisprudence evolved fitfully. Never did a majority bloc favoring total incorporation of the first eight amendments materialize. Instead,

the Court after 1931 began a halting process of selectively incorporating certain portions of the Bill of Rights into the Due Process Clause, thereby extending new federal guarantees upon the states.[5] By this time the Court had begun to look beyond the contentious issue of the Framers' desires and to recognize positive reasons to apply portions of the Bill of Rights to the states given the nature of the rights involved and the demands of a rapidly evolving democratic society. By 1940, the Court completed the selective incorporation of the speech, press, assembly, and religion provisions of the First Amendment.[6] Selective incorporation of several criminal procedure guarantees—the Sixth Amendment's assistance of counsel and public trial provisions, and the Fourth Amendment's provision against unreasonable search and seizure—was achieved by 1949.[7]

Justifications for these profound departures in constitutional interpretation shifted with changing Court membership, with a rationale rooted in rights necessary to "a scheme of ordered liberty," which prevailed in the late 1930s, largely giving way to a quite different "fair trial" standard in the 1940s. Advocates of the latter standard, though continuing to favor the incremental broadening of the Due Process Clause to provide an expanding scope of liberties, in fact did not in a technical sense endorse the notion of incorporation. In *Palko v. Connecticut* (1937), Justice Benjamin N. Cardozo first articulated the "ordered liberty" standard, the essential feature of which was a determination of whether candidate provisions for incorporation were rights "fundamental" to "a scheme of ordered liberty." At that time, a majority of the Justices yet regarded the criminal procedure guarantees from the Fourth, Fifth, Sixth, and Eighth Amendments as so-called "formal" rights, distinct from more vital "fundamental" ones, without which "justice would not perish." These formal rights, the majority argued, could safely be left outside the favored circle of fundamental rights limiting the states as well as the national government. Soon after, during the 1940s, a majority of a newly configured Court began for a time to evaluate the nationalization of criminal procedure provisions of the Bill of Rights not by employing Justice Cardozo's strategy but rather against a quite different "fair trial" standard. Fair trial advocates, Felix Frankfurter foremost among them, considered incorporationist notions unsound, and they rejected the idea that the Fourteenth Amendment's Due Process Clause bore any direct relation to the first eight amendments. When deciding the appropriateness of imposing national standards upon the states in the area of criminal procedure through the Due Process Clause, these Justices preferred merely to decide whether the state procedural practice in question met the threshold requirement of ensuring the accused a fair trial.

Fair trial proponents carefully distinguished certain procedural rights that they in time began to read into the Due Process Clause from similar guarantees in the Bill of Rights. This approach differed fundamentally from that of their incorporationist predecessors, who when moved to extend an important safeguard upon the states accomplished this task by construing the Due Process Clause to encompass the relevant provision of the Bill of Rights in precisely the form that provision occupied in federal constitutional jurisprudence. The provision therefore bound the states precisely as it constrained the federal government for the reason of the right's identicality on both state and federal levels, with federal interpretation of the provision



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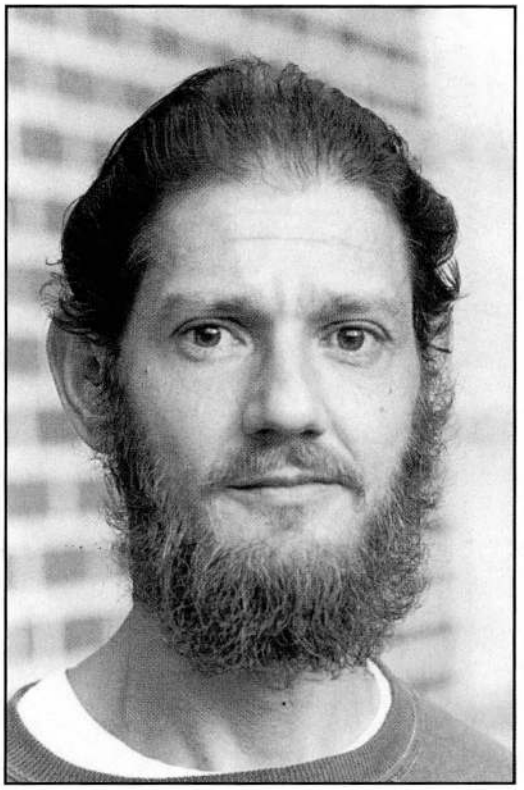

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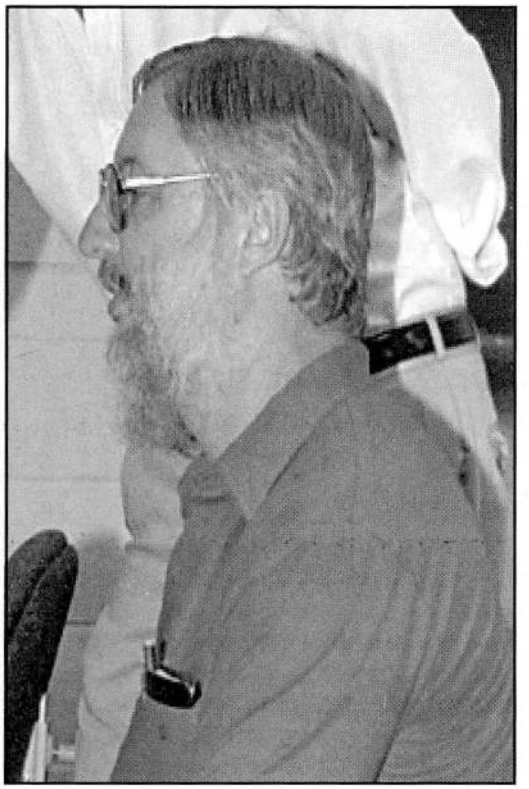

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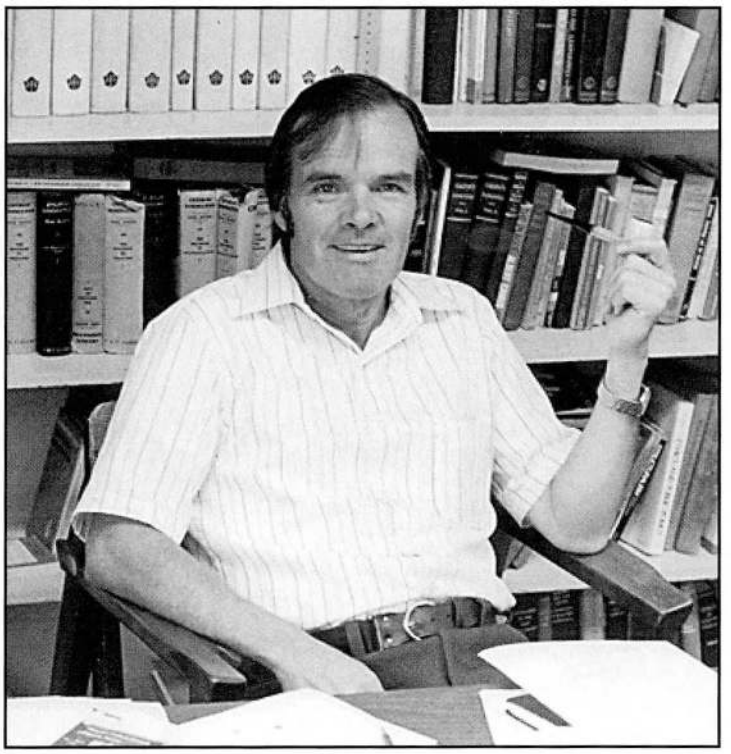


Robert Osborn

**To challenge the whites-only policy at Watts' Grill, the Chapel Hill Freedom Committee recruited University of North Carolina professors Albert Amon and William Wynn (psychology), and Duke University professors Peter H. Klopfer (zoology), David Smith (mathematics), Frederick Herzog, Harmon Smith (both divinity), and Robert Osborn (religion) to visit the restaurant in the company of several younger black activists. Herzog, Harmon Smith, and Osborn all were ordained Methodist ministers. Neither Duke nor UNC had any African-American faculty members at the time. (Photographs of Amon, Wynn, and Herzog were unfortunately unavailable.)**

representing the determinative ruling on its scope and application. The fair trial standard obviously produced an altogether different result.

In the half decade before Peter Klopfer took his speedy trial appeal to the Supreme Court in 1966, a group of ardent civil libertarians assembled under Chief Justice Earl Warren's leadership and moved deliberately to nationalize a number of key criminal procedure provisions of the Bill of Rights. Without formally adopting the total incorporation doctrine championed most notably by Justice Hugo L. Black, the Warren Court selectively incorporated much of the substance of the Bill of Rights not previously brought within the ambit of the Due Process Clause. Between 1961 and 1965, the Court incorporated, and thus applied to the states, criminal procedure prohibitions and provisions including the Fourth Amendment's exclusionary rule, the Fifth Amendment guarantee against compulsory self-incrimination, the Sixth Amendment provisions for counsel in all criminal cases and confrontation of adverse witnesses, and the Eighth Amendment's proscription of cruel and unusual punishments.[8]

Whether the Supreme Court would see fit to construe the Due Process Clause to include the Sixth Amendment guarantee that in "all criminal prosecutions, the accused shall enjoy the right to a speedy. . . trial," as Klopfer hoped, was unclear. Such a ruling would conform neatly to the Warren Court's established pattern. Moreover, no single issue commanded more of the Court's and the nation's attention in the mid-1960s than civil rights, a factor sure to increase Court scrutiny of Klopfer's petition given the context of his prosecution. Yet the Court by the spring of 1966 faced increasingly vehement denunciations for its string of incorporationist criminal procedure rulings, which some assailed as threatening "law and order." The Court's widely noted 1965 privacy ruling in *Griswold v. Connecticut*, a birth control case, and June 1966 decision in *Miranda v. Arizona* establishing the right of a criminal suspect to be advised of his rights, further dismayed critics who judged the Warren Court excessively liberal.[9] In the face of this rising tide of criticism, it remained to be seen whether the Court would choose to stay its course as the nation's political atmosphere shifted rightward.

The circumstances of the Klopfer case opened in the dramatic form so common to civil rights sit-ins in those years. Peter Klopfer and his companions, three black students among them, journeyed on the evening of January 3, 1964, to Watts' Grill, a small whites-only restaurant on the outskirts of Chapel Hill. Even before the group had crossed the parking lot to reach the restaurant's front door, a voice inside the building rang out, "Get those damned niggers out of here!"[10]

Klopfer and the others took no great surprise at this reception, but they had hoped for better. Earlier demonstrations in the community had involved primarily students and young adults,[11] but their party included seven white male professors, five from Duke University and two from the University of North Carolina at Chapel Hill, all well dressed and mature. As first conceived by leaders of the Chapel Hill Freedom Committee, a coalition of protest and civil rights groups that had pressed the desegregation issue in Chapel Hill with a campaign of nonviolent civil disobedience, the Watts' Grill demonstration was to include a small number of professors of both races. The Freedom Committee recruited UNC professors Albert Amon and William Wynn (psychology), and Duke professors Klopfer (zoology), David Smith (mathematics), Frederick Herzog, Harmon Smith (both divinity), and Robert Osborn (religion). Herzog, Harmon Smith, and Osborn all were ordained Methodist ministers. Neither Duke nor UNC had any African-American faculty members at the time, and consequently the Freedom Committee persuaded a professor at North Carolina College for Negroes [now North Carolina Central University] in Durham to participate. Pressured by his chairman, however, he withdrew at the last minute, and four younger activists, three of whom were black, stepped in.[12]

Its reputation as a stronghold of liberalism in the South notwithstanding, Chapel Hill's progress in desegregation had been spotty and slow. Despite (or perhaps in part because of)[13] the early influence of such outspoken "Southern progressives" as Howard Odum, a professor at the University from 1920 to 1954, and more notably still of Frank Porter Graham, university president from 1930 to 1949 and a member of President Truman's Committee on Civil Rights, the town's white residents generally and the university's Board of Trustees and many business owners in particular accepted change

reluctantly, if at all. Members of Chapel Hill's black community organized as early as the mid-1940s, just after the war, but their first efforts at reform were stymied by the white establishment that controlled the town economically and politically. Various groups of concerned black citizens lobbied through the 1950s for improved racial conditions, also with little success. Federal court rulings in 1951 and 1955 forced the university to admit black graduate and undergraduate students,[14] but as late as 1960, they numbered fewer than forty on a campus of 8,500. In 1957 the Chapel Hill School Board refused the first formal post-*Brown* appeal to integrate the town's local white public schools, rejecting a father's request that his son be allowed to enter Chapel Hill Elementary. The School Board adamantly maintained such a stance until 1960, when, after several UNC professors replaced other board members, an extremely modest integration program was adopted.[15]

Still, Chapel Hill's version of Jim Crow was sufficiently benign in certain of its superficial aspects to win the town a favorable reputation as a leader on the race issue among southern communities. To many outsiders, Chapel Hill appeared a bastion of racial accommodation. The town's Board of Aldermen consistently couched their refusals to address the petitions of the black community in the rhetoric of concern, just as they were careful to authorize periodically the creation of various task forces to study the racial situation. More important for its image, through 1960 Chapel Hill experienced no ugly incidents of racial violence. In particular, the widely watched integration of the university had gone off without trouble, a result that heightened the progressive reputation of both the institution and the town.[16]

Over the next several years, the intensifying civil rights struggle in Chapel Hill seriously undermined this reputation. Students at Chapel Hill's black high school began picketing and sitting-in at a number of the town's segregated businesses following the widely publicized sit-in at the Greensboro, North Carolina,


**The Watts' Restaurant and Motel in Chapel Hill is pictured here several years before the January 1964 sit-in. Owners Austin and Jeppie Watts depended on university patronage but refused to serve blacks.**

Woolworth's store in February 1960. Town leaders and civil rights groups thereafter maintained an uneasy peace until May 1963, when some 350 people marched down Chapel Hill's main thoroughfare in support of a local public accommodations ordinance. When the town's aldermen, swayed by pressure from the Merchants' Association, tabled consideration of the ordinance in June, the Committee for Open Business, the umbrella organization under which the various civil rights groups in Chapel Hill then functioned, began a crash program to "train citizens of varying age groups in the philosophy and practice of all forms of nonviolent civil disobedience." On July 19, the COB launched Chapel Hill's first mass civil disobedience protest, with thirty-four blacks and whites sitting in at the Merchants' Association. All were arrested. Tensions rose still further when the mayor, who had pledged to have all charges dropped as part of a negotiated truce, subsequently failed to secure dismissal of the charges. Four persons in fact were tried, and three spent thirty days in jail rather than pay a fifty dollar fine.[17]

Throughout the fall of 1963, disagreement over strategy and tactics within the Chapel Hill civil rights movement led to the reorganization of its forces into several new groupings. Alarmed by calls for increased militancy, certain white liberals and black moderates broke off from the COB and formed the Citizens United for Racial Dignity. The COB's young black activists and their white allies, including a number of students from the university, themselves formed a local chapter of the Congress on Racial Equality (CORE). The COB was thus effectively disbanded. In mid-December 1963, a further reorganization occurred when the Chapel Hill Freedom Committee, "an admixture of protest and civil rights groups," was formed. It was the Freedom Committee, led by young blacks and whites, most of them students, that would orchestrate and implement a broad campaign of civil disobedience in the ensuing months.[18]

On December 13, the Chapel Hill Freedom Committee threw open the floodgates of protest. That evening two black students and two white companions, one a visiting correspondent for New York City's *The Village Voice*, ventured to the Pines Restaurant, Chapel Hill's finest dinner restaurant, where, after being refused service, they refused the manager's order to leave and were arrested. Chapel Hill "is smug and self-righteous and so proud of the past that it has not really kept pace with the current situation," the correspondent wrote in a widely circulated account. "It has been so willing to live on the moral capital of men like Odum and Graham that it is now fearfully close to being morally bankrupt." Freedom Committee members sat in repeatedly throughout the remainder of the month. On one occasion, an eighty-year-old white Episcopalian minister and the wife of a university classics professor joined younger protesters from the Freedom Committee in a follow-up sit-in at the Pines Restaurant. By New Year's approximately 150 individuals had been arrested. All were students or young adults save for several black adults, the elderly minister, and the professor's wife.[19]

In the course of these many demonstrations, Freedom Committee members kept perfect faith with the doctrine of nonviolent resistance, a stance endorsed by Klopfer and his peers. The faculty volunteers who set out on the evening of January 3 for Watts' Grill considered nonviolent protest both morally legitimate and tactically indispensable. As Klopfer explained in a letter to the *Duke Chronicle* several days later, "Some public facilities in Chapel Hill and Durham will not be persuaded to integrate through appeals to reason. The only alternative appears to be the course adopted centuries earlier by Christ (and more recently by Gandhi). By demonstrating our belief in the injustice of racial segregation, by a tranquil acceptance of blows and prison, by returning love for hate, we believe that the 'still small voice within' will come to be heard." Such a commitment on the part of the Freedom Committee's younger demonstrators required courage in its application. On numerous occasions they had been assaulted by white detractors, who used their fists, brooms, and heavy boots as weapons. Ammonia and bleach dousings had become commonplace; in one instance, an irate store manager poured ammonia down a passive demonstrator's throat.[20]

Moreover, the professors were rapidly losing patience with the white community's reluctance to take an active role in desegregation efforts. Klopfer insisted that rhetoric alone on the part of whites, no matter how high-minded and supportive of the black cause, would not be

enough to prevent a racial schism:

> In order to bridge the widening gulf between the Negroes and the whites of this community, we believe it is essential for white men to voluntarily share the indignities and burdens thrust upon our darker brethren. Merely stating our belief in the principles of equality upon which our nation is based will no longer suffice to allay the suspicions and moderate the hostility that increasingly separate our two races.[21]

Watts' Grill seemed for several reasons a particularly appropriate target for the faculty group. The restaurant depended on university-related patronage, but, more to the point, it remained one of the toughest holdouts in the battle to desegregate Chapel Hill. While approximately one-quarter of the town's commercial establishments continued to refuse service to blacks,[22] few proprietors seemed less likely than Austin and Jeppie Watts to bow to student pressure. There had been a small demonstration at their restaurant on the prior night, January 2, during which the Watts and their staff roughed up six young demonstrators. Austin Watts, a big man over six feet and weighing some 280 pounds, had a history of assault convictions for brawling, but it was Mrs. Watts who distinguished herself on the 2nd. She straddled the head of a passive protester and, in the presence of customers, urinated on him. "Anybody," she exclaimed, "that'd let somebody piss on them!"[23]

"It would be fair to say, we think," several of the professors later explained, "that all of us were prepared to risk this kind of civil disobedience if conditions consequent upon our going to the restaurant required it." As events unfolded in the twenty minutes after they reached the restaurant on the evening of Friday, January 3, they had no choice in the matter. Austin Watts, his wife, and various staff and spectators confronted the group at the entrance to the Grill upon their arrival just before 9:00. When Albert Amon asked Watts if the party could come in, Watts grabbed Amon by the jacket and began to strike him. Others, including Mrs. Watts, joined in, and as Amon fell to the floor, two of the younger activists succeeded in throwing themselves over Amon's body. Klopfer and the others sat down on the pavement just outside the restaurant door where they, too, were quickly set upon. A waitress came around to the front of the building with a garden hose, the nozzle of which she held directly against the demonstrators' eyes and foreheads and shoved between their legs. With the temperature below freezing that night, the dousing had considerable effect. Mrs. Watts soon appeared outside the restaurant with a broom, which she used to beat the passive men and to prod them in the groin, advising "this is how we get the hogs to move." After some minutes, several sheriff's officers appeared and put an end to the melee. Amon was bleeding badly from the head, so the officers sent him in a squad car to the hospital for emergency care. The police loaded professors Klopfer, Herzog, Osborn, David Smith, Harmon Smith, and Wynn, and the four younger men, all of whom were "wet, bruised, and in a state of shock," into several police vehicles and transported them to the county jail. There they were booked, held for the night, and finally released the next morning after posting $100 trespass bonds.[24]

Klopfer set out later that same morning to locate an attorney for what he thought was going to be "a trivial case" of misdemeanor trespass. At the suggestion of his Duke colleagues, Klopfer sought the advice and assistance of a young member of the Duke Law School faculty, Paul Hardin, whom Robert Osborn and Harmon Smith knew from a monthly inter-racial discussion group involving progressive members of the Duke faculty and the Durham community. Hardin, who was not then a member of the North Carolina bar, agreed as requested to try to locate an attorney for the five Duke professors. Hardin's first thought was to get a senior member of the Durham legal establishment, "someone with clout and prestige," and he telephoned acquaintances from the discussion group and asked for their suggestions and assistance.[25]

Summoning several of the professors to his office that Saturday afternoon, Hardin advised them, quite to their surprise, that they had "got a tiger by the tail." Hardin and his contacts had come up empty handed after making numerous inquiries of the Durham bar. Many made no secret of their contempt for the professors' actions, and all appreciated the professional risks attending the representation of so controversial

a group. Hardin's only remaining prospect, whom he had been unable to reach, was a recent graduate of the law school, Wade Penny, Jr., whose acquaintance Hardin had continued through the discussion group. Penny had "no reputation as a radical or a renegade," but Hardin judged him a "man of integrity, of conviction," and thought Penny might accept the job. However, as Hardin warned the professors, Penny was the sort who "liked to quote Aristotle to juries." When Hardin reached Penny later that day, Penny agreed to take the case.[26]

Penny, then in his second year as a sole practitioner and by every measure an earnest young servant of the law, attended Duke both as an undergraduate and as a law student, and thus felt deep loyalty to the university community. But another factor convinced him to accept the professors' case. He was no civil rights crusader, and, beyond his participation in the informal discussion group, he had not previously been involved in any fashion in the civil rights movement. Still, Penny's moral and professional sensibilities were offended by what he judged the southern legal establishment's failure to engage the burgeoning social and legal revolution then sweeping across the South and the nation. Displeased that fellow southern attorneys so often shied from participation in civil rights cases, preferring instead to let northern lawyers fight the legal battles in southern courtrooms, Penny saw himself as part of a "young and better educated South" responsible for taking up these issues and presenting them thoughtfully to fellow Southerners. Offered the opportunity to defend Klopfer and his colleagues, Penny saw a chance to confront the southern judiciary, and through them southern whites more generally, with a situation where "the person speaking was from the South and was white, and not black," in order to "force the state to come around and deal with [racial issues]. At least the emotional content ought to be down a little bit, and therefore they might have to deal with it a little bit more intellectually." Penny met with the five professors over the weekend and began the process of putting together their defense.[27]

By early February some 1,076 charges stood pending against approximately 250 individual demonstrators, the vast majority of whom were students at UNC or Chapel Hill high schools. To the professors' surprise, local solicitor Thomas "Dick" Cooper[28] elected to try each of the six professors—William Wynn of UNC, who had separate legal counsel, and the five Duke faculty—individually during the regular February

**This photograph, attributed to *Daily Tar Heel* staff photographer Gary Blanchard and published in the January 20, 1968, edition of the *North Carolina Anvil*, was probably taken at one of several other protests at Watts' Grill because no photographer documented the January 3 incident. Albert Amon, the psychology professor who was badly beaten in the sit-in, also routinely photographed such protests when he was not physically participating.**

session of Orange County Superior Court. Penny considered this move a further sign of the state's determination to "make an example out of them," particularly since the cases were sure to draw considerable media attention.[29]

In its general character the trial of David Smith, the first professor called before the court during the regular February session, set a pattern for subsequent trials of the other faculty. Austin Watts, the prosecution's lead witness, testified that the group of eleven had entered the restaurant and silently laid down upon the floor, and that he had been forced to call the police after the demonstrators refused his repeated requests to leave. On cross-examination, Watts steadfastly denied that he had assaulted anyone. The solicitor next called one of the arresting officers as the prosecution's only other witness. At Penny's prompting the deputy informed the court that upon reaching Watts' Grill he had found the group of demonstrators huddled outside the restaurant's door, soaking wet. Penny then put professors Osborn, Amon, and Harmon Smith on the stand, and each contradicted Watts' version of events and described the beatings in detail. Finally, Penny called UNC physics professor Joseph Straley, who had gone to Watts' Grill to serve as an "observer" for the Chapel Hill Freedom Committee. Having watched the twenty-minute fracas from his car across the parking lot, Straley corroborated the account provided by Osborn, Amon, and Harmon Smith.[30]

After deliberating just ten minutes, the jury pronounced David Smith guilty of trespass. The presiding judge summoned Smith to the bench, admonished him that, "as a man of learning, [you] of all people ought to set an example for others," and then sentenced the mathematics professor to sixty days hard labor on the state roads. Shocked that the judge ordered not only an active sentence but one of such severity, Penny immediately filed notice of appeal to keep Smith out of jail while an appeal proceeded.[31]

Others, too, soon registered their dismay at the stiff sentence. In an editorial entitled "The Meaning of 'Chapel Hill,'" the *Raleigh News and Observer,* the state's leading daily, observed:

> Wherever the original blame may lie, they are manufacturing ill-will for North Carolina in the trial of the professors in the Orange County Superior Court in Hillsboro. Already in important centers in the North shock and surprise has [sic] been registered as a result of the 60-day sentence given a young Duke math teacher for joining a group including Negroes peaceably seeking service at a Chapel Hill cafe. . . .[A]lready the words, "Chapel Hill," which once seemed a term for enlightenment, are now being bandied about as words in the company of Oxford, Mississippi, and Albany, Georgia.

On the UNC campus, the *Daily Tar Heel* reprinted the same piece under the heading, "The First Gut Shot: Are More to Come?"[32]

On the following Monday, March 2, a three-week Special Criminal Session of Orange County Superior Court convened in Hillsboro to hear the hundreds of civil rights cases, including those of the five remaining professors, not reached during the regular February session. At the direction of the state's judicial authorities, Judge Raymond Mallard of Tabor City, who enjoyed a wide reputation as a hanging judge, presided over the session.[33] Trials of the remaining five faculty took precedence at the Special Session, with UNC psychology professor William Wynn the first to be tried. Much to everyone's surprise, Wynn's jury divided eleven to one when the single black juror, an NAACP member, voted to acquit. Wynn was retried two weeks hence, and this time convicted. Guilty verdicts came back for Duke professors Herzog and Osborn in the interim. Harmon Smith was found guilty in a subsequent two-week session convened in April, Judge Mallard again presiding, to resolve the still-outstanding cases of nearly all of the younger defendants.[34]

Klopfer's case, meanwhile, had come to trial on Wednesday morning, March 12, during the second week of the Special Criminal Session. After Austin Watts testified for the prosecution, Penny put Klopfer on the stand in his own defense. "He made a good witness," Penny recalled. "Peter is a Quaker, and once they reach a conclusion, they don't back down or apologize for their position." Klopfer "is sharp, and a quick wit," Penny continued, yet "very cool and detached at the same time. He made some quick comebacks to the solicitor. He would bait him a little bit. Peter

was very good on semantics." Cooper at one point asked Klopfer if he felt duty-bound at times to violate the law. "Only in response to higher law, yes," Klopfer responded, "[though] I am not suggesting that an individual has a right to violate the law with impunity." Klopfer denied Cooper's assertion that he had gone to the restaurant specifically to be arrested, and he remarked on the irony of being tried for trespass when in fact their party had been "attacked in an unprovoked manner."[35]

With many of the witnesses by that time well-rehearsed, testimony went rapidly, and Judge Mallard gave the Klopfer case to the jury that same afternoon at four o'clock. The jury—five white women, six white men, and one black man, of whom six resided in Chapel Hill and the others in the more conservative environs of Hillsboro and rural Orange County—included one member, soon to be elected jury foreperson, whose loyalties were clearly in question. She was Mrs. Athena Parker, daughter-in-law of the elderly Episcopalian minister who had been arrested at the Pines Restaurant in December. Because the court clerk had erred and failed to subpoena Parker for jury duty, she would never have known to appear in court but for a coworker who happened to see her name in a public notice in the local paper. When Parker nonetheless reported to Judge Mallard on the appointed morning in the Hillsboro courtroom, Mallard made a point of publicly praising her commitment to her civic duty. Although Parker believed solicitor Cooper must have known of her father-in-law's arrest and sympathies, and though he had asked other prospective jurors whether they had relatives among the demonstrators, he never put this question to her. Most probably because Mrs. Parker had won Judge Mallard's praise for her unusual initiative in appearing for jury duty, Cooper declined to dismiss her from the pool.[36]

Having retired with the others to the jury room, Mrs. Parker at once found herself at the center of a storm. She polled the group and found it sharply divided, she and six others favoring acquittal, the remaining five preferring to convict. The split followed axes of gender and place of residence, with the women and the Chapel Hillians making up the early majority. As deliberations continued on Thursday, the tide shifted in favor of conviction as the five jurors hoping to convict harangued and wore down their considerably less-assertive colleagues. As the jury adjourned at the end of the day on Thursday, exhausted and still divided, a reporter observed that the group "showed visible signs of emotional stress."[37]

On Friday morning, after just fifteen minutes of further deliberation, Mrs. Parker informed Judge Mallard that the jury was hopelessly deadlocked. Joined by one other juror, Parker had stood her ground. It was true that Parker revered her father-in-law and that she was sickened by Austin Watts' thuggery and appalled that Jeppie Watts had urinated on another human being. "I just could not tolerate this sort of behavior in my neighborhood," she recalled. But she voted as she did for the simple reason that, to her view, there was no evidence that Peter Klopfer had trespassed at Watts' Grill. Had he done so, she would have voted to convict "without hesitation, just as I would have convicted my own father-in-law." Judge Mallard thus had no choice but to declare the second mistrial of the session. He ordered Klopfer to reappear on Monday morning to await retrial.[38]

Klopfer was not retried in the final days of the Special Session, nor was his case called during the further proceedings in April. Mallard and Cooper used this time to clear from the docket the enormous number of cases still pending. By one count some 250 younger demonstrators together faced more than 1,400 separate charges.[39] Mallard and Cooper ultimately struck a back-room deal with these defendants and their attorneys, promising lenient sentencing in exchange for *nolo contendere* pleas. After the defendants entered such pleas, however, Mallard sprung his trap and double-crossed the young protestors. Abandoning his earlier pledge, Mallard imposed numerous active jail terms running three to twelve months, stiff fines, and harsh probationary terms. In particular, Mallard forbade all further participation in subsequent civil rights demonstrations at the risk of revocation of probation and immediate jailing. Around this time Mallard also announced the penalties he was imposing on the four professors convicted in his court. Mallard sentenced Harmon Smith to sixty days, and William Wynn and Robert Osborn each to ninety days, at hard labor. Because Mallard mistakenly interpreted Frederick Herzog's final statement to the court as a recantation, the

judge fined Herzog $50 and court costs but did not jail him.[40]

Preoccupied with the other cases, Cooper continued the Klopfer trespass matter until the next regular criminal session in August and thereby quite unwittingly and much to his disadvantage entangled the Klopfer case with watershed changes in civil rights law under way at the federal level. On July 2, President Johnson signed into law The Civil Rights Act of 1964, Title II of which contained provisions specifically forbidding racial discrimination at places of public accommodation. More on point, Title II prohibited "any attempt to punish" a person seeking to exercise a right or privilege of equality secured by the Act. Thus, as a matter of law it was now unclear whether Klopfer could any longer be prosecuted for his alleged trespass infraction at the Watts' Grill. This may explain why Cooper, when August arrived, once again continued Klopfer's case, this time to the December session of Superior Court.

While Klopfer and Penny of course had regarded the Act's passage in July as encouraging, it was not until December, when the Supreme Court both sustained the constitutionality of Title II's public accommodations provisions[41] and noted the retroactive applicability of these provisions to bar prosecution of persons arrested for trespass while seeking service at segregated facilities,[42] that Penny and Klopfer decided, as Klopfer recalled, "to go on the offensive." Until this time, they had not fought Cooper's requests for the continuances; indeed, their instinct after the March mistrial was initially to lie low so as to avoid a guilty verdict and harsh sentence from an unfriendly court. Now, however, the trespass charge against Klopfer appeared void, and Penny pressed to get the case brought before a judge.[43] Cooper, however, once again had the case put over, this time from December to the April 1965 session. As Penny and Klopfer awaited the April court date, more good news emerged from the federal courts. In February, the Supreme Court applied the principle of Title II's retroactive applicability in a sit-in case, from North Carolina no less, that bore striking resemblance to Klopfer's.[44] Then, in March, the United States Court of Appeals for the Fifth Circuit declared that state trespass prosecutions forbidden by the Civil Rights Act could be removed to federal district court for dismissal.[45]

Dick Cooper recognized that he now had no chance to prosecute Peter Klopfer successfully. Yet he retained one option he found far more attractive than the outright dismissal of the charge. Just prior to the April session, Cooper informed Penny that he planned neither to dismiss nor retry the Klopfer case. Instead, Cooper indicated that he would request that the court grant him a "*nolle prosequi* with leave," a procedural device occasionally utilized in North Carolina criminal courts. From the Latin, "to be unwilling to pursue," the nol pros with leave constituted a declaration by a prosecutor that he preferred not to prosecute the suit further but rather to freeze the indictment, suspend the statute of limitations, and retain absolute discretion to reinstate the case at any future point. Most commonly, the nol pros with leave and its close cousin, the so-called straight nol pros (in which the court rather than the prosecutor retained discretion concerning reinstatement), found application when a probationary effect was desired, the implicit agreement between the court and the accused being that the suspended charge would become a dead letter at some later date so long as the accused avoided further troubles in the interim. A nol pros could, however, be utilized for less admirable ends. The court or prosecutor could use the threat of reinstitution of a nol-prossed charge to coerce an accused into avoiding activities deemed undesirable, for example, thereby effectively suppressing unpopular dissent. With this in mind Judge Mallard had in fact carefully arranged that at least one charge was excluded from the *nolo contendere* plea of each of the younger demonstrators. Mallard had then nol-prossed these excluded charges, hundreds in all, so that he could use the threat of fresh prosecution to dampen any activist spirit not extinguished by his tough sentencing.

As typically applied, both the nol pros and the nol pros with leave appear to have found their justification in common law, rather than statutory law. The only relevant statutory reference, which first appeared in 1905, failed to specify clearly how the use of either device ought to be construed.[46] In 1912, the North Carolina Supreme Court had defined the nol pros and the nol pros with leave as follows:

> A nol. pros. in criminal proceedings is nothing but a declaration on the part of the solicitor that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a capias, after a nol. pros., does not issue as a matter of course upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen. . . . The only difference between a general or unqualified nol. pros. and one "with leave" is that in the latter case the leave to issue a capias upon the same bill is given by the court in advance, instead of upon a special application made afterwards.[47]

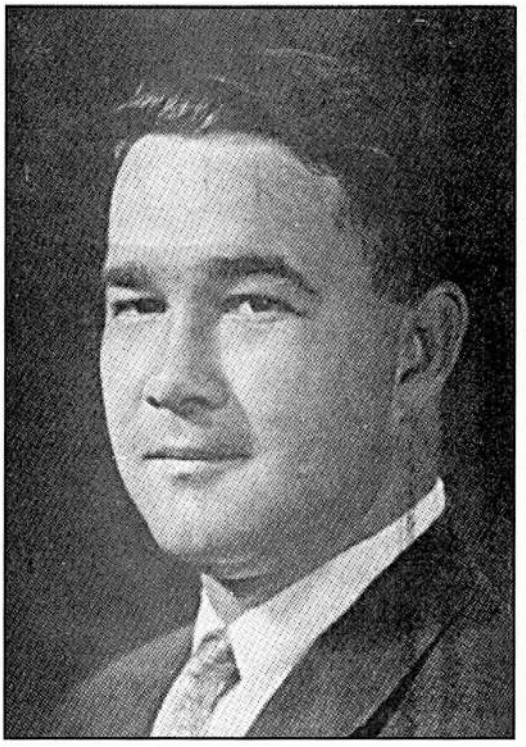
As for Cooper's intention to grant a nol pros with leave, Penny would have none of it. In Superior Court later that month, he objected strenuously when Cooper made such a request of the court. Penny argued that the trespass charge stood abated in light of court rulings sustaining the validity of Title II of the Civil Rights Act and construing its provisions to be retroactively applicable. Unimpressed, the presiding judge volunteered his willingness to grant Cooper the nol pros with leave. To everyone's surprise, however, Cooper then requested yet another continuance, this one until the following August, which the judge allowed.[48]

Several days later Klopfer and Cooper traded jibes in a local newspaper over these developments. Klopfer noted that he had already spent more time sitting in the Hillsboro courtroom than he would have served if convicted, and explained that he opposed the solicitor's request for a nol pros with leave both because the Supreme Court rulings shielded him from prosecution and because Cooper could use the nol pros to "keep me sitting in court indefinitely." Klopfer pointed out that Cooper had lost his temper when cross-examining him and offered the view that Cooper continued to pursue the matter only on account of a personal grudge. For his part, Cooper criticized Klopfer for his "stubborn" unwillingness to accept the same nol pros with leave offer that hundreds of other demonstrators had received. Cooper admitted that Klopfer's attitude irritated him, but claimed that he had no choice but to take the case to trial in August if he was to avoid giving Klopfer "preferential treatment."[49]

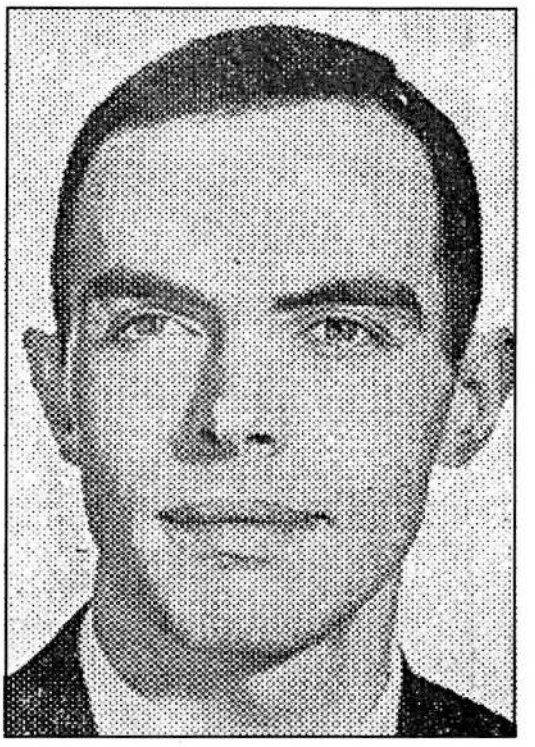
This statement was untrue, as Cooper was aware. Taking the case to trial was the surest way to expose the strength of Klopfer's claim that the trespass charge could not now be sustained. Having invested a good measure of prestige in the civil rights prosecutions, the last thing Cooper could have wanted was to lose decisively to Klopfer. Not only would this be a considerable embarrassment, it would reveal that the hundreds of trespassing charges nol-prossed by Judge Mallard were equally untenable. The best Cooper could do with Klopfer was to get a nol pros with leave, and it is not clear why he declined the presiding judge's offer of one at the April 1965 session. Perhaps he was caught off guard by Penny's strong objection, and momentarily lost sight of his best option.

When Penny discovered later that summer that the *Klopfer* case was not docketed for the August term of Superior Court, he decided to force the issue. On August 7, 1965, Penny petitioned the court to bring the Klopfer matter to a conclusion. Drawing attention to the legal developments subsequent to the passage of the Civil Rights Act, Penny asserted that the prosecution pending against Klopfer was now "barred and abated." "[A]t the very least," he argued,

> the bill of indictment pending against the defendant [is] fatally defective in that said bill of indictment purports on its face to make unlawful the exercise of a legal right which was secured to the defendant by the passage of the Civil Rights Act of 1964, which right to obtain service was given retroactive effect. . . .



**After Klopfer's original prosecution resulted in a mistrial, county solicitor Thomas (Dick) Cooper, Jr., refused either to retry Klopfer or to dismiss the charge. Instead, he used an unusual procedural device to trap Klopfer indefinitely in legal limbo, a tactic later endorsed unanimously by the North Carolina Supreme Court. The unliquidated criminal charges made it difficult for the zoology professor to win research grants and to travel abroad to pursue field work.**



**Solo practitioner Wade H. Penny, Jr., just two years out of Duke Law School, agreed to represent Klopfer and his faculty colleagues after many prominent Durham attorneys refused to defend the professors. Penny believed the time had come for a new generation of white southerners to accept responsibility for confronting racial segregation.**

Penny attacked the validity of the indictment precisely because North Carolina allowed dismissal of such a true bill only upon a court's finding a "vitiating defect."[50] He also noted that some eighteen months had passed since Klopfer had been indicted.[51]

In response to this petition, the presiding judge called the matter for consideration on August 9. Cooper now seized the chance and requested a nol pros with leave, which the court then granted over Penny's objections.[52] Klopfer was exasperated. The trespass charge was without merit in the first place, and now, after key rulings from the federal courts, was apparently invalid in all events, yet he could neither compel Cooper to prosecute, nor could he get him to dismiss the charge. Beyond the satisfaction of vindication, Klopfer also wanted to be free of the unliquidated criminal trespass charge, which was proving "a bloody pain in the neck." His zoological fieldwork required extensive travel abroad, and since every visa application demanded an explanation of any pending criminal matters, Klopfer was forced "to append all kinds of documents to show what the character of the prosecutions was." He was similarly burdened when applying for passport renewal and, more troubling still, when he sought research grants.[53]

Before the week was out, Penny filed an appeal of the nol pros with leave ruling with the North Carolina Supreme Court. (There were at the time no district courts of appeal in North Carolina.) Penny's central contention was that the application of the nol pros with leave effectively denied Klopfer a speedy trial, a right Penny insisted was guaranteed to his client by both the state and the federal constitutions. The North Carolina constitution provided that "justice [be]

administered without sale, denial, or delay," Penny pointed out.[54] As for the federal Constitution, Penny acknowledged that the Supreme Court of the United States had never explicitly applied the Sixth Amendment's speedy trial provision to the states via the Due Process Clause. But he reasoned that such a construction of due process was the only one consistent with the Court's 1963 ruling in *Gideon v. Wainwright,*[55] which incorporated the Sixth Amendment's assistance of counsel provision into the Due Process Clause of the Fourteenth Amendment, and with what he termed the "general conclusion of American Jurisprudence that the right to a speedy trial in criminal proceedings is an essential element in the 'ordered concept of liberty' and therefore a basic procedural safeguard required by 'due process of law.'" Penny also acknowledged that a defendant could waive his right to a speedy trial if he so chose, but noted that, since Klopfer had specifically objected to the entry of the nol pros with leave, no argument could be made that Klopfer had offered such a waiver. The Superior Court therefore had erred in granting Cooper the nol pros with leave because such a step effectively eliminated Klopfer's chance to secure his right to a speedy trial. "Unless the constitutional right to a speedy trial is to be subjected to complete emasculation by unfettered use of the nol pros with leave," Penny concluded, "it is imperative that the State be required to make an affirmative showing as to its justification for the entry of nol pros with leave in those cases where the defendant formally requests trial and objects to said entry . . . ."[56]

Penny was not overly optimistic that this argument would win over the State's high court, a collection of "conservative Easterners [that is, natives of conservative eastern North Carolina], . . . men in their sixties and seventies." But the North Carolina Supreme Court was a required stop on the way to an eventual federal appeal, which Penny and Klopfer already anticipated. In addition, Penny welcomed the appeal to the state as a further chance calmly to set the issues before an influential panel of Southern jurists. "For the first time," he later remarked, "here was a native Southerner up there on a case, and although we weren't arguing about public accommodations and civil rights directly, . . . I didn't want them to have the comfort of being able to put down an out of state lawyer with an Ivy League resume and an Ivy League accent."[57]

After hearing oral argument in *State v. Klopfer* on December 14, 1965, the seven justices of the North Carolina Supreme Court did not labor long over their decision. The opinion, a mere three paragraphs, turned on two sentences:

> Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi.*[58]

The North Carolina Supreme Court thus construed the right to a speedy trial to shield a defendant in the event of ultimate prosecution, at which point it might be asserted, for example, to argue for dismissal of the charge on the grounds that the undue delay had compromised the defendant's ability to present an adequate defense. But the speedy trial right emphatically did not serve the defendant affirmatively as a means by which he could compel the state to proceed. In the unanimous judgment of the state's highest court, the right to a speedy trial, though it adhered "without question" to a defendant, was of no use to a defendant in his efforts to escape the anxiety and imperiled reputation that followed upon public accusation in the period before trial.

One possible explanation for this judicial insensitivity to Klopfer's petition for relief, a request by all means consistent with the common understanding of the range of protections intended by the right to a speedy trial, is that the justices knew that Klopfer was not likely ever to be tried on the trespass charge and thus was at little risk ever of being convicted and penalized directly. Cooper had said as much publicly, explaining that in light of the rulings in the federal courts he did not plan to call Klopfer's case for retrial.[59] That Klopfer would never be jailed for his "offense" may have been justice enough in the eyes of the members of North Carolina's highest court. A second explanation was hinted at years later by one of the justices who participated in *State v. Klopfer.* After reviewing the Court's opinion, the justice immediately

recalled the social upheaval brought on by the civil rights movement. "Looking back, I just wonder if it's possible that all that commotion influenced our decision. . . . You couldn't even go to lunch, what with the picketing and all. I just wonder if the turbulent times may have influenced us."[60]

Turned away by the state, Klopfer and Penny resolved at once to push the matter to the Supreme Court of the United States. Convinced they had a strong case, Penny believed the greater challenge lay not so much in winning over the Justices once a writ of *certiorari* was granted, but rather in drafting a sufficiently compelling petition to ensure that Klopfer's case was not overlooked amidst the flood of *certiorari* petitions received by the Court. The trick was to catch the eye of the Justices' law clerks, since it was they who read through the stacks of *certiorari* petitions and then made preliminary recommendations as to which had merit. Klopfer's case presented an excellent opportunity for the incorporation of the Sixth Amendment's speedy trial provision, and Penny hoped that the "enlargement of the Fourteenth Amendment would appeal" to the clerks in view of the fact that the Court's incremental broadening of the Due Process Clause represented "one of the major constitutional developments in this century." In his judgment, there was "no logical reason" why the Supreme Court should not "go ahead and complete the transfer" of the criminal procedure provisions of the Bill of Rights to the states by expanding the Due Process Clause still further.[61]

Thus in his petition for a writ of *certiorari* Penny stressed the Warren Court's earlier willingness to incorporate certain of the criminal procedure provisions of the first eight amendments, drawing special attention to the Court's incorporationist decision in *Gideon v. Wainwright*. Penny also emphasized that the Court had ruled not two months earlier on the scope and purpose of the Sixth Amendment's speedy trial provision, albeit in a case involving federal rather than state procedure. In *United States v. Ewell*, Penny noted, the Court held:

> This [speedy trial] guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, *to minimize anxiety and concern accompanying public accusation*, and to limit the possibilities that long delay will impair the ability of an accused to defend himself.[62]

Penny also warned that use of the *nolle prosequi* with leave had a chilling effect on the exercise of First Amendment rights of free speech and assembly "by using minor criminal prosecutions to ensnare the participant into the labyrinth of state criminal prosecution where the participant may be harassed and intimidated into silence or inaction." Describing Klopfer as an "accused [who] ha[d] challenged the prevailing opinion of the community," Penny hoped with this oblique reference to the wider struggle for black equality to arouse the sympathy of the Court for a civil rights demonstrator.[63]

On the last Thursday in May 1966 the nine Justices of the Supreme Court met in conference to consider a long list of pending *certiorari* petitions. The so-called "cert memos" prepared for four members of the Court by their respective clerks reveal that Penny had decidedly mixed luck convincing the clerks to champion Klopfer's case, since in three instances the clerk-author recommended denying Klopfer's request for Supreme Court review. The four cert memos do reflect, however, that Penny succeeded in making clear the basic questions presented by the *Klopfer* case. With varying degrees of emphasis the four authors noted the burden borne by Klopfer in light of the pendency of an unliquidated criminal charge. All four authors also explicitly recognized the civil rights context in which the case had arisen and acknowledged the possibility that the nol pros with leave could be used to coerce unpopular individuals into silence and therefore wrongly to abridge their First Amendment right to freedom of speech. As to the central constitutional question of the applicability of the Sixth Amendment's speedy trial provision to the states, two authors ignored it (more precisely, they implicitly accepted that the right existed without specifying whether its source was the state or the federal constitution), while a third simply assumed that the federal right did indeed apply. The fourth author, however, highlighted the question as one yet to be resolved conclusively by the Court.[64]

The vote on the *Klopfer certiorari* petition soon followed. Chief Justice Earl Warren,

underscoring in pencil the few sentences of his cert memo that repeated Penny's concern over the use of the nol pros with leave against a civil rights demonstrator, rejected the suggestion of his clerk and voted to affirm. Justice William O. Douglas, whose clerk had given the *Klopfer* petition a ringing endorsement, also voted to affirm. The tally was evened as Justices John Marshall Harlan and Tom Clark, perhaps influenced by the views of their respective clerks, voted to deny. Justice Byron R. White joined Harlan and Clark, but the remaining members of the Court all voted to hear Klopfer's case, making the final count six to three in the affirmative.[65] The Court soon after scheduled oral argument for December 8, 1966.

Penny filed a formal brief with the Court that was largely similar to his original petition, again emphasizing that the Justices had every reason to locate the Sixth Amendment's speedy trial provision within the Due Process Clause of the Fourteenth Amendment. He insisted that such a move would be wholly consistent with the logic underlying the Court's earlier incorporation of various criminal procedure provisions into its construction of the meaning of "due process." This time Penny also advanced the argument that, even if the Court for some reason was unwilling to carry over the Sixth Amendment's speedy trial provision *in toto* to the Fourteenth Amendment's Due Process Clause, the Justices alternatively could construe the Due Process Clause itself to be of sufficient scope as to secure protection for Klopfer. The Court could, that is, avoid formal incorporation of a specific guarantee of the Bill of Rights, a step that by definition made the right binding upon the states precisely as it was binding upon federal courts, and instead could simply announce that it now construed the phrase "due process of law" to provide a defendant with a positive right not to be kept forever under the cloud of an unresolved criminal charge. Several members of the Court, Penny noted, expressed such a preference in opinions concurring with Justice Black's pronouncement for the Court the previous year in *Pointer v. Texas*,[66] construing the Fourteenth Amendment's due process guarantee to encompass the Sixth Amendment's Confrontation of Adverse Witnesses Clause. Although Penny did not favor this latter approach, he recognized that Justice Harlan in particular might prefer it, since Harlan had consistently rejected the notion of formal incorporation as unsound. Turning to another front, Penny drove home the point that the Warren Court in his view bore an ongoing responsibility to support the civil rights movement after so auspiciously encouraging its rise with the 1954 *Brown* decision by adding immediately after his description of the abuses "which pervade the administration of criminal justice in state courts" the phrase "particularly in the South."[67]

In his seven-page brief for the state, Andrew Vanore, a twenty-eight-year-old staff attorney in the North Carolina Attorney General's office who had presented the state's case in oral argument before the North Carolina Supreme Court, noted that the Sixth Amendment's speedy trial provision was not yet "expressly. . . made mandatory in state proceedings." Immediately thereafter, however, as if to concede the applicability of the federal speedy trial guarantee to the states, Vanore observed that "most of the other Sixth Amendment rights are in fact binding on the states through the Fourteenth Amendment." Still, Vanore defended the state's position by asserting both that the nol pros with leave caused no prejudice to a defendant's standing and that a defendant had no right to compel the state to prosecute.[68]

In early November Chief Justice Warren received a thirteen-page "bench memorandum" on *Klopfer v. North Carolina* from Bill Finn, one of his four clerks. Finn considered it a foregone conclusion, given the six-to-three margin on the vote to grant *certiorari*, that the Court intended to side with Klopfer. The issue in Finn's view thus was not whether the Court would reverse the state court decision, but on what grounds. Finn advised Warren that he had found nothing of merit in "the state's remarkably short brief." Noting that the case had arisen in a civil rights context, Finn also told Warren that "the state may well be accused of harassing and intimidating the petitioner," since the prosecutor had been able to place the trespass charge "in limbo—safe from [the petitioner's] attack on its validity, and yet forever available at the [prosecutor's] beck and call." Reaching the matter of how the Court could justify its ruling, Finn wrote that the "question is whether due process by itself or through absorption of the Sixth Amendment's right to a speedy trial required the

state to dismiss an indictment delayed, without reason shown in the record, for eighteen months and. . . indefinitely in the future." Finn viewed the perpetual pendency of the charge as a clear violation of "traditional due process." The question was whether the Court would go all the way and "absorb" or incorporate the Sixth Amendment's speedy trial provision. "If there is a federal constitutional right to a speedy trial," he concluded, "then the Court is justified in creating an appropriate safeguard to that right by requiring that the government, whether state or federal, fish or cut bait within a reasonable time."[69]

Oral argument in *Klopfer v. North Carolina* on December 8 proved a most unusual hearing,[70] though it began simply enough. Penny, just thirty years old, began by deliberately setting out the facts of the case. He had previously decided that a straightforward approach would be most effective since, in his view, "the state didn't have much of a case." After several minutes, various Justices began asking questions, most of which concerned the nol pros with leave. Reviewing the procedure with the Court, Penny explained how the entry of the nol pros with leave and the North Carolina Supreme Court's subsequent ruling left Klopfer without any opportunity to escape the indefinite pendency of the trespass charge. The tone of the questions from the Bench was matter of fact. At one point one of the Justices noted that Penny had raised the First Amendment "chilling effect" concern in his brief, and Penny responded that although the nol pros with leave typically functioned to establish an informal probationary period with which both the court and the defendant were satisfied, such was not the case in the present instance. As Penny's allotted thirty minutes came to a close, Warren indicated that the Court had a satisfactory understanding of his position, and Penny sat down.[71]

Vanore then rose to present the state's case. An unusual exchange ensued, one of a very few instances of its sort in the history of oral argument before the Court.

"I think the crux of the case is whether or not the defendant here can compel the state to prosecute," Vanore began, explaining that the entry of the nol pros with leave was "the equivalent of a dismissal." Justice Potter Stewart immediately took exception. "But it *isn't* a dismissal," he shot back. "This thing actually hangs over this petitioner's head for the rest of his life." Justices Abe Fortas and William J. Brennan, Jr., each then proposed a scenario in which the pendency of a criminal charge might harm Klopfer. He would have to disclose this if he made an application for federal employment, would he not? The point was clear and, with little option, Vanore admitted it was so.

This concession won Vanore no relief from the spirited questioning, which only intensified. Chief Justice Warren then asked about the indefinite tolling of the statute of limitations. If brought to trial at a distant point in the future, Warren asked, could the petitioner invoke his right to a speedy trial to deflect the prosecution? Did the state, in other words, recognize that some form of speedy trial right adhered to a defendant? Vanore, already showing signs of stress, replied, "As far as the state of North Carolina's position is, the defendant is entitled to a speedy trial, if there is to be a trial." Vanore thus attempted to argue the illogical position, one consistently maintained by the state to this point, that a defendant unquestionably enjoyed a right to a speedy trial, yet one that attached only at the time of actual trial. "Now, as far as the question . . . this is hanging over his head indefinitely, there's no doubt about that. But practically speaking, the state takes the position that a nol pros with leave is in effect a dismissal."

Justice Hugo L. Black, ardent champion of civil liberties during his thirty-four years on the Court, could contain himself no longer. He bore down on Vanore: "Did I understand you correctly to say that if the solicitor were to decide to prosecute this very man, that this very man could then offer a defense which the state would then accept?"

Vanore: "Well, I'm not sure. . . , but I would certainly think. . . that that would be a good defense, that he was denied his right to a speedy trial."

Black: "Then all you're—the controversy here is, as I gather it, is the state's right to keep something pending against him that the state knows he couldn't be convicted of."

Vanore: "I think that is the crux of the matter, yes."

Black, incredulous: "*Why* would the state do this?"

Vanore: "I cannot give any good reason for

why the state does that. I can simply say this, that, uh—" Completely off balance, Vanore hesitated, speechless.

Black shattered the long pause. "What you are saying is: Here is a man charged with an offense for which he has a good defense, which would be recognized and he would be turned loose, but he is denied any right to raise it in the state of North Carolina."

Vanore could not escape. "That is correct," he replied.

In this instant Vanore effectively conceded North Carolina's case, for his admission was tantamount to a confession of error. Black had heard enough. "Why does the state of North Carolina not confess error?" he demanded.

Several other Justices then pushed the crumbling Vanore to explain what he would do to resolve the matter. "Well," he answered, "I might suggest that the Court remand to the Supreme Court of North Carolina with direction that the state either try this man within a reasonable time, or that the Supreme Court itself quash the indictment."

"On what grounds, counsel?" Justice Potter Stewart then asked. Stewart wanted to see how far the state's attorney was willing to go in his retreat. Did Vanore endorse the Court's incorporation of the Sixth Amendment provision, or did he prefer avoiding incorporation in favor of a ruling that the state had transgressed the Fourteenth Amendment's general stipulation that due process of law be guaranteed to all defendants? "Do we say speedy trial?"

After several false starts Vanore agreed. "Well," he said, "it would have to come under the Sixth Amendment speedy trial, yes—"

"Has that been applied to the states?" Stewart interrupted.

"No, it has not," Vanore replied correctly.

"Do you suggest that we do it in this case?" asked Stewart.

Vanore realized that he had now backed himself into an uncomfortable corner. No, he said, he did not. Justice Harlan then suggested to Vanore that perhaps the Court could limit its ruling to general due process, but Vanore was sufficiently adrift by now that he failed to see that Harlan was trying to assist him. Vanore reversed himself again and responded that this narrower ruling would be "more problematic as far as the state is concerned than the Sixth Amendment."

Confessions of error before the Supreme Court are extremely rare, and appreciating this fact, a perplexed Warren now addressed Vanore: "I wonder why in both your answer to the petition for *certiorari* and also in your brief. . . that no such concession as you now make was made. . . . In both of these documents you ask the Court to deny this petitioner *any* relief. Now why do you come to us in that posture?"

Vanore's answer was a muddle. "I preferred, quite frankly," he said, "not to put it in the brief, Mr. Chief Justice, and that if any admission of error was made that it would be made orally, because I was not sure at that particular time that I in my own mind thought it was error."

Justice Black thought this answer insufficiently contrite. "Well, why are you not [now] confessing to a plain, open, flagrant violation of the Sixth Amendment. . . ?"

Vanore was at a loss for words. Grasping for an answer, he made the mistake of attempting to resurrect his original thesis that the right to speedy trial attached only at the time of actual prosecution, and that this presented no constitutional difficulty. Exasperated, Black dissuaded Vanore from such a move by leading him back through the same sequence of questions that had culminated in his confession of error.

This time, however, Vanore hesitated when Black asked if the Sixth Amendment's speedy trial provision ought to apply to the states. When Vanore nevertheless mustered no possible alternative justification, Justice Stewart came to his aid by recalling Justice Harlan's earlier observation that the Court could act merely on Fourteenth Amendment due process grounds. Vanore weakly agreed.

As the hearing wound down, Harlan asked Vanore if he was authorized to confess error for the state. Vanore said that he was. He added that "I've already discussed that point with my superiors," a claim that seems implausible under the circumstances. Warren then ended the session.

Klopfer, who traveled to Washington to hear the argument before the Supreme Court, vividly recalled that when Vanore gave an especially unsuccessful reply at one point, Justice Douglas, unable to contain himself, leaned back in his chair, slapped his knee, and laughed heartily. As this

happened, Klopfer's seatmate, a Duke law professor who briefed the case *amicus curiae* for the North Carolina Civil Liberties Union, turned to Klopfer and said simply, "We've won." "I didn't dare believe it," Klopfer remembered, "but I must say that my attitudes toward the judicial system, which had become very cynical, were reversed at a stroke."[72]

The following day, December 9, 1966, the Justices met in their usual day-long Friday conference. When they reached the *Klopfer* case, Warren asked for comments before polling the members of the Court. Not a single Justice spoke for the state, a result that all nine must have anticipated. As Warren called the roll, each Justice agreed that North Carolina's treatment of Peter Klopfer was constitutionally unacceptable. There was, however, some disagreement among the members as to how the Court should justify its reversal of the North Carolina Supreme Court. As is common practice when the Court is unanimous, the Chief Justice assigned the opinion to himself.[73]

By March 9, all of the members of the Court had responded to Warren's draft circulations. Six Justices joined in Warren's result, and another member of the Court notified Warren that he wished to concur without comment. The ninth member could not accept Warren's approach and instead circulated a copy of a separate concurring opinion. With internal matters thus concluded, Warren set aside seven minutes on the Court's morning calendar for the following Monday to allow for the reading of his majority opinion and also the announcement of the separate concurrence.[74]

When the Chief Justice delivered his opinion as scheduled, March 13, 1967, thus became a date of importance in the record of American constitutional history. Warren's opinion, joined by six other Justices and reaching every bit as far as Peter Klopfer and Wade Penny had hoped, explicitly incorporated the Sixth Amendment's speedy trial provision into the Court's construction of the Due Process Clause of the Fourteenth Amendment. The right to a speedy trial, the Court unanimously concluded, could indeed serve a defendant affirmatively as a sword with which he might vindicate his name, rather than merely as a shield in the event of ultimate prosecution.

Warren began by acknowledging that there had been a "difference of opinion as to what provisions of the [Sixth] Amendment apply to the states," but he noted, citing *Gideon v. Wainwright* and *Pointer v. Texas*, that the Court gradually was resolving the uncertainty. "We hold here," Warren declared, "that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" and "one of the most basic rights preserved by our Constitution." Warren had been anticipating this ruling ever since the *Klopfer* case had been brought to the Court's attention, his clerk Finn recalled. Indeed, the Court accepted the case for the very purpose of extending the speedy trial guarantee from the Bill of Rights to the states via the Fourteenth Amendment. There had been "no issue on incorporation," Finn recalled. "Warren was absolutely clear on that." The principle of incorporation "was sufficiently well-established that the Chief didn't think it a departure."[75]

Warren denounced North Carolina's nol pros with leave as an "extraordinary criminal procedure,"[76] the use of which subjected Klopfer to indefinite and unacceptable hardship. The Court fully appreciated, Finn remembered, that Klopfer's case had arisen "in the context of the civil rights movement, to which the Court was extremely sensitive in those years." Warren noted that an exhaustive review of criminal procedure in the fifty states revealed not a single instance of endorsement of such a device as the nol pros with leave, and he drew attention to the fact that the nol pros with leave could well be used perniciously to coerce a dissenter into silence:

> The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him [to remain free from custody]. The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina

> denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

The speedy trial guarantee, Warren concluded, affords "affirmative protection against an unjustified postponement of trial. . . ." He ordered the judgment of the North Carolina Supreme Court reversed.[77]

The other Justices responded predictably, with Black, Brennan, Clark, Douglas, Fortas, and White joining the Chief Justice's opinion. (In response to Warren's February 28 circulation, Black had scratched a note to the Chief Justice indicating that he was "happy to join in another opinion declaring that the Fourteenth Amendment makes a Bill of Right's safeguard applicable to the States."[78]) Justice Stewart concurred without comment. Only Justice Harlan had been unable to accept the majority's incorporationist approach, one he had long rejected, and in his separate two-paragraph concurrence he stated that he preferred the application of a "fundamental fairness" standard, which could be satisfied by a decision resting solely on the Fourteenth Amendment due process guarantee and avoiding the Sixth Amendment altogether.[79]

Already familiar with the Warren Court's effort to extend criminal protection guarantees from the Bill of Rights to the states via incorporation, Court watchers among the national news media did not fail to grasp the significance of the *Klopfer* ruling. "The decision is a milestone in constitutional development, since the speedy trial provision had not previously been held to apply to the states," *The New York Times* announced the following day.[80] *Time* magazine drew attention to the circumstances of Peter Klopfer's arrest and prosecution in heralding the Court's willingness to lift the professor "Out of Legal Limbo":

> In 1964, the usually enlightened campus town of Chapel Hill, N.C., jailed scores of faculty and students for trying to desegregate local public accommodations. To keep the demonstrators quiet, Solicitor (Prosecutor) Thomas Cooper used a ploy of keeping them in a kind of legal limbo by indefinitely postponing their trials. Last week the Supreme Court voided the ploy, and in the process made history: for the first time, the court extended the Sixth Amendment right of speedy trial to all American courts.[81]

The decision also prompted comment by legal academicians. Applauding the Court's utilization of incorporation to extend the speedy trial right to state court proceedings, one scholar noted that adoption of Justice Harlan's approach would scarcely have been sufficient, as a practical matter, to secure the right to criminal defendants in state trial courts. Absent incorporation and its explicit extension of federal speedy trial procedural standards to the states, the author noted, the Supreme Court could not have avoided the necessity of ongoing intermittent scrutiny of state court construction of the ambiguous fundamental fairness standard. With so many state court jurists already quite disgruntled with the Warren Court's reform of state criminal procedure by the use of incorporation, this argument continued, the Court was wise to avoid reliance on the cooperation of these judges. The *North Carolina Law Review*, for its part, announced the certain demise of the nol pros with leave: "In view of the Supreme Court's holding in *Klopfer* that the right to a speedy trial affords affirmative protection against *unjustified* delay, it is difficult to see how the procedure of nol. pros. with leave can be further tolerated."[82]

Vindication had finally come to Peter Klopfer, from no less than the nation's highest court. The Supreme Court's ruling, he told a reporter at the time, was a "vindication of the constitutional principles on which this country was built."[83] Yet it had been a long three years since his arrest at Watts' Grill. Klopfer and his family never sat near the windows of their country home at night, on account of the occasional shotgun blast taken surreptitiously from a nearby road. Thinking back on the experience years later, Klopfer observed:

> I've been cognizant from the first that it's people like Wade Penny who can take pride in the [outcome]. I'm just the bone the dogs were fighting over; I didn't have much to do with which dog won. . . . I didn't see at the time that my decision was putting me at special

> risk beyond that which was normally demanded of a person. It's a little different from jumping into an icy lake to save a drowning person; you can take pride in that success. I think Wade legitimately can take pride, because he did something and he did it at some considerable risk to himself and he didn't have to do it. There was nothing about Wade or his training which says, "You must defend these people." He didn't come out of that kind of background which puts that imperative upon you. My background [as a Quaker] was such that that imperative *was* upon me.[84]

At the time of the Supreme Court's ruling, Wade Penny was serving in the state legislature, having won a seat in the November 1966 general election. He would complete a second term before assuming full-time responsibility for his family's furniture business. He was "delighted to obtain this unanimous decision," he explained to a reporter, because it "will be of substantial value in helping to overcome the lack of objectivity and basic fairness, which often characterizes the administration of justice in the state courts." The *Klopfer* case was the last he would handle. With a smile, he noted that it was "good to go out on top."[85]

Dick Cooper, who was still prosecuting cases in Orange County in March 1967, seemed unimpressed by the Supreme Court's ruling. Technically, the Court's decision required Cooper either to try Klopfer or to dismiss the charge. Bitter to the end, Cooper chose not to accept the spirit of the decision; he actually moved, with the cooperation of the court, to bring Klopfer to trial in April 1967. Pleading a busy schedule at the last moment, he had the case continued until the August term. Cooper finally dropped the charge in December, but only after a federal district court judge ruled that if he did not do so, the judge would immediately remove the case to federal court and dismiss it.[86]

## Conclusion

Peter Klopfer's "trivial case" served the Warren Court as a perfect vehicle for incorporating the Sixth Amendment's speedy trial provision. Alert to the civil rights context in which the case arose and to the punitive character of North Carolina's use of the nol pros with leave, the Court seized the opportunity presented by Klopfer's appeal to extend the speedy trial safeguard upon the states. In time, the Supreme Court's *Klopfer* ruling spawned a flurry of speedy trial legislation as states moved to bring their procedural rules into conformance with the federal standard. In North Carolina, this legislation included the statutory repeal of the *nolle prosequi*.[87]

Even as the nation's political climate grew increasingly hostile to the substance of its work, the Warren Court in the late 1960s did not shy from completing a thorough reform of state criminal procedure with a further string of incorporationist decisions. Indeed, subsequent to the March 1967 *Klopfer* decision but prior to the Chief Justice's departure from the Court two years later, Warren and his colleagues selectively incorporated and thus transferred to the states the remaining major criminal procedure provisions of the Bill of Rights: the Sixth Amendment's provision for compulsory process for obtaining favorable witnesses, the Sixth Amendment's allowance for jury trials in all non-petty criminal cases, and the Fifth Amendment's guarantee against double jeopardy.[88] These rulings capped the remarkable run of twenty incorporationist decisions between 1931 and 1969 with which the Court secured the nationalization of the Bill of Rights, and thus did the case of Quaker zoology professor and civil rights proponent Peter Klopfer take its place among the constitutional landmarks of this century.

***Note:** *The author wishes to thank William Leuchtenburg, Peter Coclanis, Peter Filene, Scott Philayaw, and John Semonche for critical evaluations of the manuscript.*

## Endnotes

[1] For discussion of the gradual broadening of the Amendment's Due Process Clause and the extension of provisions of the Bill of Rights upon the states, *see, e.g.*, Richard C. Cortner, **The Supreme Court and the Second Bill of Rights** (Madison: University of Wisconsin Press, 1981); Roald Y. Mykkeltvedt, **The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights** (Port Washington, NY: Associated Faculty Press, 1983); and Henry J. Abraham and Barbara A. Perry, **Freedom and the Court: Civil Rights and Liberties in the United States** (New York: Oxford University Press, 6th ed. 1994), pp. 30-91.

[2] Scholars have fiercely debated the proper scope and purpose of the Fourteenth Amendment, their differences of opinion owing primarily to two factors: the ambiguity of the historical sources remaining from the 39th Congress of 1866 and subsequent ratification debate; and the scholars' keen appreciation of the stakes of the contest, given continuing judicial and political disagreement on the issue. For recent examples of treatments marking opposing ends of the interpretive spectrum, compare Michael K. Curtis, **No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights** (Durham: Duke University Press, 1986) (supporting the view that the Framers intended to extend the Bill of Rights upon the states) and Raoul Berger, **The Fourteenth Amendment and the Bill of Rights** (Norman, OK: University of Oklahoma Press, 1989) (rejecting this notion).

[3] The controlling precedent was *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), where Chief Justice John Marshall wrote for a unanimous Court that the Bill of Rights was meant as a limitation upon the national government and had no applicability to the states.

[4] *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), effectively made a dead letter of the Privileges and Immunities Clause; *Plessy v. Ferguson*, 163 U.S. 537 (1896), the infamous "separate but equal" precedent, best suggests the long disutility of the Equal Protection Clause of the Fourteenth Amendment.

[5] The first use of the Due Process Clause to extend a provision of the Bill of Rights to limit state action in fact occurred in 1896. Here the Court endeavored not to extend civil liberties but to strengthen constitutional protection of property rights, which faced new challenges issuing from state legislatures. Specifically, the Due Process Clause of the Fourteenth Amendment was used to apply to the states the eminent domain provision of the Fifth Amendment. *See* Justice Harlan's opinion for the Court in *Chicago, Burlington & Quincy RR v. Chicago*, 166 U.S. 226 (1897).

[6] *Gitlow v. New York*, 268 U.S. 652 (1925) (dictum, speech), *Stromberg v. California*, 283 U.S. 359 (1931) (speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (press); *DeJonge v. Oregon*, 299 U.S. 333 (assembly); *Hamilton v. Regents of U. of California*, 293 U.S. 245 (1934) (dictum, freedom of religion); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise of religion). Following *Cantwell*, the Court resolved any lingering doubts about the status of the First Amendment's Establishment Clause in *Everson v. Board of Education*, 330 U.S. 1 (1947). For a particularly illuminating review of the Court's departure along the path to incorporation, *see* Klaus H. Heberle, "From *Gitlow* to *Near*: Judicial 'Amendment' by Absent-Minded Incrementalism," 34 *Journal of Politics* (1972): 458-83.

[7] *Powell v. Alabama*, 287 U.S. 45 (1932) (counsel in capital cases); *In re Oliver*, 333 U.S. 257 (1948) (public trial); and *Wolf v. Colorado*, 338 U.S. 25 (1949) (unreasonable search and seizure).

[8] *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel in all felony cases); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation of witnesses); and *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishments).

[9] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966).

[10] Peter Klopfer, Robert Osborn, David Smith, and Harmon Smith, to "Dear Friends," May 8, 1964, Peter H. Klopfer File, Duke University Archives (hereafter,"Letter of May 8, 1964").

[11] An indispensable contemporary account of the civil rights movement in Chapel Hill in 1963-64 is noted North Carolina novelist and Chapel Hill resident John Ehle's **The Free Men** (New York: Harper & Row, 1965); a second useful contemporary account covering the same subject but focusing more closely on the legal developments and issues is Daniel H. Pollitt's "Legal Problems in Southern Desegregation: The Chapel Hill Story," 43 *North Carolina Law Review*; 689-767 (1965).

[12] Author's interview with Peter Klopfer (hereafter, "Klopfer Interview"); Marcellus Barksdale, "Civil Rights Organization and the Indigenous Movement in Chapel Hill, N.C., 1960-1965," 47 *Phylon*: 29-42 (1986); "16 More Demonstrators Arrested at Sit-Ins Here," *Chapel Hill Weekly*, January 5, 1964, p. 1; "Dunne Says Pines Visit Not Sit-In," (University of North Carolina at Chapel Hill) *Daily Tar Heel*, December 15, 1963, p. 1; and "New Year Brings Race Violence to Chapel Hill," *ibid.*, January 7, 1964, p. 1.

[13] The argument has been made that the progressivism of such archetypal southern liberals as Odum and Graham served more often to forestall fundamental change than to encourage it. *See, e.g.*, the influential thesis in William H. Chafe's **Civilities and Civil Rights: Greensboro, North Carolina, and the Black Struggle for Freedom** (New York: Oxford University Press, 1980).

[14] *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951), *cert. den.* 341 U.S. 951 (1951); *Frasier v. Board of Trustees*, 134 F. Supp. 589 (M.D.N.C. 1955).

[15] Barksdale, "Indigenous Movement in Chapel Hill"; and Pollitt, "The Chapel Hill Story," 690-91; and, for total black enrollment at UNC in 1960-61, *see* "Law School Gives Negro Top Honor," *Charlotte News*, May 4, 1961.

[16] *Ibid.*

[17] "Mass 'Civil Disobedience' Workshops Are Planned," *Chapel Hill Weekly,* July 10, 1963, p. 5; "New Desegregation Effort is Stymied," *ibid.*, July 17, 1963, p. 1; "34 Are Arrested during Sit-In Here," *ibid.*, July 21, 1963, p. 1: "Segregation Protest Demonstrations End," *ibid.*, July 24, 1963, p. 1; Pollitt, "The Chapel Hill Story," 691-92; Barksdale, "Indigenous Movement in Chapel Hill," 35-37; and, for an account of the meeting of the Board of Aldermen, *see* Ehle, **The Free Men,** 71-74.

[18] Barksdale, "Indigenous Movement in Chapel Hill," 39.
[19] David McReynolds, "Christmas in Chapel Hill," (New York City) *The Village Voice*, December 26, p. 2 (reprinted in *Daily Tar Heel*, January 7, 1964, p. 3); "New Year Brings Race Violence to Chapel Hill," *Daily Tar Heel*, January 7, 1964, p. 1; and Ehle, **The Free Men**, esp. 123-31.
[20] Klopfer to the Editor, *Duke Chronicle*, January 8, 1964, p. 4; and Ehle, **The Free Men**, esp. 144-45.
[21] Klopfer to the Editor, *Duke Chronicle*, January 8, 1964, p. 4; and Klopfer Interview.
[22] A survey in early January 1964 revealed discrimination at twenty-nine of 116 Chapel Hill businesses included in the study; *see* "DTH Survey Shows Unequal Service at 25% of 116 Places," *Daily Tar Heel*, January 12, 1964, p. 1.
[23] Klopfer Interview; Letter of May 8, 1964; and Ehle, **The Free Men**, 144-45. Both Austin and Jeppie Watts are deceased.
[24] The account provided relies upon the Klopfer Interview; author's interview with UNC physics professor Joseph Straley, who was at Watts' Grill among a group of sympathetic "observers" dispatched by the Chapel Hill Freedom Committee (hereafter, "Straley Interview"); Letter of May 8, 1964; "New Year Brings Race Violence to Chapel Hill," *Daily Tar Heel*, Jan. 7, 1964, p. 1; "16 More Arrested at Sit-Ins Here," *Chapel Hill Weekly*, Jan. 5, 1964, p. 1; and Ehle, **The Free Men**, 146-48.
[25] Author's interview with Paul Hardin (hereafter, "Hardin Interview"); and Klopfer Interview.
[26] Klopfer Interview; Hardin Interview; and author's interview with Wade Penny, Jr. (hereafter, "Penny Interview"). The recollection concerning Hardin's description of Penny's penchant for quoting Aristotle is Klopfer's.
[27] Penny Interview.
[28] In local North Carolina courts, local prosecutors were then denoted solicitors. Solicitor Cooper is deceased.
[29] Penny Interview; and Pollitt, "The Chapel Hill Story," 703.
[30] Penny Interview; Straley Interview; and Ehle, **The Free Men**, 148-50, 217-25.
[31] Penny Interview; and Ehle, **The Free Men**, 225.
[32] "The Meaning of 'Chapel Hill'" (editorial), *Raleigh News and Observer*, March 11, 1964, p. 4 (reprinted in *Daily Tar Heel*, March 12, 1964, p. 2). Note also that the spelling "Hillsboro" was officially changed several years later to "Hillsborough."
[33] Ultimate authority for the appointment of judges to special sessions rested with the Chief Justice of the North Carolina Supreme Court, and it was commonly understood at the time that the state's judicial powers had a strong interest in quashing the civil rights demonstrations in Chapel Hill. Penny Interview.
[34] "Mistrial Called for Wynn; Jury Hopelessly Deadlocked," *Daily Tar Heel*, Mar. 10, 1964, p. 1; "Herzog Found Guilty on Trespass Charge," *Durham Morning Herald*, Mar. 12, 1964, p. 1A; Pollitt, "The Chapel Hill Story," 703-05; and Ehle, **The Free Men**, 217-25.
[35] Penny Interview; and "Herzog Found Guilty on Trespass Charge," *Durham Morning Herald*, March 12, 1964, p. 1A. No transcript of the original Klopfer trial was ever prepared.
[36] Author's interview with Athena Parker (hereafter, "Parker Interview"). *See* also, "Jury to Continue Klopfer Case Deliberations Today," *Durham Morning Herald*, March 13, 1964, p. 7B; and Ehle, **The Free Men**, 35.
[37] Sources for the discussion of jury deliberation are Parker Interview; "Jury to Continue Klopfer Case Deliberations Today," *Durham Morning Herald*, March 13, 1964, p. 7B; "Duke Prof's Case on Trespass Count Ends in Mistrial," *ibid.*, March 14, 1964, p. 1A; "Demonstrators Get Another Mistrial," *Daily Tar Heel*, March 14, 1964, p. 1; and "2nd Trespass Case Mistrial is Called," *Chapel Hill Weekly*, March 15, 1964, p. 1.
[38] Parker Interview.
[39] The numbers of arrestees and separate indictments vary slightly in several contemporaneous accounts.
[40] "Two Profs Given 90 Days for Sit-In Demonstration," *Chapel Hill Weekly*, March 22, 1964, p. 1; and Ehle, **The Free Men**, 242-43, 265, 278.
[41] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964).
[42] The consolidated cases of *Hamm v. City of Rock Hill* and *Lupper v. Arkansas*, 379 U.S. 306 (1964).
[43] Klopfer Interview; Penny Interview.
[44] *Blow v. North Carolina*, 379 U.S. 684 (1965) (*per curiam*).
[45] *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd* 384 U.S. 780 (1966).
[46] *North Carolina G.S.* 15-175 (1965; originally enacted in 1905).
[47] *Wilkinson v. Wilkinson*, 159 N.C. 265 (1912), at 266-67.
[48] Brief for Petitioner, at 4, *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
[49] "One Protester Faces Trial; He Rejected Judge's Offer," *Winston-Salem Journal*, May 24, 1965, p. 6.
[50] *North Carolina G.S.* 15-153, 15-155 (1965). This was not exclusively a judicial matter, however, as a solicitor was free to acknowledge, and draw the court's attention to, such a defect.
[51] The Bill of Indictment is summarized in relevant part in *State v. Peter H. Klopfer*, 266 N.C. 349 (1965); a full copy is appended to Klopfer's "Petition for Removal of State Criminal Prosecution," filed August 4, 1967, with the United States District Court for the Middle District of North Carolina, Durham Division, which in turn is maintained in the Records of the Clerk of Superior Court for Orange County, *State v. Klopfer* File, Hillsborough, North Carolina.
[52] Brief for Petitioner, at 4, *Klopfer v. North Carolina*; and "Motion of Aug. 7, 1965, in the Supreme Court of Orange County, *State v. Klopfer* #3556," in Records of the Clerk of the Superior Court for Orange County, *State v. Klopfer* File, Hillsborough, N.C.
[53] Klopfer Interview; Klopfer to the Editor, *Durham Morning Herald*, May 28, 1965, p. 4A; and Klopfer to the Editor, *ibid.*, June 24, 1965, p. 4A.
[54] North Carolina Constitution, Art. 1, Section 35, amended in 1970 upon the adoption of a modified state constitution (*see* Art. 1, Section 18 of the current constitution). *See* also *State v. Webb*, 155 N.C. 426 (1911), which, Penny argued, adopted Art. 1, Section 35 by implication as the authority for the right to a speedy trial.
[55] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[56] Defendant Appellant's Brief, at 13, 14, *State v. Klopfer*, 266 N.C. 349 (1965) Records of the North Carolina Supreme Court, North Carolina State Archives, *State v. Klopfer* File, Raleigh.

[57] Penny Interview.

[58] *State v. Klopfer*, 266 N.C. at 350.

[59] *See, e.g.*, "Klopfer's Trespass Case Will Not Be Reinstated," *Durham Sun*, Aug. 17, 1965, p. 1.

[60] Author's interview with a member of the Klopfer Court who has requested anonymity.

[61] Penny Interview.

[62] *United States v. Ewell*, 383 U.S. 116 (1966) at 120 [emphasis supplied]; Petition for Writ of Certiorari, at 7, *Klopfer v. North Carolina.*

[63] Petition for Writ of Certiorari, at 10, *Klopfer v. North Carolina.*

[64] Conference memoranda ("cert memos") as follows: "KZ" [Ken Ziffren] to [Chief Justice Earl Warren], May 21, 1966, Earl Warren MSS, Library of Congress, box 294; "C.D.R." [to Justice Tom C. Clark], May 23, 1966, Tom C. Clark MSS, University of Texas at Austin Libraries, box B217; "Boudin" [to Justice John Marshall Harlan], May 24, 1966, John M. Harlan MSS, Princeton University Libraries, *Klopfer v. North Carolina* File; and [Jerome B. Falk] to Justice William O. Douglas, May 24, 1966, William O. Douglas MSS, Library of Congress, box 1376.

[65] A consolidation of voting records on four different documents provides the result. *See* Docket Sheets, Case No. 100, *Klopfer v. North Carolina,* as follows: Douglas MSS, box 1372; *ibid.*, box 1374 (here, the indication that Justice Douglas voted to deny appears in error, and his name should be replaced by that of Justice Clark); Tom C. Clark MSS, box C83; and William J. Brennan MSS, Library of Congress, box 413. The margin would have been narrower by one had Justice Brennan followed his preconference inclination, which was to deny. Brennan wrote "deny" in a column headed "My Vote" next to a notation for the *Klopfer* petition on a preconference agenda sheet. William J. Brennan MSS, box 132.

[66] *Pointer v. Texas*, 380 U.S. 400 (1965).

[67] Brief for the Petitioner, esp. 12, 18, *Klopfer v. North Carolina.*

[68] Brief for the Respondent, at 5-7, *Klopfer v. North Carolina.*

[69] Author's interview with H. B. Finn (hereafter, "Finn Interview"); and Bench Memorandum, "HBF" [H.B. Finn to Chief Justice Warren], November 8, 1966, Earl Warren MSS, box 294.

[70] No officially prepared transcript of the oral argument exists. A transcript of the oral argument was prepared by the author (hereafter, "Transcript") from an audiotape recording, Division of Sound and Motion Pictures, National Archives.

[71] Transcript; Penny Interview.

[72] Klopfer Interview.

[73] Conference Notes (handwritten), Dec. 9, 1966, *Klopfer v. North Carolina*, William O. Douglas MSS, box 1376.

[74] Circulation Record, *Klopfer v. North Carolina*, Earl Warren MSS, box 619; and Court Calendar, March 13, 1967, *ibid.*, box 125.

[75] *Klopfer v. North Carolina*, 386 U.S. at 222-23, 226; and Finn Interview.

[76] This example of "judicial irony," as Finn described it, was Warren's alone. Finn had not included this phrase in any of his preliminary drafts. Finn Interview.

[77] *Ibid.; Klopfer v. North Carolina*, 386 U.S. at 219-22, 226.

[78] Cover sheet of draft opinion, *Klopfer v. North Carolina* #100, Earl Warren MSS, box 619.

[79] *Klopfer v. North Carolina*, 386 U.S. at 226-27.

[80] "Quick Trial Right Applied to the States," *The New York Times*, March 14, 1967.

[81] "Out of Legal Limbo," *Time*, March 24, 1967, p. 58; "Recent Decisions: Constitutional Law—Sixth Amendment Right to Speedy Trial Applied to the States by Incorporation Into the Due Process Clause of the Fourteenth Amendment," 34 *Brooklyn Law Review*: 316-23 (1967).

[82] "Constitutional Law—Effect of the Right to Speedy Trial on Nolle Prosequi," 46 *North Carolina Law Review*: 387-92, 389 (1967).

[83] "Klopfer, Penny Hail Decision," *Durham Morning Herald*, March 14, 1967, p. B1.

[84] Klopfer Interview.

[85] "Klopfer, Penny Hail Decision," *Durham Morning Herald*, March 14, 1967, p. B1; and Penny Interview.

[86] Klopfer Interview; Penny Interview; "Quest for Judgment" (editorial), *Raleigh News & Observer*, April 28, 1967, p. 4; "Klopfer's 'Speedy Trial' Case Heads for Showdown," *Durham Sun*, Sept. 22, 1967, p. 1B; "Peter Klopfer Case Dismissed," *ibid.*, Dec. 14, 1967, p. 6A; and "Duke Prof's Trial Remanded to Orange Superior Court," *Durham Morning Herald*, Nov. 18, 1967, p. 5A.

[87] For a detailed treatment of these developments, *see* Ronald M. Price, "The North Carolina Speedy Trial Act," 17 *Wake Forest Law Review*: 173-247 (1981).

[88] *Washington v. Texas*, 388 U.S. 14 (1967), *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Benton v. Maryland*, 395 U.S. 784 (1969), respectively.

# The Supreme Court in United States History: A New Appreciation

**Michael Allan Wolf**

From a perspective long removed in terms of time and experience, I can still recall my first encounter with Charles Warren's Pulitzer Prize winner that still serves as the standard institutional history of the Court. My undergraduate constitutional history professor and I were engaged in a lively discussion concerning the nature of sovereignty and states' rights in the wake of the Union victory in the Civil War. He pulled from an office shelf a well-worn volume from his set of Warren's time-honored narrative.[1]

The professor proceeded to read the text and what impressed me most was the sensible, politically practical observation of the commentator:

> This decision [*Texas v. White*[2]] has constituted one of the landmarks in American history. It settled forever the question whether a State could legally secede, and it confirmed the permanence of the Union. Nevertheless, it has frequently been considered logically unsatisfactory in its reasoning; and the dissenting opinion . . . seems more easily to be supported . . . . The decision came, however, as a welcome solution to a greatly vexed and debated question; and Chase's opinion, though adverse to the extreme claims of Thaddeus Stevens and the Radicals, who deemed the seceding States entirely out of the Union and properly subject to any legislation Congress chose to enact, was equally adverse to the claim of the Democrats, who held that Congress had no power whatever to withhold from these States any of the rights which they had possessed before the war. The general views and plans of the more moderate Reconstruction statesmen were in complete consonance with the language of the opinion; and the growing fears lest the Court would interfere with their plans were thus allayed.[3]

This was a revelation. The author of this passage, though impressed more with the logic of the dissent, complimented the majority for so skillfully maneuvering very rough political waters and thus deemed the Court's effort a success. Law was not just the stilted, confusing

rhetoric of cases and statutes; it had an intimate relationship to the world outside.

During law school, references to Warren's work were few and fleeting—most were buried in footnotes designed to direct the reader to antiquarian findings or interesting facts about Supreme Court history. Even in the legal history course, Warren's insights and discoveries would be mere asides or quaint digressions, for the development of legal doctrine over time dominated the syllabus and class discussions.

Graduate study brought new encounters and a greater appreciation for the scope and richness of Warren's work. Harvard Law School professor Morton Horwitz, who directed my reading in the history of American law, included in his essential reading list Warren's **A History of the American Bar**,[4] in which the author demonstrates his unabashed admiration for the common law as logical, adaptable, and responsive to political and societal changes. Some might find it surprising that one of the founders of the Critical Legal Studies movement would assign such an orthodox text, particularly one that was intended "not [as] a law book for those who wish to study law . . . [but as] an historical sketch for those who wish to know something about the men who have composed the American bar of the past, and about the influences which produced the great American lawyers."[5] In fact, the assignment made perfect sense, for it demonstrated that the appreciation of law as politics was neither novel nor radical in American legal historiography.

At the time his most famous work appeared, Charles Warren, a Boston, Harvard-educated lawyer with *Mayflower* and American Revolution roots (James and Mercy Otis Warren were his great-great-grandparents), was practicing in Washington, D.C. After a successful, though controversial term as chairman of the Massachusetts Civil Service Commission (during which he incurred the wrath of a powerful ward boss), Warren in 1914 began four years of service as assistant attorney general in the Wilson administration, a post that he resigned owing to his outspoken advocacy of the military trial of civilian dissenters. He was the author of several books and dozens of law review and bar journal articles, some quite influential in all governmental branches.[6]

More impressively and deeply than any other of Warren's extensive writings, **The Supreme Court in United States History** mines the minutiae of institutional history and explores key intersections between law and politics. For these contributions alone, the book has stood and remains useful as a foundation for a wide range of legal and constitutional history, as evidenced by dozens of federal and state appellate court citations,[7] and hundreds of law review and monograph footnotes.[8] Fortunately for lawyers, judges, historians, and students, there are other aspects of the work that have weathered the passage of time, cycles, and trends. The remaining pages of this review will consider a few of those aspects, providing the reader with exemplary passages that, it is hoped, will whet the appetite for a more extended visit to Mr. Warren's bookshelf.

Perhaps what first impresses the modern lawyer reading through **The Supreme Court in United States History** is the way in which the status of the Supreme Court and the practice of appellate advocacy have changed over the past two centuries. On the former point, consider the events occasioned by the resignation of Associate Justice John Rutledge, who departed to become Chief Justice of the South Carolina Supreme Court:

> [T]he President determined to make the appointment from South Carolina. Accordingly, he adopted the singular expedient of addressing a letter jointly to Charles Cotesworth Pinckney and to Edward Rutledge, (both of that State), asking if either of them would accept the position. Upon receipt of a reply from both stating that they thought that they could be of more service to the General Government and to their State by remaining in the State Legislature, Washington, on October 31, 1791, appointed Thomas Johnson, a former Governor of Maryland, and then Judge of the United States District Court. As Johnson was fifty-nine years of age—the oldest man on this first Court—he only consented to accept, after assurances that the Circuit Court system requiring arduous labor and long traveling by the Judges

> would probably be altered by the next Congress.[9]

Unfortunately for Justice Johnson and his colleagues, the Justices carried the burden of circuit-riding for several more decades.[10]

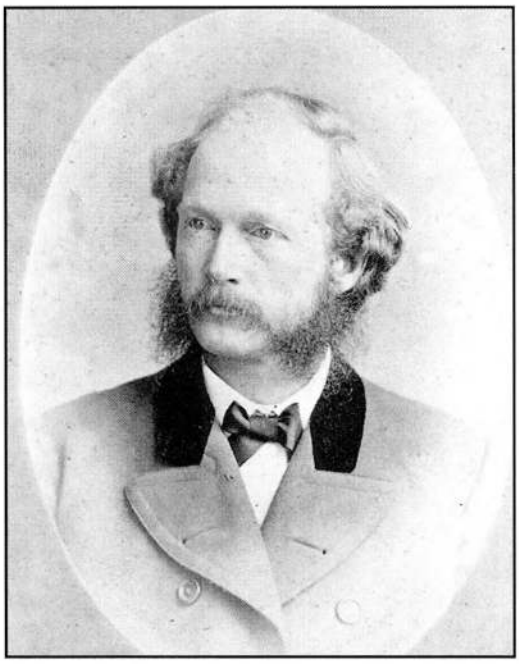
For members of the bar painfully aware of the power that the clock wields in contemporary oral argument, Warren provides colorful glimpses of a world now lost. This was a world in which legal rhetoric was valued as an art form, not derided as confusing, pompous, and costly, as evidenced by the advocacy marathon in *McCulloch v. Maryland*:[11]

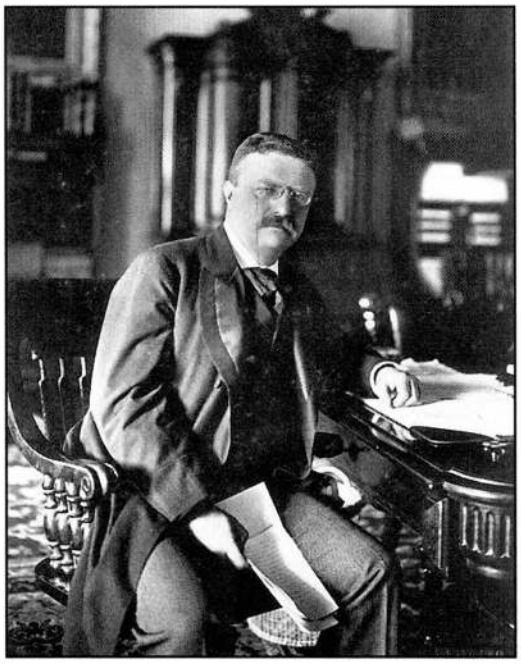
> Six of the greatest lawyers in the country were retained for its argument—William Pinckney, Daniel Webster and United States Attorney-General William Wirt, in behalf of the Bank, and Luther Martin, Joseph Hopkinson of Philadelphia, and Walter Jones of Washington, for the State. Beginning on February 22, 1819, the argument proceeded for nine days . . . . Of Martin's effort, Judge Story later narrated that he ended by saying that he had one last authority which he thought the Court would admit to be conclusive, and he then read from the reports of Marshall's own speeches in the debates in the Virginia convention when the adoption of the Constitution was discussed, whereupon, said Story, Marshall drew a long breath, with a sort of sigh. After the Court adjourned, he rallied the Chief Justice on his uneasiness, and asked him why he sighed: to which Marshall replied, "Why, to tell you the truth, I was afraid I had said some foolish things in the debate; but it was not so bad as I expected." On Monday, March 1, Pinckney began the argument which was to prove the greatest effort of his life, consuming three full days, ending on March 3, and described by Judge Story in a letter written on the last day: "I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom. We have had a crowded audience of ladies and gentlemen; the hall was full almost to suffocation."[12]

In contrast to the sparseness of current reporting on even sparser oral arguments before the High Court, members of the fourth estate were equally attentive and appreciative. Warren quotes, for example, the *National Intelligencer*, which noted that "[t]he argument [in *McCulloch*] has involved some of the most important principles of constitutional law which have been discussed with an equal degree of learning and eloquence and have constantly attracted the attention of a numerous and intelligent auditory . . . ."[13]

Judges, too, can find much that is edifying and useful in Warren's writings. Indeed, **The Supreme Court in United States History** alone has been cited in more than two dozen Supreme Court opinions, including *Baker v. Carr* (majority and dissent),[14] *Erie v. Tomkins*,[15] *Home Building & Loan Ass'n v. Blaisdell* (majority and dissent),[16] and, more recently, the dissents in *United States v. Lopez*[17] and *Lee v. Weisman*.[18] The legal gems mined from Warren's two volumes range from contemporary reactions to landmark cases,[19] to Supreme Court traditions,[20] to controversies over Court appointment.[21]

Even more important than serving as a repository of these and other historical finds, Warren's Supreme Court history assures jurists that, not infrequently, the targets of today's most visceral attacks are tomorrow's admired samples of the judicial craft. In his discussion of *Ex parte Milligan*,[22] Warren comments: "This famous decision has been so long recognized as one of the bulwarks of American liberty that it is difficult to realize now the storm of invective and opprobrium which burst upon the Court at the time when it was first made public."[23] In fact, Warren's narrative contains a veritable stream





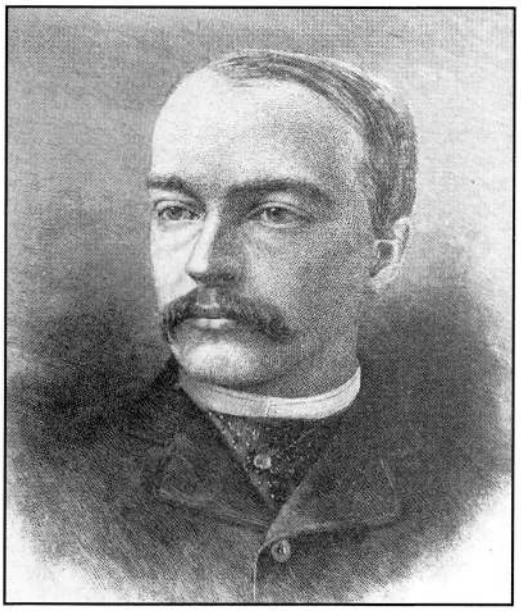
of "invective and opprobrium" directed at the Justices from all points on the political spectrum—in the popular and legal press, private letters, diaries, and political debates. Still, Warren concludes on a positive note for the nation's jurists:

> [I]n spite of the few instances in which it has run counter to the deliberate and better judgment of the community, the American people will unquestionably conclude that final judgment as to their constitutional rights is safer in the hands of the Judiciary than in those of the Legislature, and that if either body is to possess uncontrolled omnipotence, it should be reposed in the Court rather than in Congress, and in independent Judges rather than in Judges dependent on election by the people in passionate party campaigns and on partisan political issues.[24]

Coming from the pen of one who had experienced the slings and arrows of partisan struggles first-hand, in Massachusetts and in the nation's capital, this evaluation was not surprising.

Historians—legal, political, and social—will find it easier to group Warren's Court history with the amateur history of the previous generation than with the Progressive school that swirled about this prominent lawyer-historian. John Higham, in his historiographical study, **History: Professional Scholarship in America**, devotes a chapter to "The Conservative Evolutionist as Amateur."[25] In his themes, narrative style, and use of sources, Warren mirrored the style of Higham's representative evolutionists—Henry Adams, John Bach McMaster, Theodore Roosevelt, James Ford Rhodes, and Moses Coit Tyler. The patrician historians of the late nineteenth century "took as a dominant theme the forging of national unity and power in the crucible of sectional diversities." A few decades later, Warren would open his award-winning history in the same vein:

> No one can read the history of the Court's career without marveling at its potent effect upon the political development of the Nation, and without concluding that the Nation owes most of its strength to the determination of the Judges to maintain the National supremacy. Though, from time to time, Judges have declared that the preservation of the sovereignty of the States in their proper sphere was as important as the maintenance of the rights vested in the Nation, nevertheless, the Court's actual decisions at critical periods have steadily en-



**Moses Coit Tyler, Theodore Roosevelt, James Ford Rhodes, and John Bach McMaster (left to right) were all patrician historians of the late nineteenth century who greatly influenced Charles Warren. Their unifying theme was the forging of a national identity and power from sectional diversities, a phenomenon that Warren highlighted in his seminal 1922 work, *The Supreme Court in United States History.***

> hanced the power of the National Government . . . .[26]

Warren shared with Adams and the others the view that as historians they were "engaged in a literary as well as scientific task."[27] In fact, just two decades before the publication of his acclaimed Court history, Warren was actively engaged in literature, publishing several short stories in national magazines as well as a volume of political fiction.[28] To Warren, individuals, not irrepressible forces, often played the key roles in the nation's drama. Like Tyler, who "cast his narrative in the form of a succession of biographies," Warren provides colorful details on the lives of the Justices and devotes several chapters to leading members of the Court, such as "Judge Story, the War and Federal Supremacy," "Chief Justice Taney and Whig Pessimism," and "Chief Justice Waite and the Fourteenth Amendment." Of course the hero of the piece is Chief Justice John Marshall, whose death closes the first-volume of the two-volume revised set. Yet, though Warren praises Marshall for the primary role he played in "vitalizing the Constitution and making it a stronger bond of Union," he concedes that, given the profound social, economic, and political changes in the 1830s, "the time had arrived when a change in the leadership of the Court was possibly desirable."[29]

In these subtle and in more overt ways, Warren distanced himself from the practitioners of Progressive history. Six years after the publication of **The Supreme Court in United States History**, Warren began a volume on **The Making of the Constitution** with a blatant attack on the Beardean way:

> In recent years there has been a tendency to interpret all history in terms of economics and sociology and geography—of soil, of debased currency, of land monopoly, of taxation, of class antagonism, of frontier against seacoast, and the like—and to attribute the actions of peoples to such general materialistic causes. This may be a wise reaction from the old manner of writing history almost exclusively in terms of wars, politics, dynasties, and religions. But its fundamental defect is, that it ignores the circumstance that the actions of men are frequently based quite as much on sentiment and belief as on facts

> and conditions. It leaves out the souls of men and their response to the inspiration of great leaders. It forgets that there are such motives as patriotism, pride in country, unselfish devotion to the public welfare, desire for independence, inherited sentiments, and convictions of right and justice. The historian who omits to take these facts into consideration is a poor observer of human nature. No one can write true history who leaves out of account the fact that man may have an inner zeal for principles, beliefs, and ideals.[30]

The wide range of sources that Warren employs in furtherance of these beliefs makes **The Supreme Court in United States History** an important document for today's historians, even those who view Warren's attitude as naive or conservative to the extreme. In text and in footnotes, Warren includes passages from newspaper accounts, diaries, speeches, and letters representative of *all* regions of the nation and *all* political persuasions. In his discussion of the reaction that followed the Court's opinion in *Cherokee Nation v. Georgia*,[31] for example, Warren includes quotations from Martin Van Buren's autobiography, the *Richmond Enquirer*, the *Boston Courier*, the *North American Review*, Justice Story's letters, the *American Jurist*, Chief Justice Marshall's letters, the *New York Daily Advertiser*, and John Quincy Adams's diary. Ironically, it is this inclusiveness that comprises the work's greatest weakness, for while one cannot help but be impressed by the sheer expanse of Warren's readings, it is much too easy to lose sight of the overriding "plot" while wandering through the numerous asides.

Why should today's students of law, history, and politics reach for Warren's dusty volumes when more fashionable and trendy resources are available? The answer, I believe, lies in the anecdote that opens this review. While Supreme Court histories, encyclopedias and constitutional histories are legion, there still is no more accessible and entertaining way to *introduce* students to the interrelationships of American law and political history than **The Supreme Court in United States History**. The work that Justice Oliver Wendell Holmes, Jr., called a "*pièce de résistance*"[32] upon publication is still deemed "magisterial"[33] and "a genuine classic—engrossing, richly detailed, superbly easy to read"[34] by today's critical readers.

No better example of this pedagogical function exists than the chapter Warren devotes to *Marbury v. Madison*.[35] The title—"The Mandamus Case"—is the reader's first clue that this is not the typical "origins of judicial review" treatment of Chief Justice Marshall's landmark opinion. Warren does a masterful job of weaving together different strands—struggles between the ascending Republicans and the declining Federalists, the tension between rivals Marshall and Jefferson, the pre-*Marbury* origins of American state and federal judicial review, and wonderful Court trivia—to form a cohesive legal historical essay.

The accuracy of Warren's simple, overriding point has been obscured by the passage of time and a flood of commentators' and jurists' ink:

> Contemporary writings make it clear that the Republicans attacked the decision, not so much because it sustained the power of the Court to determine the validity of Congressional legislation, as because it enounced the doctrine that the Court might issue mandamus to a Cabinet official who was acting by direction of the President. In other words, Jefferson's antagonism to Marshall and the Court at that time was due more to his resentment at the alleged invasion of his Executive prerogative than to any so-called "judicial usurpation" of the field of Congressional authority.[36]

To the student of yesterday, today, and tomorrow such context is crucial, as the starting point for further exploration and analysis.

Now that this review essay is near completion, once again Warren will return to its place on my bookshelf. Its companions there—Friedman, Horwitz, Murphy, Swisher, White, and so many others—may more frequently find their way into discussions with a new generation of students. Yet, that they do so at all is due in no small part to my opportune introduction to the Supreme Court's foremost chronicle.

## Endnotes

[1] Charles Warren, **The Supreme Court in United States History** (3 volumes, Boston: Little, Brown, 1922). This review uses the 1926, two-volume, revised edition (also published by Little, Brown), and will refer to those two volumes as **I Supreme Court** and **II Supreme Court**.

[2] *Texas v. White*, 74 U.S. 700 (1868).

[3] **II Supreme Court**, at 490.

[4] Charles Warren, **A History of the American Bar** (Boston: Little, Brown, 1911).

[5] *Id.* at v.

[6] *See generally*, Michael Allan Wolf, "Charles Warren: Progressive, Historian" (Ph.D. dissertation, Harvard University, 1991).

[7] *See, e.g., infra* notes 14-21 and accompanying text.

[8] *See, e.g., infra* notes 33-34 and accompanying text.

[9] **I Supreme Court**, at 57 (footnote omitted).

[10] Congress provided some (though not total relief) to the overburdened Justices in 1869. *See* II **Supreme Court**, at 501.

[11] 17 U.S. 316 (1819).

[12] **I Supreme Court**, at 507-08 (footnote omitted).

[13] *Id.* at 508.

[14] 369 U.S. 186, 215 n.43, 218 n.45, 225 n.52, 297 n.30 (Frankfurter, J., dissenting) (1962).

[15] 304 U.S. 64, 74 n.8 (1938).

[16] 290 U.S. 398, 431 n.11, 466-67 (Sutherland, J., dissenting) (1934).

[17] 115 S. Ct. 1624, 1652 (Souter, J., dissenting) (1995).

[18] 505 U.S. 577, 635 (Scalia, J., dissenting) (1992).

[19] *Swift & Company v. Wickham*, 382 U.S. 111, 131 n. 1 (1965) (Douglas , J., dissenting) (reactions to *Cohens v. Virginia*, 19 U.S. 264 (1821)).

[20] *Lee v. Weisman*, 505 U.S. at 635 (Scalia, J., dissenting) (invocation at beginning of Court sessions).

[21] *Mistretta v. United States*, 488 U.S. 361, 399 (1989) (debate over Chief Justice John Jay's extrajudicial public service).

[22] 71 U.S. 2 (1866).

[23] **II Supreme Court**, at 427-28.

[24] *Id.* at 745-55.

[25] John Higham, **History:Professional Scholarship in America** (NewYork: Prentice-Hall, Inc., 1965) 150-57.

[26] **I Supreme Court**, at vii.

[27] Higham, *supra* note 25, at 156.

[28] *See, e.g.,* Charles Warren, **The Girl and the Governor** (New York: Charles Scribner's Sons, 1900).

[29] **I Supreme Court**, at 813-14.

[30] Charles Warren, **The Making of the Constitution** (Cambridge, MA: Harvard University Press, repub. ed. 1937) 3.

[31] *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831).

[32] On November 26, 1922, Holmes wrote: "The only serious book—no—*pièce de résistance*—that I have read is Warren on the Supreme Court (3 vols.). It is very good, interesting and able, as well as the result of careful search." Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock, in **Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932** (Cambridge, MA: Harvard University Press, 1961), Mark DeWolfe Howe, 2d ed., 2 vols. in one, vol. 2, 107 (footnote omitted).

[33] Michael Kammen, **A Machine That Would Go of Itself: The Constitution in American Culture** (New York: Vintage Books, 1986) 251.

[34] Lawrence M. Friedman, **A History of American Law** (New York: Simon & Schuster, 2d ed., 1958) 699.

[35] *Marbury v. Madison,* 5 U.S. 137 (1803).

[36] **I Supreme Court**, at 232.

# The Judicial Bookshelf

**D. Grier Stephenson, Jr.**

"[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas," observed James Madison. "Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered." Madison's context was the "arduous . . . task of marking the proper line of partition between the authority of the general and that of the State governments. . . ,"[1] but his statement applies as well to descriptions of the Supreme Court of the United States and what it does. Consider the array of metaphors employed to convey the nature of the institution, its processes, and its decisions.

For President George Washington, the Court was "the Key-stone of our political fabric" and "the Chief Pillar" upon which the national government rested.[2] For former President Thomas Jefferson, the federal judiciary was a "subtle corps of sappers and miners."[3] Justice Oliver Wendell Holmes, Jr., likened the Court to "a storm centre"[4] and its Justices to "nine scorpions in a bottle."[5] Not only had the Court "usurped" its power, charged Senator Robert La Follette in opposing the nomination of Charles Evans Hughes as Chief Justice, but the Court was the "jury box which ultimately will decide the issue between organized greed and the rights of the masses of this country."[6] For Justice Owen J. Roberts, the Court wielded a measuring rod, "lay[ing] the article of the Constitution which is invoked beside the statute which is challenged and . . . decid[ing] whether the latter squares with the former."[7] The Bench could sit "almost as a continuous constitutional convention,"[8] commented Attorney General Robert H. Jackson. Historian Alpheus T. Mason asserted that the Court was a "palladium of freedom" as well as "temple and forum,"[9] but in the eyes of Senator Russell B. Long it behaved "like a professional gambler working with loaded dice."[10]

The second Justice John Marshall Harlan's metaphor addressed what the Court was not: "a general haven for reform movements."[11] The Justices were "lions under the throne," claimed Charles P. Curtis, and mariners too, "sailing a great-circle course . . . , fixing their position from

the stars as well as taking bearings from the headlands."[12] Felix Frankfurter portrayed them as engineers, directing "a stream of history."[13] The Court was "[l]ike a jealous Cyclops," wrote Max Lerner, that wished "to rule the domain that it guarded."[14] Martin Shapiro depicted the Court of the early 1930s as a "fortress that had been shooting at Democrats for forty years. . . ." By 1940 victorious Democrats faced a choice between "level[ing]" that fortress "so it could never shoot at Democrats again," or turning "constitutional law . . . from a weapon of Republicans to a weapon of Democrats."[15]

Although varied, most of these metaphors embody a common theme. The Court and its decisions are not a completed edifice but a work in progress. The Justices are more than caretakers; they are architects and artisans. Recent books reinforce this point through several venues: history, biography, and case study.

## I History

The architectural metaphor must not be pressed too far, however. Now in its third century, the Supreme Court has not proceeded according to some grand design. The Court is less like a gothic cathedral gradually assuming its intended form through decades of labor and more like one of the old rambling farmhouses of the southeastern Pennsylvania countryside which time and the necessities and preferences of successive generations have configured.

This much seems clear from William R. Casto's account of **The Supreme Court in the Early Republic**, one of a pair of volumes that mark the beginning of a new series on Supreme Court history under the editorship of Herbert A. Johnson. Organized by periods defined by one or more Chief Justices, the series intends, when completed, to "provide readers with a convenient scholarly introduction to the work and achievements of the Supreme Court."[16] Far briefer than any of the installments in the **Holmes Devise History**, the volumes projected for the Johnson series may enjoy a wider audience and may prove to be no less useful. The initial titles[17] set a high standard for those to come.

Casto's subject encompasses the eleven years during the chief justiceships of John Jay and Oliver Ellsworth. The abbreviated recess tenure of Chief Justice John Rutledge sandwiched between—which the author terms "The Rutledge Fiasco"—commands barely six pages of text.[18] The pre-Marshall years are probably the least understood and appreciated in the Court's history, so much so that Supreme Court history is sometimes, if incorrectly, perceived as having begun with John Marshall. "When asked what they think of the early Court," Casto admits, "most people with an interest in the law and legal history respond that they do not think about the early Court."[19] That those eleven years remain *terra incognita* even among those who should know more than they do, calls for an explanation.

The years comprise a kind of dark era not because they are the most distant from our own day but primarily because the Court that Jay and Ellsworth knew was fundamentally different in at least four important respects from Courts that followed. More important than the relatively small number of cases that the Court decided is the type of case that tended to occupy the Justices' time. A full fifty-eight percent of the decisions involved national security and foreign affairs or matters closely related to them. In this category Casto places prize cases, disputes over enforcement of revenue laws, and cases that implicated foreigners and the law of nations. And one must not overlook the fact that both Jay and Ellsworth undertook important diplomatic missions while serving on the Court. The preponderance of such business was not happenstance but by intent of the Framers, who, the author believes, "envisioned the federal courts as national security courts. . . ." Moreover, the Justices fulfilled the Founders' expectations through "ongoing efforts to assist the Washington and Adams Administrations in evolving a stable relationship with the European powers—especially France and Great Britain."[20] After John Marshall's ascension in 1801, the emphasis in the Court's docket shifted. More and more Supreme Court litigation looked inward, reflecting the concerns of a nation expanding westward and building a national economy.

Today, a Supreme Court nominee advocating a "national security Court"[21] in testimony before the Senate Judiciary Committee would raise eyebrows, to say the least. The Court's connection with national security matters is decidedly passive: the Justices either side-step them alto-

gether or, when engaged, ordinarily defer to the executive branch. Exceptions make the headlines, as happened in 1971 when six Justices refused to create a national security exception to the usual abhorrence for prior restraints.[22] "The conduct of foreign relations seems long and far removed from any constitutional origins. . . ," Louis Henkin observed the following year. "When, recurrently, foreign affairs explode in constitutional controversy, it comes as a surprise, and the participants themselves, and other foreign affairs 'experts,' fumble and mumble in discussing the issues."[23]

Second, the Jay-Ellsworth Court "sought to support the political branches of the new federal government, not to oppose them."[24] Given the precariousness of the new national experiment after 1789, the opposite stance might have been disastrous, at least in the short run. This was true not only of nearly all decisions that the Court rendered but of the behavior of individual Justices in their far more time-consuming capacity as circuit judges. This "unique harmony of interest" or "paradigm of support" is, however, at odds with the popular and scholarly perception of the Supreme Court that emerged in Marshall's time and has persisted. Thanks to the development of the political party system, the nation's first experience with divided government after the election of 1800, and an expanding variety of issues on which the Court might rule, a contrary model—"the modern judicial paradigm of conflict"—took root.[25] Even though legitimation has always characterized the bulk of state and federal judicial decisions,[26] Americans expect their judges to be "independent" of the so-called political branches, not cheerleaders for Presidents, governors, and legislators.

Third, the Jay-Ellsworth Court contrasts with later ones because of the absence of institutional solidarity. Partly this was the result of the very short time each year in which the Justices would convene as the Supreme Court. Demands of the job were centrifugal, not centripetal. It was also the product of the absence abroad of both Jay and Ellsworth during part of their tenures. Yet, even when they were present, neither's personality promoted social cohesion among the Justices, Casto believes. Nor, apparently, were any of the Associate Justices temperamentally suited to supply "social leadership."[27] Except for

> Justice Iredell's letters and Chief Justice Ellsworth's letters to Justice Cushing. . . , there is scant evidence of friendly discussions in any of the early Justices' correspondence with each other. Jay actually tried to discourage informal exchanges of opinions on issues that were percolating through the lower courts.[28]

Moreover, the Court under Ellsworth had only just begun the practice of issuing a short opinion of the Court, in place of *seriatim* opinions, a device that Marshall would both expand and perfect and that contributed to the establishment of the Court's hegemony over the Constitution.[29]

Finally, the Jay-Ellsworth Court seems so distant because its sense of judicial review was so narrow. While the early Justices widely assumed the legitimacy of judicial review, they were prepared to invalidate a statute only when it was unconstitutional beyond dispute. That is, any doubt about the validity of a statute was to be resolved in its favor. Combined with the "paradigm of support," it is therefore no surprise that the early Court rendered no decision comparable to *Fletcher v. Peck*[30] or even *Marbury v. Madison*,[31] although *Chisholm v. Georgia*[32] was the Court's first plain excursion into constitutional interpretation.

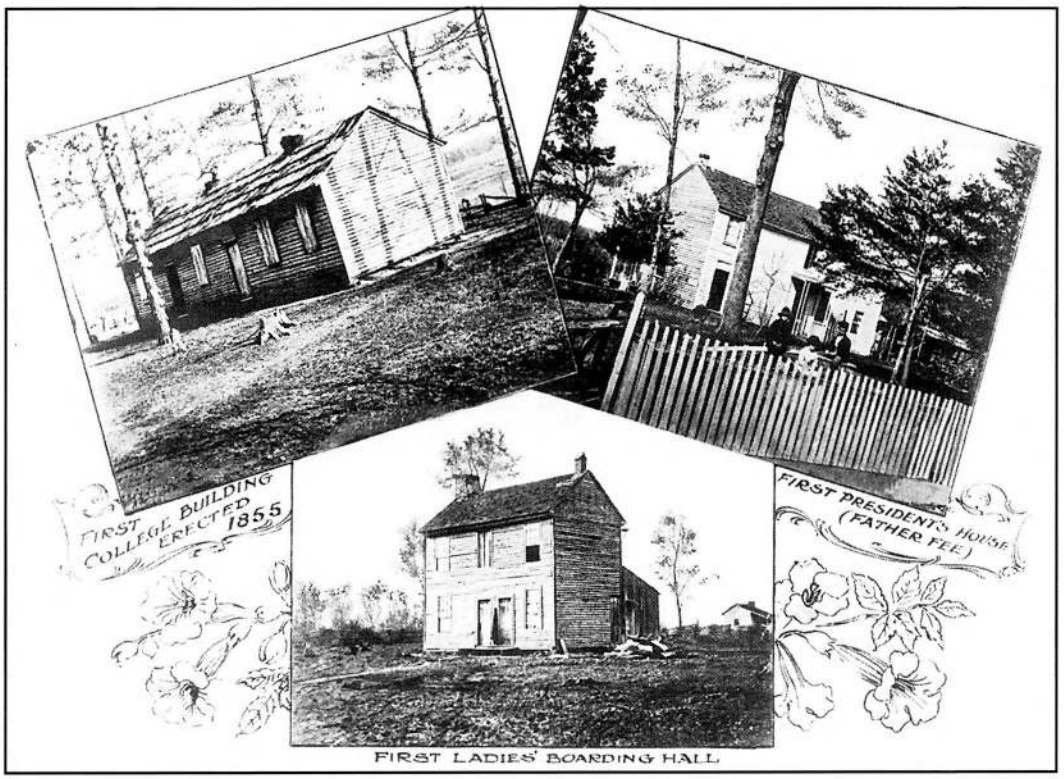
In assessing a statute's validity, the early Justices looked to various sources, including "a perceived underlying constitutional purpose"[33] as in *Hylton v. United States*,[34] the plain grammatical meaning of the Constitution and the ratifiers' (that is, people's) intent, as in *Calder v. Bull*,[35] but not the Framers' intent. The journal of the Philadelphia Convention and other sources such as Madison's notes had not been published, and Casto concludes that there was no prevailing "consensus on the abstract issue of whether resort to Framers' intent was legitimate. Instead they seem to have viewed intent as a plausible argument to which there was a plausible counterargument."[36] Even Justices "who had direct knowledge of the proceedings in Philadelphia almost never used this form of analysis."[37] As fashionable as supraconstitutional principles became for later Courts, these were admissible in constitutional interpretation for the early Court only as providing "clues to the

people's sovereign will. . . ."[38]

Casto, however, casts doubt on the validity of one explanation sometimes offered for the early Court's low visibility and prestige: the caliber of its membership. "The modern blurring of the early Justices into an anonymous collection of undistinguished and indistinguishable journeymen belies the clear gradations of talent" that were present. Of the twelve persons who sat prior to Marshall, there were at least two stars, he concludes: Justices Paterson and Iredell "could easily have held their own on any of the Courts in the succeeding two centuries." John Jay was a success despite having authored only one major opinion "because his presence assured the nation that the Court would be led by a man of sound judgment." Two more, Justices Wilson and Chase, "clearly had the ability to transcend analysis and see new ways of looking at problems," but, owing to the personal and personality problems of the former and latter, respectively, neither reached his potential.[39]

Nearly a century after the Supreme Court's first session in 1790, Chicago attorney Melville W. Fuller became President Grover Cleveland's choice as the eighth Chief Justice.[40] The record and significance of his Court are now the subject of **The Chief Justiceship of Melville W. Fuller 1888-1910** by James W. Ely, Jr.

With a tenure longer than any Chief appointed in the twentieth century, Fuller's nearly twenty-two years stand at the approximate midpoint of the institution's history to date. Yet until recently, traditional scholarship has portrayed the Fuller Court, like the early Court, as intellectually uninteresting and populated mainly by nonentities. Some of its most politically important decisions were based not on the Constitution but on Social Darwinism or laissez-faire economic theory.[41] The Fuller Court's handiwork included a judicially determined standard of regulatory reasonableness, mutilation of the Sherman Anti-Trust Act, invalidation of the federal income tax, and elevation of liberty of contract to constitutional status.[42] For small-p and large-P progressives alike, this was the Court that perverted judicial review into judicial supremacy, impeded popular government, and thwarted so-




**James W. Ely, Jr.'s new book on the Fuller Court examines some of that Court's blind spots, such as its decisions involving race. Justice David Brewer's opinion for the Court in *Berea College v. Kentucky* (1908) upheld a statute banning racially integrated education in private institutions as within a state's power to govern its corporations. Above left is the first building of that college, with the president's house at right and the ladies' boarding hall below.**

cial reform. Siding with the rich against the poor, the Fuller Court launched a judicial tradition that prevailed until the constitutional crisis of 1935-37 and the famous "switch in time."[43]

Against this assessment, it is hardly surprising that Ely has written less a biography of Fuller and more an analysis of his Court's economic decisions. Fuller's life and unique duties as Chief Justice account for one-fourth of the book's 215 pages of text, commercial matters consume about one-half, and everything else—criminal justice, equality, private law, and foreign relations—squeezes into the remaining quarter. Thus, even with publication of this book, Willard King's study remains the only full-length biography of Fuller.[44]

Ely's thesis is that Fuller and his colleagues "were genuinely devoted to the preservation of individual liberty in a changing society."[45] It is, therefore, an oversimplification to view them as antiregulatory agents of capitalism. Unlike twentieth-century liberals, they defined liberty in terms of maximizing individual economic choices. Accordingly, regulatory measures were suspect. "It should never be forgotten," Justice Stephen J. Field declared in 1890, "that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe."[46]

Moreover, their decisions reflected "certain recurring values—limited government, respect for private property, [and] state autonomy. . . ,"[47] values that the Justices had acquired before the heyday of Social Darwinism. Contrary to Justice Holmes's twin assertions in his *Lochner* dissent that the case had been "decided upon an economic theory which a large part of the country does not entertain" and that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"[48] Ely finds no evidence that the Justices made any conscious attempt to write alien social or economic theory into the Constitution.[49] If this was their intent, they failed badly, since the Fuller Court upheld most regulatory measures that came before it.[50] Besides, any claim that the Court was overwhelmingly probusiness overlooks the fact that business leaders themselves in the late nineteenth century had "widely divergent economic interests" and disagreed among themselves "as to the appropriate role of government in determining economic policy."[51] Left unsaid is why it makes (or should make) a difference in evaluating a Court whether its ideas originated in eighteenth-century natural rights theory, spiced-up Jacksonian democracy (as was probably the case with Fuller himself, who had finished college at Bowdoin before the Civil War), avant-garde thought of the late nineteenth century, or twentieth-century notions of justice.

If Ely attributes substantial intellectual integrity to the Fuller Court, he admits that its Justices had blind spots too. For example, the Court looked askance at organized labor and was reluctant to "sanction governmental intervention to strengthen the legal position of industrial workers. . . ."[52] *In re Debs*,[53] which grew out of the Pullman strike of 1894, may have been popular outside labor circles, but Justice David Brewer's unanimous opinion engaged in creative law-making to uphold the injunctions and convictions that followed their violation. The result reached far beyond the litigation at hand by encouraging extensive use of antilabor injunctions. In another defeat for the labor movement, *Loewe v. Lawlor*[54] applied the Sherman Act to unions, regarding a secondary boycott as a direct restraint of interstate commerce.

Race was a second blind spot. *Plessy v. Ferguson*[55] "embodied popular attitudes"[56] and barely attracted notice in the mainstream press when it was decided in 1896. It was surely not the source of racial segregation laws, because these had been on the books in many states for some time, but the decision became significant because in upholding the constitutionality of "equal but separate" railroad accommodations, it legitimized segregation laws "and opened the door to more intrusive state control of racial minorities." As a "reliable symbol of the times,"[57] *Plessy* also "signaled the Fuller Court's abandonment of any efforts to achieve racial equality."[58] That became clear in 1899 when Justice John Marshall Harlan, despite his solo dissent in *Plessy*, declared for a unanimous Bench in *Cumming v. Richmond County Board of Education*[59] that a county was free to subsidize the tuition at private high schools for white students while converting the only high school for blacks into a primary school. Then Justice Brewer's opinion for the Court in *Berea College v. Kentucky*[60] upheld a statute banning racially integrated education in private institutions as within a state's power to govern its corporations. Chal-

lenges to clever restrictions on black voting fared no better.[61]

Decisions on race and economic regulation place the Fuller Court at odds with the post-1937 Court, of course, but Ely's account finds at least one significant patch of common intellectual ground between the two judicial eras. By animating the Due Process Clause of the Fourteenth Amendment, the Fuller Court was the first to develop a constitutional jurisprudence of individual rights. Thus, in Fuller's time the paradigm of conflict, to which Casto alluded, blossomed. By applying liberty in an economic context—liberty against government[62]—the Court lay the foundation of a judicial defense of liberty in other contexts. True, the Fuller Court was reluctant to apply more than the Just Compensation Clause of the Bill of Rights to the states,[63] but even in denying the application of other provisions,[64] it grudgingly conceded a point that Justices a half century later used to expand the judicial protection of constitutional rights[65], radically transforming the American political system.

George Anastaplo has been a participant in that transformation. While the reputations of most constitutional scholars rest only on what they write, his also rests on his decade as a constitutional litigant. These twin roles enrich his commentary entitled **The Amendments to the Constitution.**

"I'm not going to write a dissent this time," Justice Hugo L. Black opined privately and impatiently in December 1960. "I've written enough on these." Anastaplo is "too stubborn for his own good. This whole thing is a little silly on his part."[66] The event prompting Black's dismay was the Court's vote in conference to reject Anastaplo's petition arising from his refusal in 1950 to answer questions about his political beliefs as a condition for admission to the Illinois bar. Black's feelings were understandable: no one thought Anastaplo was a Communist or any other kind of threat to the Republic. Justice Harlan's majority opinion was factually correct: Anastaplo "holds the key to admission in his own hands."[67] Nonetheless, Black did write a dissent, defending without qualification the petitioner's First Amendment right to silence: "We must not be afraid to be free," he declared.[68]

Anastaplo's defeat in the Supreme Court—he argued his own case—highlights a curiosity in the professional accomplishments of one whom a former teacher later described as an "adamantly principled philosopher and scholar," adding "any man who is kicked out of Russia, Greece [as had happened to Anastaplo] and the Illinois bar can't be all bad."[69] Had the bar committee been more tolerant, had Anastaplo been more flexible, or even had he won his case in the Supreme Court, his career path might have been vastly different. Without both his primary and secondary contributions, the literature on the American Constitution would surely be far less interesting and rich.

Expressly billed as a companion to the author's **The Constitution of 1787**, published in 1989, **The Amendments** is a compilation of lectures like its sibling. The author delivered the more recent set to a college and community audience between September 1990 and April 1991 in Hickory, North Carolina. Of the book's seventeen chapters, four review the background and purposes of the Bill of Rights, and nine explore the amendments themselves. Only the First Amendment merits a chapter all its own. In addition, discrete chapters explore "Education in the New Republic," "The Confederate Constitution of 1861," "The Emancipation Proclamation of 1862-1863," and "The Constitution in the Twenty-first Century."

Together, these lecture/chapters comprise slightly more than half of the 454 pages in the volume prior to the index. About a third of the remainder consists of thirteen sets of documents, letters, and other sources, ranging from Magna Carta (1215) and Thomas More's petition to Henry VIII on parliamentary freedom of speech (1521) to the Constitution of the Confederate States and the Emancipation Proclamation.

**The Amendments** is a jurisprudentially visionary discourse on American political thought as manifested in the twenty-seven amendments and in the interpretation of some of them by the Supreme Court. Like Learned Hand's Holmes Lectures published as **The Bill of Rights** in 1958, the reader learns as much (or more) about the author's thinking as about the subject promised by the title. The book continues the author's efforts "to redeem the story of this Country in such a way as to contribute . . . both to the edification of this generation of my fellow citizens and to the education of the teachers of future generations."[70] For Anastaplo "the Constitution

and its amendments presuppose an established constitutional and legal system. The amendments ratified from time to time have either acknowledged rights already recognized or adjusted arrangements in a way consistent with the overall system."[71] A political system that guards basic rights and functions smoothly needs a citizenry with "moral judgment, including the sense of civility . . ." where emphasis [is] placed "more upon duties than upon rights."[72] Accordingly, the idea of rights must be properly understood. Herein lie several ironies.

First, from the author's perspective the Supreme Court has done both too much and too little with the First Amendment. Following Alexander Meiklejohn,[73] Anastaplo believes that political speech is what the First Amendment, outside its religion clauses, was intended to shield. The Court's sin of omission stems from its refusal not only to accept his free speech claim thirty-five years ago but ever to acknowledge in principle an absolute protection for political speech. The Court's sin of commission consists of broadening "speech" to encompass "expression" (such as artistic works), which, Anastaplo holds, is not essential to "effective self-government" and "can, in some circumstances, undermine the character and education needed for sustained self-government."[74] Even were one to concede the point that the First Amendment is so limited, one still faces the formidable task, unaided by **The Amendments**, of separating political from nonpolitical speech.

Second, although Hugo L. Black was Anastaplo's most energetic champion on the Court and corresponded with him as late as 1969, the Justice and the author were jurisprudentially at odds on the nature of constitutional rights. Black, the legal positivist, looked to the text of the Constitution as a source of rights. For Anastaplo, these were rights "the people were already exercising . . . by 1789. . . . These were rights that were confirmed, not created, by the speech, press, assembly, and petition provisions of the First Amendment."[75] Such rights predated even the Declaration of Independence, as suggested by the Founders' use of the word "declaration" which he finds "revealing."[76] Aside from rights recognized in common law, others derive from natural right. Precisely how one discerns the latter, however, **The Amendments** leaves unexplained.

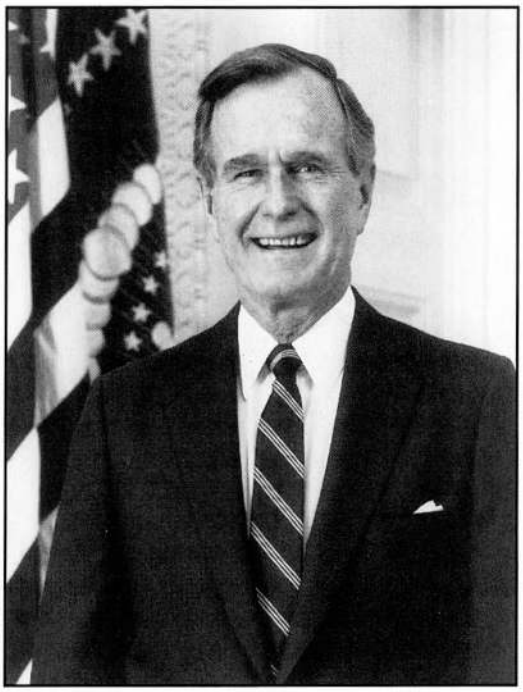
The third irony is that, while Anastaplo is not opposed to an expansive reading of constitutionally recognized rights beyond those enumerated in the text, he remains uncomfortable with the *judicial* expansion of constitutional rights, such as those the Court has found suggested by the Ninth and Fourteenth Amendments. In other words, the mere existence of a fundamental right does not necessarily legitimize its discovery by judicial means. Thus, one who argued against judicial timidity three and a half decades ago is by no means an advocate of a broad-based judicial activism. "[I]t is difficult to recognize a general or comprehensive right to privacy without calling into question many of the seemingly legitimate powers of government."[77] In this position he and Black would share some common ground, although for different reasons. Nonetheless, Anastaplo does not say that all unenumerated rights are nonjusticiable; yet he offers only the vaguest guidelines for selecting those that are.

Rather, the reader is left with the sense that most of those "other" rights are ones that the people choose to protect for themselves through the ordinary workings of the political process. "[M]uch has been done and continues to be done by statute."[78] Legislative action on the people's behalf is thus a manifestation of the implied right of revolution "retained" and "reserved" by the people, in the words of the Ninth and Tenth Amendments, respectively. This is the "key right and power of . . . a self-governing people" that make both state and national governments subordinate to the popular will.[79]

**The Amendments** is provocative, engaging, informative, and not an inappropriate introduction to George Anastaplo. Discourse on the "right of revolution," it turns out, was precisely what got him into trouble with the Illinois bar forty-six years ago. He remains important as much for what he has written since as for what he did then.

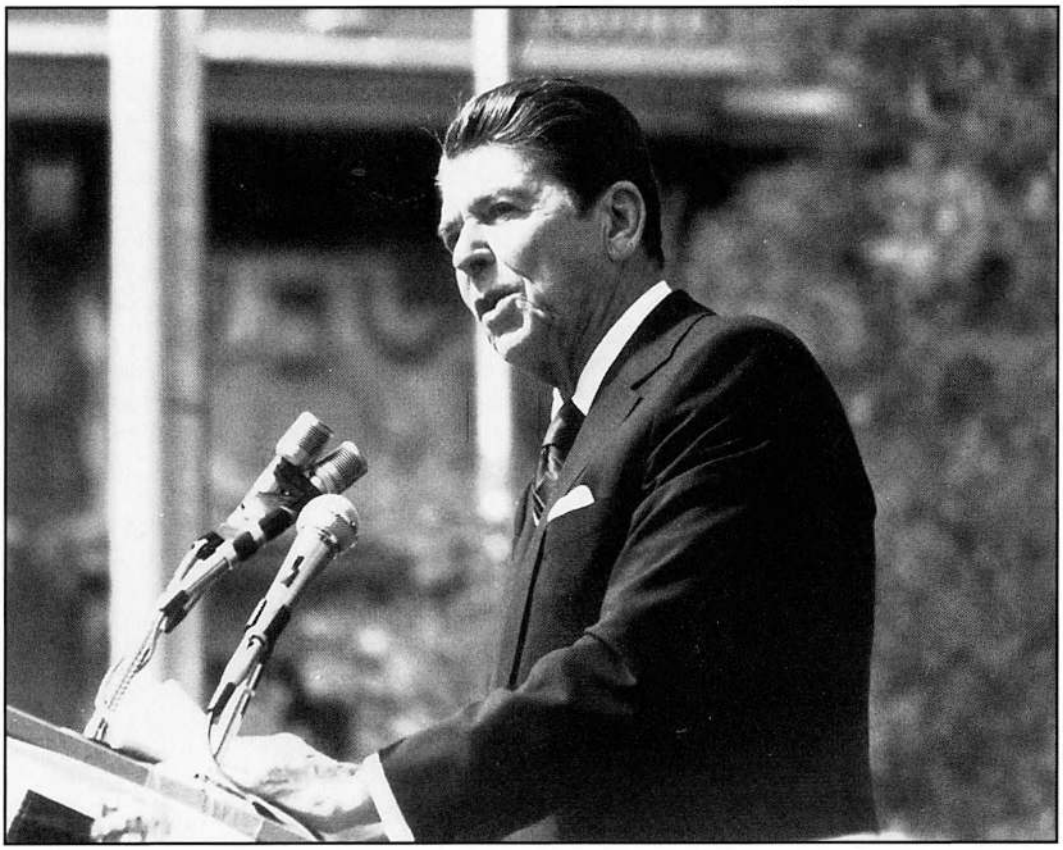
Developments in American constitutional law in the years since Anastaplo engaged the Supreme Court provide the setting for **The Center Holds** by James F. Simon. Indeed, without the redirection of constitutional law that George Anastaplo not only witnessed but in which he had a part, Simon would probably be writing books, but he would not have written this one.

Simon presumably chose the verb "holds" de-



liberately, in the sense of retaining or defending something with all means at one's disposal. The "something" in this instance consists of the substance and spirit of the civil liberties and civil rights decisions that characterized the Court during the chief justiceships of Earl Warren (1953-1969) and Warren Burger (1969-1986). The maintainable ideological core from that period is the "center" Simon deems worthy of protection.

The need to protect, moreover, implies one or more adversaries. In **The Center Holds** these appear in the likenesses of the administrations of "two conservative Republican Presidents, Ronald Reagan and George Bush." Published not quite three years after the latter met defeat at the hands of Governor Bill Clinton and corporate leader Ross Perot, Simon's book turns out to be not only a story of juristic intrigue but an epitaph for "a conservative judicial revolution that failed."[80] The author's choice of the past tense is deliberate. "[T]here remains the unmis-



**James Simon's new work, *The Center Holds*, examines efforts between 1981 and 1993 by two Republican Presidents (George Bush and Ronald Reagan, above) and the Department of Justice to change the Supreme Court through judicial appointments and aggressive litigation strategies. He illustrates both through a series of decisions that the Court rendered between 1986 and 1991.**

takable conclusion that the Ginsburg and Breyer appointments [in 1993 and 1994, respectively] mark a critical turning point for the Rehnquist Court . . . . [N]either pressure from the right wing— Rehnquist, Scalia and Thomas—nor any later appointments are likely to undercut the prevailing judicial ethos of moderation."[81]

Simon accurately characterizes the Warren and Burger Courts as having "given the broadest scope in the nation's history to the civil rights and civil liberties protections of the Bill of Rights and the Fourteenth Amendment."[82] The irony is too plain to miss. The Burger Court, after all, was supposed to roll back much of what the Warren Court had done. At least, that is what some people hoped and others feared based on the campaign of 1968, which found the Supreme Court more deeply mired in presidential politics than at any time since 1936. Richard Nixon's election was rapidly followed by events at the Court: Justice Abe Fortas's resignation, Chief Justice Warren's retirement, and the arrivals of Chief Justice Burger and Justices Harry A. Blackmun, Lewis F. Powell, Jr., and William H. Rehnquist—all within a space of thirty months. Observers expected such turmoil to yield results. Probably not since Roger B. Taney succeeded John Marshall had there been so much spoken and written on the constitutional changes that were sure to come. Simon himself wrote **In His Own Image**,[83] a penetrating (if ominous) account of what was at stake. Some journalists responded *ad hominem*, derisively labeling Burger and Blackmun "the Minnesota twins"[84] because of their initial propensity to vote the same way. An article in the *The New York Times Magazine* described Blackmun during his first Term as a "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs,"[85] a grouping of nouns and adjectives that, while descriptively accurate, was perhaps not inserted as a compliment.

Within little more than a decade, developments had largely proven prognosticators wrong. Not even in the arena of criminal justice, where there was less willingness to side with the claimant, was a single Warren Court precedent overturned outright. Besides, the Burger Court had instituted supervision of the administration of capital punishment. Alongside continuation of other Warren Court policies on matters such as race, legislative apportionment, and church-state relations were landmark decisions on the emerging constitutional issues of gender discrimination and abortion. By the usual measures of political liberalism and judicial activism, the Burger Court frequently scored well. In Vincent Blasi's summation, it was "the counter-revolution that wasn't."[86]

Thus, there came to pass the events that Simon chronicles in **The Center Holds**: efforts by the White House and the Department of Justice between 1981 and 1993 once again to change the Court through judicial appointments and aggressive litigation strategies. He illustrates both through a series of decisions that the Court rendered between 1986 and 1991, a demarcation that is noteworthy in two respects. First, it is bounded by the first Terms of Rehnquist as Chief Justice and Clarence Thomas as Associate Justice; second, in addition to Thomas, it witnessed the arrival at the Court of Justices Antonin Scalia, Anthony Kennedy, and David Souter.

The cases that Simon utilizes have several things in common. Most are familiar even to those whose knowledge of the Supreme Court extends no further than what appears in newspapers and television news. The book nonetheless breaks new ground in its description of the process by which the Court reached those decisions. Aside from reliance on the usual sources such as transcripts of oral argument and published opinions, Simon makes extensive use of the Thurgood Marshall Papers and more modest use of the Robert J. Jackson, William J. Brennan, Jr., and William O. Douglas Papers.[87] Simon gleaned additional insight and information from interviews, credited in the source notes, with Justices Blackmun, Brennan, Powell, Stewart (in 1978), as well as others outside the Court who were involved in particular cases. Simon obtained certain internal Court documents from a source or sources noted only as "CS" (confidential sources). The CS notation appears at least twelve times in the source notes (all of them keyed to the first half of the volume that deals with race and abortion cases). In view only of citations to the acknowledged interviews and papers, one wonders whether the author's perception of events might have been different had most of the acknowledged sources been more ideologically representative of the Bench as a whole.

Second, the cases involved morally and politically difficult issues that commonly define dif-

ferences between conservatives and liberals today, and in almost every instance, the Court split five to four on the pivotal question. It is important to remember, however, that neither particular is typical of the Court's work. It would probably be a conceptual strain to situate most of the Court's business each Term across a great moral divide. Moreover, while each Term has at least some five-four splits—one has to go back to 1929 to find a Term with none—the Court decides most of its cases more convincingly. During the six terms in which each of Simon's case analyses falls, the Court decided a total of 791 cases, of which only 20.4 percent were decided by a one-vote margin. During the same period, by contrast, the Court decided 38.3 percent of its cases unanimously. Put differently, of the 791 cases, more than three-fourths were *not* decided by one vote.[88] It may be just as well. If most of the Court's business consisted of high-profile moral questions and if the Court disposed of them routinely five to four, the future of the Court itself might be in doubt.

Third, and key to Simon's thesis, on the pivotal question in each major case discussed, conservatives needed one or two votes (depending on the Term) from centrist colleagues to equal five. That coalition proved elusive. A "moderate" position, more often liberal than conservative, prevailed instead. The center held.

## II Biography

Literature on individual Justices falls conveniently into four categories: (1) traditional biographies; (2) examinations of one or several episodes, relationships, or situations in a subject's career, such as the Justice's appointment; (3) analyses of a Justice's jurisprudence on one or more topics; and, (4) hybrids that are largely jurisprudential but include pertinent biographical detail. One of the books surveyed here comes from the first category and two from the fourth.

There is yet no thorough biography of Justice William J. Brennan, Jr., who retired in 1990, although he has been the subject of several book-length studies. One of the most recent (and briefest) of these is Robert Richards's **Uninhibited, Robust, and Wide Open**. Students of the First Amendment will instantly recognize the source of the title: Justice Brennan's opinion for the Court in *New York Times Co. v. Sullivan*,[89] which enlarged press freedom by substantially narrowing constitutionally acceptable grounds for libel actions brought by public officials. Appropriately, the book is an evaluation of Brennan's role in shaping constitutional standards on free speech and press. Analysis of both published judicial opinions and internal Court documents that Richards found in the Brennan Papers leads him to the conclusion not only that Brennan believed the First Amendment to be "the cornerstone of the democracy" but that Brennan was among those most "instrumental in bringing about many of the landmark changes in this area of law. . . ."[90] That appraisal stands in contrast to some of the earliest prognoses when President Eisenhower picked Brennan to succeed Justice Sherman Minton. "The first reaction of many," wrote a relieved Daniel Berman, ". . . is that [Eisenhower] has not inflicted John Foster Dulles, Herbert Brownell, or Thomas E. Dewey on us for life."[91] Then as now, initial assessments can be misleading.

Richards's book examines the Court's experience in six troublesome areas, each of which presented a conflict between free expression and at least one other desirable social value: press oversight and personal reputation, obscenity and public morality, free press and a fair trial, unpopular views and community consensus, information and national security, and advertising and the public interest. With each, Richards demonstrates that Brennan either spoke for the Court or, working in the background, significantly influenced the outcome.

Aside from the Justice's intellect and his constitutional values, Richards's book suggests to this writer at least three factors that account for Brennan's impact on the First Amendment. The first was sheer opportunity. There was work to be done. When he joined the Court in 1956, the constitutional law of free speech and press was still relatively undeveloped. "The Court had not yet addressed the issues of obscenity or libel," one commentator noted.

> [I]t had made only passing acquaintance with the complexities of commercial advertising and the concept of public forum, it had not yet discovered the content-based/content-neutral distinction, its protection of subversive advocacy was more theo-

retical than real, and its overall free speech jurisprudence was rigid, simplistic, and incomplete.[92]

The second was time. Brennan not only sat for thirty-three years but served with twenty-two colleagues (roughly one fifth of all persons who have sat on the Court since 1790). During his tenure the Court decided more than 250 cases on free speech and press. Time and circumstance thus provided both a variety of raw material for a Bench otherwise disposed to confront the challenge and a setting in which doctrines he helped to fashion could mature.

The third was Brennan's demeanor. Another Justice with the same interest and blessed with the same intellect might have been ineffectual. Brennan was effectual—a "gentle giant"[93]—partly because of the force of his reason, his patience, his respect for collegiality and accommodation, and his persistence. This at least is the conclusion one draws from the various memoranda Richards includes. The decisionmaking process as represented in his book resembles less the contact sport that characterizes Simon's and more an intellectual and courtly enterprise.

If Brennan stood to the left of the "center" that Simon depicts, Antonin Scalia stands to the right. **The Jurisprudential Vision of Justice Antonin Scalia** by David Schultz and Christopher Smith comprehensively assesses the 102nd Justice after a decade on the Court.[94] Others such as Justices Black, Felix Frankfurter, and John Paul Stevens have been appraised at similar points in their careers.[95] Moreover, it is a measure of change at the Supreme Court that, a decade after his appointment, only three colleagues (Rehnquist, Stevens, and O'Connor) have served longer.

Schultz and Smith are concerned with more than longevity and seniority, however. Among "Rehnquist-era" Justices, Scalia is the "one individual [who] stands out as a judicial visionary. . . ."[96] For the authors vision includes "strongly held and articulated views on the values embodied in the Constitution, the proper methods for judicial interpretation, and the Supreme Court's role in the governing system." A keen sense of values, interpretation, and role are important beyond the little truth that they make scholarly writing easier, more engaging, and even fun. (It is no mere coincidence that Justices who, like Brennan and Scalia, possess a discernible judicial philosophy are more likely to be written about than those who do not.) Vision is important as an explanatory factor: it helps to account for what Justices have done and what they probably will do on the Bench. Vision is also important because it can be an ingredient of leadership. Particularly since no Justice's vote counts numerically more than another's, vision is one (although surely not the only) resource to influence other Justices. Vision is no guarantee that one will prevail, but it is a necessary condition if a Justice "seeks to persuade his or her colleagues to cast their votes in a manner that moves the Court down a designated path."[97]

The authors discern Scalia's jurisprudential vision through analysis of his opinions on a range of issues, including property rights, governmental institutions, First Amendment matters, and criminal justice. They find "recurring themes," reflecting an attempt "to reconcile several competing values and goals" that embrace both ideological and legal values.[98] These themes "illuminate a specific, unique conception of constitutional law and the judicial branch's proper place in the governing system"[99] that Schultz and Smith call "a post-*Carolene Products* jurisprudence."[100]

The designation is significant. *United States v. Carolene Products Co.*,[101] with its famous Footnote Four, signaled the three distinguishing features of the modern Court: renunciation of judicial protection of property rights, broad acceptance of the administrative state, and assumption of a rigorous judicial duty to guard the Bill of Rights (minus property), to police and to keep open the channels of political change, and to protect "discrete and insular minorities" who, because of their unpopular status, could be the victims of majoritarian politics.

Scalia's vision is not an outright rejection of the judicial role symbolized by *Carolene Products* and a reversion to the "old Court," but a modification of the post-1937 tradition. Guided by a "textualist-originalist" approach to constitutional and statutory interpretation,[102] Scalia is skeptical both of delegation of power to administrative agencies and of the property/personal rights dichotomy. There is only qualified endorsement of traditional Bill of Rights claims. While not charmed with legislative power in principle, if usually respectful in practice, he is

most likely to advocate intervention when majoritarian politics has turned against "whites, corporations, and property owners." Thus, he has his own set of preferred values. The label "conservative," however, is inadequate, because the authors believe that Scalia "is distinctively different from other Justices who generally share his outcome preferences." This difference is characterized by a willingness to rethink "the political philosophy and values that have defined American constitutional jurisprudence since the New Deal."[103]

Even if Scalia never becomes the "leader of a conservative counterrevolution," the authors conclude that Scalia remains one of the most important figures on the Court. "His importance lies in the words and reasoning that constitute his vision, and that vision, when placed in the enduring form of a written opinion, has the potential to shape doctrines and decisions in the near and distant future."[104]

A century before Schultz and Smith completed their study, the first Justice John Marshall Harlan had already passed the midpoint of his nearly thirty-four years on the Court. President Rutherford B. Hayes's choice in 1877 to succeed Justice David Davis who had resigned to enter the United States Senate from Illinois, Harlan compiled a record that spanned eight administrations (counting the bifurcated presidency of Grover Cleveland only once).

For a long time, however, no biography of Harlan existed, although for many years Harlan only shared a common neglect. As Felix Frankfurter observed accurately in 1937, "American legal history has done very little to rescue the Court from the limbo of impersonality. A full-length analysis of only two or three of the seventy-eight Supreme Court Justices has been attempted."[105] Two decades later judicial biography had become commonplace, but Harlan remained among the slighted. A scholar who would be the first to correct the omission observed that the "recently published biography of Justice William Johnson [by Donald Morgan] has restored to his place in history the only other Justice who perhaps could compete with Harlan in the lack of attention paid a significant career."[106]

The inattention seemed inexplicable because Harlan had a long, eventful, and even colorful professional life and was a person of conviction. The adjectives "tepid" and "indifferent" were plainly inapplicable to the man. He undertook almost every venture with enthusiasm. Moreover, judged by political norms that have prevailed since 1950, Harlan was usually on the correct side of the controversies of his age. Unlike many a contemporary for whom a biographer today might have to apologize, Harlan has been, in many respects, vindicated by events. In short, Harlan is for biographers what every genealogist hopes to find: an ancestor worthy of his descendants.

The inattention in Harlan's case was due largely to the general inaccessibility, until very recently, of his papers at the Library of Congress and the University of Louisville. That barrier removed, students of the Court are fortunate now to have two excellent biographies of Harlan. Loren P. Beth's[107] was published just three years before Tinsley E. Yarbrough's **Judicial Enigma**. Both authors were well-equipped for the commitment that a life of Harlan required. Beth had both written on his subject and was thoroughly at home in the period about which he wrote.[108] Yarbrough wrote his biography of the first Harlan on the heels of his book about the second,[109] and so was already familiar with the family. With the authorship of books on both Harlans and others,[110] Yarbrough is a member in good standing of an exclusive club: biographers of multiple Justices.

At first glance the Beth and Yarbrough books seem very much alike. Beth's is only modestly longer, Harlan's Supreme Court years occupy the same proportion (forty-eight percent) in each, and both cover the expected topics. Accounts of important events differ only marginally. For example, while Harlan's Civil War service figures prominently in each, only Yarbrough's recounts the future Justice's arrest of a Presbyterian minister during a church service in Florence, Alabama, after the elderly cleric prayed earnestly for a Confederate victory. (Both sides in the War Between the States evidently took seriously the power of prayer.) On Harlan's law practice, Yarbrough allots more space than Beth to the only case Harlan ever argued before the Supreme Court of the United States—the famous Walnut Street Presbyterian Church dispute, which involved the extent of civil court jurisdiction over ecclesiastical questions.[111] But only Beth seems to have noted that the Louisville attorney oppos-

ing Harlan was Thomas W. Bullitt, who had fought against Harlan as one of Morgan's Raiders.[112]

Rather, the principal difference between the books involves theme or emphasis,[113] as suggested by the titles themselves. Beth subtitled his biography "The Last Whig Justice." Harlan's life accordingly unfolds in the context of his times and heritage. Extensive background on Kentucky politics and American history before, during, and after the Civil War precedes development of Harlan's judicial values, all toward the end of illuminating his "whigism."

In contrast, Yarbrough entitles his work **Judicial Enigma** and seeks to explain Harlan by exploring enigmatic qualities that the man displayed in the judicial, political, and personal arenas of his life. "Enigma" brings to mind Justice Frankfurter's reference to Harlan as one "who may respectfully be called an eccentric exception,"[114] as he dismissed Harlan's insistence in *Hurtado v. California*[115] (in the context of dismissing Justice Hugo L. Black's similar insistence in the case at hand) that the Fourteenth Amendment made the provisions of the Bill of Rights applicable to the states.[116] The same Harlan who, in solo dissents, could advocate an expansion of federal protection for civil liberties and protest invalidation of a federal civil rights act and the validation of a state segregation law also spoke for the Court (as Ely also recounts in his study of the Fuller Court) in dismissing objections to a Georgia county's denial of a high school education to blacks.[117] Harlan wrote dissents in the Sugar Trust Case, the Income Tax Cases, and the Bakeshop Case,[118] yet accepted the Court's recently constructed substantive due process apparently without reservation.[119]

Yarbrough believes that Harlan's political career was perhaps even more complex. An ardent Whig, Harlan joined the Know-Nothing movement and enthusiastically championed its anti-Catholic, antiforeign ideas. A slave owner before the Civil War, Harlan opposed emancipation after hostilities began in 1861 and the extension of the franchise to former slaves after 1865. Yet he not only fought secession but organized a regiment for the Union Army. By 1871 Harlan was the Republican gubernatorial candidate in Kentucky and heartily embraced Reconstruction policies and the three Civil War amendments.

Neither was Harlan's personal life free of enigmatic qualities. A devout man and a lay leader in the Presbyterian Church, Harlan sometimes did not take seriously his financial obligations to creditors. He had difficult relations both with his brother James, who had ruined his own legal career through various addictions, and with the latter's son Henry, seeing them more as cause for embarrassment than as kin deserving of help.

Enigmatic though he was, Harlan was (and is) not alone. It is hardly unusual for public figures—Supreme Court Justices included—to change their views or even to occupy apparently contradictory positions, especially when they, like Harlan, have been caught up in tumultuous times and when their public lives span decades, as Harlan's did. Furthermore, even well-intentioned people have their warts and their "can't helps."[120] Whose life would appear unblemished under the scrutiny of a careful biographer? For someone from Harlan's religious tradition, imperfectibility was a given.[121] Nor does it seems especially useful to query, as the author does, whether "Harlan would have joined modern civil liberties developments that the Justices of his era were not obliged to confront . . . ."[122] The question is not only unanswerable but irrelevant. What matters are Harlan's deeds and his legacy. By nearly any measure, both are considerable.

## III Case Study

Studies of a single constitutional case or group of similar cases are intellectually useful in at least three ways in understanding the Supreme Court's role in American government. First, case studies are descriptive. As analytical narratives, they depict all or part of the judicial process at work, from the origins of a controversy to its resolution, including its impact on the larger political system and on future litigation.[123] The "process" involves decisionmaking not merely in the Supreme Court but in other tribunals too, since almost all cases proceed through a series of lower courts on their way to the top.

Second, case studies are efficient. Since it is not feasible for every case to be examined in great detail, readers make judgments about reality from a much smaller number of close-up encounters, inferring the whole from the part. A single case

study demonstrates how the judicial process can work; a series of case studies allows conclusions to be drawn fairly about how the judicial process ordinarily does work.

Third, case studies are demonstrative. They lay bare important, but sometimes overlooked ingredients in constitutional interpretation. One of these is the pursuit of self-interest. Cases typically begin because some person or some entity wants to do something that the government forbids, wishes not to do something that the government commands, or, admitting that the government may impede or require, believes that the government has done so in an impermissible manner. The individual (or entity) and perhaps even the official adversary may care little about constitutional interpretation beyond the hope that it provides the means to the desired result. The Supreme Court then applies its understanding of the Constitution to the dispute, announcing the "rule" applicable in all similar cases in courts across the land. The role of self-interest in shaping public policy under the American Constitution unfolds plainly in three case studies, each of which involves the First Amendment.

**The Kingfish and the Constitution**, by practiced case-study author Richard Cortner, should be of interest to students of Louisiana history and politics as well as the Supreme Court. An account of the participants, circumstances, and events that culminated in *Grosjean v. American Press Co.*,[124] the book deserves a wide audience. On one side was Huey P. Long and his statewide political organization, on the other were the publishers of thirteen daily newspapers in Louisiana and the American Newspaper Publishers Association. At issue was the constitutionality of a law, proposed in 1930 and enacted in 1934, that imposed a tax of two percent on the gross receipts from the sale of advertising on all newspapers with a weekly circulation at or above 20,000. Of the state's approximately 163 publi-


**The subject of *The Kingfish and the Constitution* is a suit by the American Newspaper Publishers Association arguing that an advertising tax applied only to papers critical of Louisiana governor Huey P. Long (left) was unconstitutional. In *Grosjean v. American Press Co.* (1936) the Supreme Court ruled the tax a violation of freedom of the press.**

cations that sold advertising, most of which were weekly newspapers, the tax applied only to the thirteen daily papers, all but one of which were critical of Long.

Long's press support came from those smaller circulating weeklies. The tax bill had originally targeted only the New Orleans and Shreveport dailies that were Long's fiercest opponents, but was broadened in an attempt to disguise the law as a revenue measure levied on those with a greater ability to pay.[125] Because the plan legalized economic intimation of Long's political enemies, Cortner believes that the tax "was one of the most serious assaults upon freedom of the press in this century."[126]

The daily papers fought back in court and prevailed. (The person against whom newspapers brought their lawsuit was Alice Lee Grosjean, herself the granddaughter of a Shreveport newspaper publisher, and Louisiana's Supervisor of Public Accounts. "Among Long's intimates, [she] was also considered to be his mistress," although this relationship was never the subject of discussion in the press.)[127] First a three-judge U.S. district court concluded in March 1935 that the tax violated the Equal Potection Clause of the Fourteenth Amendment.[128] On direct appeal, all nine Justices also agreed that the tax was constitutionally flawed, but Justice George Sutherland rested his opinion of the Court on the First Amendment's guarantee of freedom of the press. Both grounds had been fully developed by New Orleans attorney Eberhard P. Deutsch in a "remarkable fifty-one-page document [that] laid out the strategy and principal constitutional arguments that newspaper counsel would in fact follow almost to the letter . . ." in their briefs.[129] Deutsch had prudently stressed the strategic importance of the free press argument since the discriminatory features of the tax were subject to legislative correction. Ironically, Long never learned the fate of his attempt to censor the dailies. Sutherland announced the Court's decision on February 10, 1936, five months to the day after Long succumbed to the wounds inflicted two days earlier by an assassin.

*Grosjean* should rank prominently on any list of Supreme Court decisions delineating press freedom. Coming only five years after *Near v. Minnesota*[130] held squarely for the first time that the Free Press Clause applied to the states through the Fourteenth Amendment, it went far beyond *Near*'s invalidation of outright censorship. Facially, the Louisiana tax was not censorial, but the Justices considered the law "in the light of its history and of its present setting," concluding it "to be a deliberate and calculated device . . . to limit the circulation of information."[131] The Court ever since has been unusually wary of the effects of taxation on the press.[132]

Until Cortner's book appeared, *Grosjean* had fallen nearly out of sight, except among experts on press freedom. The case is routinely relegated to a footnote in most texts, if it is mentioned at all, although the **Oxford Companion** wisely allots the case an entry of its own.[133] Obscurity may derive in part from timing. The 1935-36 Term is most often remembered because of the impending showdown between the Court and President Roosevelt, not press freedom. Obscurity may also be due to the dozens of press cases that have followed and therefore overshadowed *Grosjean*. In the same way that it is harder to recall the second American to orbit the earth or to walk on the moon, being the second important press case is qualitatively different from being the first. Had the Court ruled for Supervisor Grosjean, however, the lineage of press cases in the past sixty years might have been much shorter. Perhaps Cortner's *Kingfish* will restore this old case to the place it deserves.

Unlike the corporate entities that pressed a constitutional right in *Grosjean*, the First Amendment claimants in Merlin Owen Newton's **Armed with the Constitution** were ordinary people from "nonexceptional backgrounds" whose commitment and steadfastness thrust them "into moments of national prominence."[134] But for their conflict with local authorities, few people would ever have heard of Newton's personae: Thelma and Rosco Jones and Grace Marsh. All three were Jehovah's Witnesses who took seriously the divine directive that "you shall receive power when the Holy Spirit has come upon you; and you shall be my witnesses . . . to the end of the earth."[135] Putting their faith to work on the streets, the Joneses were arrested in Opelika, Alabama, on April 1, 1939, for soliciting without a license. Marsh and five other Witnesses were arrested for trespass on December 24, 1943, in Chickasaw, Alabama, a "company town" owned by a shipbuilding concern.

**Armed with the Constitution** is the most

important portrayal of the relationship between the Witnesses and the First Amendment since David Manwaring's study of the flag-salute cases.[136] Both books make clear the impact that Witnesses had on the First Amendment in the late 1930s and the 1940s—"vital links in the chain of events and the legal philosophy that championed the cause of individual liberty."[137] Witnesses were to the First Amendment then what civil rights marchers and antiwar activists were a quarter century later. Indeed, the latter were the decided beneficiaries of the former.

Newton recounts the fate of Marsh and the Joneses in the state courts and in the Supreme Court in the context of the Witness movement and Alabama politics and society. The claimants figured prominently in a drama unfolding at the Court as the Justices were in the first stages of their *Carolene Products* reformation.

The Joneses were initially unsuccessful in stretching the logic of *Grosjean* to religious practices, with a five-Justice majority in *Jones v. Opelika* finding no constitutionally compelled exemption from taxes on the sale of religious literature.[138] Nonetheless, three of the *Jones* dissenters (Justices Black, Douglas, and Murphy) used the occasion to confess their error in having joined the majority in the 1940 school flag-salute case.[139] Moreover, the Witnesses' setback in *Jones* was only temporary. Within a year, Justice James F. Byrnes, Jr., part of the *Jones* majority, resigned and was replaced by Justice Wiley Rutledge, who joined with the *Jones* dissenters to grant a rehearing.[140] Looking back to the Supreme Court's first decision in *Jones, Murdock v. Pennsylvania*[141] reached the opposite conclusion. Rutledge's arrival, combined with Justice Robert H. Jackson's appointment in 1941, then generated six votes to reject the constitutionality of a mandatory flag salute.[142]

Grace Marsh succeeded the first time when

**Merlin Owen Newton's *Armed with the Constitution* is an important portrayal of the relationship between the Jehovah's Witnesses and the First Amendment during the 1930s and 1940s. The Supreme Court's decisions on freedom of religion paved the way for later decisions on civil rights. Above is a 1953 baptismal service for some 5,000 Jehovah's Witnesses at the Riverside Cascade Pool in New York City.**

her case reached the Supreme Court. One of the last cases decided before Chief Justice Harlan Fiske Stone's death, *Marsh v. Alabama*[143] made new law: the Supreme Court equated a private corporation with a municipality, thus bringing the former within the reach of the Fourteenth Amendment and therefore of the First Amendment as well. The equation would later present the Justices with some troublesome line-drawing problems in other settings during the 1960s and 1970s, but in the meanwhile *Marsh* provided the rationale for the Court to invalidate private discrimination in barring black participation in a party primary.[144]

The First Amendment conflicts that Newton and Cortner chronicle were brief, no more than a few years. In contrast, the controversy at the heart of Robert Goldstein's **Saving "Old Glory"** spans a century: laws that protect the American flag from desecration. It is a sign of the evolution of constitutional interpretation that only recently has this issue been perceived in First Amendment terms. The first of a trio of volumes that the author projects on the flag desecration debate, **Saving "Old Glory"** primarily concerns events prior to the most recent uproar: *Texas v. Johnson*,[145] which for the first time squarely regarded flag burning as a constitutionally protected speech, and its aftermath. Treated in the last chapter,[146] this decision pressed one of the proverbial hot buttons in American politics. Congress promptly enacted a revised federal flag protection act, which the Court struck down in *United States v. Eichman*,[147] and the Bush administration and the Court's critics in Congress tried unsuccessfully to overturn *Johnson* and *Eichman* by constitutional amendment. Muted somewhat, the din persists, demonstrating once again how quickly and deeply the Supreme Court can entangle itself in the political briar patch.

Goldstein shows that the turmoil surrounding *Johnson* and *Eichman*, however, marked the third, not the first, time that flag desecration had captured the national consciousness. Encouraged by veterans and patriotic organizations, the first efforts to protect the flag from improper use and treatment flourished between 1895 and 1910, not coincidentally during a time of significant immigration, industrialization, and concern about the influence of "foreign" ideologies. It was this campaign, the author believes, that "largely 'created' the twentieth-century iconization of the American flag."[148]

No national flag protection act emerged from Congress during this time, but by the start of World War II congressional committees had held hearings on the subject a dozen times, and between 1917 and 1932 every state enacted bans on flag desecration.[149] The Supreme Court's initial encounter with flag protection occurred in *Halter v. Nebraska* in 1907, which upheld a state's flag law as a reasonable business regulation after two men had been convicted for marketing "Stars and Stripes" brand beer upon which had been affixed a label bearing the likeness of the American flag.[150] The ruling "seemingly definitively established the constitutionality of flag desecration laws."[151]

Flag desecration erupted as a political issue again when protests mounted against U. S. policies in Vietnam during the 1960s.[152] The fracas resulted in the first national statute outlawing flag desecration, which the author calls "a transparent attempt to suppress a particular form of antiwar dissent . . . ."[153] The period also witnessed the Supreme Court's reentry into the controversy when in 1969 it overturned, five to four, a state conviction for flag desecration in *Street v. New York*.[154] The state may have come close to prevailing, the author notes, because Justice William O. Douglas drafted a dissenting opinion objecting to what he feared would be the outcome.[155] Perhaps reflecting the tenuous alignment of the Justices, the Court's decision was grounded on the possibility that Street had been punished for what he said, rather than for what he did. The Bench explicitly avoided "the far more contentious issue of physical flag desecration," and "initiated a pattern of failing to squarely face [*sic*] this question . . . for the next twenty years."[156] The only other cases that generated opinions by the Supreme Court during this second period—*Smith v. Goguen* and *Spence v. Washington*—likewise avoided the large issue and were both decided six to three for the claimants on narrow, fact-specific, grounds.[157]

For whatever reason—the book offers nothing about the Court's deliberations[158] at this moment—the Court tackled this question forthrightly in the Johnson case in 1989, less than a year after the Pledge of Allegiance had been a prominent issue in the presidential campaign.[159]

Unlike the two previous periods of flag controversy, the Court largely inaugurated the third on its own. Ironically, the majority of five relied almost in passing on *Street*, "pointing out that symbolic physical flag protests were constitutionally equivalent to oral criticism of the flag," observes Goldstein, "a logical point that hardly required twenty years of legal pondering to reach."[160]

As each of the volumes surveyed here demonstrates, the Supreme Court can ignite as well as extinguish controversies, enthrone as well as dethrone public policies, and hearten as well as confound elected leaders. To render this array in all its dimensions, authors should be glad that apt metaphors abound.

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## Endnotes

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[5] Max Lerner, **Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court** (1994), dust jacket.
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[12] Charles P. Curtis, Jr., **Lions Under the Throne** (1947), p. 333.
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[14] Lerner, **Nine Scorpions in a Bottle**, p. 27.
[15] Martin Shapiro, "Chief Justice Rehnquist and the Future of the Supreme Court," in D. Grier Stephenson, Jr., ed., **An Essential Safeguard: Essays on the United States Supreme Court and Its Justices** (1991), p. 146.
[16] William R. Casto, **The Supreme Court in the Early Republic** (1995), p. xi.
[17] Casto's book is the second volume in the series to appear. The first volume, by James W. Ely, Jr., is considered below.
[18] Casto, p. 90.
[19] *Id.*, p. 249.
[20] *Id.*, p. 71.
[21] *Id.* This is the title Casto gives to Chapter 4.
[22] *New York Times Co. v. United States*, 403 U.S. 713 (1971).
[23] Louis Henkin, **Foreign Affairs and the Constitution** (1972), pp. 4-5 (footnote omitted).
[24] Casto, p. 247.
[25] Casto, p. 249.
[26] This is commonly thought to be one of the functions in the political system that courts routinely perform. *See, e.g.*, D. Grier Stephenson, Jr., *et al.*, **American Government,** 2d ed. (1992), p. 551.
[27] In a collegial body such as the Supreme Court, leadership may have at least three dimensions: intellectual, managerial, and social. Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," *Journal of Supreme Court History* 63, 64 (1991).
[28] Casto, p. 112.
[29] Casto notes that Ellsworth followed the practice of the Connecticut Superior Court on which he sat from 1784 to 1789. *Id.*, p. 110.
[30] 10 U.S. (6 Cranch) 87 (1810).
[31] 5 U.S. (1 Cranch) 137 (1803).
[32] 2 U.S. (2 Dall.) 419 (1793).
[33] Casto, p. 227.
[34] 3 U.S. (3 Dall.) 171 (1796).
[35] 3 U.S. (3 Dall.) 386 (1798).
[36] Casto, p. 232.
[37] *Id.*, p. 231.
[38] *Id.*, p. 236.
[39] *Id.*, pp. 248, 250.
[40] This author is pleased to have in his possession Chief Justice Fuller's commission of office as well as the constitutional and judicial oaths that Fuller signed. It is unclear why these items had been separated from the rest of the Chief Justice's papers which have long been housed at the Chicago Historical Society. Some years ago, a former student found the Fuller items amid a rack of motion picture publicity posters at a collectibles shop in the eastern part of Lancaster County, Pennsylvania. The Fuller items are mounted in a two-sided frame: the commission, signed by President Cleveland and Secretary of State Bayard, is on one side; the oaths, signed by Fuller and witnessed by Justice Miller, are on the other, along with the letter of transmission from the Justice Department.
[41] For example, *see* William O. Douglas, **We the Judges** (1956), p. 276; and, Henry J. Abraham, **Justices and Presidents**, 3d ed. (1990), p. 149.
[42] *Chicago, Milwaukee, and St. Paul R.R. Co. v. Minnesota,* 134 U.S. 418 (1890); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (rehearing, 1895); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).
[43] For attitudes toward the Court during and after the Fuller years, *see* William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937** (1994).
[44] Willard L. King, **Melville Weston Fuller: Chief Justice of the United States, 1888-1910** (1950, reprinted 1967).
[45] James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller 1888-1910** (1995), p. 79.
[46] Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, reprinted in 134 U.S. 729, 745.
[47] Ely, p. 1.
[48] *Lochner v. New York*, 198 U.S. 45, 75 (1905) (dissenting opinion). For a short account of the role of Holmes's Lochner dissent in the progressive critique of the Court, *see* G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (1993), pp. 326, 363-365.
[49] Ely, p. 76.
[50] One of the Court's defenders made a similar point just fifteen years after Fuller's death. Charles Warren, **Congress, the Constitution, and the Supreme Court** (1925), p. 236.
[51] Ely, p. 75.
[52] *Id.*, p. 81.
[53] 158 U.S. 564 (1895).
[54] 208 U.S. 274 (1908).
[55] 163 U.S. 537 (1896).
[56] Ely, p. 158.
[57] David P. Currie, **The Constitution in the Supreme Court: The Second Century 1888-1986** (1990), p. 40.
[58] Ely, p. 158.
[59] 175 U.S. 528 (1899).
[60] 211 U.S. 45 (1908). Justice Harlan dissented, seeing the measure as "an arbitrary invasion of the rights of liberty and property. . . ." *Id.*, 67.
[61] For example, *see Giles v. Harris,* 189 U.S. 475 (1903).
[62] Edward S. Corwin, **Liberty Against Government** (1948).
[63] *Chicago, B. & Q. R.R. Co. v. Chicago,* 166 U.S. 226 (1897).
[64] *Twining v. New Jersey*, 211 U.S. 78 (1908), rejecting the view that a state judge's negative comment on a defendant's failure to testify implicated the self-incrimination clause of the

Fifth Amendment.
[65] Ely, p. 168.
[66] Roger K. Newman, **Hugo Black: A Biography** (1994), p. 504.
[67] *In re Anastaplo*, 366 U.S. 82, 91 (1961).
[68] *Id.*, 116.
[69] C. Herman Pritchett, "Book Review," 60 *California Law Review* 1476 (1972).
[70] George Anastaplo, **The Amendments to the Constitution** (1995), p. xvi.
[71] *Id.*, p. 229.
[72] *Id.*, pp. 236-237 (emphasis omitted).
[73] **Free Speech and its Relation to Self-Government** (1948).
[74] Anastaplo, pp. 53-54.
[75] *Id.*, p. 53.
[76] *Id.*, pp. 15, 30.
[77] *Id.*, p. 96.
[78] *Id.*, p. 234.
[79] *Id.*, p. 100.
[80] James F. Simon, **The Center Holds** (1995), p. 11.
[81] *Id.*, p. 303.
[82] *Id.*, p. 11.
[83] James F. Simon, **In His Own Image: The Supreme Court in Richard Nixon's America** (1973).
[84] Henry J. Abraham, **Justices and Presidents**, 3d ed. (1992), p. 307.
[85] Jon R. Waltz, "The Burger/Blackmun Court," *New York Times Magazine,* December 6, 1970, p. 61.
[86] Vincent Blasi, ed., **The Burger Court: The Counter-Revolution That Wasn't** (1983).
[87] Each collection is at the Library of Congress. Justice Jackson died in 1954, but is important to Simon's study because of memoranda Chief Justice Rehnquist wrote when he clerked for Jackson during the 1952 Term. Douglas retired in 1975, but Simon, whose biography of Douglas (**Independent Journey**) was published in 1980, uses his papers for background on cases with antecedents, such as *Roe v. Wade*, 410 U.S. 113 (1973), decided during Douglas's tenure.
[88] The figure of 791 includes those cases decided with a signed opinion and *per curiam* opinions that followed oral argument.
[89] 376 U.S. 254, 270 (1964).
[90] Robert D. Richards, **Uninhibited, Robust, and Wide Open** (1994), p. vii.
[91] *The Nation*, October 13, 1956, p. 298.
[92] Geoffrey R. Stone, "Justice Brennan and the Freedom of Speech: A First Amendment Odyssey," 139 *University of Pennsylvania Law Review* 1333, (1991)
[93] The phrase is part of the title for chapter one.
[94] Both authors have already written several articles about Scalia. Smith has also authored a book-length study: **Justice Antonin Scalia and the Supreme Court's Conservative Moment** (1993).
[95] Charlotte Williams, **Hugo L. Black: A Study in the Judicial Process** (1950); Louis J. Jaffe, "The Judicial Universe of Mr. Justice Frankfurter," 62 *Harvard Law Review* 357 (1949); Robert Judd Sickels, **John Paul Stevens and the Constitution: The Search for Balance** (1988).
[96] David A. Schultz and Christopher E. Smith, **The Jurisprudential Vision of Justice Antonin Scalia** (1996), p. xii.
[97] Schultz and Smith, p. xi.
[98] In the literature on the Supreme Court, scholars debate the degree to which Justices are moved more by ideological or legal values. One school postulates attitude or result orientation; the latter methodology, text, and intent. *See*, for example, Saul Brenner and Harold Spaeth, **Stare Indecisis** (1995).
[99] Schultz and Smith, p. xiii.
[100] *Id.*, p. 24.
[101] 304 U.S. 144 (1938).
[102] Schultz and Smith, p. 208.
[103] *Id.*, p. 207.
[104] *Id.*, p. xiii.
[105] Frankfurter, **The Commerce Clause,** p. 6.
[106] Loren P. Beth, "Justice Harlan and the Uses of Dissent," 49 *American Political Science Review* 1085, 1085 (1955).
[107] Loren P. Beth, **John Marshall Harlan: The Last Whig Justice** (1992). *See* "The Judicial Bookshelf," *Journal of Supreme Court History* 109, 112-114 (1992).
[108] *See* Beth's "Justice Harlan and the Uses of Dissent," and his **Development of the American Constitution, 1877-1917** (1971).
[109] **John Marshall Harlan: Great Dissenter of the Warren Court** (1992). *See* "The Judicial Bookshelf," *Journal of Supreme Court History* 109, 114-117 (1992).
[110] **Mr. Justice Black and His Critics** (1988).
[111] *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).
[112] Beth, **John Marshall Harlan**, p. 85.
[113] There is a difference in style as well. Beth quotes far more extensively from Harlan's letters, thus allowing his subject to tell much of the story. Drawing from the same collection, Yarbrough is more selective and therefore more interpretive.
[114] *Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring).
[115] 110 U.S. 516 (1884).
[116] 332 U.S. at 68 (Black, J., dissenting).
[117] *Cumming v. Richmond County Board of Education,* 175 U.S. 528 (1899).
[118] *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (rehearing, 1895); *Lochner v. New York*, 198 U.S. 45 (1905).
[119] Yarbrough, 181. *See* Harlan's opinion in *Mugler v. Kansas*, 123 U.S. 623 (1887).
[120] Oliver Wendell Holmes, Jr., "Natural Law," in **Collected Legal Papers** (1921), p. 310.
[121] For example, *see* the answer to question 78 in the **Larger Catechism**, a document dating from 1648 that by Harlan's time was both widely studied and accorded official status by nearly all strands of Presbyterianism in the United States.
[122] Yarbrough, p. 228.
[123] Walter F. Murphy and Joseph Tanenhaus, **The Study of Public Law** (1972), p. 20.
[124] 297 U.S. 233 (1936).
[125] Richard C. Cortner, **The Kingfish and the Constitution** (1996), pp. 85-89.
[126] *Id.*, p. 187.
[127] *Id.*, p. 33.
[128] *American Press Co., v. Grosjean*, 10 F. Supp. 161 (E.D.La, 1935).
[129] Cortner, p. 100.
[130] 283 U.S. 697 (1931).
[131] 297 U.S. at 250 (1936).
[132] For example, *see Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), which struck down a tax on paper and ink.
[133] Kermit L. Hall, **The Oxford Companion to the Supreme Court of the United States** (1992), p. 354.
[134] Merlin Owen Newton, **Armed with the Constitution** (1995), p. 1. Like Hugo L. Black, Newton was reared in Clay County, Alabama.
[135] Acts 1:8 (RSV).

[136] David R. Manwaring, **Render Unto Caesar: The Flag Salute Controversy** (1962).
[137] Newton, p. 8.
[138] 316 U.S. 584 (1942).
[139] *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).
[140] 319 U.S. 103 (1943) (*per curiam*).
[141] 319 U.S. 105 (1943).
[142] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).
[143] 326 U.S. 501 (1946).
[144] *Terry v. Adams*, 345 U.S. 461 (1953).
[145] 491 U.S. 397 (1989).
[146] Goldstein, pp. 195-228.
[147] 496 U.S. 310 (1990).
[148] Goldstein, p. 3.
[149] *Id.*, p. 2. Texas had been one of the first states to act; the historical antecedent of the statute involved in *Johnson* became law in 1917.
[150] 205 U.S. 34 (1907).
[151] Goldstein, p. 50.
[152] *Id.*, p. 99.
[153] *Id.*, p. 2.
[154] 394 U.S. 576 (1969).
[155] Goldstein, p. 107.
[156] Goldstein, pp. 177-178.
[157] 415 U.S. 566 (1974); 418 U.S. 405 (1974).
[158] Goldstein, p. 201.
[159] Citing the *Barnette* decision of 1943, Governor Michael Dukakis had vetoed in 1977 a law in Massachusetts requiring daily public school recitation of the Pledge of Allegiance.
[160] Goldstein, p. 106.

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