

Introduction

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This issue of the **Journal** covers a wide variety of topics, and well represents the growing interest in Supreme Court history as well as the varied ways in which that interest is pursued. D. Grier Stephenson's "Judicial Bookshelf" covers a wide range of books on the Court, and Elizabeth Garrett, a former clerk to Justice Thurgood Marshall, reviews Mark Tushnet's two-volume biography of the Justice. As a comparison of how history was done "then" and how it is done "now," Alexander Wohl contributes another of our "In Retrospect" pieces with a review of Albert Beveridge's monumental biography of Chief Justice John Marshall.

Interestingly, and with practically no assistance from the editors, some of the articles we received relate well to one another. Paul Finkleman's piece on the *Prigg* case details one of the Court's earliest efforts to deal with the growing problem of slavery; a half-century later the Court, as Justice Thomas shows in his discussion of *Plessy v. Ferguson*, was still caught in the mindset of the nineteenth century; and then our student essay winner, Kevin Kruse (a student of Richard Polenberg's at Cornell) details how the Court finally began moving toward a modern view of the Equal Protection Clause. Similarly, after we had asked Michael Wolf to reexamine the landmark zoning case of *Euclid v. Ambler*, we received Garret Power's analysis of the lawyering in that case.

We are pleased and proud to present an-

other article dealing with constitutional courts in other countries, this one from the Hon. Michael Hudson McHugh, a member of the High Court of Australia. The germ of this article came a few years ago when Justice McHugh hosted my wife and me at a dinner in Sydney, and we started talking about the differences and similarities between the courts of the two countries. We hope to be able to continue this series in the future with articles on other constitutional courts in order to understand the unique role that the Supreme Court plays in our political-legal system, a role unique among the developed nations.

The issue is rounded out by pieces on what might have become the Court's first major statement on the First Amendment, a hitherto little known set of draft opinions in the William Paterson papers, edited by William James Hull Hoffer, a graduate student at the Johns Hopkins University; a look at the mail received by Justice Black in response to his dissent in *Tinker v. Des Moines*, by John Johnson, who has recently published a book on the case; Michael Kahn's analysis of Lincoln's method of choosing Justices, and Sandra Wood's article on the senior Associate Justice, whose role and powers are often overlooked.

All told we are delighted with the variety of articles that scholars have been sending to us, and which we are able to present to you. If anyone asks about the state of Supreme Court history, the answer is that it is alive and thriving.

The High Court of Australia

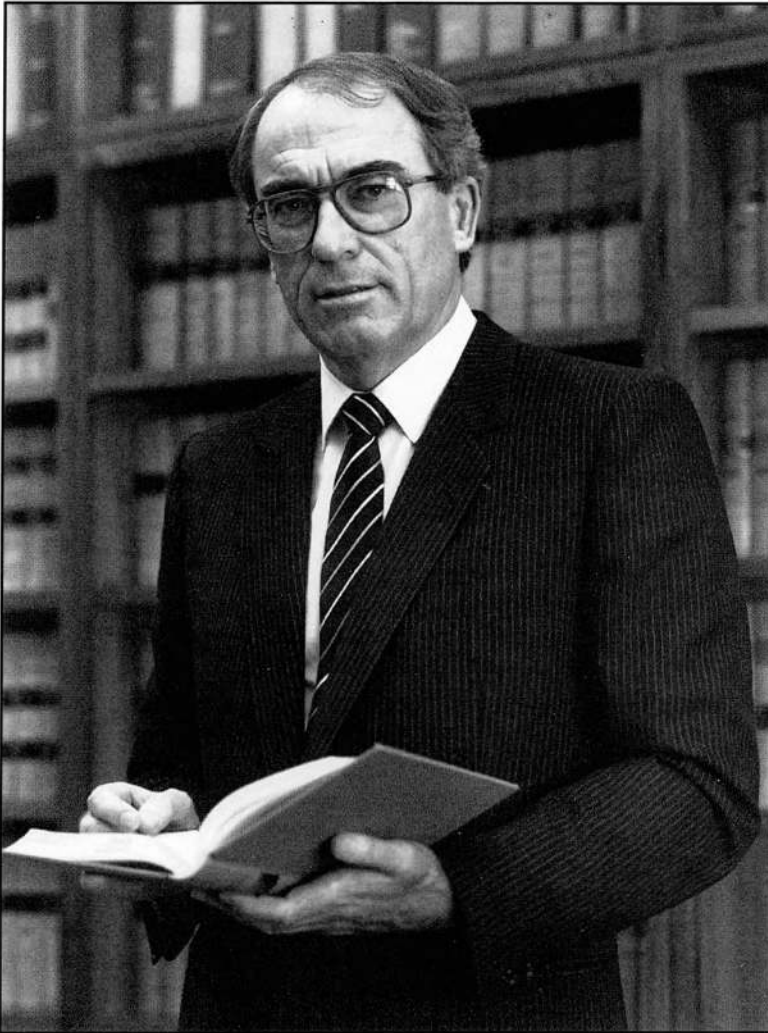
Michael Hudson McHugh

Introduction

The High Court of Australia, like the Supreme Court of the United States, is the guardian of the Constitution that creates it. Each court is the creation of a federal Constitution that gives effect to the political doctrine of the separation of legislative, executive and judicial power. Each Constitution vests specific heads of power in a federal legislature consisting of a Senate and a House of Representatives and leaves each state free to legislate within its own domain except in cases where the Constitution has withdrawn legislative power from the states. Each Constitution contains a Supremacy Clause that ensures that, in the case of conflict between federal and state legislative enactments, the federal enactment will prevail. Each Constitution contains an Establishment Clause, which are similarly worded. Given these

similarities and the remarkable similarities between the legislative powers specifically granted to the federal legislatures of each country, one would expect the roles of the two courts in their respective legal systems to be similar.

Two factors have combined, however, to make the roles of the Courts essentially different. The first is the existence of the Bill of Rights in the Constitution of the United States and the absence of a counterpart in the Australian Constitution. The second is that the High Court is, but the Supreme Court is not, part of the legal system of the states that constitute the federation. As a result, the nature of the cases that come before the two courts is on the whole quite different. Unlike the Supreme Court, whose “docket” appears to be dominated by issues concerning the Bill of Rights and the interpretation of federal enactments, the High Court’s “docket” is dominated by appeals in



The author, Michael McHugh (pictured), is a Justice of the Australian High Court. In providing for the establishment of the High Court and other federal courts, the Australian Constitution follows the plan of Article III, section 1 of the Constitution of the United States. However, the two courts have different practices: for example, oral arguments before the Australian court may take as many as five days.

civil and criminal matters. The nature of the High Court's work as an appellate court and the absence of a Bill of Rights in the Australian Constitution have also influenced that Court's approach to the judicial process.

Until recently, the High Court had generally decided cases in accordance with the theory of legal positivism that asserts that answers to legal issues are to be found by working out the logical implications of relevant legal rules, principles, and concepts. The Court's method of deciding cases involved a strict legalism that generally ignored the social and economic dimensions of its decisions. Upon his swearing-in as Chief Justice of the High Court in 1952, Sir Owen Dixon, widely regarded as the greatest lawyer that Australia

has produced, said the following:¹

[C]lose adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

To understand the role of the High Court and its place in the Australian legal landscape, some familiarity with the development of Australia as an independent nation and the creation of its Constitution is helpful, if

not necessary.

Background

History

Immediately prior to the federation of the Commonwealth of Australia in 1901, Australia comprised six British colonies: New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania. As British colonies, each received the English common law upon settlement. In time, the Parliament of the United Kingdom gave each colony its own Constitution, which created a legislature and allowed for self-government within each colony. The political institutions of the colonies reflected their English roots by adopting the political concepts of parliamentary sovereignty and responsible government under which executive power was exercised by Ministers of the Crown, who were members of and answerable to the parliament. None of the Constitutions of the colonies contained a formal separation of legislative, executive, and judicial power.

During the latter half of the nineteenth century, an increasing number of prominent colonial figures encouraged the idea of a colonial union. To them, the economic and practical advantages of a united geographical region were obvious. In addition, they feared the increasing involvement of countries such as France and Germany in the Pacific region. They believed that external threats to the colonies could be best repelled by a united force.

The Constitutional Conventions

In the 1890s, delegates from the colonies, many of whom were prominent lawyers, debated the idea of federation at a series of Constitutional Conventions. Most delegates favored the model of the Constitution of the United States, which circumscribed the scope of national power, in preference to the Canadian model, which allocated the bulk of power to the central government. Given their experience with the institutions of parliamentary sovereignty and responsible government, it is not surprising that the delegates did not wholeheartedly adopt the U. S. approach. They preferred to

put their faith in parliamentary democracy and responsible government rather than in a Bill of Rights and the vesting of executive power in a President who was not constitutionally answerable to the legislature.

The Constitution

After Conventions in 1891, 1897, and 1898, the move toward a federal union culminated in a draft Constitution, which was approved by the peoples of the colonies. With only one substantial amendment concerning appeals to the Judicial Committee of the Privy Council, the Parliament of the United Kingdom enacted the draft Constitution into law as the *Commonwealth of Australia Constitution Act 1900*. That Act contains nine clauses. The first eight clauses (commonly referred to as the "covering clauses") contain introductory, explanatory, and consequential provisions. The whole of the Constitution is contained in the ninth clause, which originally contained 128 sections, one of which provided for amendments to the Constitution by referenda initiated by the federal Parliament and approved by a majority of people in a majority of states.

The Commonwealth

The Constitution created the Commonwealth of Australia and vested the three arms of government in a parliament, an executive, and a judicature. This distribution of power is similar in principle to that effected by the U. S. Constitution. The legislative power of the Commonwealth is vested in a "Federal Parliament" which consists of the Queen (acting through her representative the Governor-General), a Senate, and a House of Representatives.² The Senate is "composed of Senators for each State, directly chosen by the people of the State."³ The House of Representatives is "composed of members directly chosen by the people of the Commonwealth," and the number of members chosen in the several states is "in proportion to the respective numbers of their people."⁴ To become law, a parliamentary bill must be passed by both Houses of Parliament and does not take effect until it is assented to by the Governor-General. In practice, the Governor-

General's approval is largely a procedural requirement because constitutional convention requires the Governor-General to act on the advice of the Ministers.

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General on advice from the Federal Executive Council. The Departments of State are administered by ministers appointed by the Governor-General. A minister of state must be a member of the Senate or the House of Representatives and shall be a member of the Federal Executive Council.

However, the constitutional provisions concerning executive power do not truly reflect the way in which Australian government operates. The Executive Council meets with the Governor-General for purely formal matters. In practice, executive power is exercised by a "Cabinet," which consists of some but not all ministers, the chief of whom is the Prime Minister (neither the Cabinet nor the Prime Minister is referred to in the Constitution). Ministers are members of the political party or coalition that has the majority of members in the House of Representatives. Accordingly, although the Constitution incorporates the notion of separation of powers, the Parliament and the Executive are linked through the Ministry by the political concept of responsible government, i.e. the executive is answerable and responsible to Parliament. Unlike the legislative and executive arms of government, however, the Judiciary is completely separate and independent.

The adoption of the theory of responsible government gives rise to one of the fundamental theoretical differences between the Australian and the U. S. constitutional positions. Unlike U. S. constitutional theory, Australian constitutional theory has not perceived the sovereignty of the nation as being vested in "the people." Like Britain, the sovereignty of the Australian nation has been seen as vested in the Crown. However, the passing of the *Australia Act 1986* (UK), an act by which the Parliament of the United Kingdom effectively undertook not to legislate for Australia, has undermined the traditional position. Some judges and scholars, including myself,⁵ have said that the political and legal sovereignty of Australia must now reside in the people of

Australia. If this view gains acceptance, it may have a profound effect on the way that the Constitution is interpreted. Hitherto, the Constitution has been seen and interpreted by the High Court as a statute of the Parliament of the United Kingdom.

The States

The Constitution also provides that, subject to the Constitution, the Constitutions of the states continue. So does every power of their parliaments except where the Constitution exclusively vests it in the federal Parliament or withdraws it from the states. When a law of a state is inconsistent with a law of the Commonwealth, the latter prevails. Thus unlike the American states, which obtained sovereignty and broke their constitutional ties with Great Britain by declaring their independence in 1776, the Australian states remained tied to Westminster until the passing of the *Australia Act 1986* (UK).

The High Court

The Judicial Power of the Commonwealth

Section 71 of the Constitution vests the "judicial power of the Commonwealth in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." In providing for the establishment of the High Court and other federal courts, the Constitution follows the plan of Article III, section 1 of the Constitution of the United States.

Section 73 gives the High Court jurisdiction to hear and determine appeals from the judgments and orders of "any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State." Section 75 of the Constitution gives the High Court original jurisdiction in certain federal matters, one being a matter "[i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." This provision gives the High Court a jurisdiction that the Supreme Court has held that it does not have and could not be

given.⁶ Although the original jurisdiction of the High Court may be extended by federal legislation to certain other enumerated federal matters, the Court's jurisdiction in the matters specified in Section 75 cannot be restricted or diminished without constitutional amendment.

An Historical Anomaly

Until recently, the High Court was not the ultimate court of appeal in the Australian legal system. The Supreme Courts of the states had and have jurisdictions similar to those of the Courts at Westminster. Prior to federation, appeals from the state Supreme Courts went to the Judicial Committee of the Privy Council sitting in London (commonly referred to as the Privy Council). The Australian Constitution did not remove the right of appeal from a state Supreme Court to the Privy Council. Consequently, alternative appeal paths from state courts to the High Court and the Privy Council existed until legislation was enacted in 1986.

Furthermore, subject to federal legislation, the Constitution allowed appeals to the Privy Council from High Court decisions concerning the general law and in constitutional cases except those involving a question "as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States."⁷ No appeal lay in these "inter se" cases without a certificate from the High Court. In all but a few cases, therefore, the Privy Council was the final arbiter of Australian law. While the Privy Council retained that jurisdiction, it was inevitable that the development of Australian law would closely track the development of English law.

In 1975, however, the Parliament of the Commonwealth legislated⁸ to prevent an appeal from the High Court of Australia to the Privy Council with the exception of the inter se cases, an exception that would require a constitutional amendment. Subsequently, the possibility of appeal from any other Australian Court, state or federal, was terminated in 1986.⁹

As a consequence of these recent legislative initiatives, it can now be truly said that the

High Court sits at the apex of a fully integrated Australian judicial system.

The Creation of the High Court

Although Section 71 of the Constitution declares that the judicial power of the Commonwealth shall be vested in the High Court and "in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction," the federal Parliament did not enact enabling legislation to give effect to the constitutional declaration until 1903.¹⁰ Instead of adopting the U. S. approach of vesting exclusive federal jurisdiction in newly created federal courts, the Parliament took the second option in Section 71 and invested the existing state courts with federal jurisdiction. Subsequently, the federal Parliament created federal courts to deal with such matters as bankruptcy and industrial relations; but it was not until 1976 that Parliament created a federal court that was invested with general federal jurisdiction.

The High Court Justices

The Constitution provides for a High Court consisting of a Chief Justice and at least two other Justices.¹¹ Upon the creation of the Court in 1904, a Chief Justice and two Justices were appointed. Currently, the Court has seven Justices. Justices are appointed by the Governor-General in Council¹² (which means on the recommendation of the federal government). A commission is issued and the Justice sworn in at a public sitting of the Court. An appointment is for a term expiring upon the attainment of seventy years.¹³ A Justice may only be removed by the Governor-General in Council on an address from both Houses of Parliament for proved misbehaviour or incapacity.¹⁴

Because the Australian Constitution contains no "Advice and Consent" clause, High Court Justices do not have to submit to the rigorous screening process endured by potential Supreme Court of the United States Justices prior to Senate confirmation of their appointments. However, federal legislation now requires the Attorney-General of the Commonwealth to consult with the Attorneys-General

of the states before an appointment is made to the Court.

Location of the Court

Since 1980, the High Court has sat in its own building in Canberra, the national capital, where the Principal Registry of the Court is located. Prior to 1980, the Court was an itinerant court sitting in turn in each of the capital cities and with a principal registry and court building in Melbourne. There are registries in all seven state and territory capital cities around Australia. The Court usually sits for two weeks each month except in January, May, and July. The arguments of the parties are put orally although in recent years written submissions have played an increasingly important role in the presentation of argument. Rules of Court, not dissimilar to those of the Supreme Court of the United States, now require written submissions to be filed prior to the hearing. However, oral argument still dominates the hearing process. An important case may still take up to five hearing days although most cases finish within one day.

Each year, the Court sits for a week in Brisbane, Perth, Adelaide, and Hobart if those cities have sufficient work. The Court also regularly sits in Sydney and Melbourne to hear motions for special leave to appeal (the High Court's equivalent of the Supreme Court's certiorari jurisdiction). Each party is given twenty minutes to put argument in favor of or against the grant of special leave. Ordinarily, only three Justices hear special leave applications.

Jurisdictional Differences Between the High Court and the Supreme Court of the United States

The powers and jurisdiction of the High Court and the Supreme Court of the United States differ in many respects. The High Court hears and determines appeals from all states. Indeed, the largest part of the Court's workload consists of appeals against decisions of the state courts on state matters. Because that is so, the Court is not bound to follow the decisions of the state courts. The Supreme Court, on the other hand, does not act as a court of

appeal determining state law matters. American state courts have exclusive responsibility for interpreting state laws. Moreover, where the Supreme Court of the United States obtains jurisdiction over issues governed by state law, my understanding is that the Court follows the decisions of the state courts on those issues. The Supreme Court therefore does not have the same unifying influence on the law of the United States as the High Court has on the law of Australia.

The two courts also have different roles in constitutional interpretation. Although both the High Court and the Supreme Court of the United States are the protectors of their respective federal Constitutions, the High Court, unlike the Supreme Court of the United States, is also the protector of the constitutions of the Australian states.

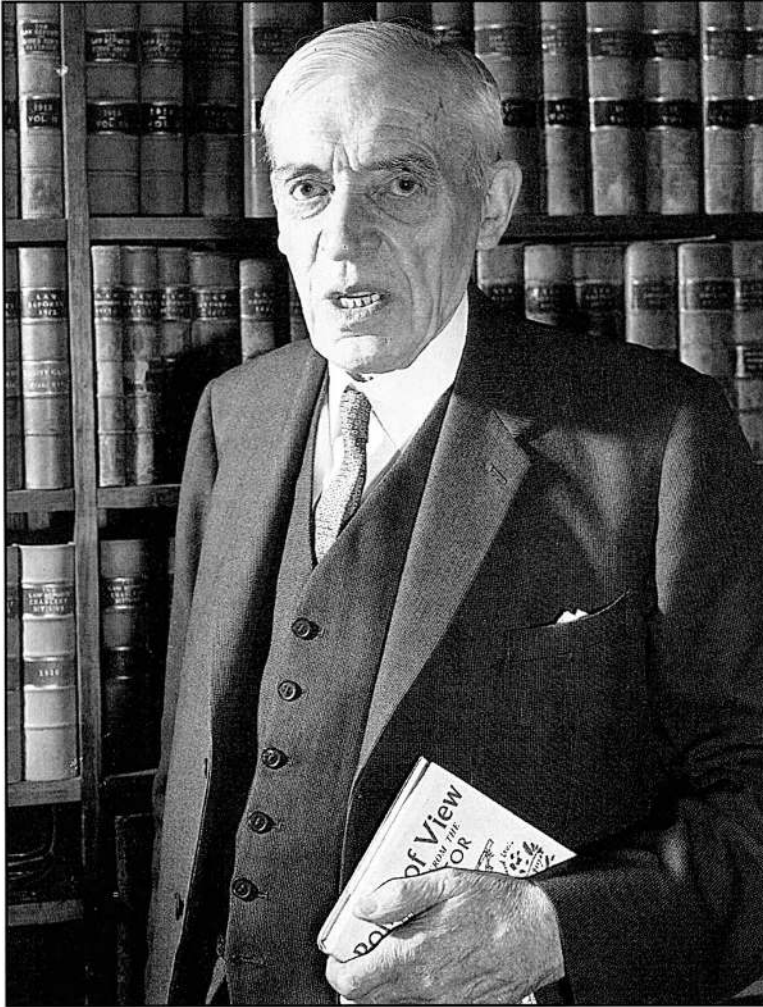
The Role of the High Court in Australian Society

The Early Years of the High Court

In 1903, Sir Samuel Griffith was appointed the first Chief Justice of the High Court. Edmund Barton and Richard O'Connor were the other two Justices appointed to the Court. All three had participated in one or more of the Constitutional Conventions preceding federation and had distinguished records of public service. Chief Justice Griffith had been Premier of the colony of Queensland and later Chief Justice of Queensland. He was one of the most eminent lawyers of his time. Justices Barton and O'Connor were also distinguished lawyers and politicians. Justice Barton had been the first Prime Minister of Australia, and Justice O'Connor had been the leader of the government in the Senate.

Prior to federation and during the brief period between federation and the establishment of the Court, politicians, lawyers, and journalists debated the need for the creation of the High Court. Many took the view that, because federal jurisdiction could be conferred on state Supreme Courts and the Privy Council remained as the final court of appeal, establishing the High Court was unnecessary.

However, the high quality of the first appointments to the Court ensured that it quickly



The late Sir Owen Dixon, who became Chief Justice of the High Court in 1952, is widely regarded as the greatest lawyer that Australia has produced. He championed the Court's method of deciding cases according to a strict legalism that generally ignored the social and economic dimensions of its decisions.

gained the confidence of the Australian legal profession and the wider community. Furthermore, the Court tenaciously refused to accept a subservient status to the Privy Council. It insisted that the Constitution made the Court the final arbiter of "inter se" constitutional questions unless the Court certified that a question raising such an issue should be determined by the Privy Council.¹⁵ This eager acceptance of responsibility did much to cement the Court's status in the eyes of the Australian public.

In its approach to constitutional interpretation, the early High Court was greatly influenced by the decisions of the Supreme Court of the United States. Early High Court decisions on the Constitution are replete with references to U. S. decisions. The Court itself

noted:¹⁶

When . . . we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.

The perception of U. S. influence was so great that the Chief Justice was forced to defend the Court against criticism of bias toward American decisions.¹⁷ In response to a

suggestion by the judges of the Supreme Court of Victoria that the High Court had such a bias,¹⁸ Griffith CJ said:¹⁹

The learned Judges are, however, quite in error in supposing that we have, in any case that has yet come before us, indicated any preference for American decisions, or any disregard for British decisions.

The first High Court Justices believed that both the Commonwealth and the states were “sovereign” within the areas of power delineated by the Constitution. They held that this allocation of sovereignty meant that the Commonwealth and the states were to be free to exercise their functions and powers without encroachment by the other.²⁰ This doctrine of the immunity of instrumentalities was based on principles expounded by the Supreme Court of the United States throughout the nineteenth century.²¹

The first Justices of the High Court also drew another implication from the Constitution that protected the position of the states. They held that powers not expressly given by the Constitution to the Commonwealth were impliedly reserved to the states. The Court drew this implication although the Constitution does not contain any express reservation of powers to the states, such as that contained in the Tenth Amendment to the Constitution of the United States. In resolving any conflict between the scope of an express power vested in the Commonwealth and the scope of an implied power reserved to the states, the Court treated the “reserved power” as dominant. It read the Commonwealth power restrictively so that it did not impinge on the scope of the “reserved power.”²² No doubt the doctrine of reserved powers reflected the perception of these Justices as to the nature of Australian federalism at that time. Like “the Four Horsemen of the Apocalypse” of the Supreme Court of Chief Justice Charles Evans Hughes, the first Justices of the High Court did not accept the idea that the interests of the nation might be best served by a powerful central government.

The Engineers’ Case

In 1920, the balance of federal power shifted decisively in favor of the Commonwealth as a result of the Court’s decision in the *Engineers’* case.²³ By then, all of the original Justices had left the Court. In *Engineers*, a majority of the Court held that the Commonwealth Parliament had power to make laws binding on the states. The majority judgment criticised the first Court’s approach in interpreting the Constitution, characterising it as an abandonment of the ordinary canons of statutory construction in favor of political judgments that were outside the proper functions of a Court. The majority stressed that the Court had to give effect to the express words of the Constitution and not modify them by resort to implications drawn from what Justices might believe was the spirit of the Constitution. Although the doctrine of reserved powers was not in issue in *Engineers*, the reasoning of the majority rejected its validity as well.

The majority Justices also rejected the primary role that decisions of the Supreme Court of the United States had played in the interpretation of the Australian Constitution. Notwithstanding the similarity of structure between the respective Constitutions, the majority said that the Australian Constitution was to be interpreted in the light of two underlying fundamental political concepts that were foreign to the Constitution of the United States. They were the common sovereignty of the British Empire and the principle of responsible government to which I have referred. Their Honours said:²⁴

[I]n view of the two features of common and indivisible sovereignty and responsible government, no more profound error could be made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country.

The Effect of the Engineers’ Case

The *Engineers’* case has been trenchantly criticized²⁵ and its reasoning is not persuasive.

But it gave effect “to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs.”²⁶ As a result, it has had an enormous influence on the development of Australian constitutional law. The Court’s insistence on adherence to literalism and the traditional rules of statutory construction in place of the unexpressed political principles, which were probably in the minds of the Founders, has strongly favored the Commonwealth and diminished the power of the states.

Two illustrations suffice to make the point. Section 51 of the Constitution gives the Parliament of the Commonwealth power to make laws “with respect to” “(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth” and “(xxix) External affairs.” A literal interpretation of the corporations power has made it an effective vehicle for regulating economic life in Australia, since any law regulating conduct that has significance for the activities, functions, relationships, or business of the specified corporations is regarded as a law “with respect to” those corporations.²⁷ A literal interpretation of the external affairs power has enabled the Commonwealth to pass laws giving effect to obligations under international treaties entered into by the Executive government even though those laws regulate subjects which are otherwise outside the list of enumerated Commonwealth powers.²⁸

However, the approach of literalism and strict legalism has not always favored the Commonwealth over the states. Thus, the Court has maintained a strict division between interstate trade and commerce (which is an enumerated Commonwealth power) and intra-state trade and commerce (which is not). Consequently, the Court has refused to hold that an intra-state activity is within the commerce power where that activity affects interstate commerce in a mere social or economic sense. The Court’s decisions on the interstate commerce power reflect the approach of the Supreme Court to the interstate commerce power prior to *National Labor Relations Board v. Jones & Laughlin Steel Corporation*.²⁹ They are to be contrasted with the more flexible approach of the Supreme Court that openly

takes economic and social considerations into account in interpreting the interstate commerce power and other powers of the federal government.

While overall the High Court’s literal and legalistic approach to the Constitution has favored the Commonwealth in contests with the states, the same approach has often favoured the subject in contests with the Commonwealth. In *Australian Communist Party v. The Commonwealth*,³⁰ the Court declared invalid the *Communist Party Dissolution Act 1950* (Cth) which purported to dissolve the Australian Communist Party, authorize the seizure of its property and prohibit its members from holding certain positions. The Court held that the legislation could not be supported under an implied power to preserve the Commonwealth from internal attack because the legislation did not prescribe any rule of conduct or prohibit specific acts or omissions by way of attack or subversion. Instead the legislation purported to deal directly with the bodies and persons named and described. Further, the Court held that the legislation could not be justified under the power to make laws “with respect to” the “naval and military defence of the Commonwealth”³¹ because at the commencement of the legislation there was a state of ostensible peace.

Similarly, by a literal reading of Section 92 of the Constitution—which departed from the section’s historical purpose—the Court invalidated Commonwealth legislation that purported to acquire compulsorily all private banks in Australia.³² Section 92 had been designed to protect trade between the states from border tariffs and discriminatory state legislation. But under the Court’s interpretation, it became for a time a guarantee of free enterprise.

The *Engineers’* case also signified a movement away from reliance on decisions of the Supreme Court of the United States, not only in interpreting the Australian Constitution, but also in considering common law matters. The legalistic approach to statutory construction endorsed by the Court in the *Engineers’* case together with the continued right of appeal to the Privy Council ensured that, for the greater part of the twentieth

century, Australian courts and, for that matter, Australian legislatures, would look to England for guidance in developing Australian law and legal institutions.

Beyond a doubt, the *Engineers'* case has been as important to the development of Australian law as *Marbury v. Madison*³³ has been to United States law.

The Changing Role of the High Court in Contemporary Australia

By 1990, a majority of High Court Justices had adopted a broader approach to the interpretation of the Constitution and the development of the common law. They impliedly rejected literalism as the determinant of constitutional meaning. They exhibited a willingness to look to the historical purpose and background of individual sections of the Constitution in some cases³⁴ and beyond the express wording of the Constitution to draw implications from its nature and structure in other cases.³⁵ Social and economic factors are now also taken into account in common law and constitutional matters to an extent that would have been unthinkable twenty years ago. Furthermore, the Court has been prepared to develop a uniquely Australian common law that not only reflects contemporary Australian society, but recognizes Australia's place as a member of a wider international community.

Examples of the High Court's Recent Approach

In contrast to the Constitution of the United States, the Australian Constitution does not contain a First Amendment protecting freedom of communication. However, the High Court has held that, because the Constitution provides for a system of representative and responsible government, by implication it necessarily protects freedom of communication between "the people" on government and political matters.³⁶ Without freedom of communication on these matters, the Court reasoned, the people would not be able to make effective choices in the elections for which the Constitution provides. Consequently, the Court held invalid legislation purporting to prohibit

the broadcasting or televising of political advertisements during an election period.³⁷

In *Theophanous v. Herald and Weekly Times Ltd*,³⁸ a narrow majority of the Court held that the constitutional freedom of communication guaranteed the publication of material discussing government and political matters and provided a constitutional defence to a common law action for defamation. Recently, in *Lange v. Australian Broadcasting Corporation*,³⁹ the Court clarified the holding in *Theophanous*. In a unanimous decision, the Court held that by implication the Constitution protects freedom of communication but does not itself confer an individual right of communication. Such a right must be found in the general law, particularly the common law. However, the Court went on to hold that, in the light of the constitutional freedom of communication, the common law of defamation unreasonably infringes the common law right of a person to communicate with another on government and political matters. The Court held that to conform with the constitutionally required freedom the doctrine of qualified privilege had to be developed to provide a defense for defamatory publications made to large audiences that contained untrue material concerning such matters. It therefore developed that defence to accord with the constitutional requirement.

Notwithstanding that the Australian Constitution has no equivalent to the Fifth and Fourteenth Amendments, some members of the Court have held that the Constitution impliedly guarantees the equality of all persons under the law and before the courts. They have done so by using the concept of popular sovereignty as a premise from which to draw the implication.⁴⁰ However, at the present time, only a minority of Justices support the drawing of this implication.

The state Constitutions do not expressly provide for the doctrine of the separation of powers. Nevertheless, the High Court has recently held⁴¹ that state courts, while exercising state jurisdiction, are protected in some respects by the federal Constitution's separation of powers. Under the federal Constitution state courts may be invested with federal judicial power. Consequently, the Court held that it is a

necessary implication of the Constitution that state legislatures cannot give state courts functions that could undermine public confidence in their impartiality when they exercise federal judicial power. In *Kable*, the Court invalidated New South Wales legislation that purported to give the Supreme Court of the state power to order the detention of a named individual in jail after his sentence had expired. The High Court held that the procedures which would result in such an order were repugnant to the judicial process and could undermine public confidence in the impartiality of the Supreme Court of New South Wales.

The Court's recent approach is not restricted to constitutional matters. The Court has decided that the indigenous people of Australia retained a form of native title to their land, which survived the colonisation of Australia by Britain.⁴² It has also held that native title may continue to coexist with grants of pastoral or mining leases over the same land.⁴³ The first

of these decisions rejected the generally accepted view that native title was extinguished as a consequence of the application of the international law doctrine of *terra nullius*. Hitherto, Australian land law, reinforced by a decision of the Privy Council in 1889,⁴⁴ had proceeded on the fiction that Australia was "an uninhabited country" at the time of settlement and that the rights of the indigenous people to their land had been extinguished.

The High Court has also decided that a criminal trial court has inherent power to stay criminal proceedings for serious offences where an accused person is unable to afford legal representation and remains unrepresented through no fault of his or her own.⁴⁵ Additionally, the Court has rejected the previously accepted common law rule that, upon marriage, a wife gave irrevocable consent to sexual intercourse with her husband.⁴⁶ Further, the Court continues to develop a uniquely Australian law of negligence that sometimes



In *Wik Peoples v. Queensland* (1996) the High Court held that native title held by the indigenous people of Australia may continue to coexist with grants of pastoral or mining leases over the same land.

involves the modification and even abolition⁴⁷ of previously enunciated common law principles.

Reasons for the Change in Approach

There are a number of reasons for the change in the High Court's judicial role. First, it was not until the latter part of this century that the High Court asserted its judicial independence from Britain and evinced a willingness to take an independent and creative lead in the development of Australian law. It was not until 1963 that the Court decided that it would no longer automatically follow decisions of the House of Lords⁴⁸ and it was not until 1978 that the Court decided that it would not automatically follow decisions of the Privy Council.⁴⁹

Second, it was not until 1975 and 1986 respectively that appeals to the Privy Council were abolished from the High Court and the state Supreme Courts. Until these appeals were abolished, Australian litigation could ultimately be decided by the Privy Council. While the appellate jurisdiction of the Privy Council continued, the development of Australian law, divorced from the development of English law, posed immense practical problems for the Court.

Third, Australian judges have now generally rejected the traditional theory that courts merely declare the law. Judges have openly acknowledged the law-making function of the courts, particularly appellate courts.⁵⁰ They acknowledge that it is impossible to accept that the application and development of legal rules and principles can be isolated from the contemporary social context. Courts could not satisfactorily resolve the increasingly complex issues and novel factual circumstances that come before them by relying on the interpretive approaches to the Constitution and the common law that found favor in Australia for much of this century.

Fourth, the Court has recognized that Australia is part of a larger international community and that international and regional conventions may have a legitimate and important influence

on the development of Australian law.⁵¹ Thus, in *Teoh's* case,⁵² the Court accepted that the provisions of a treaty that has been ratified by the executive government may affect legal rights even when the treaty has not been incorporated into domestic law. In *Teoh*, the Court held that members of the Australian community have a legitimate expectation that government officials will act in accordance with Australia's obligations under such treaties. Consequently, a decision by a public official will be void if the official disregards a relevant treaty without having given a person affected by the decision the opportunity to argue that the provisions of the treaty should be applied.

The Court has also shown a willingness to look at the decisions of courts and tribunals in the United States, Canada, New Zealand, and Europe. In particular, decisions of the Supreme Court of the United States and of federal courts of the United States are routinely referred to by counsel and cited by the Court.

The Future Role of the Court

In response to this new approach, the High Court has received increasing political, academic, and media attention. The Court has been labelled "activist" and "creative" and has been accused of usurping the role of Parliament. This criticism misconceives the role of a final appellate and constitutional court. As Lord Radcliffe has pointed out⁵³ there:

was never a more sterile controversy than upon the question whether a judge makes law. Of course he does. How can he help it?

Because that is so, it is inevitable that the High Court of Australia will continue to make law for an independent and evolving nation that is part of an international legal community.

**I am indebted to James Stellios of the Research Section of the High Court of Australia Library for research assistance in preparing this paper.*

Endnotes

¹ (1952) 85 CLR at xiv.

² Constitution, s 1.

³ Constitution s 7.

⁴ Constitution s 24.

⁵ *McGinty v. Western Australia* (1996) 186 CLR 140 at 230.

⁶ *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

⁷ Constitution s 74.

⁸ Privy Council (Appeals from the High Court) Act 1975 (Cth).

⁹ Australia (Request and Consent) Act 1985 (Cth); Australia Act 1986 (Cth); Australia Acts (Request) Acts enacted by each state.

¹⁰ Constitution, s 71.

¹¹ Constitution, s 72.

¹² Constitution, s 72.

¹³ Constitution, s 72.

¹⁴ See, for example, *Commissioners of Taxation (NSW) v. Baxter* (1907) 4 CLR 1087.

¹⁵ *D'Emden v. Pedder* (1904) 1 CLR 91 at 113.

¹⁶ *Deakin v. Webb* (1904) 1 CLR 585.

¹⁷ See *Deakin v. Webb* (1904) 1 CLR 585 at 604.

¹⁸ *Deakin v. Webb* (1904) 1 CLR 585 at 605.20 *D'Emden v. Pedder* (1904) 1 CLR 91; *Deakin v. Webb* (1904) 1 CLR 585; *The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488.

¹⁹ Including the judgment of Chief Justice Marshall in *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819).

²⁰ See, for example, *Peterswald v. Bartley* (1904) 1 CLR 497; *The King v. Barger* (1908) 6 CLR 41.

²¹ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129.

²² *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129 at 148.

²³ See, for example, Latham, "The Law and the Commonwealth" in Hancock, *Survey of British Commonwealth Affairs: Problems of Nationality 1918-1936* (1937), vol. 1, 510 at 563-564.

²⁴ *Victoria v. The Commonwealth* (1971) 122 CLR 353 at 396.

²⁵ *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369.

²⁶ *The Commonwealth v. Tasmania* (The Tasmanian Dam Case) (1983) 158 CLR 1; *Queensland v. The Commonwealth* (1989) 167 CLR 232.

²⁷ 301 U.S. 1 (1937).

²⁸ (1951) 83 CLR 1.

²⁹ Constitution s 51 (vi).

³⁰ *Bank of NSW v. The Commonwealth* (1948) 76 CLR 1.

³¹ 5 U.S. (1 Cranch) 137 (1803).

³² *Cole v. Whitfield* (1988) 165 CLR 360 (rejecting the wide literal interpretation of s 92 of the Constitution and

relying on its historical purpose to read down the words of the section); *Cheatle v. The Queen* (1993) 177 CLR 541 (holding that legislation purporting to provide for the majority jury verdicts infringes the Constitution's requirement for "trial. . . by jury" in trials on indictment.

³³ The High Court has not been unanimous in its approach. There has been a narrow majority in a number of significant constitutional and common law cases including *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104, *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211 and *Wik Peoples v. Queensland* (1996) 187 CLR 1.

³⁴ *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106; *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v. Australian Broadcasting Corporation* (1997) 71 ALJR818; 145 ALR 96.

³⁵ *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106.

³⁶ (1994) 182 CLR 104.

³⁷ *Lange v. Australian Broadcasting Corporation* (1997) 71 ALJR818; 145 ALR 96.

³⁸ *Leeth v. The Commonwealth* (1992) 174 CLR 455.

³⁹ *Kable v. DPP (NSW)* (1996) 70 ALJR 814; 138 AIR 577.

⁴⁰ *Mabo v. Queensland [No 2]* (1992) 175 CLR 1.

⁴¹ *Wik Peoples v. Queensland* (1996) 187 CLR 1.

⁴² *Cooper v. Stuart* (1889) 14 AC 286 at 291.

⁴³ *Dietrich v. The Queen* (1992) 177 CLR 292.

⁴⁴ *The Queen v. L* (1991) 174 CLR 379.

⁴⁵ See, for example, *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520 (holding that the strict liability rule in *Rylands v. Fletcher* (1866) LR 1 Ex 265; affd (1868) LR 3 HL 330 was now incorporated in the law of negligence).

⁴⁶ *Parker v. The Queen* (1963) 111 CLR 610.

⁴⁷ *Viro v. The Queen* (1978) 141 CLR 88.

⁴⁸ McHugh, "The Law-making Function of the Judicial Process," (1988) 62 *Australian Law Journal* 15, 116; *O'Toole v. Charles David Pty Ltd* (1991) 171 CLR 232 at 267; *Torrens v. Aloha v. Citibank* (1997) 144 ALR 89 at 99-100.

⁴⁹ See, for example, *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168; *The Commonwealth v. Tasmania* (The Tasmanian Dam Case) (1983) 158 CLR 1; *Queensland v. The Commonwealth* (1989) 167 CLR 232; *Dietrich v. The Queen* (1992) 177 CLR 292; *Mabo v. Queensland [No 2]* (1992) 175 CLR 1; *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106.

⁵⁰ *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.

⁵¹ "Law and Order," (1964) 61 *Law Society's Gazette* 821.

The Virtue of Defeat: *Plessy v. Ferguson* in Retrospect

Clarence Thomas

As we near the end of this century, I would like to discuss a decision that came at the close of the last: *Plessy v. Ferguson*, the notorious 1896 case that helped usher in (or at least sanction) more than half-a-century of legalized racism.¹ In particular, I would like to discuss it from the standpoint of those who were on the losing side and the virtues of losing, especially in the face of insurmountable odds. I must say, in passing, that, as virtuous as it may be, losing is not an experience to which I hope to become that accustomed on this Court.

The hundredth anniversary of *Plessy* has passed with almost the same lack of general interest that the decision received when Justice Henry Billings Brown delivered the opinion for a 7-1 Court on May 18, 1896. As the historian C. Van Woodward describes it, in contrast to the great controversy that arose when the Court struck down much of the 1875 Civil Rights Act in the *Civil Rights Cases*,² “the *Plessy* decision was accorded only short, in-

conspicuous news coverage and virtually no editorial comment outside the Negro press.”³ Reviewing the newspapers of the day, one writer of today observes that several papers ignored *Plessy* in favor of decisions involving an heiress’s million-dollar inheritance and a claim of plagiarism by a well-known playwright.⁴ Progressive journals such as the *Harvard Law Review* and the *Yale Law Journal* busied themselves with articles such as “The Law of Icy Sidewalks in New York State,”⁵ and “Two Years’ Experience of the New York State Board of Law Examiners,”⁶ but paid no attention to *Plessy*.

Aside from a sprinkling of law review articles and law school addresses, *Plessy*’s centenary also has passed with little attention.⁷ This may be the case (at least in part) because the excellent scholarly work on *Plessy* done by Professor Charles Lofgren and by Professor Owen Fiss⁸ has discouraged others from entering the field. *Plessy*, however, may be re-

25th, he will speak in English. Should the hall be able to accommodate the platform at the head of it will be utilized.

at an early hour M. and Joseph Rainey, residing on Morgan streets, from that corner and drunkenness and disturbance. They pleaded not guilty. Orders were ordered against

at 4:45 o'clock the male of the name of No. died without medical aid. The coroner was notified.

The State against Andrew with the murder of was called before Judge a preliminary hearing. By agreement the case until Thursday week. It was crowded when the

case was called to-day stenographer in court. He noted this as being a fact, as Mr. Borden should be on hand.

THE CITY HALL.

er Murphy Promulged Few Appointments—Committee Meeting..

In a communication to the committee, he notified that body that the location of a school building on Lafayette and Cy examined. The bid of O'Neill for \$25,940 and that of John Mc-25,492. As the specifications and of the contract to the lowest bidder recommended that the bid be accepted.

papers it was made to appear an official error and transposition between Lafayette and Cy. McNally's bid was for \$25,947. A balance was suggested. It may be the bid of McNally while very close to that of the other bidders, does price of filling, but inasmuch as the school is intended to be a quires grading, this item is not very important.

sent to the Criminal Sheriff

The committee met last night and passed upon some minor matters.

JIM CROW LAW.

UPHELD BY THE UNITED STATES SUPREME COURT.

Statute Within the Competency of the Louisiana Legislature and Railroads—Must Furnish Separate Cars for Whites and Blacks.

Washington, May 18.—The Supreme Court today in an opinion read by Justice Brown, sustained the constitutionality of the law in Louisiana requiring the railroads of that State to provide separate cars for white and colored passengers. There was no interstate-commerce feature in the case for the railroad upon which the incident occurred giving rise to case—Plessy vs. Ferguson—East Louisiana railroad, was and is operated wholly within the State, and the laws of Congress of many of the States. The opinion states that by the analogy of the laws of Congress, and of many of states requiring establishment of separate schools for children of two races and other similar laws, the statute in question was within competency of Louisiana Legislature, exercising the police power of the State. The judgment of the Supreme Court of State upholding law was therefore upheld.

Mr. Justice Harlan announced a very vigorous dissent saying that he saw nothing but mischief in all such laws. In his view of the case, no power in the land had right to regulate the enjoyment of civil rights upon the basis of race. It would be just as reasonable and proper, he said, for states to pass laws requiring separate cars to be furnished for Catholic and Protestants, or for descendants of those of Teutonic race and those of Latin race.

Are You One

Of those unhappy people who are suffering with weak nerves, starting at every slight sound, and who are

There are the usual nervous seekers here. They have New Orleans and from of the State. Some of them fully in the interest of the nation in the last night, but others probably who are office who did not become the administration until certain that Governor Mc contained in the chair.

Senator Romain and other members of the League of the gentlemen from the voted against the Democratic proposition to go behind were on the platform and participated in the ceremony to the inauguration error. That was all very way, but it is to be questioned the action of the representatives attended the Old Fellowship will dovetail with the yesterday.

It is said that when it comes up for consideration an attempt will be made to tax sawmills on the taxable the existing law sawmills from taxation. The sawmills fostered by wise legislation to be one of the most important State, and no industry a promise of continued Whether or not the legislature kindly to the proposition the lumber mills on the cult now to say.

Ex-Representative Kin here for a few days enjoy. He has had to be re-elected. When Mr. Knig was Legislature he was content in public with a dainty life but now he sports a luxury

Col. I. D. Moore is here Price in being elected to Col. Moore has had the of meet many of his friends is canvassing for himself usually runs in hard luck gets beaten, but he has a ty of winning the fights for others; and he has handled any of Mr. Price's

Mr. Price will not be friends to look after his in William H. Price returned

The Supreme Court's decision in *Plessy v. Ferguson* proved the temper of the 1890s in holding that races could be segregated if equal facilities were provided. At the time, the decision drew little attention: in Louisiana's *The Daily States* it did not even make headlines.

ceiving such disinterest today because of its complete rejection by our society. If so, the recent apathy toward *Plessy* is a striking demonstration of the benefits of losing. For it was in losing in *Plessy* that the foundations were laid for the eventual victory over segregation. To explore this idea, I would like to examine the stories of three people who lost in 1896: the defendant, Homer Plessy, his lawyer, Albion Tourgée, and John Marshall Harlan, the lone dissenter in *Plessy*.

I

More is known of the case that bears his name than is known of Homer A. Plessy, the man who challenged Louisiana's Separate Car Act. Passed in 1890 by the Louisiana legisla-

ture, the Act required "equal, but separate" accommodations for blacks and whites on railroad cars. Railroad employees, such as conductors, were responsible for assigning passengers to the cars on the basis of their race, and railroads could refuse to carry anyone (without liability for damages) who did not comply with the assignment. Employees faced a maximum twenty-five dollar fine and up to twenty days in jail if they made incorrect assignments, as did passengers who insisted on sitting in the wrong seat. Nurses attending children of another race were exempted.⁹

A committee of New Orleans blacks decided to seek a test case to challenge the law, and retained Albion Tourgée, a Republican lawyer then living in New York, to handle the litigation. Though I focus on Tourgée, virtually all

of the local work was done by his able co-counsel, James C. Walker, a New Orleans attorney. Homer Plessy, however, was not the first plaintiff chosen to bring suit. In late 1891, Tourgée and Louis Martinet, a New Orleans lawyer, physician, and newspaper founder, began to search for an ideal test case. They entered into discussions with the Louisville and Nashville Railroad, which agreed to a test. Their first client was Daniel F. Desdunes, a twenty-one-year-old octoroon—in other words, one who was only one-eighth black and was of such fair complexion that he might pass for white. He was the son of Rodolphe Desdunes, one of the leaders of the Creole community in New Orleans. Desdunes was arrested for sitting in a whites-only car on a trip from New Orleans to Mobile, Alabama.¹⁰ Desdunes' case, however, was dismissed because the Louisiana Supreme Court held in the meantime that the Louisiana Act did not apply to interstate railway trips.¹¹

Plessy, a thirty-four-year-old octoroon friend of Rodolphe Desdunes, became the next plaintiff. He purchased a ticket in June 1892, for a trip from New Orleans to Covington, Louisiana—a wholly intrastate trip—on the East Louisiana railroad. He was arrested after he attempted to sit in the white car; it seems clear that the incident had been prearranged with the railroad, because although Plessy was “a passenger of the colored race,” he was but one-eighth black and, according to his counsel, “the mixture of colored blood [was] not discernable.”¹² In fact, the criminal information against Plessy did not mention his race, nor was his race discussed during the trial proceedings. The Louisiana Supreme Court would use this lack of color against Plessy. In its opinion affirming the constitutionality of the Louisiana Separate Car Act, the Court observed that: “The statute applies to the two races with such perfect fairness and equality that the record brought up for our inspection does not disclose whether the person prosecuted is a white or a colored man.”¹³

Plessy's appearance became an important issue in the case. It formed the basis of an alternative argument, in case the appellate courts rejected Plessy's core Fourteenth Amendment claim of equal justice before the law. Before both the Louisiana Supreme Court

and the Supreme Court of the United States, Plessy argued that the Louisiana law was irrational and arbitrary for classifying an octoroon as black, “though the mixture of colored blood was not discernible,”¹⁴ and that he was actually white and entitled to the full privileges and immunities “secured to citizens of the United States of the white race by the Constitution and laws of the United States.”¹⁵ Plessy's first claim in his brief before the Supreme Court went so far as to argue that his whiteness was a constitutionally protected property right and that authorizing railroad employees to deny it violated the Due Process Clause. Although this argument might have appealed to the property-conscious Supreme Court of the late nineteenth century, today it rings strange. As the historian C. Vann Woodward has observed, “this was not the defense of the colored man against discrimination by whites, but a defense of the ‘nearly’ white man against the penalties of color.”¹⁶

Plessy was tried before Judge John H. Ferguson, who ultimately would become the name defendant, in Louisiana Criminal District Court on October 13, 1892. Plessy challenged the jurisdiction of the court, as one did under the procedures of the day, by pleading that the Louisiana law was unconstitutional for requiring racial separation in violation of the Thirteenth and Fourteenth Amendments. His lawyers claimed that the law imposed a badge of servitude on their client by perpetuating “the distinction of race and caste among citizens of the United States of both races.” As their brief declared: “the statute in question establishes an insidious distinction and discrimination between citizens of the United States, based on race, which is obnoxious to the fundamental principles of national citizenship, perpetuates involuntary servitude, as regards citizens of the colored race, under the merest pretense of promoting the comforts of passengers on railway trains, and in further respects abridges the privileges and immunities of the citizens of the United States, and the rights secured by the thirteenth and fourteenth amendments of the federal Constitution.”¹⁷ In addition to his alternative arguments about the arbitrary classification of octoroons, Tourgée also claimed that the exception for nurses was irrational and that

the delegation of authority to railroad employees was illegal.

After losing his motion before Judge Ferguson, Plessy took an immediate appeal to the Louisiana Supreme Court. Narrowing the statute by interpretation in certain ways, that court rejected Plessy's claims. Asserting that "an almost uniform course of decision" among the lower federal courts and the state courts permitted separate but equal facilities, Louisiana Justice Charles Fenner announced that "equality, and not identity or community, of accommodations, is the extreme test of conformity to the requirements of the Fourteenth Amendment."¹⁸ As the Supreme Court of the United States would agree three years later, the Louisiana Justices concluded that the law constituted a valid exercise of the state police power "in the interest of public order, peace, and comfort."¹⁹

Plessy took an immediate appeal to the Supreme Court of the United States. He continued to raise his challenge to the Louisiana law as a badge of inferiority in violation of the Thirteenth Amendment and as a denial of equal treatment by the laws on the basis of his race in violation of the Fourteenth Amendment. Justice Brown, writing for a 7-1 Court, rejected these arguments on the ground that separation did not constitute inequality. "The object of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."²⁰

The Court dismissively rejected Plessy's claim that even if the facilities were equal, the separation itself placed blacks in an inferior state in violation of the Fourteenth Amendment. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."²¹ Professor Charles L. Black, Jr., who taught at the Yale Law School during my years there,

described this part of the Court's opinion thus: "The curves of callousness and stupidity intersect at their respective maxima."²²

Once the Supreme Court issued its decision, the criminal proceedings against Plessy could resume. Accordingly, on January 11, 1897, more than four years after he had attempted to board a white railroad car, Plessy entered a guilty plea in criminal district court. He was fined twenty-five dollars. Homer Plessy died twenty-eight years later in 1925 at the age of sixty-three, and he was buried in St. Louis Cemetery No. 1, in New Orleans.²³ All else, however, about the intervening years of his life appears to have been lost to history.²⁴

II

Homer Plessy's lawyer from the Criminal District Court all the way to the Supreme Court was Albion Tourgée. As I noted earlier, however, James C. Walker of New Orleans was the local counsel who actually drafted all pleadings and seems to have masterminded the strategy for the case. Tourgée already had lived an interesting life as a soldier in the Union army during the Civil War, as a carpetbagger, as a popular novelist, and as a life-long advocate of equal justice for blacks. Tourgée's sympathetic biographer, Otto Olsen, for example, entitled his work *Carpetbagger's Crusade*.²⁵ By the time of *Plessy*, Tourgée had become, in Olsen's words, "the nation's most persistent and vociferous white champion of full racial equality."²⁶ Tourgée welcomed an aggressive approach to challenging Jim Crow in Louisiana. "Submission to such outrages," he advised the New Orleans blacks, tends "only to their multiplication and exaggeration. It is by constant resistance to oppression that the race must ultimately win equality of right."²⁷ While Tourgée did not live to see that day, his was one of the many steps on the road to equal rights regardless of race.

Tourgée grew up in Ohio and Massachusetts—both centers of abolitionism. He attended the University of Rochester in 1859, dropped out for financial reasons, returned, and then enlisted as a private in the Union army when the war came. As a member of the 27th New York Volunteer Infantry, Tourgée fought

at the first battle of Bull Run and was injured when a retreating battery ran him down. Paralyzed and beset by the back problems that would plague him the rest of his life, Tourgée recovered enough to re-enlist, this time as a lieutenant in the 105th Ohio Volunteer Infantry. Wounded again in operations in Tennessee and Kentucky, Tourgée was captured, imprisoned, and then exchanged. Returning briefly from the front in 1863 to get married in Ohio, he rejoined the 105th Ohio but his injured back forced his resignation in December 1863.

Tourgée then began his career as a lawyer and politician. Returning to Ohio, he resumed his legal studies and gained admission to the Ohio bar in 1864. In 1865, attracted by opportunity in the South and driven to warmer climes by his declining health, Tourgée moved to Greensboro, North Carolina. He edited a newspaper and then in 1868 became a delegate to the North Carolina constitutional convention, which had been called to draft a new constitution so that the state could gain readmittance to the Union. After the convention, Tourgée was appointed to a state commission charged with drafting a new Code of Civil Procedure, and then in 1868 he was elected a Superior Court judge. As a judge, Tourgée sought to impose tough justice on the Ku Klux Klan, despite threats to his personal safety. As Republicans began to lose their hold on power, Tourgée's possibilities for re-election evaporated, and he left the bench in 1874. He was sent again as a delegate to the Constitutional Convention of 1875, lost a race for Congress in 1878, and left the state in 1879. Eventually settling in upstate New York, Tourgée became a writer and achieved fame with a novel based on his experience in the South. The book, **A Fool's Errand**,²⁸ was a remarkable success and sold 200,000 copies, a large figure for that time.²⁹ It blamed both the stubborn racism among some elements in the South and the cowardice of the North for the failure of Reconstruction.

Continuing to write, Tourgée worked on various equal rights enterprises and took on the *Plessy* case pro bono. Tourgée knew that he faced long odds before the Court. As he said even before *Plessy* had reached oral argu-

ment, "[t]he Court has always been the foe of liberty until forced to move on by public opinion."³⁰ In the preceding quarter-century, the Supreme Court had invalidated the Civil Rights Act of 1875,³¹ had narrowed the scope of the Fourteenth Amendment's Privileges and Immunities Clause,³² had invalidated the Ku Klux Klan Act of 1871,³³ and had enforced a state action requirement on civil rights bills passed pursuant to the Fourteenth Amendment.³⁴ Lower federal and state courts had permitted separate but equal facilities, while judicial decisions in nonracial Fourteenth Amendment cases generally permitted a wide discretion to states in the exercise of their police powers.³⁵ The times also seemed to be moving against Tourgée, as the Compromise of 1877 had been followed by the enactment of segregation laws in several Southern states and the disappearance of the Republican party in the South. Indeed, the years after *Plessy* would witness the almost complete disenfranchisement of blacks by practices and procedures barring them access to the polls and the extension of Jim Crow to almost every aspect of life.³⁶

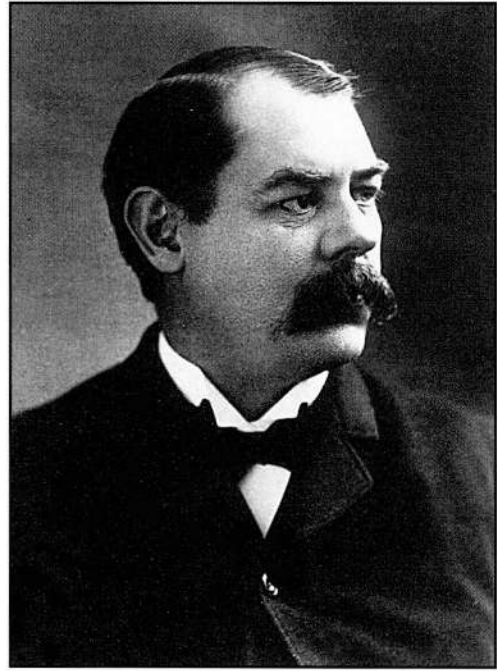
Nevertheless, Tourgée and the co-counsel he acquired for the Supreme Court litigation, Samuel L. Phillips, a former Solicitor General who had argued the *Civil Rights Cases*, went forward with the appeal before the Court. Why? To be sure, Tourgée, like every good counsel, had counted the votes and thought he could find a way to win. In an October 1893 letter to Louis Martinet, one of the New Orleans Creole leaders who had organized opposition to the Louisiana law, Tourgée began to express some doubts about whether to seek an expedited hearing for the case, or to wait. He admitted that "[o]f the whole number of Justices there is but one who is known to favor the view we must stand upon," and that "[t]here are five who are against us. Of these one may be reached, I think, if he 'hears from the country' soon enough. The others will probably stay where they are until Gabriel blows his horn."³⁷ In order that this fifth Justice "hear from the country," Tourgée recommended that measures be taken to sway public opinion and the news media against segregation as soon as possible, and that the case not be rushed. Tourgée held up his end of the bar-

gain—it would take more than three years for the Court to hear argument and render a decision after the Louisiana Court had issued its judgment—but the expression of public opinion he sought never emerged.

Litigation tactics aside, there was more to Tourgée's efforts to pursue the case in the face of, it must be admitted, daunting odds. Tourgée had never given up his crusading efforts to defeat racism, and in his letter to Martinet he made clear his feelings that *Plessy* was part of a larger fight. "The American Negro will have to make his contest for equality of right and opportunity with the Negro-hating white man of the United States wherever he may be upon the planet . . . There is but one way: the battle of liberty, justice and equal opportunity must be fought out here. The colored man and those white men who believe in liberty and justice—who do not think Christ's teachings a sham—must join hands and hearts and win with brain and patience and wisdom and courage."³⁸ Some might question Tourgée's decision to proceed, but he was a man who believed in fighting for his principles.

Of course, as we all know, Tourgée lost, and it is almost certain that even if he had never brought his case to the Supreme Court, some other case would have presented the Court with the opportunity to affirm the doctrine of separate but equal. His efforts, however, were not in vain. His forceful and direct challenge of segregation as a violation of the Thirteenth and Fourteenth Amendments forced the Court to display openly the racial attitudes that underlay its decision. The obviousness and moral wrongness of these attitudes would stand as a symbol of injustice that would pollute our jurisprudence and tear at the seams of our nation, but that also would unify blacks.

Further, Tourgée's arguments may have inspired Justice Harlan's dissent in *Plessy*. In his brief, for example, Tourgée wrote that: "Instead of being intended to promote the *general* comfort and moral well-being, this act is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class. Justice is pictured blind and her daughter, the Law, ought at least to be color-blind."³⁹ Tourgée's brief also would have an impact further into the future.



Although Albion Tourgée (above) lost his case, his brief probably influenced Justice John Marshall Harlan's dissent and may even have influenced Justice Robert H. Jackson's thinking in *Brown v. Board of Education*. James C. Walker of New Orleans was the local counsel who actually drafted all pleadings and seems to have masterminded the strategy for *Plessy*.

While considering another segregation case more than fifty years later, Justice Robert H. Jackson took an interest in Tourgée, who had lived in upstate New York near the Justice's home. He wrote to two friends of his discovery of Tourgée:

The *Plessy* case arose in Louisiana, and how Tourgée got into it I have not learned. In any event, I have gone to his old brief filed here, and there is no argument made today that he would not make to the Court. He says, 'Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.' Whether this was original with him, it has been gotten off a number of times since as original wit. Tourgée's brief was filed April 6, 1896 and now, just fifty-four years after, the question is again being argued whether his position will be adopted and what was a

defeat for him in '96 be a post-mortem victory.⁴⁰

We can only speculate whether Jackson's discovery of Tourgée's brief influenced his thinking in *Brown v. Board of Education*. We can be sure, however, that the position Tourgée adopted in 1896 did become the grounds for, as Justice Jackson put it, "a post-mortem victory."

As I noted earlier, Tourgée lost in 1896, and he lost convincingly. As Charles Lofgren has written, however, *Plessy* "is more than a tale of losers. Besides having their years in court, Martinet and [Tourgée] had their arguments displayed on the record—indeed, memorialized in Justice Harlan's dissent—to instruct later generations."⁴¹ Among those later generations would be the blacks and their brave lawyers who challenged the evils of segregation. Tourgée's work, even in a losing effort, forced the Court to articulate and endorse the principle of "separate but equal" that, as a symbol of racism and injustice, would inspire those that fought against it. In losing to evil, Tourgée laid the foundations for its eventual defeat.

III

The third figure in this story is the Justice who immortalized the efforts of Plessy and Tourgée in the **United States Reports**: Justice John Marshall Harlan. Harlan had grown up in Kentucky, studied law at Transylvania University, joined the state bar in 1853, and practiced law with his father, who was a close friend of Henry Clay and a leading politician in the state. He was elected a county judge in 1858, and when the war came he joined the Union army as a lieutenant colonel at the head of the 10th Kentucky Volunteer Infantry. He participated in battles in Mississippi, Tennessee, and Kentucky. Coincidentally, he and Tourgée may have been involved in the same pursuit of the elusive cavalry of the Confederate General, John H. Morgan, in Kentucky and Tennessee.

Upon his father's death in 1863, Harlan resigned his commission, returned home, and emerged as a leader of the Constitutional Unionist Party. He was elected state attorney general, and when the war ended he switched to the Republican Party. He also lost two bids for

the governorship. As head of the Kentucky delegation to the Republican national convention in 1876, Harlan's switch of support to Rutherford B. Hayes gave the latter the presidential nomination. Hayes placed Harlan on a commission to choose which of two rival Louisiana governments was legitimate. Then, in a show of reconciliation to the South, President Hayes tapped Harlan to fill a Court vacancy.

At first glance, Harlan would not have struck observers as a natural defender of equal rights for blacks. As his most recent biographer has pointed out, Harlan had joined the Know-Nothing movement in the 1850s and had been a slaveowner. During his political campaigns in Kentucky, Harlan had vehemently opposed emancipation, extension of the vote to former slaves, and federal programs to help freed slaves.⁴² As the attorney general of Kentucky, he had attempted to prevent the spread of abolitionist policies (Kentucky was not covered by the Emancipation Proclamation because it had remained in the Union).⁴³ After the war he had publicly supported segregated schools and had opposed the public accommodations provisions of the 1875 Civil Rights Act. He apparently told racist jokes during a campaign speech and continued to do so privately once on the bench.⁴⁴ He had a mulatto half-brother, Robert Harlan, the son of his father and a slave, with whom he kept in contact but whom he never formally acknowledged as a member of the family.

Despite these racial attitudes, Justice Harlan took up the cause of equal rights on the Court. He dissented in the *Civil Rights Cases*, intentionally using the very pen and inkwell used by Chief Justice Roger B. Taney to write *Dred Scott*. Harlan declared that: "Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law."⁴⁵ In *Hurtado v. California*, Justice Harlan again dissented and argued that the framers of the Fourteenth Amend-

ment had intended to incorporate the Bill of Rights against the states.⁴⁶

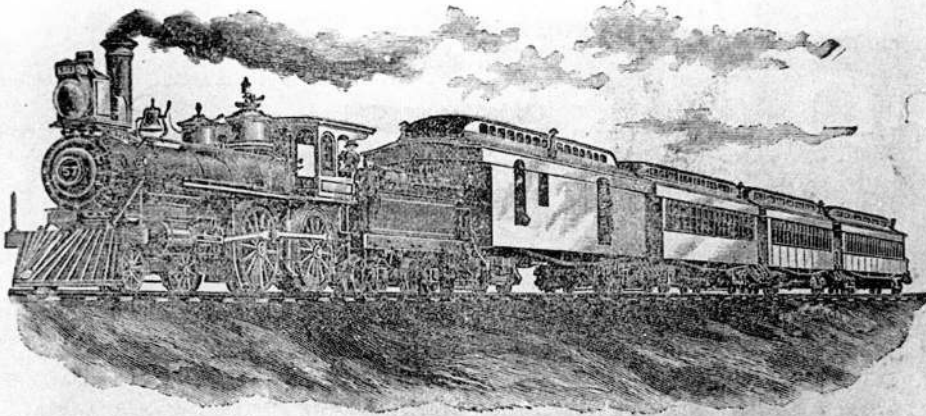
These decisions were followed by Justice Harlan's justly famous dissent in *Plessy*. As he did in the *Civil Rights Cases*, Justice Harlan dissented alone in arguing that the Fourteenth Amendment prohibited the state from making distinctions among its citizens on the basis of race. He wrote: "in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."⁴⁷ He quickly dismissed the argument that separate but equal treated both races justly. "Every one knows," he said, "that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons."⁴⁸ He realized that he was writing for the ages, if not for the country: "In my opinion," he declared, "the judgment this day ren-

dered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case."⁴⁹

These courageous words, written in defiance of his unified Brethren and of the history of his times, won Justice Harlan a low opinion in the eyes of some of his then and future colleagues. The other great dissenter, Justice Oliver Wendell Holmes, Jr., described Justice Harlan as "the last of the tobacco-spitting judges" and described his mind as a "powerful vise, the jaws of which [could never be closed]."⁵⁰ Justice Felix Frankfurter, in his concurrence in *Adamson v. California*, described Justice Harlan's views on incorporation as that of an "eccentric."⁵¹

No doubt some of these views concerning Justice Harlan's character arose from the moral certainty with which he adhered to his principles—a certainty which sometimes burst forth in his physical conduct. It is said, for example, that while reading his dissent in the *Income Tax Case*,⁵² Justice Harlan pounded the Bench for emphasis and wagged his finger in the face of Chief Justice Melville W. Fuller and Justice

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—TO THE—

GREAT ABITA SPRINGS.

E. S. FERGUSON,
G. P. A.

Homer A. Plessy purchased a ticket for the trip from New Orleans to Covington, Louisiana, on the East Louisiana Railway. It seems clear that his arrest for attempting to sit in a whites-only car had been prearranged with the railroad, because Plessy was but one-eighth black and, according to his counsel, "the mixture of colored blood [was] not discernable."

Stephen J. Field.⁵³ Chief Justice Charles Evans Hughes told the story that Justice Joseph P. Bradley, the author of the majority opinion in the *Civil Rights Cases*, and Justice Harlan “actually shook fists at one another.”⁵⁴ In remarks at a dinner given by the Supreme Court bar in honor of Harlan’s twenty-fifth anniversary on the Court, Justice David Brewer observed, perhaps jokingly, that his colleague “goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness.”⁵⁵

While his certainty and fervor may have rubbed his contemporaries the wrong way, it was his belief in his principles that perhaps allowed him to endure the solitary position in which he often found himself. It was his firm belief in the righteousness of his cause that allowed his words to speak to future generations. It was his attachment to principle that guaranteed that his positions one day would inspire others to defeat the great wrong he had fought in a losing struggle. His ringing declaration that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens,” is one of the most famous and powerful phrases in American constitutional law.

Harlan’s words were a beacon to blacks as they lived under oppression and fought to overturn the dreadful laws of segregation. I can remember, as a young child growing up under segregation, learning the phrase “Our Constitution is color-blind” before I even knew what the Supreme Court was or who Justice Harlan was. His words inspired the great civil rights revolution that removed the Black Codes and Jim Crow. As Judge Constance Baker Motley reminisced during a ceremony in this Court to honor Justice Thurgood Marshall, Justice Harlan’s dissent was a steady resource to Justice Marshall during his time as chief counsel for the NAACP. As she said:

Marshall had a “Bible” to which he turned during his most depressed moments . . . Marshall would read aloud passages from Harlan’s amazing dissent. I do not believe we ever filed a major brief in the pre-*Brown* days in which a

portion of that opinion was not quoted. Marshall’s favorite quotation was, “Our Constitution is color-blind.” . . . It became our basic creed. Marshall admired the courage of Harlan more than any Justice who has ever sat on the Supreme Court. Even Chief Justice Earl Warren’s forthright and moving decision for the Court in *Brown* did not affect Marshall in the same way. Earl Warren was writing for a unanimous Supreme Court. Harlan was a solitary and lonely figure writing for posterity.⁵⁶

Although Justice Harlan, Albion Tourgée, and Homer Plessy lost their case, they placed the nation and this Court on the proper course to vindicate the great principle of equal justice before the law. Their example and their words inspired others to continue their struggle, to fight their fight, to endure hardships and setbacks. Though their story was not the story of winners, they sparked a long and hard struggle, one that would not end until they were long dead. Indeed, their victory must, of necessity, be “post mortem.”

Endnotes

¹*Plessy v. Ferguson*, 163 U.S. 537 (1896).

²*Civil Rights Cases*, 109 U.S. 3 (1883).

³C. Vann Woodward, “The Birth of Jim Crow,” 15 *Am. Heritage* 103 (1964).

⁴*Plessy v. Ferguson: A Brief History with Documents* 127 (Brook Thomas, ed., 1997).

⁵Loran L. Lewis, Jr., “The Law of Icy Sidewalks in New York State,” 6 *Yale L.J.* 258 (1897).

⁶Austen G. Fox, “Two Years’ Experience of the New York State Board of Law Examiners,” 10 *Harv. L. Rev.* 199 (1896).

⁷For the sprinkling, see Daniel R. Gordon, “One Hundred Years after Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy,” 40 *N.Y.L. Sch. L. Rev.* 641 (1996); John Minor Wisdom, “A Dedication to Judge John Minor Wisdom: Plessy v. Ferguson—100 Years Later,” 53 *Wash. & Lee L. Rev.* 9 (1996).

⁸Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (1987); Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993).

⁹Laws of Louisiana, Act No. 111 (1890).

¹⁰Lofgren, *supra* note 8, at 33.

¹¹*Abbott v. Hicks*, 11 So. 74 (La. 1892).

¹²Lofgren, *supra* note 8, at 41.

¹³*Ex Parte Plessy*, 11 So. 948, 951 (La. 1892).

¹⁴*Plessy v. Ferguson*, 163 U.S. 537, 538 (1896).

¹⁵*Plessy* Rehearing Petition, quoted in *id.* at 55.

¹⁶C. Vann Woodward, "The Birth of Jim Crow," 15 *Am. Heritage* 101 (1964).

¹⁷Quoted in *Ex Parte Plessy*, 11 So. 948, 949 (La. 1892).

¹⁸*Id.* at 950.

¹⁹*Id.* at 951.

²⁰*Plessy*, 163 U.S. at 544.

²¹*Id.* at 551.

²²Quoted in Richard Kluger, *Simple Justice* 80 (1975).

²³Lofgren, *supra* note 8, at 253 n. 35.

²⁴*Id.* at 208.

²⁵Otto H. Olsen, *Carpenter's Crusade: The Life of Albion Winegar Tourgée* (1965).

²⁶Otto H. Olsen, *The Thin Disguise: Turning Point in Negro History Plessy v. Ferguson, A Documentary Presentation (1864-1896)*, at 11 (1967). See also Jules Lobel, "Losers, Fools & Prophets: Justice as Struggle," 80 *Cornell L. Rev.* 1331, 1375-83 (1995); Michael Kent Curtis, "Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of *Plessy v. Ferguson*," 13 *Const. Comm.* 187 (1996).

²⁷Olsen, *The Thin Disguise*, *supra* note 26, at 11.

²⁸Albion Tourgée, *A Fool's Errand* (1879).

²⁹Curtis, *supra* note 26, at 192.

³⁰Tourgée to Louis A. Martinet, October 31, 1893, in Olsen, *Thin Disguise*, *supra* note 26, at 78.

³¹*The Civil Rights Cases*, 109 U.S. 3 (1883).

³²*The Slaughter-House Cases*, 83 U.S. 36 (1873).

³³*United States v. Harris*, 106 U.S. 629 (1883).

³⁴*United States v. Cruikshank*, 92 U.S. 542 (1875).

³⁵Lofgren, *supra* note 8, at 80-92.

³⁶See C. Vann Woodward, *The Strange Career of Jim Crow* 67-111 (3rd rev. ed. 1974).

³⁷Tourgée to Martinet, Oct. 31, 1893, in Olsen, *Thin Disguise*, *supra* note 26, at 78.

³⁸*Id.* at 79.

³⁹*Plessy*, Brief for the plaintiff at 19.

⁴⁰Robert H. Jackson to Ernest Cawcroft and Walter H. Edson, April 4, 1950, reprinted in Olsen, *Carpenter's Crusade*, *supra* note 26, at 353-54.

⁴¹Lofgren, *supra* note 8, at 208.

⁴²Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* (1995).

⁴³*Id.* at 60.

⁴⁴*Id.* at 139.

⁴⁵*Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

⁴⁶*Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting).

⁴⁷*Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

⁴⁸*Id.* at 557 (Harlan, J., dissenting).

⁴⁹*Id.* at 559 (Harlan, J., dissenting).

⁵⁰Francis Biddle, *Mr. Justice Holmes* 108, 111 (1942).

⁵¹*Adamson v. California*, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring).

⁵²*Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 652 (1895); on rehearing, 158 U.S. 601, 638 (1895).

⁵³Yarbrough, *supra* note 42, at 172; "John Marshall Harlan," in Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* 363 (1992).

⁵⁴Hall, *supra* note 53, at 363.

⁵⁵Quoted in Yarbrough, *supra* note 42, at viii.

⁵⁶Quoted in Yarbrough, *supra* note 42, at 229.

In the Shadow of the Chief: The Role of the Senior Associate Justice

Sandra L. Wood

“There have been great leaders on the bench who were not Chief Justices.”
Charles Evans Hughes¹

When asking questions about who leads the Supreme Court, the answer has most often been the Chief Justice.² The Chief speaks first in Conference and makes opinion assignments when in the majority. The Court takes its name from the Chief who presides over it; the Chief’s ceremonial and administrative duties add to his stature as he presides over oral argument and Conference discussions, giving at least the appearance that the Chief Justice is the leader of the Court.

Yet, the literature on the Chief Justice has indicated gaps between the potential for leadership and the reality.³ That makes the senior Associate Justice (SAJ) a logical contender for leadership. As the second to speak in Conference, the SAJ may be able to persuade wavering Justices. If in opposition to the Chief, the SAJ may make a considerable number of opinion assignments. Additionally, of course, the SAJ has knowledge and experience of having been on the Court for an extended period of

time (most SAJs have been on the Court more than twenty years).

The Justices do perceive such a role in their own social structure. Justice Harold H. Burton characterized the role in the following manner:

There is also an unsung post of responsibility among the Justices themselves which is inherent in every court—that of the senior member of the Court. Through his length of experience on the Bench, exceeding that of each of his associates, the senior in point of service bears the inescapable responsibility of such seniority To each member of the Court junior to himself he remains a part of the Court as that Court made its first impression on the newcomer. The senior Justice necessarily adds to the understanding by the Court of decisions reached during his service on it. Firsthand familiarity with

the formulation of precedents is a priceless asset. The Supreme Court has been exceptionally fortunate in having such familiarity available to it because, throughout two-thirds of its life, its senior Justice has had from 20 to nearly 35 years of prior service as a member of the Court.⁴

As Philip Kurland noted, "Length of tenure may be a necessary, but not a sufficient, condition for judicial greatness." He continued, "[L]ongevity of service has proved to be of great importance in permitting a justice to effect his will in the adaptation of the Constitution to his times. [But] length of tenure by itself, witness . . . John Catron, Robert Grier, is not adequate to assure that a justice will make his mark on our Constitutional Jurisprudence."⁵ The Justices recognize the importance of seniority in providing expertise and leadership to the rest of the Court. Lewis F. Powell, Jr., for example, acknowledged the senior Associate Justice's expertise after he joined the Court in 1971. Although he had practiced corporate law for four decades, Powell sometimes felt awkward and unsure. Once he pointed to the 403 volumes of **U. S. Reports** that held all of the Supreme Court opinions. "Bill Douglas," he said, "now he knows what is in those books. I don't."⁶ The Court's long-established practice of discussing cases in order of seniority and sitting in order of seniority (both in Conference and oral argument) shows the centrality of length of tenure in the organization of the Court.

Not surprisingly, the primary point of similarity between the SAJs is that they all served a long time. Excluding John Rutledge, who only served one year, the average service on the Court (until 1992), is twenty-eight years. The shortest length of service for a Justice who served as SAJ was fifteen years for Owen J. Roberts, while William O. Douglas holds the record for length of service at thirty-six years. The average length of service for all Justices (including SAJs) is sixteen years.⁷ Table 1 lists the senior Associate Justices, by date, as well as the Chief Justice who presided with them.

Four aspects of the role of senior Associate Justice serve to define that position. First,

the SAJ acts as presiding officer in the absence of the Chief Justice. Second, beginning in the Taney era, the SAJ in the majority has made the opinion assignment if the Chief did not participate or dissented. Third, many SAJs have coveted the role of the Chief for themselves. Finally, the illness and senility of the SAJ have sometimes created a situation in which the general role expectations would be unmet.

Presiding Over the Court

One major function of the SAJ has been to preside over the Court in the absence of the Chief Justice. This happened when the Chief Justice was ill, out of town, or had resigned or died and no successor had been appointed. Justice Miller wrote in 1885:

In consequence of the illness of the Chief Justice [Waite] I have had to be acting Chief Justice in his place. I always knew that he did a great deal more work than I, and had many apparently unimportant matters to look after to which the other judges gave no time and very little attention.⁸

Justice Miller found these tasks to be quite burdensome. After the death of Waite, Miller continued to preside over the Court for six months until a successor could be named and confirmed.

On the other hand, Oliver Wendell Holmes, Jr., who took over many administrative tasks during the illness of Chief Justice Taft, did not seem to mind. Holmes also acted as Chief Justice during summers when Taft was away. "They exchanged comradely notes about the business of the Court, and Holmes liked to play the young cavalier, calling Taft, 'My Lord' or 'Emperor,' and signing himself, 'Your obedient servant.'"⁹ When Taft resigned from the Court and Holmes became acting Chief Justice, he handled the routine business of the Court with alacrity. Holmes' experience as Chief Judge in Massachusetts may have been an asset. He conducted Conferences with celerity, succinctly stating the matter, indicating his position and then pausing only for disagreement. Taft's Conferences had been long and rambling. "Conferences are

Table 1
The Senior Associate Justices

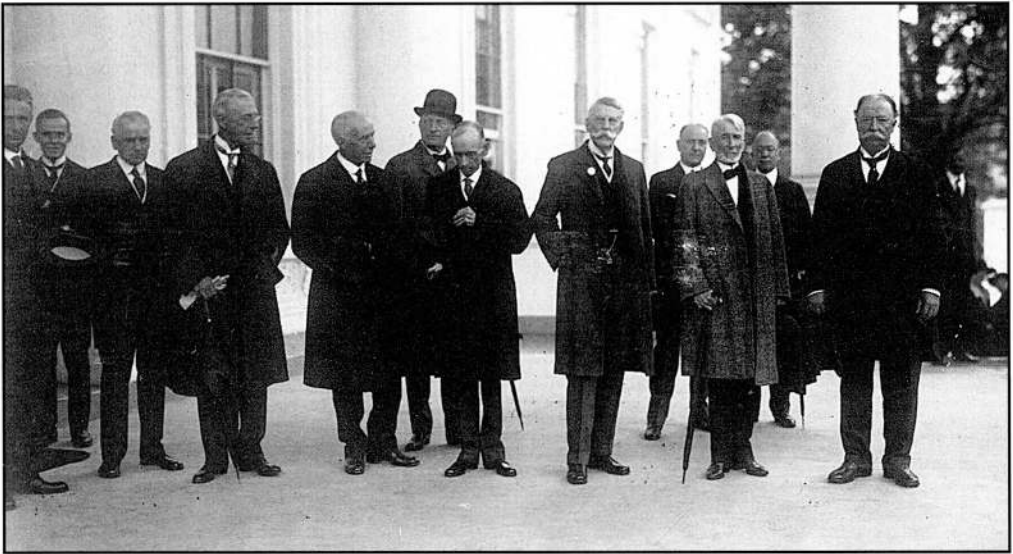
YEARS	SENIOR ASSOCIATE	CHIEF JUSTICE
1790-91	John Rutledge	John Jay
1791-1810	William Cushing	John Jay (1791-94) John Rutledge (1795) Oliver Ellsworth (1796-1800) John Marshall (1800-18??)
1811-30	Bushrod Washington	John Marshall
1831-44	Joseph Story	John Marshall (1831-35) Roger B. Taney (1835-44)
1845-60	John McLean	Roger B. Taney
1861-69	James Wayne	Roger B. Taney (1862-63) Salmon P. Chase (1864-69)
1870-72	Samuel Nelson	Salmon P. Chase
1873-80	Nathan Clifford	Salmon P. Chase (1873) Morrison R. Waite (1874-80)
1880-90	Samuel F. Miller	Morrison R. Waite (1880-87) Melville W. Fuller (1888-90)
1891-96	Stephen J. Field	Melville W. Fuller
1897-1911	John M. Harlan	Melville W. Fuller (1897-1910) Edward D. White (1911)
1912-24	Joseph McKenna	Edward D. White (1912-20) William H. Taft (1921-25)
1925-32	Oliver Wendell Holmes, Jr.	William H. Taft (1926-29) Charles Evans Hughes (1930-32)
1933-37	Willis Van Devanter	Charles Evans Hughes
1938-40	James C. McReynolds	Charles Evans Hughes
1941-44	Owen J. Roberts	Harlan Fiske Stone
1945-71	Hugo L. Black	Harlan Fiske Stone (1945) Fred Vinson (1946-52) Earl Warren (1953-68) Warren E. Burger (1969-71)
1972-74	William O. Douglas	Warren E. Burger
1975-89	William J. Brennan, Jr.	Warren E. Burger (1975-86) William H. Rehnquist (1987-89)
1990-92	Byron R. White	William H. Rehnquist
1993	Harry A. Blackmun	William H. Rehnquist
1994-	John Paul Stevens	William H. Rehnquist

a joy, and we are dispatching business with great rapidity," Justice Harlan Fiske Stone reported to Frankfurter.¹⁰

Administrative responsibilities fell upon Justice Hugo L. Black upon the unexpected death of Chief Justice Fred Vinson. He presided at the Conferences held on October 10, 17, and 24, 1953, after Vinson died and at the request of new Chief Justice Earl Warren. Black made all of the opinion assignments during that time and ran the administrative side of the Court. Felix Frankfurter wrote Black a note saying that Black had conducted the Conferences "admirably." He continued, "You stated, and stated well, the cases that should have been put to the Conference for discussion and guided the talk as talk should be guided—by a gentle but firm, or firm but gentle, rein."¹¹ Black made ten assignments during that time and prepared the "dead list" during those interim weeks.¹² The dead list presents a list of cases appealed on certiorari that are not discussed at the Conference. Any Justice can request that a case be removed from the dead list. Frankfurter, for example, wrote on September 28, 1953, to request that two items be removed from the dead list. The memo continued: "When next you and I talk, I shall put to you considerations that for me make it undesirable, as a policy after your

regime, to have a list of recommended grants."¹³ The fact that Frankfurter called Black's Term as interim Chief Justice a "regime" indicates that some power (perhaps coveted by Frankfurter) must go along with composing the dead list, particularly since the first Conference of the Term usually concerns a large number of such appeals.

The SAJ has not been universally lauded for his leadership skills. When William O. Douglas presided over the Conference in the absence of Chief Justice Warren E. Burger, Conference ended several hours earlier than usual, and he would feel quite satisfied that he had been more efficient than the Chief Justice. While Douglas's clerks attributed the quickness to his incisive analysis that cut to the heart of the matter, colleagues disagreed. "Bill didn't discuss anything," one said. "He would just say, 'This is a case involving such and such a statute. The issue is such and such. I vote to affirm.' No wonder we were out of there so early."¹⁴ As Justice Powell said in an interview: "Bill was impatient at Conference. . . . He would run the Conference with great expedition. So instead of really encouraging people to discuss a case all he was interested in was how they were going to vote."¹⁵ Douglas viewed Conference as a time of nose-counting, not consen-



When Joseph McKenna presided over the Court during Chief Justice William Howard Taft's illness, he irritated his Brethren by mismanaging the Conference and showing poor judgment. Eventually, the senior Associate Justice's reasoning got so muddled that the other Justices secretly agreed not to count his vote in cases where the vote was close. Pictured above are members of the Taft Court on a visit to the White House with McKenna and Taft in the foreground at right.

sus building, that rarely changed anyone's mind.

But much worse was the Conference under Joseph McKenna. In May 1923, McKenna ran the Conference during Taft's illness. Taft wrote to former Justice John Hessin Clarke: "I had all my cases prepared in typewriting, but he preferred not to read them at all, and the Conference did not amount to much, so that we had to do most of it over again the next week."¹⁶ McKenna was a constant thorn in Taft's side, but the elderly Justice steadfastly refused to resign despite his incapacity.

Opinion Assignment

Beginning with the Taney Court, the senior Justice in the majority made the opinion assignment if the Chief dissented.¹⁷ The ability to assign the Opinion of the Court has long been considered the keystone of the Chief's power.¹⁸ If he disagrees with the Chief, the SAJ will make a significant number of opinion assignments. While Chief Justices make more than ninety percent of the opinion assignments, the senior Associate Justice may make assignments in some of the most contentious and important decisions each Term.

Recent SAJs have viewed opinion assignments as important to their potential leadership. Douglas tangled with Burger on this subject a number of times. *Lloyd v. Tanner*¹⁹ (1972) fanned Douglas's ire over the assignment power. Douglas believed that the Chief Justice was undecided and so he assigned the case to Thurgood Marshall, who had shown a particular interest in that case (concerning free speech in a shopping mall). However, while Douglas was out of town, Burger sent a memo around that assigned Powell to write the *Lloyd* opinion. Douglas fired off a memo to the Chief Justice:

You led the Conference battle against affirmance and that is your privilege. But it is also the privilege of the majority, absent the Chief Justice, to make the assignment. . . . If the Conference wants to authorize you to assign all opinions, that will be a new procedure. Though opposed to it, I will acquiesce. But un-

less we make a frank reversal in our policy, any group in the majority should and must make the assignment.²⁰

Douglas was even more incensed when Burger assigned the abortion cases to Harry A. Blackmun. When Douglas confronted him, Burger said that there were "literally not enough columns to mark up an accurate reflection of the voting."²¹ But when some Justices began to discuss holding the cases over for another Term, Douglas fired off another memo he threatened to publish as a dissent to the order for reargument:

When a Chief Justice tries to bend the Court to his will by manipulating assignments, the integrity of the institution is imperilled. . . . Perhaps the purpose of THE CHIEF JUSTICE, a member of the minority in the Abortion Cases, in assigning the opinions was to try to keep control on the merits. If that was the aim, he was unsuccessful. Opinions in these two cases have been circulated and each commands the votes of five members of the Court. Those votes are firm, the Justices having spent many, many hours since last October mulling over every detail of the case. The cases should therefore be announced.

The plea that the cases be reargued is merely strategy by a minority somehow to suppress the majority view with the hope that exigencies of time will change the result. That might be achieved of course by death or conceivable retirement. . . . But that kind of strategy dilutes the integrity of the Court and makes the decisions here depend on the manipulative skills of the Chief Justice.²²

These incidents, among others, show the tension over opinion assignments and the jealousy with which those assignments are regarded by the SAJ. It seems clear that the SAJs do view opinion assignment as their prerogative in those cases in which they are the senior Justice in the majority, and they have been willing to confront the Chief Justice, if

Table 2
Opinion Assignments of the Senior Associate Justices

Senior Associate*	Years Served as SAJ	Total Opinion Assignments	Chief Did Not Participate	Unanimous Cases	Close Cases
Joseph Story	1831-44	3	3	1	1
John McLean	1845-60	11	6	5	1
James Wayne	1861-69	5	1	1	2
Samuel Nelson	1870-72	10	2	1	1
Nathan Clifford	1873-80	77	71	54	5
Samuel F. Miller	1880-90	128	115	109	0
Stephen J. Field	1891-96	36	17	12	2
John M. Harlan	1897-1911	109	53	51	20
Joseph McKenna	1912-24	45	10	9	7
Oliver Wendell Holmes	1925-32	17	15	15	0
Willis Van Devanter	1933-37	18	5	5	16
James C. McReynolds	1938-40	18	8	7	1
Owen J. Roberts	1941-44	32	8	5	12
Hugo L. Black	1945-71	183	42	21	69
William O. Douglas	1972-74	62	0	0	25
William J. Brennan, Jr.	1975-89	267	6	4	35
Byron R. White	1990-92	28	0	0	11
Harry A. Blackmun	1993	10	0	0	3
John Paul Stevens**	1994-	21	0	0	11

*Justices John Rutledge, William Cushing, Bushrod Washington, and Joseph Story (until 1835) have not been considered in this analysis because the senior Associate Justice did not begin making opinion assignments until Taney was Chief Justice.

**Through 1995 Term.

necessary, to maintain that power.²³

The opinion assignments made by the senior Associate Justices after Taney are shown in Table 2.²⁴ Two clear trends are evident. First, the bulk of assignments made by senior Associate Justices prior to Hugo L. Black were made due to the death, illness, or resignation of the Chief Justice. Nathan Clifford, for example, made seventy-seven assignments while he was SAJ, and seventy-one of those occurred due to the lack of participation of the Chief; there was a ten-month gap between the death of Waite and the appointment of Fuller. The large number of assignments made by Samuel F. Miller can also be attributed to the six-month gap between when Fuller died and White was appointed Chief Justice. John Marshall Harlan, too, made nearly half of his assignments due to the lack of a Chief Justice after Edward

Douglas White died and before Taft was sworn in. By contrast, such gaps in the chief justiceship are virtually nonexistent in the modern era. No gap occurred at all between Hughes and Stone, Warren and Burger, and Burger and Rehnquist. Less than two months separated the death of Stone and the appointment of Vinson and less than a month lapsed between Vinson's death and Warren's appointment. The fact that most of these Chiefs resigned rather than died on the Bench may make it easier for presidential appointments to occur without delays.

However, the increasing divisiveness on the Court itself has led modern SAJs to have even greater opportunities for making assignments.²⁵ As Table 2 shows, a tremendous increase has occurred in the number of highly conflictual cases being assigned by the SAJ.

While earlier SAJs were assigning many unanimous routine cases, the modern SAJs are assigning large numbers of highly divisive cases. More than half of the assignments made by William J. Brennan, Jr., were close cases, and only four of 267 were unanimous. Very few, then, of those cases could be considered strictly routine. Douglas, Byron R. White, Blackmun, and John Paul Stevens assigned *no* unanimous cases due to lack of Chief Justice participation, but made a sizeable percentage of their assignments in highly conflictual cases.

It appears clear, therefore, that the opinion assignments made today by the SAJ are quite different than those made in the past. While historically the SAJ was responsible for making routine assignments when the Court lacked a Chief, the modern SAJ makes a large number of assignments in contentious cases due to the increasing propensity of the Chief Justice to dissent.

As a corollary to majority opinion assignment, another responsibility of the SAJ in the modern era has been to assign the dissent. The increased incidence of dissent on the Court makes assignments desirable both to unite the dissenters on policy grounds and to distribute the work more equally among frequent dissenters.²⁶ Largely, the actions of Justice Brennan have institutionalized this practice.²⁷ While increasing numbers of dissents occurred beginning in the 1940s, no immediate attempt was made to rally the dissenters around one opinion. Dissenters tended to write individually, infrequently consulting other dissenters. For example, despite the fact that “Black and Douglas dissenting” became common parlance, the two did not usually agree on one dissent. In fact, while Black and Douglas *agreed* 82.6 percent of the time, Black joined only 36.1 percent of Douglas’s dissents, while Douglas joined merely 27.6 percent of Black’s dissents. They seemed to make little effort to come to agreement concerning their reasons for dissent.

In the 1970s, extensive evidence of dissent assignments begins to occur formally, through memos to the dissenters. Typically, a memo was sent to the Justices in dissent, designating one of them (or the assigner) to write a common

dissent. The most typical text from Brennan simply states: “We three are in dissent in the above. I’ll be happy to try my hand at the dissent.” The number of dissent assignments steadily increased during the 1970s, from Douglas assigning from five to ten dissents per year in the early 1970s to Brennan assigning more than forty dissents per year during the late 1980s.²⁸ Unlike the majority opinion assignments that represent a partially coercive power, dissent assignments are not similarly constrained. The senior judge assigns a dissent and the assignee generally writes it, but any Justice may write an additional dissent. Thus the SAJ may carefully consider the vagaries of those in dissent in order to make an assignment that will garner joins from all of the dissenters.

Added to the responsibility of opinion assignments when in the majority, the dissent assignment creates an even stronger sense of role, especially for the SAJ who is often in dissent.

Promotion Fever

A third aspect of the role of the SAJ has been a tendency to covet the duties of the Chief Justice on a permanent basis. Several SAJs thought that they were the most logical successors to the deceased or retired Chief and may have harbored resentment after failing to secure the expected honor.

Such appears to be the case when Morrison R. Waite was appointed to the Court, and senior Associate Justice Clifford had been presiding over the past Term. Waite told a friend:

Those fellows up there want to treat me as an interloper. I was met today by the senior Associate Justice Clifford, who has been presiding since the vacancy, with the suggestion that as I am a stranger in the Court and its methods, I would better allow him to continue to preside for a time until I learn the formalities of the Court.

Waite did not take advantage of Clifford’s offer, but “got on the box as soon as I arrived there this morning, gathered up the lines and drove, and I am going to drive and those gentle-

men know it."²⁹

John Marshall Harlan also believed that he should be appointed Chief when Melville W. Fuller died, despite his somewhat advanced age. According to the journalist son of a friend:

But with 'mellow pathos in his voice,' and a lump in his throat, he 'frankly avowed his disappointment' that the chief justiceship had gone to White. 'I hope no friend of mine importuned the President to make me chief justice,' Harlan had said. 'That office is too great to be scrambled for. I had hoped, though, that the president would let me round out my career as chief Justice. It would have given me an opportunity for work that would have prolonged my life.' The Justice could not understand Taft's concern about his age. 'I am only 78. That ought not to indicate old age and uselessness.' Nor could he condone the president's disregard of their long association. 'It once was my privilege to be of some little service to Mr. Taft when he was a young judge,' he told his friend's son, a wave of sadness sweeping across his face. 'I had thought that he understood me better than he seemed to.'³⁰

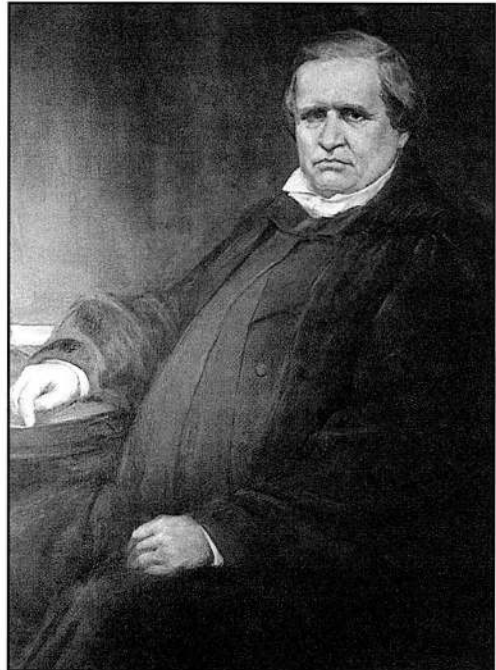
While it is not clear that Black coveted the role, others may have acted on his behalf in suggesting his name to President Harry S Truman when Stone died. "I wish Eisenhower would make you Chief Justice," wrote Douglas to Black. "It would be the smartest thing he could do *politically* and the best possible appointment on the merits. But I do not think he's smart enough to do it."³¹ Such instances of promotion fever are rarer in the modern era because the senior Justice recently has not been of the same political party as the appointing President.

Lingering Too Long

The final aspect of the role of the SAJ has too often been pathetic. The SAJ was often characterized, by the Chief Justices and his Brethren, as old and senile. From time to time

Court members have felt that the SAJ outlived his usefulness and remained only as a burden to the Court; in those instances Justices occasionally schemed to force him to resign. Chief Justice Waite noted in 1880, a year before Clifford left the Court, that Clifford was "permanently disabled."³²

Similarly, Stephen J. Field's colleagues were worried, and had been for some time (practically during the whole of his tenure as SAJ), about his mental capacity.³³ Field voted on cases and forgot his position; he asked questions in oral argument showing that he was not following the arguments of counsel.³⁴ During his early tenure on the Court he wrote twenty-five opinions per year, but the number of opinions dwindled beginning in 1893, going from nine in 1893 to six in 1894, and only four in 1895. Field noticed the dwindling number of assignments, and with his typical irascibility, he wrote Chief Justice Fuller in 1896: "I return to you the



The majority of writing assignments made by senior Associate Justices occurred because of the death, illness, or retirement of the Chief Justice. Of the seventy-seven assignments Nathan Clifford (above) made, seventy-one occurred because the Chief Justice was not participating. Clifford so coveted the role of senior Associate Justice that he tried to persuade newly appointed Chief Justice Morrison R. Waite to let him continue to preside until Waite learned the ropes.

enclosed memorandum of the cases assigned to the different Justices made yesterday. I do not care to retain any memorandum of assignment of cases where none are assigned to myself. I do not know and shall not ask the reason that no cases have been assigned to me within the past six months."³⁵

Additionally, Chief Justice Taft assigned senior Associate Justice McKenna only simple cases and even then the results were not always satisfactory. "In case after case he will write an opinion," Taft commented, "and bring it into Conference, and it will meet objection because he has missed a point in one case, or, as in one instance, he wrote an opinion deciding the case one way when there had been a unanimous vote the other, including his own."³⁶ McKenna completely missed the central point in a case assigned to him in 1924. Taft wrote: "It seems to me, with deference, that you have not stated the real point of the case as agreed upon in Conference."³⁷ Taft wrote out a statement covering the central issue, and McKenna tried again. "It seems to me, with deference," Taft wrote, "that you still miss the point in your opinion upon which the Conference determined that this case should turn."³⁸ The best was yet to come, however. The next Term, McKenna circulated an opinion that left the Chief Justice in doubt as to the identity of the case. "McKenna's language is as fog. He does not know what he means himself. Certainly no one else does. I try to give him the easiest cases but nothing is too easy for him."³⁹

Such stories of disabled Justices made strong impressions on some. Black made his son promise to tell him if he became unable to do his job. After suffering a slight stroke, Black checked in with his son and asked if he noted any differences. Hugo L. Black, Jr., did notice differences, but told his father:

I said you were not the old Hugo Black anymore. I didn't say you weren't still a Supreme Court superstar when it comes to ability to judge soundly and push out quality and quantity production. It just may not come as easy as it did before.⁴⁰

Black decided not to retire at this time. How-

ever, as time went on, others began to notice Black's failing health. In 1968, he wrote a reply to a letter discussing a point he had made "in a dissent I wrote a few years ago in *Feldman v. United States*." That case came down in 1944. And several times toward the end of the Term Douglas noted that in Conference "Black made unexpected remarks that don't make sense."⁴¹ In another instance, Black kept a lawyer arguing a case well beyond the allotted time by demanding the attorney agree with his view of the case.⁴²

At times, the problems caused by the SAJ's illness compelled the rest of the Court to take action. In the case of McKenna, Taft and his colleagues met at Taft's house in November 1924 and agreed not to decide any cases in which McKenna's vote was crucial.⁴³ Burger and Brennan handled problems with Douglas in virtually the same way. During Douglas's last months on the Court, Chief Justice Burger consulted with next-in-line Brennan about opinion assignments that Douglas should have made.⁴⁴ Yet this behavior is problematic. Both Brennan and Burger felt uneasy about their actions, although such activities may have been necessary in order to prevent institutional harm.

Discussion and Conclusion

The role of the senior Associate Justice highlights the importance of seniority to the decisionmaking process of the Court. The Justices are well aware of the prerogatives that moving to the senior position is likely to bring. The Court sits in order of seniority, discusses the cases by order of seniority and makes the opinion assignments on the basis of seniority. Justice Blackmun, after the retirement of Justice White, remained on the Court in order to retain the prerogatives of seniority, particularly opinion assignment. One implication of this study for presidential appointments may be to appoint young and healthy candidates to the Court. Their longevity may pay off in their ability to influence the Court as they move into the SAJ position.

Over time, the role of the SAJ has changed considerably. Historically, the most important role of the SAJ was to preside in the absence of the Chief Justice and make opinion assignments

during those periods. Gaps between Chiefs lasted many months, in some cases nearly a whole Term, and so this was a considerable responsibility. On the modern Court, however, while this interim role has virtually disappeared, the increasing propensity of the Chief Justice to dissent has created more opportunities to make opinion assignments in contentious cases. The growing prevalence of the dissent assignment is another manifestation of the growing stature of the position of the SAJ. These two functions make the modern senior Associate Justice a potentially important leader on the Court.

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William Paterson and the National Jurisprudence: Two Draft Opinions on the Sedition Law of 1798 and the Federal Common Law

William James Hull Hoffer

In the late 1790s, controversies swirled about the nature and extent of the Constitution of the new nation. The achievement of the Framers had already been tested by the rise of a standing two party system, a novelty anathema to existing Anglo-American political theory. The rival political camps had reached out from within the government to create electoral parties throughout the land. In the process, political leaders became electoral organizers, in societies, parades, speeches, and newspapers rallying adherents and battering opponents. Events in Europe gave urgency and energy to the party competition. The Federalist party, already the bastion of the creditor interest, traditional religion, and deference politics, sympathized with the commercial interest in Great Britain while the rapidly emerging Democratic Republican party identified with the revolutionary program of France. The egalitarian striving of French revolutionaries echoed in the manifestoes of

the Democratic Republicans, while the conservative cautions of the English right found favor among Federalists. Leaders of the parties contested foreign policy, the handling of the national debt, and the very nature of the political process within the new republic.¹

The political contest focused upon control of Congress and the presidency—at least until 1798. According to defenders of the Constitution, the federal courts were to be the weakest branch of the new government, its judges shielded from partisanship by tenure during good conduct and the two tiered system of nomination and confirmation.² The Judiciary Act of 1789 created the inferior courts of a national judiciary, but failed to give to the district and circuit courts the manpower or the rulemaking power necessary to carry on their work.³ State governments refused to accept the authority of these inferior federal courts when vital state interests were involved.⁴ Even the Supreme Court was less than supreme. A



In his analysis of two of Justice William Paterson's draft opinions, the author shows how the New Jersey Justice (above) went beyond defending his country's federal common law for political reasons and wrestled with some of the great constitutional questions.

number of leading lawyers and judges spurned nomination to its Bench because they thought it less important than state tribunals. It had no building of its own, a skeletal staff, and worst of all, from the standpoint of its members, Supreme Court Justices had to ride circuit and sit on federal trial courts. So debilitating was the circuit riding that only the healthiest Justices could survive it for long. John Jay, the first Chief Justice, retired from his post after a mere six years, in part to preserve his health. Freed of the onus of traveling long days and nights over terrible roads he lived for nearly three more decades.⁵

Long a relative backwater in the political wars, in 1798 the federal courts became the focal point of the battle. The gravamen was the Federalist majority in Congress adapting English common law doctrine to criminalize seditious libel of the government in the Seditious Libel Act of 1798. Publication of libels of the government was criminalized. Some states already had such acts on their books, but no one doubted that a state could adopt English common law precedents if it so

chose, but under the new statute cases were to be heard in federal courts.⁶ Was a federal seditious libel law constitutional? Scholars still battle over the status of the federal common law, pouring over such hoary precedents as *U.S. v. Hudson and Goodwin*,⁷ *Swift v. Tyson*, and *Erie v. Tompkins*, among others.⁸ Some researchers have found evidence in contemporaries' unpublished papers that place the protagonists in one partisan camp or the other.⁹ The underlying assumption in these arguments is that the issue had either politicized the federal bench or demonstrated how partisan that bench already was.

Supreme Court Justice William Paterson faced the question of the constitutionality of the seditious libel law in 1798, and although scholars credit him with strongly supporting the constitutionality of the seditious libel law, his draft opinions have gone largely unanalyzed on their own merits.¹⁰ They deserve better, for Paterson's reasoning was sharp and his reading of doctrine was able. Much has been made of the fact that Paterson's jury charge in *Vanhorne's Lessee v. Dorrance*¹¹ may have laid the groundwork for *Marbury v. Madison*¹² and judicial review, but Paterson's jurisprudence comes out more strikingly in two draft opinions discussed below. Early on in the Supreme Court's intellectual life, he grappled with the great interpretive conundrums: should the Constitution be regarded as an expression of natural law or was it the command of the sovereign; might fundamental law be loosely constructed; was there a living constitution or were the Justices bound by the plain meaning and the presence or absence of key words and phrases; and, finally, what was the relation between the national government and the states?¹³ Seen in this light, these draft opinions show more than a judge eager to defend a federal common law for political reasons, but a jurist laying out the groundwork for the jurisprudence of generations of constitutional commentators and judges to follow.

The occasion for these two draft opinions arose out of a complicated turn of events that pitted the ruling Federalist party, nominally

headed by President John Adams, and the aggressive and liberal Republicans, under the leadership of Vice President Thomas Jefferson and James Madison. At stake was not only supremacy in Congress, but American relations with France and Great Britain. The two nations had been at war on and off for the past decade. The United States had adopted an official pose of neutrality, but in refusing to honor its 1778 commitment to defend France and then concluding a treaty with Britain, the Jay Treaty, that the French could only regard as an insult to them, the Federalists had made France a virtual enemy without gaining any real concessions from the British. Nevertheless, agents of the French government operated within the United States and received assistance from many sympathizers who still distrusted British aims and felt sympathy for the French situation. These francophiles often had places in the Republican party and Republican party leaders actively endorsed France over Great Britain.¹⁴

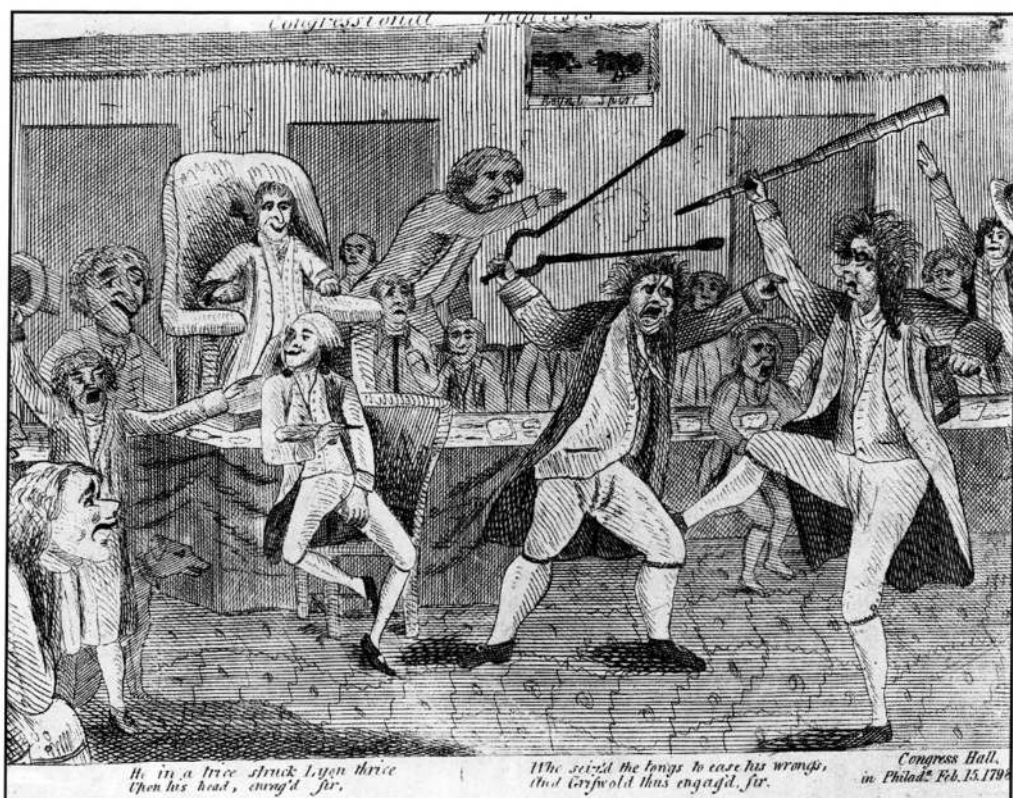
One of the primary scenes of the conflict between these two factions was the print media. Newspapers in the new nation had become major sources of informative propaganda and the battleground for public opinion. Each group had their paper in the media markets of the day, Philadelphia, New York City, Charleston, and the other commercial centers that served the vast agriculturalist population of the continent. Serving as the primary means for organizing supporters and providing spurs to action in elections, newspapers conducted sophisticated campaigns against opposing viewpoints through passionate argument as well as ridicule and bombast. The newspapers, though extremely limited in coverage and circulation, were the lifeblood of the fierce partisan battles that overrode the thin unities under the previous Washington administrations.¹⁵

In this hotly contested political environment, the XYZ affair provided a surge of support for the Federalist cause and the struggling administration of President John Adams that led directly to the Seditious Libel Act. In a poorly calculated diplomatic move, influenced by the United States' recent Jay Treaty with Great Britain, Talleyrand, the

French foreign minister, used three Swiss agents to solicit a bribe from the three U. S. ministers, Charles Cotesworth Pinckney, Elbridge Gerry, and John Marshall, whom John Adams had appointed to negotiate a lessening of the growing hostilities between France and the United States. The offer, meant as a slight to the new nation, was leaked to the Federalist press at home and created a vast upsurge of patriotic fervor for war with France.¹⁶ Buoyed by this overwhelming support, the Federalist majority in both houses of Congress passed several pieces of legislation to deal with the seemingly inevitable conflict. These measures included appropriations for a navy, a large national army, and several anti-immigrant provisions. In keeping with the spirit of the times, the Federalists pressed for and managed to pass a Sedition Act on July 14, 1798.¹⁷

The debates in Congress had become heated as the partisan implications of the bill dawned on the beleaguered Republicans. Republicans worried, rightfully, that the new law could bring most of them and their party apparatus, as well as their newspaper editors, into federal courts and chill their ability to counter the pro-war fervor. Although the new law was considerably more progressive than the common law crime,¹⁸ the likelihood of jail time and considerable fines upon conviction exerted a strong deterrent to speaking against those in government or contravening their policies.¹⁹ Out of doors, the Republican protest against the Sedition Law got stronger and spread faster as the Federalist prosecutors brought fourteen prosecutions into the federal courts.²⁰ Outspoken Republican newspaper editors were the first to run the gauntlet while, initially, only one politician, Congressman Matthew Lyon of Vermont, suffered under the measure.

Republicans maintained throughout the duration of the Sedition Law's life that Congress did not have the power to pass it; that it was contravened by the First Amendment to the Constitution; that its effect was to inhibit the very foundation of freedom on which the republic was based; and that it symbolized perfectly the monarchist and anti-democratic nature of the Federalist party, which made them unfit to govern.²¹ On the one



This satirical cartoon portrays the first fight in the chambers of Congress, an altercation between Congressman Mathew Lyon of Vermont and Congressman Roger Griswold of Connecticut. Partisan fevers ran high during debate over passage of the Sedition Act of 1798, with Republicans fearing that the new law could bring them, as well as their newspaper editors, into federal courts and chill their ability to counter the pro-war fervor. Lyon, a Republican, was in fact one of twenty-five people arrested under the act.

hand, it is not clear whether the Republicans were inching toward a broader definition of freedom of political speech in this debate, or merely crying out that their ox had been gored. After attaining power in 1801, the Jeffersonians did not repeal the Seditious Libel Act, but let it expire. What is more, the Jeffersonians showed no hesitation to use seditious libel laws, for example in Virginia, to drive Federalist editors to cover.²² On the other hand, the fact that the Federalists had identified attacks on “government” with the attacks on the policies of the Federalist party was surely a less than evenhanded interpretation of their own statute. And, although the law allowed truth as a defense, it was surely hard for Republican partisans to show that their anti-Federalist opinions were true. Political opinion by its very nature is hard to verify.

While James Madison and Thomas

Jefferson drafted resolutions for state assemblies to attack the Federalists and their dangerously loose construction of the Constitution, their adherents fought the prosecutions in courts.²³ The editors in the dock had little chance of acquittal, in large measure because Federalist marshals hand-picked Federalist juries to hear these cases presented by Federalist prosecutors. On the bench sat a wholly Federalist judiciary. Everyone charged was convicted, a predictable outcome, though one that might have resulted even had the system not been rigged, so narrowly tailored was the law.²⁴ Defendants’ counsel might have argued to the jury that they were the ultimate arbiters of law as well as fact. Colonial and revolutionary counsel made this argument, with some success.²⁵ It is still made in some state criminal trials.²⁶ But, given the composition of the juries in these cases, such

an appeal to jury nullification of the law would have been a waste of time.

The oddity remains that there is no record of an appeal of these cases, or even of the common law indictments brought before the passage of the Sedition Law.²⁷ Despite their fervent opposition to the common law in federal courts, whether drawn from old English precedents or as the source of newly passed legislation, the Republican defendants did not choose to appeal. An appeal would have given them another forum in which to raise objections to the constitutionality of the federal law and to the conduct of the Federalists. If the arguments of counsel were not actually contemptuous of the bench, Republican appellate pleaders might have had a privilege to assault government policies that the new law had just denied to Republican editors. Nevertheless, there are several reasons why the Republicans may have eschewed appeal. First, the particular defendants may not have had enough resources to fight politically and maintain a legal appeal. It was easier to just pay the fine and serve the time. Second, much more sympathy for the Republican cause might be gained through conviction and imprisonment than through technical legal arguments in appellate courts. The law was of limited duration (corresponding to the war scare with France) and the Republican counter-punch from the rising resentment against the Sedition Act looked to sweep the Federalist judicial officers from power. Third, the Republicans knew that the Federalists were largely in control of the judicial branch with most of the judges and Justices having Federalist sympathies. An appeal to these judges might only lead to a definitive opinion in favor of the constitutionality of the sedition law.

William Paterson's draft opinions on the subject prove this last presupposition solidly grounded. Though disavowing any connection with the Federalist party,²⁸ Justice William Paterson's personality and background kept him strongly away from the emerging Republican majority's positions. William Paterson was born in Ireland in 1745 and emigrated with his family very shortly thereafter to New Jersey. His father eventually settled the family in

Princeton where he set up a general store. Young William studied hard and managed to gain admission to the school in town, the College of New Jersey (later Princeton University). There Paterson learned Greek, Latin, history, philosophy, and enjoyed public speaking in the debating clubs.²⁹ He developed early on an Englishman's respect for property and rights. He espoused a love of the virtues of conservative republicanism with a concern for the profligacy and corruption he believed were corroding the vitality of the mother country and threatening her American colonies. Seeking the remuneration and status of a country lawyer, Paterson apprenticed to Richard Stockton and quietly watched the growing conflict with Great Britain. Fairly late in the crisis, Paterson, a struggling lawyer with much to lose if he chose incorrectly, decided to support the revolutionary cause. His prudence was surely a professional, lawyerly virtue, but he was also an ambitious young man, and he knew that political advancement for one without connections to the metropolitan imperial center must lie in the provincial, patriot cause.³⁰

Paterson's star rose quickly during the American Revolution as he undertook a variety of legal responsibilities in the fiercely divided colony. As fervent a patriot as he would become, he was always careful to nurture political contacts that would serve him very well in the years to come. He served as the secretary of New Jersey's revolutionary congress and took part in the disagreeable task of drafting New Jersey's constitution, doing the best he could to secure the rights of the propertied. As the state's attorney general, he proved a zealous prosecutor of British sympathizers.³¹ There was no bar in this era against a public official continuing his private law practice, and, upset with the legislature's support for debt relief, he pursued his burgeoning legal practice. Private suits brought sizable fees in a number of large land claim disputes and debt recovery actions.³²

But Paterson's advancement was based as much on the soundness of his legal thinking as on his political skills. His most recognized national role came at the federal Constitutional Convention in 1787. Serving as one of New

Jersey's representatives to the Convention, he drafted a plan of government that would have insured that the smaller states would not be dominated by the more populous ones in any new national government.³³ Although the New Jersey Plan that he had partially authored and introduced met defeat, Paterson's views made possible the Great Compromise—giving to the lower house a population-based representation while preserving the equal status of all states in the Senate.

Paterson returned home something of a hero, continued his law practice, and was chosen by the state legislature to serve in the U. S. Senate. There he participated in the committee that drafted the Judiciary Act of 1789, a bold and far reaching addition to the powers of the federal government. There was nothing in the Constitution that mandated a fully articulated inferior federal court system, or that allowed litigants from different states to remove a suit to the federal courts. It may have been that such courts would be more neutral forums than the state courts, particularly for British merchants or their agents attempting to recover unpaid, pre-Revolutionary debts. The fact remains, however, that the federal district and circuit courts gave far more power to the weakest branch and shifted the boundary of state-federal authority.³⁴

After three terms in the limited office of governor of New Jersey, Paterson was appointed by President George Washington to the Supreme Court in March 1793.³⁵ It was in this capacity that Paterson rode his appointed circuit, presided over sedition trials and gave his resounding support for the sedition law and the use of a federal common law of crimes in his instructions to various grand juries. He reminded them of their solemn duty to pursue all lawbreakers vigorously, and allayed any doubts they might have about the legality of indictments under the newest pieces of Federalist legislation.³⁶ The political implication of Paterson's strong law and order position was hardly novel in this era. Other judges routinely used grand jury instructions as occasions for far more partisan lectures than Paterson assayed.³⁷ But the grand jury instruction was not a legal opinion per se. It had no force as precedent, nor was it intended

as a meditation on the merits of the law. It was simply an admonition.

Sometime in late 1798 or early 1799, Paterson, anticipating an appeal of the sedition law's constitutionality, prepared two draft opinions that went far beyond his charges to any of the grand juries. The fact that Paterson expected a challenge to the constitutionality of the sedition law reminds us that judges in this era saw judicial review as legitimate. They did not need *Marbury v. Madison*. Paterson himself had affirmed a court's judicial review powers over state law in *Vanhorne's Lessee v. Dorrance*. In the first tax cases, the Jay Court had already hinted that it had the power to review the constitutionality of federal acts.³⁸

This is the clear implication of Paterson's opening to the first draft opinion,³⁹ "Whether the act be constl. or Congress had authority to pass it?" and the reason why Paterson would have felt it necessary to think about this question. Other passages in these two draft opinions show that Paterson subscribed to the view of the Court's inherent powers of judicial review. The second draft opinion makes this clear with the unequivocal statement, "This authority is vested in the courts of the U. States."⁴⁰ Thus, rather than being the creation of a doctrine, Marshall's arrogation of the review power merely made explicit what others had already believed.⁴¹ This made *Marbury's* acceptance more certain though less revolutionary. In the vast portion of these drafts, however, Paterson concentrates on the common law and the powers of Congress.

Paterson did not fully develop his arguments and omissions appear quite frequently. The drafts also overlap and lay out different expositions on some of the same contentions. It should also be noted that his points strongly resemble those Harrison Gray Otis proffered in the House during the debate on the sedition law.⁴² This should not be completely unexpected because Paterson did circulate in Federalist circles and these points were well rehearsed since Alexander Hamilton successfully argued the loose construction position in his message on the chartering of the first Bank of the United States.⁴³

The first point in the first draft opinion reiterates the implied powers source for

unmentioned federal common law.⁴⁴ The term “general clause” either refers to the Necessary and Proper Clause⁴⁵ outright or obliquely. Inherent in the concept of being able to carry out the express powers is the ability to pass laws implicated in that task. Paterson refers to currency and revenue protection measures though any number of federal operations would have supported this widely-held proposition. He does not address the scope of the implied powers. Links to explicit powers could easily become quite tenuous and subject to abuse. Later jurisprudence surrounding Congress’s interstate commerce regulation⁴⁶ followed from future Justices’ difficulty with Paterson’s common sense driven interpretation.⁴⁷ The question would be how far a government could go to defend itself. While no one questioned that the government had that power, many did inquire as to the definition of the government. Paterson, like many Federalists, at the very least failed to look more deeply into who and what was being protected. The issue was not clear. Paterson’s position led to the prosecution of political opponents of the administration while many argued at the time and later that the real government that needed protection was a republic based on open debate and freedom of speech.⁴⁸

Missing this maelstrom completely, Paterson swiftly moves to the area of greatest concern, the common law as a source of Congressional power. He writes forcefully, “I have no doubt of its extension.”⁴⁹ Supporting this controversial contention are three main lines of argument. First, the common law references throughout the Constitution and its amendments lead to the implication that the common law is a given presumption in the legal environment within any court in the nation. Paterson’s list includes impeachment, Congressional privilege from arrest, the mention of habeas corpus and bill of attainder, the extent of judicial power, treason, felony, the Fifth Amendment’s use of “grand jury,” and the Seventh Amendment’s mention of “suits at common law.”⁵⁰ Taken together the phrases and terms used throughout the Constitution lead to a strong impression that the very legal language is the language of the common law. If

the language of the Constitution is that of the common law, then the common law was assumed to be present in the federal courts.

While his reasoning by analogy and inference leads in the right direction, it does not take Paterson far enough. First, the references assume a common law that might just be borrowed from the states, not necessarily independent and national. Federal courts would use the procedures and laws of the jurisdiction in which they were located without creating an independent federal common law of crimes.⁵¹ Second, just because reference is made to common law terms and crimes does not require the institution of federal common law crimes. A judge could use the common law as a reference without using it as a source for indictments. Third, the silence of the Constitution on this very issue could be read many different ways both for and against the presence of a federal common law. In the great tradition of the common law, if there was to be a federal common law, it would have to be accepted and gain precedential status.

Justice Paterson then makes reference to a resolution of the revolutionary Congress, but his manuscript does not provide a complete date, leaving confusion as to exactly which Congressional resolution he refers. It is highly probable that he is referring to the same one he cites in another draft opinion beginning “To determine the question” that is headed in the Bancroft Collection, “Common Law in the U.S.”: October 14th, 1774.⁵² The Continental Congress passed several resolutions that day including two that fit Paterson’s claim. Resolutions 2 and 3 declare that the colonists brought with them when they emigrated the rights and privileges of Englishmen, and that these rights were passed to succeeding generations.⁵³ Resolution number 5 states “That the respective colonies are entitled to the common law of England. . . .” bearing Paterson’s position.⁵⁴ The status of these resolutions is questionable as legally binding precedent. The Continental Congress was a predecessor to the Constitutional government and some of its actions were adopted by the new government including the debts and the settlement of the Northwest territories. Nevertheless, the new government did not explicitly

THE
Massachusetts Spy
Or, Thomas's Boston Journal.

'Do thou Great LIBERTY inspire our Souls—And make our Lives in thy Possession happy—Or, our Deaths glorious in thy just Defence.'

VOL. IV.) THURSDAY, JULY 7, 1774. (NUMB. 179.)

JOIN OR DIE

THE great demand for this paper, has often occasioned many good customers being disappointed, for which the publisher is very sorry: He will, in future, endeavour to prevent any thing of the like kind happening, so long as he may have the honour of being an assistant to the public.

The glorious prospect of public affairs, at present, in this second capital, has occasioned great pressing Demands upon him, which notwithstanding he informs his customers, he can by no means answer without their kind assistance: He is oblig'd to trouble them with a **diminishing** of advertisements, but his affairs make it necessary: His customers in the country know in their persons, and also in the other colonies, he hopes will take proper notice of it, and consider there is no possibility, (especially for a young beginner) in carrying on business without regular payments.

A word of this kind, it is well known is attended with great expense, and he begs leave to say it is a third larger than any News-Paper published in this province, and contains as much News, as many Political Essays, at any in America; and is the cheapest on the globe.

I. THOMAS.

In the House of Representatives, June 14, 1774.

WHEREAS there will become due in this month of July money given by the province-treasury, and sufficient provision having been made for the paying of the same, and if the collectors of such moneys should not bring them in to the treasury to be paid, the province will suffer damage by such neglect:

Resolved, That the collectors of such moneys, who shall not bring them to the province-treasury, to be paid by the last day of July next, shall not receive any interest on the same, after that time, and the province-treasury is hereby directed forthwith to make this order as published in the Boston News-papers, these weeks last past, that every one concerned may be notified hereof. Done at the encouragement.

T. CHURCH, Speaker in Council, June 15th. Read and concurred.

JOHN COTTEN, D. Secy.
THO. GAGE.

Confuted to a true copy, sent.

JOHN COTTEN, D. Secy.

THE Treasurer of the province hereby gives public notice to the collectors, merchants and collectors of the province taxes, that they pay the same upon the Tuesday by the 15th of July next.

Tuesday-Evening, June 15, 1774.

From the PENNSYLVANIA GAZETTE.
L E T T E R I V.
To the Inhabitants of the British Colonies in AMERICA.

Resolved.

THE Senate resolved, that the preceding letter was written, inasmuch as similar resolutions every attempt to prove that the Colonies are not bound to obey the British Acts.

Riots and weak publications, by a small number of individuals, are sufficient reasons with Parliament to rain many thousand inhabitants of a truly respectable town, to dissolve charters, to abolish the benefits of the writ of *habeas corpus*, and to deprive American Liberty—for the justest reason that can be. But in England the good grows with publications, seditions, treasonable and even blasphemous. The discontented spirit over the Kingdom, proclaiming their resentments. Many enormous riots have disturbed the public peace. The foreign has been instilled in puffing from his palace to the Parliament-house, on the behalf of the nation. It is to be concluded from these facts, that the Body of the People is sedition and traitorous? Can his Majesty believe, that he is thought by his English Subjects in general, to be such a person, as those who have represented him will the two heads of Parliament acknowledge what has been spoken and written and acted against them as England, exceeds the sentiments of the Kingdom? or will they say, that the people of England have fastidiously their liberty, because some of them have been discontented? It is by a judgment formed in each city by the same rule: Let them consider *themselves* as subjects.

Freedom and reason are totally different. The pretensions, and to be given by our false colonies, are but the pretences for the exclusive privilege exercised against her. This is a reason for the exclusive privilege, defining and not desirable as it is, of depriving the freedom of America by a military force, to be supported by money taken out of our own pockets, and the heinous consequence of opportunity for attacking this end. This is a reason is evident from the manifest's speech. The system is formed with us, but the act is dissimulated: Indeed, I do not believe it was expedient, we should have such a free and small intelligence of the Liberties agitated against us, as we have received. Any person, who questions the maintenance of liberties published in pamphlets and news papers in Great-Britain, or the species made in

conversis validissimis gratia pro nobis utitur, quam quod commode non commode. Rursus ad propagandas commode periculosae continentis. In dem. Anglii primum evenit vicissitudo.

Why did the little Swiss cantons, and even small provinces of the low states, so successfully resist the attempts, that they were not contented with an empire founded in the vanity and mutual advantage, unamously and unopposed show to "LAW" the faithful and inflexible words "AT THEIR FEET"? Besides, they wisely regarded the interest of each as the interest of all.

Our own experience furnishes a successful additional proof of an observation made by a great and good man, Lord president Fothergill. "It is a certain truth," says he, "that of three and kingdoms in proportion as they grow great, weak they and powerful, grow weak, wicked and oppressive; and the history of all ages gives evidence of the fact contrary to all that three and kingdoms, when the two of their kind quity is full." Another "truth" is "occasional" is that "such times and kingdoms" never have been, and never will be, but by the prodigious, victorious and finally successful of their people. To employ three words to illustrate a point so manifest, would be the idle waste of giving gold. Surely you cannot think at this time, my countrymen, but that the people of Massachusetts are following in a careful manner in us all; and therefore, that we ought immediately to direct our most prudent measures for their relief and our own safety.

Our instant dependency of the present distress is unspeakably valuable. We have not the least prospect of our own assistance. The passion of dissipation, rising like a plague, for about seven years past, has spread with unusual malignity through Europe, Africa, and Asia, and has had the most fatal effects. The remaining spirit of frugality, that inspired and languished in the palatements of France

Newspapers in the new nation, although limited in circulation, were major sources of informative propaganda and the battleground for public opinion. Fierce political battles between the Federalists and Anti-federalists were played out in vicious editorials in small papers like *The Massachusetts Spy*.

adopt all the measures of its predecessor. Furthermore, these were resolutions, not laws enacted to give the union the common law. Though a foundational document from the Continental Congress like the Declaration of Independence might be accorded official court recognition as a statement of principles or a way of thinking about law,⁵⁵ it appears that it would take an explicit act to make resolutions 2, 3, and 5 legally binding.

The second major area of Paterson's argument in the first draft opinion consists of predicating Congress's power to pass the sedition law on the Constitution's inherent incorporation of the common law. "The common law extends to every state—Our ancestors brought it over with them as their birthright."⁵⁶ Like a property right and a political liberty, the common law becomes a matter of heritage and inherent rights as in the "inalienable rights" in the Declaration of Independence. Giving his own version of

original intent, of considerable import considering he was a member of the Constitutional Convention, he declares that the purpose of the Constitution was, like the Revolution, "to confirm, preserve, and perpetuate these rights."⁵⁷ Unfortunately, Paterson's summation of the purpose of the Framers is undermined by all the arguments in today's debate over original intent.⁵⁸ While one can now safely conclude that Paterson believed after 1798 that the Constitution was meant to enshrine the common law, he has left no extant document to show his state of mind at the time. Furthermore, there were several other Framers, some of whom, like James Madison, argued strenuously against a federal common law of crimes.

Although Leonard Levy has all but incontrovertibly shown that the First Amendment was patterned after a common law experience,⁵⁹ there is nothing to corroborate Paterson's claim that there was a general

understanding of the Constitution's position with regard to the common law. The very statement that he gives about one national common law is stretching the truth of the matter at best. The states had incorporated the common law very unevenly if at all and their treatment of similar matters also varied according to their judges' interpretations.⁶⁰ To conclude this section Paterson gives his own version of the conservative nature of the American Revolution, not fought to establish a new order, but to preserve the existing rights and privileges given, at least in part, in the common law.⁶¹

In the third major argument in the first draft opinion, Paterson attempted to deal with the most forceful Republican argument, one that would hold sway over the twentieth century, that the First Amendment protected the political subject matter of the sedition law from congressional disapproval. He neatly diffuses this assault with an emphasis on the construction of "abridge" in the First Amendment. Given that the freedom of the press is to be presumed, its status then must have been pre-existing. Where else to look for this source than the common law? Paterson's note to Blackstone's *Commentaries* indicates strongly that the Blackstonian definition of seditious libel is to be accepted as the accurate summation of the law at that time.⁶² Paterson comments with a tinge of irony that it was a law made more liberal by the Sedition Act, not abridged. The jury was now allowed to determine the whole facts and truth was a defense. Furthermore, he argues that without the common law as a reference point for the First Amendment, freedom of the press would be far more limited as it was in any state of the Union. "Liberty implies the doing of what is right," and is not protected when it injures others;⁶³ again Blackstone's formulation.

In addition to the aforementioned affirmation of the federal courts' authority to review Congressional enactments, the second draft opinion extends Paterson's natural law view of Constitutional interpretation. The setting is one of civil disorders and revolt. To the fears raised by Shays' rebellion that had led to the Constitution, and the tumult of the Whiskey Rebellion in Western Pennsylvania that had

caused President Washington to call out the army, Paterson added the recent Fries Rebellion in 1798.⁶⁴ Here highly contentious political speech set a match among kindling and waited for the flames to render the government helpless.⁶⁵ Perhaps Paterson drew false lessons from history, but the conservative's fear of the mob is very real. The sedition law becomes a preventive measure to secure the "general welfare."⁶⁶ In this, Paterson might be referring either to the Preamble or to the tax and spend clause.⁶⁷ Either way he was staking out a position that liberals now claim as their own. The general welfare language has now been used to create a second, shadow constitution that is far more liberal, nationalistic, and progressive than any in Paterson's generation envisioned.⁶⁸ But Paterson would have known that the Preamble has no real force in constitutional law (as opposed to the interpretation of ordinary statutes) and the Tax and Spend Clause by its language permits only appropriations for federal projects. Once again, he must argue that the Necessary and Proper Clause permits this interpretation.

To buttress this reading, Paterson maintains that natural law principles sustain the right of self-defense of any sovereign government. Self-defense naturally flows to any individual under natural and common law while any government receives it from the "law of nations, and which in this particular is derived from the law of nature."⁶⁹ Inherent in any government's powers must be that of self-preservation. The power to suppress insurrection gives weight to this theory although it only covers the use of the militias.⁷⁰ Undergirding all of Paterson's argument based on natural law is the dictum he set out in another draft opinion that offered another version of the natural powers of sovereign nations. "This constitution must receive a liberal const[ructio]n so as to effectuate the beneficent intention of the framers."⁷¹ The jurisprudential descendants of this dictum have called this "the living constitution."⁷² An open reading of the text should be supplemented with the understanding that the purpose was to benefit the entire nation.

Paterson's draft opinions on the Sedition

Act never saw the light of day, but they do reveal a great deal about Justice William Paterson's beliefs regarding the federal common law, the First Amendment, judicial review, and how to interpret the Constitution. While many of his arguments on the First Amendment and the federal common law have been rejected by his successors on the Supreme Court, his construction of the Constitution found latter day adherents. As such his vision of a sovereign nation upholding liberty and promoting the prosperity of its citizens has achieved fruition and made certain his lasting contribution to legal history.

* * *

These draft opinions are in the Bancroft Collection, volume 300, in the New York Public Library. They are transcripts made from the originals. The originals for the first draft opinion, "Law respecting libel and common law," and the third draft opinion, "Common Law in U.S.," can be found in the Paterson Family Papers and the William Paterson Papers, respectively, Special Collections in the Princeton University Library. As the third draft opinion has already been printed in the *Connecticut Law Review*, only the first two draft opinions that are examined above are printed below. The page numbers refer to the Bancroft transcripts, a much more legible copy than the originals. Punctuation and abbreviations are as in the original.

Justice William Paterson's Draft Opinions on the Sedition Law of 1798

First Draft Opinion

Law respecting libel &c. common law

P. 531

Whether the act be constl. or Congress had authority to pass it?

1. It is a power, which comes under the general clause of the constitution; and besides is necessarily incidental to every government or civil institution. No government can long exist, where libelous publications against its executive and legislative authorities, their acts and measures are suffered to pass with impunity. The power of punishing such offences is a necessary instrument or mean of self preservation. No authority is expressly given to Congress to make laws to punish frauds on the revenue, or forgeries of bill or notes of the bank of the U. States, or resistance to the judicial process of the U. States, or taking away or falsifying any record or process of the same. And yet Congress have passed laws on these subjects, as

P. 533

coming within the general clause of the constitution. But 2dly. this point will receive further illustration, when we come to discuss the amendment to the constitution, which declares, that congress shall not abridge the freedom of the press. And here the question arises, whether the common law extends to the United States in criminal cases. I have no doubt of its extension. Throughout the constin references are made to it. See Art. 1. §3fr. 7, or the last. Art.1. §6fr 1. §9.fr.2.3. §10.fr.1.

Art.3. §2.fr.4. §3.fr2

Art.4. §2.fr2. Ar. 5 & 7 of Amendmt.

Again, Congress on the day of 1777-unanimously resolved in the words following -

The common law extends to every state - Our ancestors brought it over with them as their birthright. It is somewhat remarkable, that the common law should extend to the states individually, and yet not to the states collectively,

P. 535

or in the aggregate. The constn. of the U. States was intended like the revn. to confirm, preserve, and perpetuate these rights and ^[not] to impair, and still less to abolish them. The result is, that the constn. is predicated upon the common law; it assumes it as an existing rule and is built upon it as such.

4 Bl. Com.

The amendment to the constn. ordains, that the liberty of the press shall not be abridged. The expression is relative, and obviously refers to rule or principle then existing, or in other words, to the common law. You shall not abridge, that is, narrow or lessen, the liberty of the press. To determine whether this liberty of the press be abridged by any law, we must know in what it consists, or how it stood at the time of making the amendment. This is fully done by the passage, which has been read in Bl. Com. The amendment declares, that congress shall not abridge the freedom of the press. The amendment takes away the power of restriction but not of extension - and accordingly we find, that the act of Congress instead of abridging the liberty of the

P. 537

press really extends it.

1. At com law, the punishment, fine & imprisonment at the discretion of the court - and also pillory - The act sustains the power of the court both as to fine and imprisonment.

2. At com law, the party indicted for a libel could not give its truth in evidence, because it tended to a breach of the peace. Under the statute, the party may give the truth in evidence, which shall acquit him.

But 3dly admitting, that the common law does not extend to the U. States in criminal cases, we are then to inquire, in what consists the liberty of the press? Does it consist in a license to publish false, scandalous, and malicious calumnies, or libels against the government, its officers, and acts? If so, there is not a state in the union, which can boast of the liberty of the press. For such libels are punishable in every state. The liberty of the press depends upon the same principle as the liberty

P. 539

of speech, or of action. Liberty implies the doing of what is right; and must be exercised in such a manner as not to be injurious to others or to the public. This is a necessary restriction. When a person therefore makes the press the vehicle of defamation and abuse, this restriction is disregarded, and hi becomes an offender. The right is then prostituted, and converted into an injury or wrong.

“To make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the U. States, or in any department or office thereof.”

The freedom of the press is to be determined by the meaning of these terms in the common law.

The article supposes the power over the press to be in congress, and prohibits them only from abridging the freedom allowed to it by the common law.

Art. 1. §8. The congress shall have power

P. 541

to lay and collect taxes, duties, imports and excises; to pay the debts, and provide for the common defence and general welfare of the United States.

The judicial power shall extend to all cases in law and equity, & c. All cases in law and

equity have a clear and definite meaning, well understood through our whole country. All cases at law mean all cases at common law arising under the constn. _The common law is the unwritten law, is recognized in and pervades every state of the Union. To calumniate the government or oppose lawful acts is an offence at common law_

P. 543

Second Draft Opinion
Law against libel &c.

The objn. to this law is, that it is contrary to the constn.; because it is said, that congress are not empowered to pass any act to punish libels or false, scandalous and malicious writings against the government. It is an obvious and just remark, that we ought not, on slight grounds, to suppose, that congress would violate the constn., when they are under oath to support it. The case should be clear, and liable to no well-founded doubt, before we undertake to pronounce an act of congress to be void for want of constitutionality. It is, however, a happy circumstance, that when any act of this kind occurs, we have a competent authority to pass upon it, and to decide, whether it be constl. or not. This authority is vested in the courts of the U. States. Now it [is]⁷³ well known, that the circuit courts of the U. States have uniformly declared, that congress were authorized to pass the law in

P. 545

question, that it is constl., and of course must be obeyed and executed. After the numerous judl. decisions on this subject, I was in hope, that the question was at rest, and would not again be brought forward for considn. But as it has been, it becomes necessary for the court to deliver their opinion upon it. The law under review is clearly within the words of the constn., Which declares, that congress shall power to provide for the com. defence and general welfare of the U. States, to suppress insurrection, and to make all laws, which shall be necessary and proper for carrying into execution the powers delegated to them. False, scandalous, and malicious writings agt. the president, or congress, or the laws, or measures of the nation, operate in no small degree against the general welfare, as their direct tendency is to bring the government into contempt, to weaken its lawful authority, to excite hatred, stir up sedition, and utterly to destroy the confidence of the people. A republican government, like ours, depends much, if not wholly, upon public

P. 547

opinion, and will work to no good purpose, if public affection be withdrawn from it. It lives in the hearts of the people; take away their good opinion and affection, and the republic is a body without a soul; the principle of animation is gone, the pulse of life beats no more. __ It is admitted, that the U.S. form a complete and independent nation, and possess the powers of sovereignty in as full a manner as any nation upon earth. Now the right of self defence and preservn. is inherent in and necessary to every nation, and therefore the making of laws to punish libels and seditious publications is the exercise of a proper authority. It flows immediately from the great preservative principle, which forms an essential part of the law of nations, and which in this particular is derived from the law of nature. Are not false, scandalous and malicious writings, such as are described in the act, direct attacks upon government, and powerful, and, not unfrequently, effectual means to subvert lawful authority, and to introduce disorder,

P. 549

uproar, and anarchy. What government can exist for any length of time, if acts of this kind be not punished? What government does not punish them? Calumnies and lies are odious and destructive vices in private, + still more so in public life. We all remember the insurrections which broke out in Penna.__ What was their origin? Whence did they arise? Why, beyond all doubt, from seditious writings and misrepresentations of the acts of Congress, which deluded and

mislead the people, and wrought them into a temper fit for treason. Hence rebellion reared her crest agt. the national will and authority. Hence it was, that the people, in that part of the country, rose in arms and levied war agt. the U.S., compelled the public officers to resign, pulled down or burnt their houses, and destroyed their property, and for a time prevented the execn. of constitutional laws. This is the natural operation and result of libels, if they be suffered to pass with impunity. They excite a spirit of disobedience and sedition, and generally terminate in disastrous acts of insurrection, dangerous to good order, civil liberty, and private

P. 551

property. The raging of the people, what can withstand? It drives with the impetuosity of a hurricane, and upturns everything in its course. Life, liberty, property, and governmt. are in jeopardy and frequently prostrated before popular commotions. For need I ask, what spirit rides in such whirlwinds and directs such storms? So begins, and so ends the tragic scene. To prevent insurrections is much more safe and wide than to suppress them: and indeed the authority to effect the former is implied in the right and power to attain the latter. Or must govt. be a silent spectator of all the preparatory measures to excite an insurrection, without any authority to interfere until it actually breaks out? Must the eruption first burst upon our heads? This certainly would argue extreme weakness or folly. We should think that man little short of an idiot, who would patiently behold the beginnings of a fire, and not attempt to put it out until it had risen into a flame. It may then be too late, or attended with much difficulty, toil, and danger. So it in the moral and political world. The prudent course is to make use of precautionary

P. 553

measures; for preventive is preferable to penal justice. To say, that a state has not authority to punish libels and seditious publications, is to deny or withhold from it the principle of self defence, which belongs to every individual by the law of nature, and to very government by the law of nations.

The amendmt. supposes, that congress had constl. authority over the press or else, why does it declare, that congress shall not abridge the freedom of the press? Why restrict, where there was previous power? There is no need to limit the exercise of an authority, where no authority exists - You may as well circumscribe the powers of a non-entity. To abridge or lessen the freedom of the press is a relative term; and refers to an existing rule. We must first know in what the freedom of the press consists, before we can determine whether it be abridged or not. The com. law gives the rule, which is well known to every part of the U. States. The amendment. Was made to prevent the freedom of the press from being diminished ___ You may enlarge but not abridge it.

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Endnotes

¹ The novelty of the two party system and the importance of foreign policy in the process are documented in Joseph Charles, *The Origins of the American Party System* (New York, 1961).

² Clinton Rossiter, ed., *The Federalist Papers* (New York, 1961), No. 78, 464-6.

³ Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789, Exposing Myths, Challenging Premises and Using New Evidence* (Norman, Oklahoma, 1990), 22-3.

⁴ For example, in *Chisholm v. Georgia*, 2 U.S. 419 (1793). See John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* (New York, 1987).

⁵ Maeva Marcus, et. al., eds., *Documentary History of the Supreme Court of the United States* (New York, 1985, 1988), Volume I, 6-7, Volume II, 1-3.

⁶ Leonard W. Levy, *Emergence of a Free Press* (New York, 1985), 307-8.

⁷ 11 U.S. (7 Cranch) 32 (1812).

⁸ *Swift v. Tyson*, 41 U.S. 1 (1842); *Erie v. Tompkins*, 304 U.S. 64 (1938). Julius Goebel, Jr., *History of the Supreme Court of the United States, Volume I: Antecedents and Beginnings to 1801*, (New York 1971), 623-33; Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, (Cambridge, Massachusetts, 1977), 9-12; Leonard W. Levy, *Emergence of a Free Press*, 274-9; Robert C. Palmer, "The Federal Common Law of Crime," 4 *Law and History Review*, 267 (Fall 1986, No. 2); Stephen B. Presser, "A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence," 73 *Northwestern Law Review*, 27-111 at 46-72 (1978); Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," 4 *Law and History Review*, 223 (Fall 1986, No. 2); Charles Warren, *The Supreme Court in United States History*, (Boston, 1924), 433-7.

⁹ William R. Casto, "The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations," 18 *Connecticut Law Review* 467 (Spring 1986, No. 3), 480-1; Stewart Jay, "Origins of Federal Common Law: Part One," 133 *University of Pennsylvania Law Review* (June 1985, No.5) 1003, n.243, 1083-5. Both of these eminent scholars place the Paterson draft opinion, "Common Law in the U.S.," 300 Bancroft Collection, 555-75, also available in William Paterson Papers, GenMSS [misc.] oversize file, Princeton University, prior to the Neutrality Act of 1793 because Paterson states there was no statute on that point at the time of his writing. Yet, he also makes reference on page 563 to James Madison's arguments against the Alien and Sedition Acts (that "cases in law" referred only to civil matters) which was articulated in 1799. Goebel, *History of the Supreme Court*, 652. Unless Paterson is referring to another author on a different matter, this draft opinion should be placed with the two examined in this piece which would make sense as it does fit with the general tenor and argument of the other two draft opinions.

¹⁰ I refer throughout this piece to the first draft opinion and the second draft opinion. The first draft opinion appears with the heading "Law respecting libel and common law," the second with the heading "Law against libel," in the Bancroft Collection in the New York Public Library, volume 300, 531-553. These are transcripts made from the originals with the headings added by the transcriber. The original for the first draft opinion can be found in the Paterson Family Papers, CO541, Box 1, Folder 1, Special Collections and Rare Books, Princeton University Library.

¹¹ 2 U.S. (2 Dall.) 304 (C.C.D.Pa. 1795).

¹² 5 U.S. (1 Cranch) 137 (1803).

¹³ For a broad description of this sea change in American jurisprudence see Horwitz, *The Transformation of American Law*, 10-23.

¹⁴ For a description of this period in American politics see Stanley Elkins and Eric McKittrick, *The Age of Federalism* (New York, 1993), 518-90; for a view firmly against the Federalist position, James Morton Smith, *Freedom's Fetters, The Alien and Sedition Laws and American Civil Liberties* (Ithaca, New York, 1956), 2-21.

¹⁵ Elkins and McKittrick, *The Age of Federalism*, 282-92.

¹⁶ See William Stinchcombe, *The XYZ Affair* (Westport, Connecticut, 1980).

¹⁷ Elkins and McKittrick, *The Age of Federalism*, 571-93

¹⁸ As defined in Great Britain and described in Blackstone's *Commentaries*, common law seditious placed the burden of proof on the defendant, let the jury decide only whether the defendant had published the material, and truth was not a defense. Zechariah Chafee, Jr., *Free Speech in the United States* (New York, 1969), 504.

¹⁹ Smith, *Freedom's Fetters*, 100.

²⁰ In addition there were three prosecutions for seditious under the common law initiated before the passage of the Sedition Law. Smith, *Freedom's Fetters*, 185.

²¹ Smith, *Freedom's Fetters*, 424-8.

²² Levy, *The Emergence of Free Press*, 340-7.

²³ The Virginia Resolutions, the work of Madison, reviled the Federalists for returning to the monarchistic and tyrannous jurisprudence of England, but did not prescribe a remedy. The Kentucky resolves, drafted by Jefferson secretly, called for state governments to "interpose" themselves between their citizens and the federal government when the latter violated the Constitution. Levy, *Emergence of a Free Press*, 306.

²⁴ Smith, *Freedom's Fetters*, 421-4.

²⁵ See, e.g., William Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," 76 *Michigan Law Review* (1978), 904.

²⁶ See, e.g. Albert W. Alschuler and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States" 61 *University of Chicago Law Review* (1994), 867-911.

²⁷ Goebel, *History of the Supreme Court of the United States*, 651-8.,

- ²⁸John E. O'Connor, **William Paterson, Lawyer and Statesman, 1745-1806**, (New Brunswick, New Jersey, 1979), 224.
- ²⁹O'Connor, **William Paterson**, 7-30.
- ³⁰O'Connor, **William Paterson**, 49.
- ³¹O'Connor, **William Paterson**, 72-108.
- ³²O'Connor, **William Paterson**, 122-3.
- ³³O'Connor, **William Paterson**, 135-60.
- ³⁴O'Connor, **William Paterson**, 168-73.
- ³⁵O'Connor, **William Paterson**, 199-200.
- ³⁶O'Connor, **William Paterson**, 244-8.
- ³⁷See, e.g. Peter Charles Hoffer and N.E.H. Hull, **Impeachment in America, 1635-1805** (New Haven, 1984), 231, 232 (Justice Samuel Chase's charges to grand juries).
- ³⁸*Hylton v. U.S.*, 3 U.S. (Dall.) 171 (1796). Bernard Schwartz, **A History of the Supreme Court** (New York, 1993), 23-4.
- ³⁹I have called this the first draft opinion because it appears first in the Bancroft Collection. I call it a draft opinion because it was in a collection labeled "legal opinions" both in the Bancroft Collection and in the Paterson Papers in Princeton University Library as well as the language Paterson uses throughout indicating that these drafts were not either grand jury charges or meant for newspaper publication.
- ⁴⁰Paterson, "Law against libel," 543.
- ⁴¹For a more complete analysis of the forerunners of *Marbury* and its wide acceptance see Schwartz, **A History of the Supreme Court**, 3-14, 22-24.
- ⁴²Smith, **Freedom's Fetters**, 132-3.
- ⁴³Broadus Mitchell, **Alexander Hamilton, The National Adventure, 1788-1804** (New York, 1962), 100-2.
- ⁴⁴Patterson, "Law respecting libel and common law," 531-33.
- ⁴⁵Article I, Section 8, clause 18.
- ⁴⁶Article I, Section 8, clause 3.
- ⁴⁷Though the case list is too extensive to fully cite here, the names associated with the clause comprise some of the most important in U.S. constitutional law. E.g. *Schechter Poultry Corp. v. U.S.* 295 U.S. 495 (1935), *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1957), and *U.S. v. Lopez* 514 U.S. 549 (1995).
- ⁴⁸Smith, **Freedom's Fetters**, 418-21.
- ⁴⁹Paterson, "Law respecting libel and common law," 533.
- ⁵⁰Respectively, Article I, Section 6, clause 1; Section 9, clauses 2 and 3; Section 10, clause 1; Article III, Section 2, clause 4; Section 3, clause 2; Article IV, Section 2, clause 2; Amendment V; and Amendment VII.
- ⁵¹Julius Goebel, Jr. makes this point and argues that at the time of the Sedition Law and later, federal district courts had already adopted this jurisdiction based approach for procedure and their interpretation of the Constitution. **History of the Supreme Court of the United States**, 658.
- ⁵²William Paterson Papers, 300 Bancroft Collection, New York Public Library, 567. This particular draft opinion was reprinted as an appendix to William R. Casto, "The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations," 18 *Connecticut Law Review* (September 1986, No. 3), 467, 526-530.
- ⁵³Worthington Chauncey Ford, ed., *Journals of the Continental Congress, 1774-1789*, (Washington, D.C., 1904), vol. I, 68.
- ⁵⁴*Journals of the Continental Congress*, 69.
- ⁵⁵See, e.g. Peter Charles Hoffer, **The Law's Conscience: Equitable Constitutionalism in America** (Chapel Hill, 1990), 76-79; Pauline Maier, **American Scripture: Making the Declaration of Independence** (New York, 1997), 204.
- ⁵⁶Paterson, "Law respecting libel and common law," 533.
- ⁵⁷Paterson, "Law respecting libel and common law," 535.
- ⁵⁸See e.g. Leonard W. Levy, **Original Intent and the Framers' Constitution** (New York, 1988) and Jack Rakove, **Original Meanings: Politics and Ideas in the Making of the Constitution** (New York, 1996).
- ⁵⁹Levy, **Emergence of a Free Press**, 266-81.
- ⁶⁰Peter Charles Hoffer, **Law and People in Colonial America** (Baltimore, Maryland, 1992), 116.
- ⁶¹Paterson, "Law respecting libel and common law," 535.
- ⁶²Paterson wrote "4 Bl. Com." most likely referring to William Blackstone, **Commentaries on the Laws of England** (Chicago, Illinois, 1979), Volume 4, Section 13, 150-3.
- ⁶³Paterson, "Law respecting libel and common law," 539.
- ⁶⁴Paterson, "Law against libel," 549. For an account of these troubles see Thomas P. Slaughter, **The Whiskey Rebellion: Frontier Epilogue to the American Revolution** (New York, 1986), 173-221; Leonard D. White, **The Federalists, A Study in Administrative History, 1789-1801** (New York, 1948), 421-3.
- ⁶⁵Paterson, "Law against libel," 549-51.
- ⁶⁶Paterson, "Law against libel," 545.
- ⁶⁷Article I, Section 8, clause 1.
- ⁶⁸See, e.g. Akhil Reed Amar, "The Bill of Rights as a Constitution," 100 *Yale Law Journal* 1131.
- ⁶⁹Paterson, "Law against libel," 547.
- ⁷⁰Article I, Section 8, clause 15.
- ⁷¹Paterson, "Common Law in U.S.," 559.
- ⁷²See e.g. Bruce Ackerman, "Constitutional Politics/Constitutional Law," 99 *Yale L. J.* 453 (1989); Bruce Ackerman and Neal Katyal, "Our Unconventional Founding," 62 *U. Chicago L. Rev.* 475 (1995); William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," 27 *S. Tex. L. Rev.* (1986); 433; Paul Brest, "The Misconceived Quest for the Original Understanding," 60 *B. U. L. Rev.* 204, 226 (1980); Ronald Dworkin, "Ch. 5. Constitutional Cases," **Taking Rights Seriously**, (Cambridge, Massachusetts, 1977); John Hart Ely, **Democracy and Distrust**, (Cambridge, Massachusetts, 1980) 1-2; Laurence H. Tribe, **God Save This Honorable Court** (New York, 1985) 45; **American Constitutional Law** (Mineola, NY, 1988) 771.
- ⁷³In the transcript.

Prigg v. Pennsylvania

Understanding Justice Story's Proslavery Nationalism

Paul Finkelman

In early 1843 former President John Quincy Adams spent most of a day “in transient reading the report” of *Prigg v. Pennsylvania*,¹ “otherwise called the Fugitive Slave Case.” Never one to mince words, “Old Man Eloquent” noted in his diary that the case, consisted of “seven judges, every one of them dissenting from the reasoning of all the rest, and every one of them coming to the same conclusion—the transcendent omnipotence of slavery in these United States, riveted by a clause in the Constitution. . . .”²

The meaning of the case was clear to Adams and other opponents of slavery: the “slave power” had won another victory. It was a particularly painful outcome for Adams because the author of the “Opinion of the Court”—Justice Joseph P. Story—was a fellow Bay Stater and a professor of law at Adams’ alma mater, Harvard. Adams’ analysis was wrong on only one minor point: eight of the Justices actually agreed with the outcome, but

only six of these wrote opinions. The seventh opinion was a lone dissent from Justice John McLean of Ohio.

I

The Conviction of Edward Prigg

In *Prigg* the Court overturned the kidnapping conviction of Edward Prigg, a Maryland farmer who had helped his neighbor, Nathan S. Beemis, seize Margaret Morgan and her children, and bring them back to Maryland as fugitive slaves. Pennsylvania’s “Personal Liberty Law” of 1826 required that anyone removing an alleged fugitive slave from the state first get a certificate of removal from a state or local judge. This law was designed to prevent free blacks from being taken South without a due process hearing and sufficient evidence to justify removing them from the state.

Prigg and his companions had violated this

law when they took Margaret Morgan and her children out of Pennsylvania without a certificate issued by a state judge or magistrate. A Pennsylvania justice of the peace had refused to give Prigg a certificate of removal because there was some question as to whether Margaret Morgan was really a slave. Morgan's background, and the uncertainty about her status, illustrates the need for a law such as the one in Pennsylvania, to give due process protections to blacks claimed as fugitive slaves.

A Maryland farmer named John Ashmore had owned Morgan's parents, but sometime before 1812 Ashmore allowed the two slaves to live as free people. Although Ashmore, who was Beemis's father-in-law, never formally freed the two slaves, thereafter he "constantly declared he had set them free."³ The two blacks raised their daughter Margaret⁴ as a free person. At his death in 1824 Ashmore owned only two slaves, both of them young males.⁵ Morgan had never been claimed as a slave, grew up



Pennsylvania's "Personal Liberty Law" of 1826 required that anyone removing an alleged fugitive slave from the state first get a certificate of removal from a state or local judge. Edward Prigg, a Maryland farmer who had helped his neighbor, Nathan S. Beemis, seize Margaret Morgan and her children, and bring them back to Maryland as fugitive slaves, appealed to the Supreme Court, arguing that Pennsylvania's 1826 law violated the federal Fugitive Slave Law of 1793. At left is an abolitionist's engraving of a woman jumping to her death to avoid being returned to slavery.

believing she was free, married a free black, and was assumed to be free by most people in the community. She had been listed in the 1830 Maryland census as a free black.⁶ In the early 1830s she moved to Pennsylvania with her free-born husband. There the Morgans had one or more children, in addition to two born in Maryland. Her children born in Pennsylvania were free under Pennsylvania law.

When Beemis and Prigg came to Pennsylvania they seized the entire Morgan family, and brought them before a justice of the peace, to obtain a certificate of removal under the 1826 Pennsylvania law. Given the circumstances of the family, it is not surprising that the justice refused to issue the certificate. At that point Beemis, Prigg, and two other men forcibly removed Margaret and her children from Pennsylvania.

York County indicted Beemis and his three companions for kidnapping, but the governor of Maryland refused to cooperate in their extradition. After lengthy negotiations Maryland agreed to extradite Prigg to Pennsylvania, with the understanding that if he was convicted he would not be required to serve a jail sentence until the case had been taken to the Supreme Court.

After his conviction in a York County court, Prigg had an expedited appeal to the Pennsylvania Supreme Court. That court upheld the conviction without a written opinion. Prigg then appealed to the Supreme Court, arguing that Pennsylvania's 1826 law violated the federal Fugitive Slave Law of 1793. The governor and attorney general of Maryland were deeply involved in the proceedings and the state paid Prigg's attorney.

II Story's Opinion

In overturning Prigg's conviction, the Supreme Court (1) upheld the constitutionality of the 1793 Fugitive Slave Law; (2) struck down Pennsylvania's 1826 "personal liberty law," and by implication all similar laws in other states; (3) declared that no state could pass any law that interfered with or supplemented the federal Fugitive Slave Law; (4) declared that masters or their agents had a common law right to

recapture their runaway slaves, without fulfilling any of the requirements of the federal Fugitive Slave Law; and (5) asserted that every state was morally obligated to help enforce the federal Fugitive Slave Law of 1793, but that Congress lacked the power to require the states to do so.

This was an enormously complex and confusing case, with a majority opinion, five concurrences, and a dissent. By the standards of the nineteenth century this was truly extraordinary. While multiple opinions today are commonplace, they were rare in the antebellum period. After Chief Justice John Marshall abolished the practice of *seriatim* opinions, Justices rarely wrote separate opinions except to dissent from the result of the case. The vast majority of decisions were unanimous. In 1832, for example, the court decided fifty-five cases. Forty-six were unanimous.⁷ Eight cases contained a single dissent.⁸ One case, *Worcester v. Georgia*, contained a dissent and a concurrence.⁹ This exceptional case, like *Prigg*, involved both race relations (Native Americans) and a conflict between state power and federal power. Similarly, in 1842, the Court decided forty-three cases, including *Prigg*. Thirty-eight contained only a single "opinion of the court." In four other cases, there were two opinions.¹⁰ This contrasts sharply with the seven opinions in *Prigg*.

In the entire period from 1801 until 1842 no case had more than seven opinions and only one besides *Prigg* had that many.¹¹ That case, *Groves v. Slaughter*,¹² decided a year before *Prigg*, also involved slavery.

The many opinions in *Prigg* suggest its significance. The bizarre array of these opinions further suggests its importance. Speaking for the Court, in what was understood at the time to be an overwhelmingly proslavery decision, was Justice Story, of Massachusetts, who was believed to be at least nominally opposed to slavery.¹³

Concurring in the result, but not in all of Story's holding, was Chief Justice Roger B. Taney. However, part of Taney's concurrence is so angry that some commentators have called it a dissent. In his concurrence Taney accused Story of reaching conclusions that Story had in fact not reached.¹⁴ Just to confuse matters

further, the official Supreme Court reporter, Richard Peters, produced a pamphlet version of the case, where he incorrectly asserted in the subtitle, that “all the laws of the several states relative to fugitive slaves are unconstitutional and void.”¹⁵ In the pamphlet’s preface (but significantly, not in the official **United States Reports**) Peters declared that “no state judicial officer, under the authority of state laws, can act in the matter.”¹⁶ Both statements are untrue, and reflect Taney’s incorrect analysis of Story’s opinion, rather than what Story actually said.

At the time the Court decided *Prigg*, observers understood it to be the most significant case dealing with slavery in England or America since Chief Justice Lord Mansfield’s opinion in *Somerset v. Stewart*.¹⁷ Had it not been for *Dred Scott v. Sandford*,¹⁸ which the Court decided in 1857, it is likely that *Prigg* would be remembered as the most important slavery case to come before any American court.

Dred Scott was of course more famous—infamous—because of its political implications.¹⁹ However, *Prigg* was jurisprudentially far more important. Two aspects of Story’s opinion touch on thoroughly modern constitutional issues: preemption and unfunded mandates.

In part of his opinion Story declared that congressional jurisdiction over the interstate return of fugitive slaves was exclusive. He argued this on the basis of the statute of 1793, but simultaneously asserted that in the absence of a federal statute, the Constitution itself preempted state action.

This was the clearest articulation of the preemption doctrine in the antebellum period.

On the federal statute, Story was emphatic:

it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were,

by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.²⁰

Story then went on to summarily reject any notion that the act of Congress was unconstitutional.²¹

Significantly, Story also applied the preemption doctrine to a situation where no federal statute existed. Thus, if Congress repealed the 1793 law Story held that state statutes regulating the return of fugitive slaves would still be void. Under Story’s theory any state law that provided any procedural protection for someone claimed as a fugitive slave interfered with the federal right under Article IV, Section 2, Paragraph 3 of the Constitution. This was because, in the absence of a federal law—or even in the presence of such a law—Story found that the Fugitive Slave Clause was self-executing. Thus, the Massachusetts Justice wrote:

Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent this clause of the Constitution may properly be said to execute itself; and to require no aid from legislation, state or national.²²

In essence, Story found two separate concepts of preemption for reversing *Prigg*’s conviction and striking down the Pennsylvania law. First, Story held that the federal law of 1793 preempted any state legislation on the manner of returning fugitive slaves. But, Story also found that the Constitution itself, by creating a

common law right of recaption in fugitive slaves, also gave the master or his agent an absolute right to seize a runaway slave, as long as it could be done without any “breach of the peace.” Thus, the Constitution preempted state regulation of the return of fugitive slaves.

Story also confronted a nineteenth century version of unfunded mandates. The 1793 law gave concurrent jurisdiction to federal, state, and local officials. Under the 1793 law a master could ask for a certificate of removal from anyone from a local justice of the peace to a Supreme Court Justice. Armed with such a certificate, the master could then take the alleged fugitive slave back to the South.

In holding that the federal government could not force the state to implement the Fugitive Slave Law, Story touched on the modern constitutional concept that Congress cannot require the states to spend money to implement federal law—what are today known as “unfunded mandates.” Thus Congress could give jurisdiction to states to enforce the 1793 law, but it could not force the states to act.

This “unfunded mandates” aspect of the case led to another ironic result with modern implications. After the decision in *Prigg* many states refused to help enforce the 1793 Fugitive Slave Law. This led to the demand for a new Fugitive Slave Law, with effective federal enforcement. The result was the Fugitive Slave Law of 1850, which led, for the first time in American history, to a federal law enforcement presence in every county in the United States.²³

To summarize, Story found that Congress had exclusive jurisdiction to decide how the fugitive slave clause was to be implemented; that the states could not add any additional requirements to the rendition process; and that the states could, and *ought to*, enforce the federal law, but that the federal government could not compel the states to do so. In a thoroughly misunderstood portion of his opinion, Story also held that the states could pass legislation to help implement the law, such as providing for the arrest and incarceration of suspected fugitive slaves, but that the states could not add any new requirements to the Fugitive Slave Law.²⁴

With the exception of the “unfunded mandates” portion of the decision, Story’s opinion

was overwhelmingly proslavery. After the decision the free states had no power to protect free blacks, or fugitive slaves, from being seized and brought South, no matter how flimsy the evidence of their status. Southerners meanwhile had a “right of recaption” to seize blacks wherever they might be found and take them South without any due process or judicial hearing, as long as they could do it without a breach of the peace. Alternatively, Southerners could take alleged fugitives before any federal judge, or any state judge willing to hear the case, and get a certificate of removal to take an alleged fugitive to a slave state.

The only protection a free state could offer its black population was to refuse to aid in the return of fugitives. Ironically, because of this provision Story called the case a “triumph of freedom.” However, no opponents of slavery saw it that way. They understood it to be a triumph of slavery.

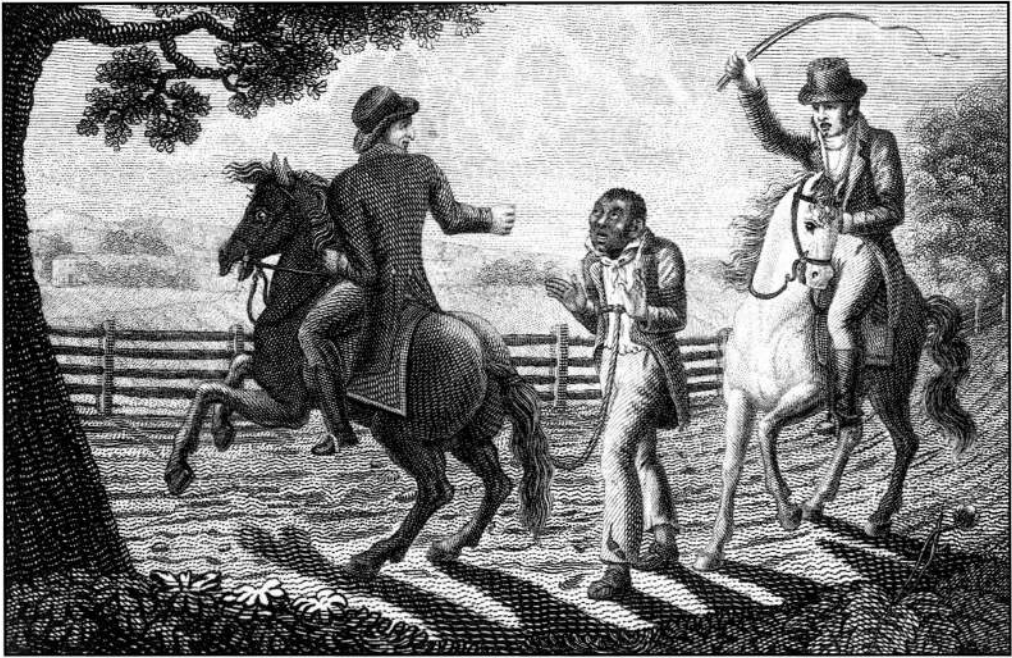
III

A Triumph of Freedom?

Who was right? Had Story written a decision that aided freedom? Or, was his decision simply one more nail driven into the coffin of liberty by a proslavery Supreme Court.

According to his son, William Wetmore Story, Justice Story “repeatedly and earnestly spoke” of his *Prigg* opinion as a “triumph of freedom.”²⁵ Whether Story actually said this, is not clear. I will defer that question for the moment, in order to first consider the argument itself.

The “triumph of freedom” analysis rests on the fifth point in Story’s opinion: that every state was morally obligated to help enforce the federal Fugitive Slave Law of 1793, but that Congress lacked the power to require the states to do so. In his opinion Story noted that “The states cannot, therefore, be compelled to enforce” the fugitive slave clause, “and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.”²⁶ But, he also noted that “As to the authority so conferred upon state magis-



Another dramatic anti-slavery engraving, this one shows a free black being cruelly treated by kidnapers. The Pennsylvania Act of 1826 was designed to frustrate would-be kidnapers, who took advantage of the lack of due process for slaves under federal law.

trates,” in the 1793 law, “while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it; none is entertained by this Court that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.”²⁷

The “triumph of freedom” was imbedded in the very last clause of this statement. If the states prohibited their magistrates from taking jurisdiction under the law, then in many parts of the nation it would be impossible to enforce the law. Without the help of state and local officials, the removal of a fugitive slave from the North would indeed have been difficult. In 1842, when *Prigg* was decided, there were few federal officials anywhere in the nation. Thus, if states did close their jails and courtrooms to slavecatchers, fugitive slave rendition would surely be hindered.

This in fact happened in a number of states in the years following *Prigg*. These new laws prohibited state officials from participating in the return of runaway slaves. The classic example of this was the Latimer case in Boston.

In 1842 James B. Gray, of Norfolk, Virginia, seized his slave George Latimer in Boston and

he was remanded to the custody of the city jailor to await a hearing on his status. However, political pressure forced the sheriff of Suffolk County to release Latimer to Gray’s custody. Fearing a mob would rescue Latimer, Gray sold the slave for a small sum to a group of Bostonians who freed him.²⁸

Following this case the state of Massachusetts passed what is known as the “Latimer Law” to prevent the use of state facilities in fugitive slave cases.²⁹ Other states passed similar acts,³⁰ and many state judges refused, on their own, to hear cases under 1793 law.³¹

These actions by state legislatures and judges put life into the claim that Story’s opinion was a “triumph of freedom.” Certainly, the decision was susceptible to an antislavery use, and many in the North took advantage of this.³²

IV

A Triumph for Slavery?

While Story’s opinion was certainly open to manipulation by antislavery state legislators and judges, it was doctrinally a huge victory for slavery.

First, the opinion upheld the constitution-

ality of the first federal law passed to protect the interests of slaveowners.³³ This law provided no due process protections for alleged slaves. Under the law a black could be sent South after a summary hearing before a judge, justice of the peace, or other low-level magistrate on the basis of an affidavit of a slave owner. The potential for kidnapping, or mistake, was high. At the time of its passage, the Pennsylvania Society for the Abolition of Slavery reported that there was “reason to fear” that the new law would “be productive of mischievous consequences to the poor Negro Slaves appearing to be calculated with very unfavorable intentions towards them” The society complained that the new law was “artfully framed” with “the word Slave avoided,” which meant that only the most vigilant opponents of bondage would be aware of the danger. Society members feared the new law would “strengthen the hands of weak magistrates” who would be used by masters to recover fugitive slaves.³⁴

This federal law led to state legislation like the Pennsylvania Act of 1826. While it may have been used to frustrate the return of fugitive slaves, the Pennsylvania law had been adopted primarily to prevent kidnapping.³⁵ At the time of its adoption “it is unlikely that many, except the militant antislavery people, understood that the law was subject to interpretations which would virtually deny the recovery of runaways in Pennsylvania.”³⁶ There were of course almost no “militant antislavery” whites in the United States in the mid-1820s and there was virtually no organized militant black opposition to slavery. Yet, even by the 1830s, when a militant antislavery movement had a strong presence in parts of Pennsylvania, there is no indication that the law was misused to prevent the capture of runaways. As in Margaret Morgan’s case, it was used to prevent the seizure of apparently free blacks. But, in *Prigg*, Story held that such laws were unconstitutional. Significantly, Story gave no indication how free blacks might be protected from kidnapping, or in the case of Margaret Morgan, how her free-born children might be able to recover their liberty.

While prohibiting the states from protecting free blacks from kidnapping, Story invited the states to help in the rendition process. They

could do this in two ways. First, by allowing their officials to act under the federal law. Although Story acknowledged that Congress could not require enforcement by state officials, he urged their participation. He noted the Court did not doubt “that state magistrates may, if they choose, exercise that authority” to enforce the law.³⁷ Furthermore, he noted that the states were free to pass laws that might help in the capture and rendition of fugitive slaves:

We entertain no doubt whatsoever, that the states, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with, or regulated by such a course; and in many cases, the operations of this police power, although designed generally for other purposes, for the protection, safety, and peace of the state, may essentially promote and aid the interests of the owners.³⁸

The only condition Story placed on such legislation was that it could never be “permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States; or with the remedies prescribed by Congress to aid and enforce the same.”³⁹

In other words, the states could help in the return of fugitive slaves, but could not take any positive action to protect their free blacks. The only act the states could take on behalf of their black population was to prohibit their own officials from participating in the return of alleged fugitives. But, this provided little comfort to the victims of Southern slave catchers. Under *Prigg*, state officials were effectively barred from helping free blacks who might be seized as fugitives.

Even more alarming was Story’s assertion that masters and their agents could act without the use of any law. Citing to Blackstone,⁴⁰ Story

declared:

we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. In this sense, and to this extent this clause of the Constitution may properly be said to execute itself, and to require no aid from legislation, state or national.⁴¹

This was truly a dangerous holding for the more than 170,000 free blacks in the North. Under this rule a Southerner could seize *any* black in the North, and if done quietly, at night, or in a place where there was no one else to see the breach of peace, take that black to the South as a slave. This part of his opinion was an invitation to kidnapping.

This holding also was a huge victory for slavery in the realm of constitutional theory. Chief Justice Roger B. Taney is often criticized for holding, in *Dred Scott*, that the Constitution protected slavery. However, in *Prigg*, Story not only found a constitutional protection for slavery, but concluded that the Constitution had in fact adopted the common law of the South when it came to slaves.

V

The Story of the "Triumph of Freedom"

Jurisprudentially, *Prigg* was an enormous triumph for slavery. The Court upheld a federal statute that aided masters and struck down a state statute that helped both free blacks and fugitive slaves. The slave hunter Prigg was released from jail, while his victims, Margaret Morgan and her children, including those born in Pennsylvania, remained in bondage. The Supreme Court issued an opinion that favored slavery and gave it a privileged position within the constitutional order. Under *Prigg* the common law of the South, in regards to fugitive slaves, became the common law of the nation. As his greatest biographer has noted, "Story's defense of the slaveholder's right to a return of

escaped slaves bristled with imperatives: of rights and guarantees that are 'positive,' 'unqualified,' and 'absolutely secured' and of 'duties' on nonslaveholders 'positively enjoined.'⁴²

Practically, the decision was less useful to slaveowners. In the 1840s a number of states prohibited their officials from aiding in the return of fugitive slaves. With few federal officials anywhere in the country, this meant that masters might have a difficult time bringing their slaves home with them. In 1849, for example, a master in Kentucky seized his slaves in Michigan, acting under Story's notion of a common law right of self help. But, at South Bend, Indiana, local officials, and a mob of citizens, stopped the party. In the end the slaves went free, although the master eventually gained some recompense through civil law suits under the 1793 law.⁴³ Thus, *Prigg* evolved into an antislavery decision.

But, was this the intention of Story? Did he really mean to write an opinion that was a "triumph of freedom." The phrase "triumph of freedom" does not appear in any of his letters, and except for his son's assertion, there seems to be no independent evidence on the subject.⁴⁴

Ordinarily, we could accept William Wetmore Story as a good source for what Justice Story said. But, William Wetmore was clearly embarrassed by his father's opinion, and by his father's attempt to hide the proslavery force of the opinion. He was also doubtless uncomfortable with the abolitionist response to his father. A year after *Prigg*, Story took jurisdiction over the case of George Latimer, and was prepared to return him to Virginia in the custody of his master. After this case, abolitionists branded Story "SLAVE-CATCHER-IN-CHIEF FOR THE NEW ENGLAND STATES."⁴⁵

Extreme though the epithet may have been, it was not entirely wrong. As Circuit Justice, he was in fact the highest federal judicial officer in the region. And, under his own ruling in *Prigg*, the federal courts were ultimately responsible for aiding masters trying to recover runaway slaves. Stung by such attacks, it seems likely that William Wetmore Story invented the "triumph of freedom" claim after his father's death.

There are two other strong reasons for be-

lieving that the “triumph of freedom” argument was the invention of Story’s son, and not the goal of the Justice himself.

First, Story was an extreme nationalist who thought the Constitution and the Court were almost sacred. To accept the “triumph of freedom” argument we must believe that Story intentionally undercut his own opinion. Would someone who devoted his entire life to the law and the Supreme Court sabotage one of his most important nationalist opinions in hopes of achieving a secret goal? This seems incomprehensible.

Furthermore, we know it is not true. The “triumph of freedom” would only come about if the Northern states refused to enforce cooperation in the return of fugitive slaves and the national government did not intervene on behalf of slaveowners. Story sought to counter both possibilities.

In *Prigg*, as we have seen, Story declared that the states had an obligation to help in the return of fugitive slaves, and furthermore, he declared that the states “in virtue of their gen-

eral police power” could pass helpful laws “to arrest and restrain runaway slaves.”⁴⁶ This is hardly the language of a judge trying to undermine the return of fugitive slaves.

More significantly, we know that in his private correspondence Story suggested ways to counter the antislavery implications of his opinion. Shortly after the Court decided *Prigg*, Story wrote to Senator John Macpherson Berrien of Georgia about various legislative matters. The letter began with a discussion of their collaboration on legislation involving federal criminal law and bankruptcy. This evidence suggests the close relationship Story had with Berrien, and thus makes his next suggestion even more important. Story then turned to a draft bill on federal jurisdiction that he had sent to Berrien. He reminded Berrien that under his proposed bill

that in all cases, where by the Laws of the U. States, powers were conferred on State Magistrates, the same powers might be exercised by Commissioners

\$200 Reward.

RANAWAY from the subscriber, on the night of Thursday, the 30th of September.

FIVE NEGRO SLAVES,

To-wit: one Negro man, his wife, and three children.

The man is a black negro, full height, very erect, his face a little thin. He is about forty years of age, and calls himself *Washington Reed*, and is known by the name of Washington. He is probably well dressed, possibly takes with him an ivory headed cane, and is of good address. Several of his teeth are gone.

Mary, his wife, is about thirty years of age, a bright mulatto woman, and quite stout and strong.

The oldest of the children is a boy, of the name of FIELDING, twelve years of age, a dark mulatto, with heavy eyelids. He probably wore a new cloth cap.

MÁTILDA, the second child, is a girl, six years of age, rather a dark mulatto, but a bright and smart looking child.

MALCOLM, the youngest, is a boy, four years old, a lighter mulatto than the last, and about equally as bright. He probably also wore a cloth cap. If examined, he will be found to have a swelling at the navel.

Washington and Mary have lived at or near St. Louis, with the subscriber, for about 15 years.

It is supposed that they are making their way to Chicago, and that a white man accompanies them, that they will travel chiefly at night, and most probably in a covered wagon.

A reward of \$150 will be paid for their apprehension, so that I can get them, if taken within one hundred miles of St. Louis, and \$200 if taken beyond that, and secured so that I can get them, and other reasonable additional charges, if delivered to the subscriber, or to THOMAS ALLEN, Esq., at St. Louis, Mo. The above negroes, for the last few years, have been in possession of Thomas Allen, Esq., of St. Louis.

WM. RUSSELL.

ST. LOUIS, Oct. 1, 1847.

The *Prigg* decision was an enormous triumph for slavery. The Supreme Court upheld a federal statute that aided masters and struck down a state statute that helped both free blacks and fugitive slaves. Practically, however, the decision was not very useful to slaveowners. In the 1840s a number of states prohibited their officials from aiding in the return of fugitive slaves. With few federal officials anywhere in the country, this meant that masters might have a difficult time bringing their slaves home with them.

appointed by the Circuit Courts. I was induced to make the provision thus general, because State Magistrates now generally refuse to act, & cannot be compelled to act; and the Act of 1793 respecting fugitive slaves confers the power on State Magistrates to act in delivering up Slaves. You saw, in the case of Prigg . . . how the duty was evaded, or declined. In conversing with several of my Brethren on the Supreme Court, we all thought that it would be a great improvement, & would tend much to facilitate the recapture of Slaves, if Commissioners of the Circuit Court were clothed with like powers.⁴⁷

Essentially, Story presented Senator Berrien with the solution to the debate over federal exclusivity and the role of the states in enforcing the Fugitive Slave Act. The federal government would supply the enforcement mechanism, through the appointment of commissioners, and the enforcement would be uniform throughout the nation. The fundamental problem with this idea was how to enact it in a Congress where Northerners, who were at least somewhat opposed to slavery, controlled the House of Representatives. Story, the Justice, had the answer for Berrien, the politician:

This might be done without creating the slightest sensation in Congress, if the provision were made general . . . It would then pass without observation. The Courts would appoint commissioners in every county, & thus meet the practical difficulty now presented by the refusal of State Magistrates. It might be unwise to provoke debate to insert a Special clause in the first section, referring to the fugitive Slave Act of 1793. Suppose you add at the end of the first section: '& shall & may exercise all the powers, that any State judge, Magistrate, or Justice of the Peace may exercise under any other Law or Laws of the United States.'⁴⁸

This was not the letter of a man hoping for a triumph of freedom. This was the letter of a

Justice committed to the aggrandizement of federal power and the return of fugitive slaves. Here he could have both.

This letter is doubly damning for Story and the "triumph of freedom" analysis. In the collection of his father's letters, Story's son reprinted the first part of this letter, which dealt with bankruptcy law, but failed to reprint the material quoted above.⁴⁹ William Wetmore Story deliberately hid the evidence that proved that his father neither thought *Prigg* was a "triumph of freedom" nor wanted it to be such. *Prigg* was a triumph of slavery and the author of the opinion of the court knew so. He also wanted to insure that his handiwork would be implemented.

VI

Explaining Prigg:

Joseph Story and Judicial Nationalism

Joseph Story never liked slavery. During the debates over the Missouri Compromise—more than a decade before the abolitionists appeared on the national scene—Story had spoken out against the expansion of the institution west of the Mississippi. In the 1820s "no other New England statesmen . . . was more fearful of Southern aggression or more determined to resist it."⁵⁰ His circuit court opinion in *United States v. La Jeune Eugenie*,⁵¹ a case involving the illegal African slave trade, and his charges on the slave trade to New England grand juries,⁵² "revealed Story's deep abhorrence of the slave trade and slavery."⁵³ In the 1830s he privately opposed Texas annexation, secretly advised public opponents of the annexation, considered it "grossly unconstitutional," and continued this opposition right up until the annexation took place in 1845.⁵⁴ Similarly, although no supporter of the abolitionist movement, Story privately argued that the Gag Rules passed by Congress to prevent the reading of abolitionist petitions were "in effect a denial of the Constitutional right of petition."⁵⁵

As Story's best biographer has amply demonstrated, the Justice "had spoken out consistently on and off the bench against slavery and the slave trade."⁵⁶ He was not an abolitionist—indeed the Garrisonians often vilified him—but he would happily have seen the institution

come to an end.

Why then, did this Justice from Massachusetts—who personally found slavery abhorrent—take an unnecessarily pro-slavery position in both *Prigg* and his treatise **Commentaries on the Constitution**?

The answer is rooted in Story's profound Constitutional nationalism. In his defense of *Prigg*, Justice Story's son noted that the fugitive slave clause "is in the national Constitution, and is a national guarantee."⁵⁷ Story himself made the same point in *Prigg*, noting that the claim to a fugitive slave was a "a case 'arising under the Constitution'" more or less obligating Congress to "prescribe the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guaranty to the right."⁵⁸ In essence, the Justice believed that the Constitution required him to protect the right of masters to recover fugitive slaves. In *Prigg* Story found that Congress had the exclusive power to regulate the rendition of fugitive slaves. This is one of the earliest examples we have in constitutional law of the preemption doctrine. *Prigg* gave Story an opportunity to use this doctrine to further strengthen the national government.

Prigg also allowed him to create a federal common law for the return of fugitive slaves. Throughout his career he favored a national common law. In 1812 Story silently opposed the outcome in *United States v. Hudson and Goodwin*,⁵⁹ where a bare majority of the Court found that the national government could not enforce the common law of crimes. A year later, in *United States v. Coolidge*,⁶⁰ Story, acting as a Circuit Justice, deftly avoided *Hudson and Goodwin* in applying federal common law to admiralty cases. The Supreme Court remained unpersuaded by Story's arguments, and reversed Story's circuit court decision in *Coolidge*, on the basis of *Hudson and Goodwin*.⁶¹ This reversal underscores Story's early commitment to a federal common law, in spite of the Court majority.

Unable to convince the Court of the importance of a federal common law, Story turned to the Congress. After *Hudson and Goodwin* Story urged Congress to pass legislation, to "give the Judicial Courts of the United States

power to punish all crimes and offenses against the Government, as at common law."⁶² In 1842 he wrote Senator John Macpherson Berrien urging a recodification of all federal criminal law and the extension of the common law to all federal admiralty jurisdiction.⁶³

Story's attempts at creating a federal common law of crimes parallel his efforts in creating a federal common law for commercial cases. In 1812, while riding circuit, Story applied general common law to a diversity case.⁶⁴ Thirty years later, in *Swift v. Tyson*,⁶⁵ Story would gain the support of the Court to create a general federal common law for civil litigation. Significantly, Story wrote the opinion in that case in the same Term that he wrote the Court's opinion in *Prigg*. *Swift* is the first case reported in that volume of *Peters' Reports*, and *Prigg* is the last case reported in the volume.

Thus, *Prigg*, which nationalized slavery and made it part of a federal common law, is consistent with Story's lifelong commitment to a nationalistic approach to law. Despite his dislike for slavery, in *Prigg* he could not resist an opportunity to nationalize slavery and create a federal common law right of recaption for slaves, just as he had tried throughout his career to expand federal common law in other areas. Thus, in defending his discovery of a constitutionally protected common law right of recaption, Justice Story declared:

We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or regulation whatsoever, because there is no qualification or restriction of it to be found therein. . . . If this be so, then all the incidents to that right attach also; the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding states.⁶⁶

In the end, then, *Prigg* was an opportunity to expand federal jurisdiction that Story could not pass up. The cost of that gain was the free-

dom of some free blacks and fugitive slaves. But, it was a cost Story was willing to pay since it was paid by people like Margaret Morgan and her children.

Endnotes

¹ 41 U.S. (16 Peters) 539 (1842).

² 11 *Memoirs of John Quincy Adams* (Charles Francis Adams, ed.) (Philadelphia, 1876) 336.

³ *Prigg* at 608-610. Thomas C. Hambly, *Argument of Mr. Hambly, of York, (Pa.) in the Case of Edward Prigg* 8 (Baltimore, 1842), reprinted in 1 *Fugitive Slaves and American Courts: The Pamphlet Literature* (Paul Finkelman ed.) (New York, 1988), 128.

⁴ We have no record of what her last name was before she married Morgan.

⁵ John Ashmore Inventory, September 28, 1824, Harford County, Maryland, Register of Willis, #1672.

⁶ U.S. Census, 1830, Manuscript Census for Harford County, Maryland, p. 394.

⁷ For example, of the 55 cases decided by the Court in 1832, 46 were unanimous.

⁸ Justice Baldwin dissented in *Green v. Neal*, 31 U.S. (6 Pet.) 291, 301 (1832); *Leland v. Wilkinson*, 31 U.S. (6 Pet.) 317, 322 (1832); *Hughes v. Trustee of Clarksville*, 31 U.S. (6 Pet.) 369, 387 (1832); *Carne v. Morris*, 31 U.S. (6 Pet.) 598, 621 (1832); *Kelly v. Jackson*, 31 U.S. (6 Pet.) 622, 633 and *Wallace v. Parker*, 31 U.S. (6 Pet.) 680 (1832); Chief Justice Marshall dissented in *Greenleaf's Lessee v. Birth*, 31 U.S. (6 Pet.) 302, 315 (1832). Justice Thompson dissented in *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 749 (1832).

⁹ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 563, 596 (1832) (McLean, J., concurring) (Baldwin, J., dissenting) (Justice Baldwin did not publish his dissent).

¹⁰ See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 418 (1842) (Thompson & Baldwin, JJ., dissenting); *Mayor of Mobile v. Hallett*, 41 U.S. (16 Pet.) 261, 263 (1842) (Catron, J., dissenting); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 23 (1842) (Catron, Jr., concurring in part and dissenting in part).

¹¹ There were no cases with six opinions. There were eight cases with five opinions, only three of which contain a dissent. See 1 *Supreme Court of the United States, 1789-1980: An Index to Opinions Arranged by Justice 1-122* (Linda A. Blandford & Patricia R. Evans eds.) (Millwood, N.Y., 1983). This research cannot be done on LEXIS or WESTLAW. Lexis incorrectly labels concurrences as dissents and fails to note some separate opinions, which Blandford and Evans call "statements" by the Justices. WESTLAW does not allow for a search of dissents and concurrences in this manner.

¹² *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841) (holding that the ban on the importation of slaves for resale found in the Mississippi Constitution of 1832 did not go into effect until Mississippi passed an enforcement statute).

¹³ Story certainly did not like slavery, and in his younger days he had attacked it in private correspondence. He

had delivered harsh attacks on the illegal African Slave Trade to grand juries while riding circuit. See Paul Finkelman, *Slavery in the Courtroom* (Washington, D.C., 1984) 212-217. But, he was also hostile to abolitionists and never showed any sympathy to the plight of the slave. He was clearly not "antislavery" in any meaningful way, although some scholars have argued otherwise. See Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, 1975). The best biography of Story remains R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, 1985). For a much harsher view of Story see Barbara Holden-Smith, "Lords of the Lash, Loom, and Law: Justice Story, Slavery and *Prigg v. Pennsylvania*," 78 *Cornell Law Review* 1086 (1993).

¹⁴ Taney complained that under Story's opinion the states could not pass helpful laws, such as those obligating sheriffs to arrest "stray" Negroes on the assumption they were fugitive slaves. In fact, such laws would not have been either supplementary to the 1793 law nor a hindrance to its enforcement and thus would have been acceptable under *Prigg*. Furthermore, Story specifically noted in this opinion that states could pass police regulations to protect their own public safety.

¹⁵ *Report of the Case of Edward Prigg Against the Commonwealth of Pennsylvania. Argued and Adjudged in the Supreme Court of the United States at January Term, 1842. In which it was Decided that All the Laws of the Several States Relative to Fugitive Slaves are Unconstitutional and Void; and that Congress have the Exclusive Power of Legislation on the Subject of Fugitive Slaves Escaping into Other States* (Richard Peters ed.) (Washington, D.C., 1842). The text of this pamphlet is exactly the same as that published in *Prigg*, 41 U.S. (16 Pet.) 539 (1842). However, the subtitle and the preface reveal that Peters was either confused about what Story held or that he purposefully followed the lead of Chief Justice Taney.

¹⁶ *Id.* at 3, 8.

¹⁷ *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B., 1772).

¹⁸ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁹ For the most recent work on *Dred Scott* see Paul Finkelman, *Dred Scott v. Sandford: A Brief History With Documents* (Boston, 1997).

²⁰ *Prigg* at 617-18.

²¹ There were many arguments against the constitutionality of the 1793 law, including its lack of due process and its failure to provide a jury trial for suspected slaves. There was also a strong and structural argument against the constitutionality of the 1793 law. Every section of Article IV but Section 2 explicitly provides for federal enforcement. Thus, some scholars and lawyers at the time argued that the Framers intended fugitive slave rendition to be left to interstate comity, along with the extradition of fugitives from justice and the granting of privileges and immunities to citizens of other states.

²² *Prigg* at 613.

²³ Under the law each U.S. District judge was authorized to appoint a federal commissioner in every county within his jurisdiction. Among their various

duties, these commissioners were empowered to enforce the fugitive slave law, and on their own could call out a posse or seek the aid of the United States army or the state militia.

²⁴ Prigg at 625.

²⁵ William Wetmore Story, ed., 2 *Life and Letters of Joseph Story* (Boston: 1851) 392.

²⁶ Prigg at 616.

²⁷ Prigg at 622.

²⁸ See Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, MA, 1957) 84; See also "An Article on the Latimer Case" in 5 *The Law Reporter* 481 (March, 1843); *Proceedings of the Citizens of the Borough of Norfolk, on the Boston Outrage, in the Case of the Run-away Slave George Latimer* (Norfolk, VA, 1843) both reprinted in 1 *Fugitive Slaves and American Courts: The Pamphlet Literature* (Paul Finkelman, ed.) (New York, 1988) 157, 211; See also William M. Wiecek, *Latimer: Lawyers, Abolitionists, and the Problems of Unjust Laws, in Antislavery Reconsidered: New Perspectives on the Abolitionists* (Lewis Perry and Michael Fellman, eds.) (Baton Rouge, 1979) 219.

²⁹ "An Act Further to Protect Liberty," *Massachusetts Session Laws*, 1843 33.

³⁰ The best survey of these laws is Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (Baltimore, 1974) 107-29.

³¹ Paul Finkelman, "Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision," 25 *Civil War History* 5-35 (1979).

³² *Id.*

³³ For the history of the adoption of this law, see Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY, 1996) 80-104.

³⁴ See copy of bill with handwritten notations in Manumissions Box 4B, PAS Papers, microfilm reel 24, p. 184; J[ames] P[emberton] [Chairman of the Committee of Correspondence] to Alex. Addison, February 12, 1793, Committee of Correspondence, Letterbook, 1789-1794, Vol. 1, 103-4 (quotation on p. 104), PAS Papers, microfilm reel 11.

³⁵ The first section, aimed at kidnappers, not slave-catchers, punished anyone who used "force and violence," to

take and carry away, or cause to be taken or carried away, and shall by fraud or false pretence, seduce, or cause to be seduced, or shall attempt so to take, carry away, or seduce any negro or mulatto from any part or parts of this commonwealth, to any other place or places, whatsoever, out of this commonwealth, with a design and intention of selling and disposing of, or of causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto, as a slave or servant for life, or for any term whatsoever

"An Act to give effect to the provisions of the constitution of the United States relative to fugitives

from labor, for the protection of free people of color, and to prevent Kidnapping," ch. L, *Pennsylvania Session Law, 1826* 150, Sec. 1 (1826).

³⁶ William R. Leslie, "The Pennsylvania Fugitive Slave Act of 1826," 13 *Journal of Southern Hist* 429 (1952) at 440, reprinted in 6 *Articles on American Slavery: Fugitive Slaves* (Paul Finkelman, ed.) (New York, 1989) 211.

³⁷ Prigg at 622.

³⁸ Prigg at 625.

³⁹ *Id.*

⁴⁰ William Blackstone, *Commentaries of the Laws of England* (London, 1765). Story quoted Blackstone as follows: "Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace." 3 Blackstone 4, quoted in Prigg at 613.

⁴¹ Prigg at 613.

⁴² Newmyer, *Supreme Court Justice Joseph Story*, 370.

⁴³ Paul Finkelman, "Fugitive Slaves, Midwestern Racial Tolerance, and the Value of Justice Delayed," 78 *Iowa Law Review* 89-141 (1992).

⁴⁴ In his prize winning biography of Story, R. Kent Newmyer wrote: "Upon his return to Massachusetts in the spring of 1842, he spoke of opinion in Prigg 'repeatedly and earnestly' to his family and friends as a 'triumph of freedom.'" Newmyer, *Supreme Court Justice Joseph Story*, at 372. In the note to this sentence Newmyer cites to William Wetmore's discussion in 2 *Life and Letters* 392, and then Newmyer writes "'Triumph of Freedom' was Story's phrase, not his son's." But, Newmyer provides no other evidence that it was the Justice's phrase. Thus, William Wetmore edited out a key section of a letter to Senator Berrien, in which Justice Story set out a way that the South could avoid any aspects of the opinion that might make it a triumph of freedom. Newmyer's own compelling analysis of Story, combined with William Wetmore's less than honest editing of his father's papers, undercuts the credibility of William Wetmore's attribution of the "triumph of freedom" statement to the Justice. See Story to Berrien Letter, cited in note 47 *infra*.

⁴⁵ Newmyer, *Supreme Court Justice Joseph Story*, 376.

⁴⁶ Prigg at 625.

⁴⁷ Story to John Macpherson Berrien, April 29, 1842, in John Macpherson Berrien Papers, Southern Historical Collection, University of North Carolina, quoted at length in James McClellan, *Joseph Story and the American Constitution* (Norman, OK, 1971) 262n-263n.

⁴⁸ *Id.*

⁴⁹ William Story, ed., 2 *Life and Letters of Story* 405-06.

⁵⁰ Newmyer, *Supreme Court Justice Joseph Story*

350-51.

⁵¹ 26 F Cases 832 (C.C.D. Mass, 1822).

⁵² Joseph Story, **A Charge to the Grand Juries in Boston, and Providence, 1819** [Boston, 1819], reprinted in, 1 **The African Slave Trade** (Paul Finkelman, ed.) (New York, 1988). For the discussion of a similar charge in 1838, see Newmyer, **Supreme Court Justice Joseph Story** 345.

⁵³ Newmyer, **Supreme Court Justice Joseph Story**, 348.

⁵⁴ *Id.* at 350-51. Story to Ezekiel Bacon, April 1, 1844, in William Story, ed., 2 **Life and Letters of Story** 481.

⁵⁵ Story to Harriet Martineau, January 19, 1839, in William Story, ed., 2 **Life and Letters of Story** 307.

⁵⁶ Newmyer, **Supreme Court Justice Joseph Story**,

346.

⁵⁷ William Story, ed., 2 **Life and Letters of Story** 386.

⁵⁸ *Prigg* at 616.

⁵⁹ 11 U.S. (7 Cranch) 32 (1812).

⁶⁰ 25 F Cases 619 (C.C.D. Mass 1813).

⁶¹ *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816).

⁶² Story to Nathaniel Williams, October 8, 1812, reprinted in William Story, ed., 1 **Life and Letters of Story** 243.

⁶³ Story to Berrien, February 8, 1842, William Story, ed., 2 **Life and Letters of Story** 402-03.

⁶⁴ See *Van Reimsdyk v. Kane*, 28 F Cases 1062 (C.C.D. RI, 1812).

⁶⁵ 41 U.S. (16 Peters) 1 (1842).

⁶⁶ *Prigg* at 613.

Abraham Lincoln's Appointments to the Supreme Court: A Master Politician at his Craft

Michael A. Kahn

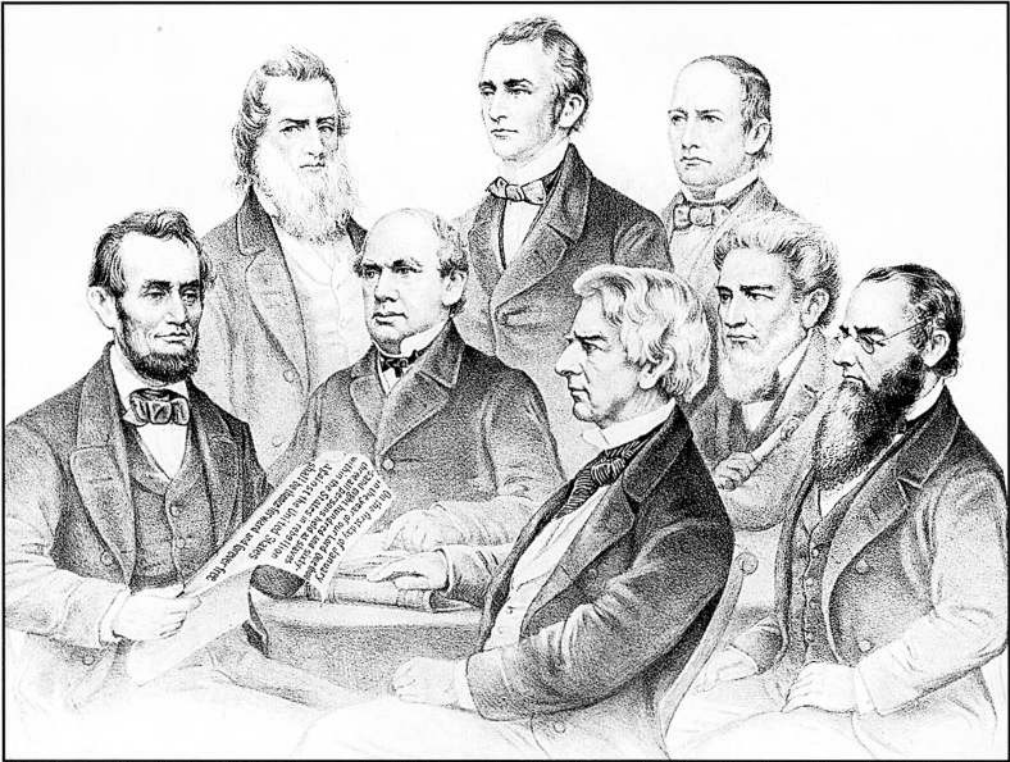
Abraham Lincoln appointed five men to the Supreme Court during a span of thirty-six months. Four of Lincoln's appointments were confirmed unanimously by the Senate and the fifth received a single solitary no vote.¹ The Senate acted on two of Lincoln's appointments the *same day* they were received and confirmed each of Lincoln's appointees within a week of receiving the nomination. Lincoln's mastery over this process was an impressive achievement because he was dealing with an active and energized United States Senate. Indeed, during the 1860s and early 1870s the Senate refused to confirm the last appointment of Lincoln's predecessor; refused to allow Lincoln's successor, Andrew Johnson, to appoint any Justices (choosing to abolish the seats rather than let Johnson fill the vacancies); and, several years later, rejected Ulysses S. Grant's appointment as Chief Justice!²

Lincoln was one of the most brilliant politicians in American history. Lincoln's deft, but

driven handling of his own political career bears witness to a Machiavellian genius in the handling of political matters, which has inspired generations of biographers. However (to borrow from Lincoln's most famous speech), little noted and not long remembered is the story of how Lincoln successfully packed the Supreme Court with right-minded men while achieving a myriad of political goals along the way.

Lincoln's Views of the Court

Abraham Lincoln ascended to the presidency on a personal platform that was extremely critical of the Supreme Court. During his famous debates with Stephen Douglas in 1858 and thereafter during his campaign for the presidency in 1860, Lincoln criticized the *Dred Scott* decision and aggressively advocated its reversal.³ In 1860 the Supreme Court was under attack by the dominant political forces of the North and its very legitimacy was being questioned



Abraham Lincoln is pictured here in 1862 reading the Emancipation Proclamation to his Cabinet. Second from the left is Edward Bates, who, unlike today's Attorneys General, had no say in the selection of nominees for the Supreme Court. In fact, when Bates asked Lincoln to nominate himself as Chief Justice ("as the crowning retiring honor of my life") the Attorney General was turned down. Also passed over in favor of Treasury Secretary Salmon P. Chase (seated at left of Lincoln) was Postmaster General Montgomery Blair.

by abolitionists and unionists who feared the Court, with its reactionary Chief Justice and its three Southern Justices, would impede the Union cause.⁴

In this political (and soon to be military) environment, Lincoln's first pronouncements as president regarding the Court were eagerly anticipated. In his inaugural address, Lincoln addressed the issue of the Court's legitimacy and role in American life.

... , the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the

hands of that eminent tribunal. Nor is there in this view any assault upon the Court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seeks to turn their decisions to political purposes.⁵

Lincoln thus articulated the first tenant of his political faith: neither the Court nor the laws, nor the rebellious acts of traitors, would be permitted to override the people's right to form and keep the Union. He also left himself open to persuasion that extreme measures, in extreme circumstances, would override even the Court's will, but he refused to openly defy or challenge the legitimacy of the Court.

Though Lincoln had never appeared before the Supreme Court, as a sophisticated litigator he had a healthy appreciation of its potential

power and considerable respect for its process from his background. In March 1861 Lincoln could not precisely foresee the clashes his administration would have with the judiciary over the suspension of habeas corpus, the raising of funds for the war, the draft, and the exercise of war powers. Nevertheless, Lincoln understood that secession was the greatest challenge the country had ever faced, and a hostile Supreme Court could cause untold harm to his goal of preserving the Union. In a nutshell, what Lincoln wanted from the Supreme Court was to be left alone. In retrospect, aided substantially by his five appointees and the ill health of his chief nemesis, Chief Justice Roger B. Taney, that is precisely what he got.

Lincoln's Defiance of the Law

Lincoln faced an unprecedented crisis from the very beginning of his presidency: immediately following his inauguration secessionist activities accelerated and the Civil War broke out. He responded to this crisis by increasing the power of the federal government under military rule and by instituting a series of activities of dubious legality but, in Lincoln's mind, of incontrovertible military necessity. Thus, beginning in 1861, Lincoln ordered or authorized widespread and seemingly arbitrary arrests of suspected traitors, broad confiscation of "enemy" property (especially on the seas), suspension of the writ of habeas corpus, initiation of the draft, utilization of paper money, and, ultimately, the freeing of the slaves in the Emancipation Proclamation. A fine lawyer, Lincoln could no doubt defend the legality of these actions under some legal theory. But, he was not interested in the legality of these measures (indeed, his administration did everything in its power to prevent the Supreme Court or any court from adjudicating the legality of his military activities). President Lincoln had a single over-arching political and military goal during his presidency: to preserve the Union. Virtually no sacrifice of human life or of the rule of law was too great to endure to reach that goal. It was in the context of that overriding political and personal philosophy that Lincoln filled five vacancies on the Court.

Three Vacancies at Once

Lincoln delivered his inaugural address on March 4, 1861—within fifty-two days he was presented with the opportunity to fill three vacancies on the Court simultaneously. No President since Washington had such good fortune. The vacancies were created by the refusal of the Senate to confirm president James Buchanan's nomination of Jeremiah S. Black to fill the seat of Justice Peter V. Daniel of Virginia who died on May 31, 1860; by the death of Justice John McLean⁶ of Ohio on April 4, 1861, and by the resignation of Justice John Campbell of Alabama on April 26, 1861, to return to his home in the Confederacy. These three seats, however, were severally encumbered by practical and political baggage.

Two of the seats were held by Justices Peter V. Daniels and John A. Campbell who rode circuit in Southern states that had seceded. Lincoln faced a conundrum as to these two seats. He did not recognize the legitimacy of secession, therefore he could not use the fact of secession to appoint Justices from loyalist states and thereby deprive (in Lincoln's world view) the Southern states of their representatives on the Court. On the other hand, he could not as a practical matter find Southern appointees; and, if he could find them, he could not safely send them to ride circuit in rebel territory. Lincoln's solution to this problem (and to the other practical problems that were caused by the system of Supreme Court Justices' circuit-riding) was to propose a new judiciary bill overhauling the circuits and realigning the states within the circuits.

On December 3, 1861, Lincoln addressed Congress and laid out his plan while at the same time using the pendency of this new scheme as justification for his delay in filling the three vacancies.⁷ For seven months Congress evaluated and rejected plans for reorganizing the federal judiciary—while members of Congress speculated as to which candidates for the Court were benefited by which new circuit configuration.

Meanwhile, the vacancies on the Court burdened Lincoln. He did not have any formal process for the selection of Supreme Court Justices. Lincoln's presidency occurred long be-

fore candidates were selected or screened by bar associations, the FBI, or the Justice Department. Moreover, Attorney General Edward Bates played no role whatsoever in the selection of the first four nominees and was himself an unsuccessful candidate for the final vacancy.⁸ Nor did Lincoln rely on any advisor or set of advisors in making his selections. Lincoln received considerable advice (by letter, newspaper article, personal visits, and even messages passed through Mrs. Lincoln) regarding each vacancy. These solicitations were received in a sphinx-like fashion, as the President did not reveal to the candidate or his supporters his true motivations or intentions. With respect to each vacancy, Lincoln, like a cook who knows just when the soup is ready, ladled out his decision without warning or explanation at the exact moment that suited his purpose and the circumstances as he saw them.

Lincoln's appointment process, accordingly, was designed to encourage energetic and intensive campaigns by office seekers and their supporters. Each of Lincoln's five appointees publicly and privately expressed their desire for appointment and each of them encouraged significant campaigns to have their wishes fulfilled. Of course for every winner there were dozens of long-shot losers and roughly a half-dozen candidates who "almost" made it.

From all appearances Lincoln received these campaigns good naturedly and with bemusement. Moreover, Lincoln learned much from these campaigns about the political forces that he needed to harness to win reelection, to win the war and to preserve the Union. How he applied these lessons is the story of his first three appointments.

Lincoln's Hand Is Forced

Vacancies in a third of the Court's seats though an inconvenience in the circuits did not affect the Court's work until it reconvened in December 1861. After convening the Court, Chief Justice Taney almost immediately absented himself due to illness. He was joined on the sidelines by an ailing Justice John Catron. Thus, in January 1862, the Court was paralyzed into inaction by the lack of a quorum and Lincoln was forced to appoint someone to

allow the Court to function.⁹

Noah H. Swayne of Columbus, Ohio, was the chosen man; Lincoln nominated him on January 21, 1862, and he was confirmed on January 24, 1862. Swayne was eligible to fill the vacancy left by the death of John McLean, who had ridden the Seventh Circuit (which then included Ohio) since 1829. Politically, Swayne was also well qualified, having vigorously supported Lincoln for President in 1860 and having been active in the fledgling Republican party since its formation. At fifty-seven Swayne was also young enough, not to mention healthy and wealthy enough, to withstand the considerable rigors and inconveniences of a Supreme Court circuit-riding life in the days when members of the Court were notoriously overworked and underpaid.¹⁰ Ideologically, Swayne was anti-slavery, which for Lincoln was a prerequisite for filling the vacancy left by McLean, a dissenter in *Dred Scott*.

Swayne's chief competition for the seat had come from elsewhere in the Seventh Circuit, predominately from Illinois. The competition for an Illinois seat had been fierce as Lincoln faced the prospect of choosing among professional and personal acquaintances, including David Davis, Senator Orville Browning, and U. S. District Judge Thomas Drummond. By selecting Swayne, Lincoln avoided prejudging whether Ohio and Illinois would end up in the same circuit under the new judiciary bill (they did not) and he avoided the sticky business of disappointing significant factions in his Illinois presidential coalition.

Though in retrospect it seems clear why he chose Swayne, it is less apparent how Swayne came to be positioned as the logical choice in January 1862. The story of how Swayne and his friends maneuvered their candidate into the position of being Lincoln's easiest and most comfortable choice tells much about the process of becoming one of Lincoln's Supreme Court nominees.

In describing Lincoln's first three appointees to the Court, the distinguished historians J.G. Randall and Richard N. Current observed "[a]ll were chosen primarily for political reasons."¹¹ Lincoln made clear that his selections for the Supreme Court would be young, healthy, staunchly anti-slavery, white males from the

circuits wherein the vacancy arose. However, within these universes Lincoln did not (as is the custom today) take any steps to identify eligible candidates nor did he empower any of his friends or any members of his administration to do so. Rather, Lincoln encouraged (by his receptiveness to their importuning and his delay in making his selections) vigorous campaigns on behalf of the eligible candidates.

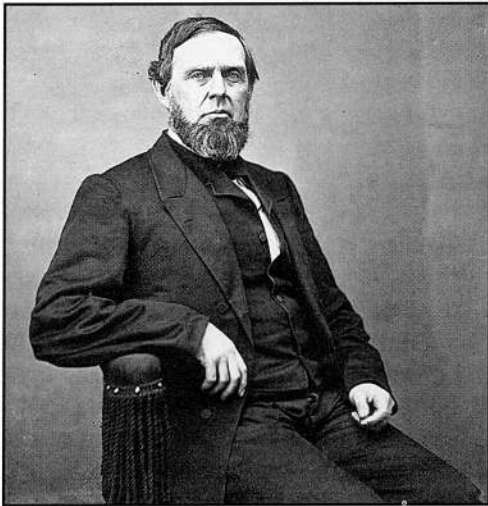
These campaigns included letter writing to Lincoln and persons thought to be influential with him; newspaper stories and editorials; public and private endorsements from individuals and groups (including state legislatures, state supreme courts and even from a subset of the Supreme Court itself), and numerous private meetings with the President. While these campaigns extolled the virtues of the various candidates, they also served Lincoln's personal and political purposes.

First, the campaigns coalesced public and congressional support for the candidates. Lincoln masterfully assessed and harnessed this support at the most opportune moments on the occasion of each of his five nominations. Each appointee was carried to Congress by a bandwagon of endorsements so it was not surprising that each was overwhelmingly and instantly

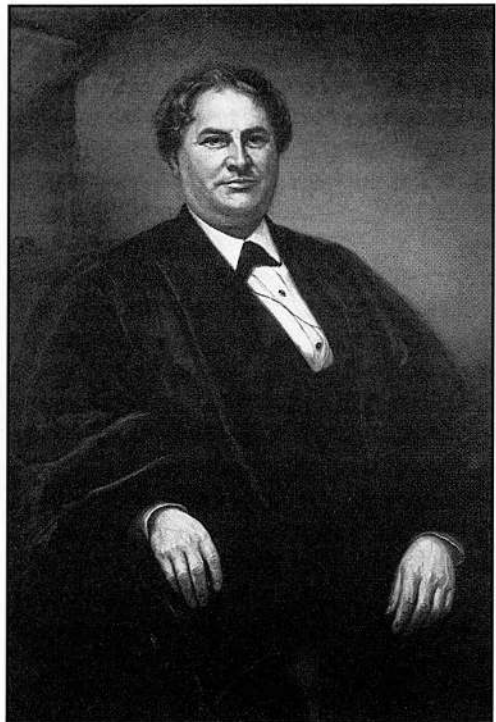
approved. Lincoln was a genius at assessing which candidate for each seat was the strongest politically and which candidate would draw the least possible opposition. Many candidates who met Lincoln's criteria were rejected because their political support was insufficient.

Second, though the campaigns extolled the virtues of the various candidates they were also conspicuous for their competition in registering approval of and support for Lincoln and his policies. Lincoln was elected in a highly fractious way in 1860 and his claim to re-election was tenuous until late in 1864. Lincoln milked the opportunities the five Supreme Court vacancies offered him for political gain. He especially used this *modus operandi* of gathering support for himself during Chase's campaign for Chief Justice, which ran concurrently with Lincoln's reelection campaign.

During these vigorous campaigns for Supreme Court appointment, candidates and their supporters were tripping over themselves to demonstrate their past loyalty to Lincoln and to promise future loyalty. The President deftly focused attention in each situation on the eventual winner by commenting privately to the eventual losers on the merits of the candidacy of the eventual winner. Accordingly, though

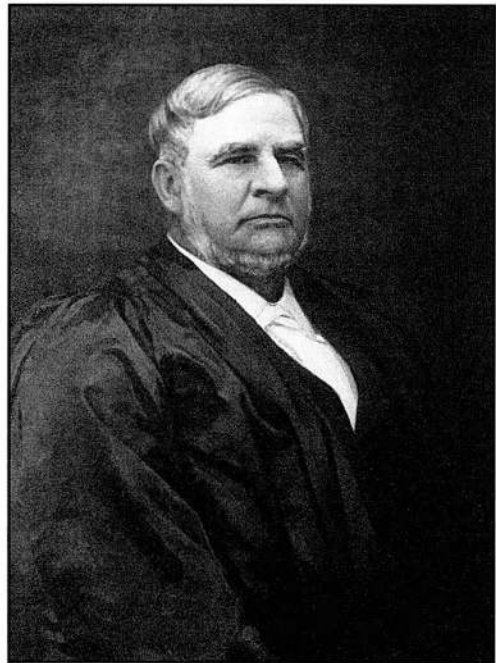


Samuel F. Miller (right) was outspokenly anti-slavery and staunchly Republican when Lincoln named him to the Bench in 1862. Most importantly, he was from Iowa, which Congress had just incorporated into the new Ninth Circuit. Iowa Senator James Harlan (above) and Iowa Governor Samuel Kentwood had visited the President to urge Miller's nomination.





When a vacancy occurred on the Eighth Circuit, it seemed obvious that Lincoln would appoint someone from his home state of Illinois. Senator Orville Browning (above), U. S. District Court Judge Thomas Drummond (above, right), and State Court Judge David Davis (right), all cronies, vied intensely for the nomination.



each appointment caused unhappiness in certain camps, each was so politically well supported and so well received in the Senate and the press that each was a significant political victory for the President and an implicit endorsement of his pro-unionist and anti-slavery policies.

Swayne perfectly and instantly anticipated how Lincoln was going to play the game. On the very day that John McLean died, April 4, 1861, Swayne wrote to Ohio's most formidable politician, Secretary of Treasury Salmon P. Chase, to seek his endorsement.¹² Swayne's letter to Chase makes it clear that he had already launched a campaign for the job through his friends. Swayne was extremely resourceful on his own behalf. He appealed to Lincoln's well known respect for McLean by implying that he was McLean's choice for the seat. He enlisted the support of a prominent railroad executive who encouraged the former railroad lawyer Lincoln to appoint Swayne, and he requested Governor William Dennison of Ohio to

write and visit Lincoln urging Swayne's appointment.

By the time Lincoln selected Swayne, a lawyer virtually unknown to the public who had never held political or judicial office, the choice had the support of Ohio's most powerful politicians—Chase and Dennison. Lincoln correctly gauged the appointment to be a popular one that would enhance his standing in Ohio and

elsewhere and that would cost him very little in any area. The appointment of Swayne, in fact, worked out exactly as Lincoln planned it.

Lincoln Gets His Bill and Iowa Gets a Seat

Lincoln finally got his circuit reorganization bill on July 15, 1862, and he immediately signed it. The bill reduced the five old Southern circuits to three and regrouped the Western states by placing Indiana with Michigan and Wisconsin in the Eighth Circuit. Most significantly the bill created a new trans-Mississippi circuit, the Ninth, which included Minnesota, Iowa, Kansas, and Missouri.

The result was a triumph for the vigorous Iowa congressional delegation that had single-mindedly lobbied for a configuration that would facilitate the appointment of the first Iowan (indeed the first person from west of the Mississippi River) to the Court.

Lincoln avidly watched the political game played out in Congress in which predictions that the placement of a state in a particular circuit would maximize or minimize the chances of persons from that state being appointed to the Court. Implicit in this contentious legislative fight was the prevailing assumption that despite its ardors and low pay, a seat on the Supreme Court was a prize worth fighting for with all available political artillery.

Lincoln was enthusiastic about rewarding the Iowans the fruits of their political victory. On July 16, 1862, within twenty-four hours of signing the judiciary bill, he appointed the Iowan Samuel F. Miller to the Court. The Senate, in turn, acknowledged the political appropriateness of this action and unanimously confirmed the nomination on the same day.

The speed with which Miller was nominated and confirmed reflects the fact that in many ways Miller was the prototypical Lincoln appointment to the Court. At forty-six Miller was young, outspokenly anti-slavery (he moved to Iowa from Kentucky in 1849 because Kentucky did not abolish slavery), and staunchly Republican (he was a candidate for governor of Iowa on the Republican ticket in 1861). He was also extremely intelligent; his legal career had flourished after he retired from a medical career.

But above all, Miller was the one and only

politically suitable candidate from the new trans-Mississippi Ninth Circuit. Miller was the subject of one of the most enthusiastic and extensive campaigns ever conducted on behalf of a prospective Supreme Court candidate. This campaign for nomination, which included letters from judges, governors, politicians, and other prominent figures throughout the country, culminated in a petition signed by 129 of 140 members of the House of Representatives and all but four Senators urging the nomination. Members of the Iowa congressional delegation also joined Iowa Senator James Harlan and Iowa Governor Samuel Kentwood in a visit to the President for the sole purpose of urging Miller's nomination.

For Lincoln's political purposes, Miller, who Lincoln did not know personally or by reputation, was the perfect candidate. The chorus of voices extolling Miller's attributes was thunderous and unanimous. Accordingly, Lincoln had the pleasant opportunity to reward the efforts of his supporters and help solidify his standing in an important political region, while offending almost no one and simultaneously furthering his political and jurisprudential principles (with regard to slavery and unionism) at the same time.

Of Lincoln's next three appointments, only one would be a remotely similar congenial experience.

Lincoln Selects a Crony

With the passage of the judiciary bill on July 15, 1862, and the nomination and confirmation of the Ninth Circuit candidate on July 16, 1862, the next appointment regarded the vacancy allocated to the Eighth Circuit, which included Lincoln's home state of Illinois. The contrast between the happy and easy selection of Miller and the contentious battle for the Illinois seat could not be more striking. For the Ninth Circuit there was really only one candidate; for the Eighth Circuit there were several, all from Illinois. Most prominently, Senator Orville Browning; U. S. District Court Judge Thomas Drummond; and State Court Judge David Davis all from Illinois. For the Ninth Circuit the decision involved no personal concerns—Lincoln had never met and had barely

heard of Miller before the campaign for his nomination commenced. For the Eighth Circuit, the decision was intensely personal because Lincoln had worked intimately with each rival candidate and many of their supporters. For the Ninth Circuit, Lincoln knew his decision would please almost everyone and would cause little or no controversy or political dissatisfaction. For the Eighth Circuit any choice would cause bitter disappointment and engender criticism from numerous long-standing supporters.

The President had been subject to pressures to appoint someone from Illinois, especially Browning and Davis, from the instant he was elected. However, Lincoln was able to resist this importuning by deferring a decision on the Illinois candidates until the judiciary bill was enacted. Unfortunately for Lincoln, this interval allowed supporters of Browning, Davis, Drummond, and others to mount impressive campaigns, bombarding the President with letters and personal visits urging the appointment of their favorite. Browning, Davis, and Drummond themselves did not make matters for the President easier as each made it clear to their friends and to Lincoln that he wanted, and believed he deserved, the appointment.

Moreover, because each of the candidates knew Lincoln and his closest friends well, each was aided by personal pleas to the President. Eliza Browning, the Senator's wife, wrote Lincoln that her husband had a greater claim to the job than anyone, and that proof of his loyalty was found in his recent illness that was caused by his strenuous speaking engagements on Lincoln's behalf. Perhaps the most effective advocate for Davis was Leonard Swett, a long time friend and supporter of Lincoln. Swett met with both Mrs. Lincoln, who said she had been urging Davis's appointment, and the President. Swett frankly told the President that Lincoln's political debt to Davis was too great to ignore. Swett promised Lincoln that if Davis was appointed, Swett would consider Lincoln's account with Swett (which according to Swett was severely out of balance) squared.¹³

Lincoln brooded on the choice between Browning and Davis for forty-two days after the judiciary bill became law, waiting until after Congress adjourned. At that point, Lincoln

declared his decision in an uncharacteristic way. As with his other four appointments to the Court, Lincoln kept his own counsel and did not tell anyone of his selection until he announced it. But, in this most personal situation, before appointing Davis he first wrote Davis declaring his intentions and he made his offer contingent on Davis's agreement to a political favor.

My mind is made up to appoint you Supreme Judge. . . . but I am so anxious that Mr. Bradley, present clerk at Chicago, shall be retained, that I think no dishonor for me to ask, and for you to tell me, that you will not remove him. Please answer.¹⁴

Lincoln's effort to preserve the political appointment of the clerk of the court in Chicago reveals his sensitivity to the political ramifications of denying Drummond the Supreme Court seat. Though Lincoln seems to have decided against appointing Drummond fairly early on, he realized the selection of Davis would cause him political grief in Illinois and he did everything he could to mitigate that harm.

Lincoln was a successful politician in Illinois because he understood the iron law of politics: to the victor goes the spoils. The Davis appointment was the ultimate expression of that principle. Davis had been Lincoln's friend and political supporter for many years. He was Lincoln's campaign manager in 1860 and was the chief architect of Lincoln's nomination for President at the convention. Indeed, no one in the period after Lincoln's election was more closely identified with Lincoln's electoral victory than Davis. Moreover, Davis, a jurist and an accomplished lawyer and politician, filled all of Lincoln's qualifications. Davis was an anti-slavery, pro-union, white male in his late forties from the correct state. Because of his qualifications and relationship with Lincoln the only surprising aspect of the Davis appointment is that it took Lincoln so long to appoint him.

The reason for the delay emerges from the political environment and Lincoln's relationship to that environment. While it was clear that Davis would be viewed as a natural, respect-

able, and easily confirmed appointment (which he was)¹⁵ it was less clear to Lincoln what political advantage he would gain from the selection of Davis and what political price he would pay for passing over Browning. Lincoln weighed the ramifications of denying Browning the nomination and seemed at times to be leaning toward selecting him. Ultimately, however, Lincoln was persuaded (most especially by Swett) that his personal and political debt to Davis was so significant that to reject Davis's candidacy would be too great an act of political disloyalty to be forgiven by his friends or forgotten by his enemies.

A Tenth Justice Is Appointed

The selection of Stephen J. Field, chief justice of the California Supreme Court, closely parallels the appointment of Miller. Field, like Miller, was appointed immediately after the enactment of a judiciary bill that created a new circuit and he was swiftly and unanimously confirmed. Field, also like Miller, was actively promoted by local interests and was presented to the President as a candidate without peer, controversy, or opposition.

Moreover, Field was clearly a distinguished and qualified candidate. Field, only forty six, was a brilliant jurist, and, although a Democrat by political allegiance, was pro-Union. Moreover, the selection of Field was pressed by his brother, David Dudley Field, a close confidant of Lincoln—an endorsement that sealed the deal for Field.

Field's selection also filled the need of having a Supreme Court Justice assigned to the Western states. It further provided the Court with an expert in the thorny land title cases arising out of California that were on the Court's docket.

Throughout 1862, as the Civil War raged and the constitutionality of Lincoln's war activities were hotly debated, Lincoln nervously faced the specter of the Taney Court dealing a mortal blow to the war effort. The prize cases offered the Court a ripe opportunity to harm Lincoln's efforts by potentially declaring the government's seizure of certain ships illegal. The controversial areas of the government's policies and practices with respect to legal ten-

der, the draft and habeas corpus were also trouble spots. Lincoln and his supporters knew that even with the three Lincoln appointees on the Court, the outcome of any particular Supreme Court decision was questionable.

Under these circumstances the opportunity to pack the Court with a tenth appointment was irresistible to Lincoln. He and his supporters, not surprisingly, were actively sympathetic to the claims of the West for a seat on the Court and they strongly supported the Judiciary Act, which Lincoln signed on March 3, 1863, creating the Tenth Circuit and the new Supreme Court seat. Three days later, Field, the unanimous candidate of the promoters of the Tenth Circuit seat, was nominated, and four days later he was confirmed.

In March 1863, Lincoln's most fervent wish for the Supreme Court was that it not interfere with his conduct of the war. Lincoln's support of the Court-packing bill was an explicit recognition of his view that the Supreme Court had no legitimate role in derailing the war effort. Field was selected by Lincoln because he was an acceptable candidate who Lincoln believed would not interfere with his war effort. Once again Lincoln was right. Field's nomination was highly praised and well received; and, thereafter, neither Field nor the Supreme Court impeded Lincoln's military activities.

Lincoln Names a Chief Justice

On October 12, 1864, Chief Justice Roger B. Taney died. Lincoln believed that in naming Taney's successor he was making a choice that would have profound practical and political consequences for his second term. Lincoln also realized that the naming of the country's fifth Chief Justice was a momentous historical event as the new Chief would continue the powerful role established by Marshall and Taney.

Taney had been sick almost continuously since Lincoln's first inauguration.¹⁶ As a consequence, Lincoln and others had thought frequently about replacing him. Nevertheless, when the news of Taney's death reached Lincoln, the President was deeply involved in both the military effort to win the war and his political effort to win re-election. Taney's death instantly energized campaigns for several aspir-



When Chief Justice Roger B. Taney died, Lincoln passed over William M. Evarts of New York (above), Justice Noah Swayne, and Postmaster General Montgomery Blair in favor of Salmon P. Chase, despite warnings that Chase's insatiable ambition made him dangerous.

ants for the job including William M. Evarts of New York, Justice Swayne of Ohio, Montgomery Blair of Maryland¹⁷ and, ex-Secretary of the Treasury Salmon P. Chase.¹⁸ Lincoln's secretary, John Hay, recorded in his diary "Last night Chief Justice Taney went home to his fathers . . . Already (before his old clay is cold) they are beginning to canvass vigorously for his successor. Chase men say the place is promised to their *magnifico*."¹⁹ Once again, Lincoln was inundated with advice that he immediately appoint each one of these men and many others including Secretary of War Edwin M. Stanton²⁰ and Attorney General Edward Bates (who asked the President for the appointment "as the crowning retiring honor of my life" by letter of October 13, 1864).²¹

As ever, Lincoln was the shrewd politician and in October of 1864 he saw no profit in alienating any of the factions of his political support by making a selection before the election. There is no evidence that he seriously considered announcing his choice before he was re-elected.

Lincoln was not, however, above using the enticement of the office to encourage campaign-

ing on his behalf. The highest prize in that regard was the active political support of Salmon P. Chase, the former Senator, governor, Secretary of the Treasury, and presidential candidate and a towering figure in the country. In the apt analysis of historian David Donald, after Taney's death in October 1864 Chase took the "cue" and stumped for Lincoln throughout the Midwest in marked contrast to his earlier maneuverings in 1864 to replace Lincoln as President.²² (Of course, Chase's unusual behavior did not go unnoticed and rumors of a bargain surfaced.)²³

Lincoln was re-elected on November 8, 1864. Congress and the Supreme Court were set to reconvene during the first week in December. The conflicting pressures on Lincoln regarding the appointment intensified directly after the election. Lincoln was variously urged by his friends and supporters to immediately appoint Chase; to forthwith appoint someone else (Evarts or Stanton or Swayne in particular); and, to *never* appoint the disloyal, overambitious, scoundrel Chase. Meanwhile, during the first months after his election Lincoln filled out his second term Cabinet and supervised the war effort.²⁴

Then, with startling suddenness, Lincoln sent Chase's name to the Senate on December 6, 1864. Lincoln did so with no advance notice. Even his closest advisors were uninformed before Lincoln put pen to paper and wrote, "I nominate Salmon P. Chase of Ohio to be chief justice of the Supreme Court of the United States, vice Roger B. Taney, deceased."²⁵

Lincoln's decision to appoint Chase was a highly personal one.²⁶ Managing Chase in the Cabinet had occupied Lincoln's mind almost continuously from Lincoln's controversial decision to name his political rival to the position of Secretary of the Treasury in 1861 until Lincoln finally accepted his resignation from the Cabinet (Chase's third such grandstand ploy) in the summer of 1864.²⁷ Because Chase was so obvious in expressing and pursuing his naked ambition and exhibited an imperious and arrogant style, Lincoln did not like Chase. But, Lincoln recognized that Chase was enormously talented and had a significant following among many politicians and certain segments of the public who found Chase's style and substance

more attractive than Lincoln's. Moreover, the President believed, correctly, that on critical, fundamental articles of Lincoln's political faith—abomination of slavery and the righteousness of the war effort—Chase was Lincoln's true ally. So Lincoln, from the time of his first election, adopted the strategy of attempting to harness and co-opt Chase's political and personal power to use in his own causes.

This strategy worked well enough until December 1864 as Lincoln manipulated Chase into serving his purposes in the Cabinet and in the re-election campaign. However, Lincoln had paid a heavy personal price for this strategy, both in terms of conflict within the Cabinet and in his seemingly endless dealings with a man who he believed to be petty and selfish. Now Lincoln was faced with the ultimate question of what to do with Chase. True to his character and style, Lincoln allowed others to express their opinions on the subject, but he made his decision alone without following any process or procedure.

Chase did everything in his power to force Lincoln's hand. He unequivocally expressed a desire for the job²⁸ and he activated a political campaign for his appointment. He lobbied critical members of Lincoln's coalition, such as Senator Charles Sumner, who intensely pressured Lincoln on Chase's behalf.²⁹

Through his friend Schuyler Colfax, Chase also addressed Lincoln's chief reservation about him—that Chase would use the Bench as a platform to continue running for President—by promising to retire such ambitions.³⁰ Finally, Chase publicly paid political homage to Lincoln by actively campaigning for Lincoln's re-election.³¹

Nevertheless, Lincoln was not forced to nominate Chase. Had he selected Evarts, Swayne, Stanton, or a dark horse candidate such as his friend Justice Davis, Lincoln probably would have secured an easy confirmation process. The Supreme Court retired on December 5, 1864, for want of a quorum³² so there was pressure to confirm any viable candidate. However, for Lincoln to choose someone other than Chase would have signified a failure to keep his apparent political bargain with Chase, the most prominent and politically powerful candi-

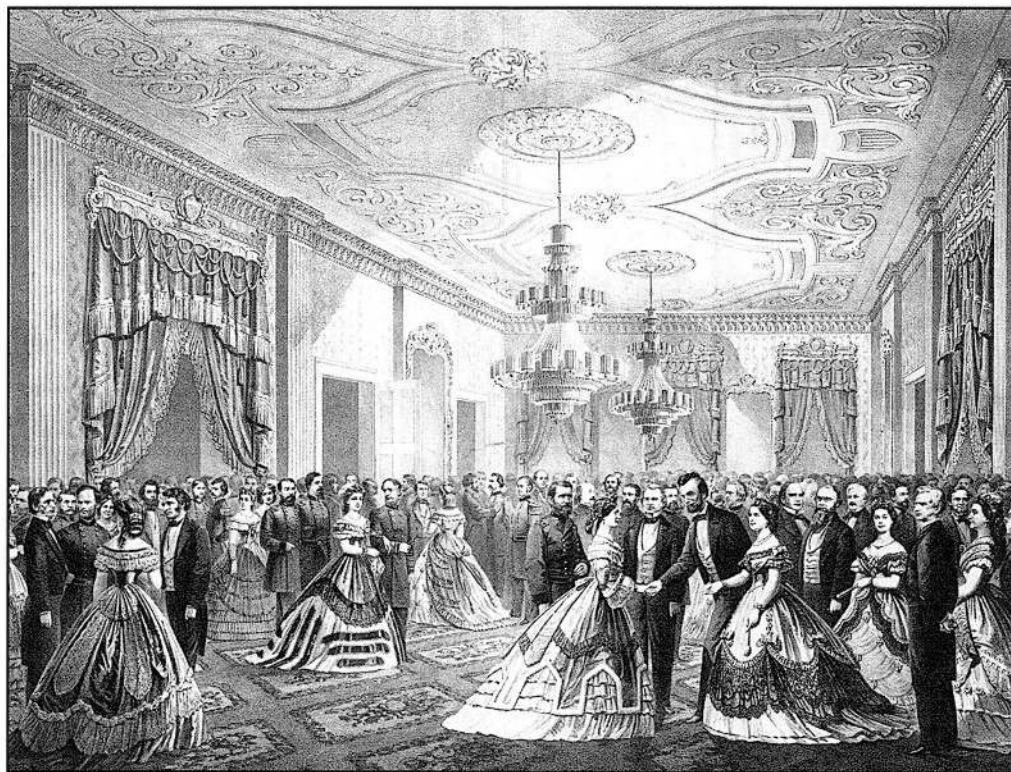
date for the job.

Lincoln justified his selection of Chase (to Representative George S. Boutwell of Massachusetts) on two basic grounds that have become accepted dogma: (1) Chase was politically prominent and had a large political following and (2) Chase's views were known to be in line with Lincoln's on issues that were critical to the administration and would soon be decided by the Court, notably the upholding of Lincoln's policies on emancipation and legal tender.³³

There were, however, others—particularly Evarts—who could have filled those requirements. Moreover, selecting Evarts, Swayne, or Davis³⁴ for what was arguably the highest honor within the power of Lincoln's presidency certainly would have been more personally satisfying to Lincoln. Ultimately, however, he selected Chase using the same criteria he used in selecting his other four nominees.

In December 1864 Lincoln looked beyond the war and saw a troubled time during which the radicals in the Senate would need to be pacified and the courts would need to cooperate in the healing efforts. The choice of Chase as Chief Justice was far and away the best way—in Lincoln's mind—of mollifying and co-opting the radicals,³⁵ of neutralizing (or at least silencing) Chase himself, a potentially dangerous and rancorous political enemy, and of providing leadership within the judiciary to promote administration efforts to preserve the Union in war and peace. The selection of Chase advanced every political and ideological goal that Lincoln was pursuing in December 1864. Therefore, Lincoln swallowed his personal qualms about Chase³⁶ and allowed his arrogant and obstinate rival the glory that he craved.

Once again, Lincoln was proven (at least during his lifetime)³⁷ correct. Chase's nomination was unanimously confirmed on the day it was received³⁸ and lavishly praised in the press. On December 15, 1864, Chase was installed as Chief Justice. On February 1, 1865, the first African-American, John S. Rock, was admitted to practice before the Supreme Court on a motion by Senator Sumner that Chase insured was favorably received. The



President and Mrs. Lincoln shook hands with honored guests at the Inauguration Ball in 1865 after the Chief Executive was reelected to office. Lincoln had stalled filling the office of Chief Justice until after the election so as not to antagonize competing factions. He had also not been above using the enticement of an appointment to encourage campaigning on his behalf.

Taney era and the nightmare of *Dred Scott* were seemingly over.

Conclusion: The Maximum Use of Political Power

Abraham Lincoln's unique presidency consisted entirely of a personal and political struggle to preserve the Union. To achieve this paramount goal Lincoln was willing to seize extraordinary powers, to violate the Constitution,⁴⁰ and to send thousands of men to their deaths. Throughout the war Lincoln managed and manipulated powerful men within and outside of his administration in order to achieve his goal. Lincoln's mistakes and triumphs in selecting people to do the important work in his government—to raise money, to deal with foreign governments, to manage the press, the Congress, and the numerous dissidents in the country, and to run his armies, were the most celebrated and criticized deci-

sions of his presidency. Lincoln used these personnel decisions, including his selection of appointees to the Court, to achieve his goal of preserving the Union. In each case, Lincoln assessed the political terrain and appointed the person he believed would best serve his ultimate political goal. Lincoln had no appointment process but he had a clear vision of what each appointment was meant to accomplish—to further his goal of preserving the Union.

Measured against his objective, Lincoln's performance in selecting Supreme Court Justices was a complete success. Each nominee was greeted by the Senate and the press with enthusiasm. Each satisfied specific and general political goals. Each decreased the threat of the judiciary side-tracking the war effort. Each increased Lincoln's prestige and influence within the Congress and within the larger political context. With his appointments Lincoln managed to reward his friends, co-opt his rivals, and avoid wasting any political capital or personal popularity on

even the scent of a confirmation fight. Given the contentious congressional environment and the miserable experience of his predecessor and two successors in appointing Justices, Lincoln's achievements in this regard seem all the more impressive.

The modern view of Lincoln is that he was *not* a country lawyer swept by the vagaries of political life into the unanticipated role of President.⁴¹ We now see Lincoln as a talented and highly successful lawyer personally driven by political ambition to the place of his choice—the presidency. The story of Lincoln's wise use of his five opportunities to fill vacancies on the Supreme Court comports completely with this understanding of Lincoln's career. A man of principle—indeed his unwavering belief in the importance of the preservation of the Union consumed him—Lincoln was also the consummate ambitious politician. The political appointments of his five Supreme Court Justices were the perfect use of his political skills in his personal effort to achieve his single-minded goal of preserving the Union.

Endnotes

¹ This no vote was a protest vote by Senator Hale of New Hampshire who thought the Court should be dissolved because of the outrages of the Taney Court. See David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: The University of Illinois Press, 1956), at 139.

² Henry J. Abraham, *Justices and Presidents* (Third Edition) (New York, NY: Oxford University Press, 1992), 115-116, 124-125, 129-131.

³ Lincoln said "But we think the Dred Scott decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this." See generally Robert W. Johannsen, *The Lincoln-Douglas Debates of 1858* (New York, NY: Oxford University Press, 1965), and *The President's Words: A Selection of Passages from the Speeches, Addresses, and Letters of Abraham Lincoln* (Boston: Walker, Fuller and Company, 1865), 111-112.

⁴ At the time of Lincoln's inauguration there were eight Justices and one vacancy. The Justices were Roger B. Taney of Maryland; James M. Wayne of Georgia; John Catron of Tennessee; John Campbell of Alabama; Samuel Nelson of New York; Robert Grier of Pennsylvania; Nathan Clifford of Maine; and, John McLean of Ohio.

⁵ *The Presidents' Words: A Selection of Passages from the Speeches, Addresses, and Letters of Abraham Lincoln* (Boston: Walker, Fuller

and Company, 1865), at 32.

⁶ McLean was appointed in 1829 after the Senate rejected John Quincy Adams' nomination of John J. Crittenden of Kentucky. In an ironic twist of fate Lincoln was sorely tempted to appoint the septuagenarian Crittenden to the same seat on McLean's death thirty-two years later in an effort to placate Southern interests. Ultimately Lincoln decided that the nomination of Crittenden would not sufficiently serve that purpose to warrant its obvious costs and risks. See Michael A. Kahn, "The Appointment of John McLean to the Supreme Court: Practical Presidential Politics in the Jacksonian Era," *Journal of Supreme Court History, 1993 Yearbook of the Supreme Court Historical Society* (Washington D.C.: The Supreme Court Historical Society, 1993), 59-71. D. Silver, *Lincoln's Supreme Court* (Urbana, IL: The University of Illinois Press, 1956), at 25 and 60. Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period 1836-64* (New York: MacMillan Publishing Company, 1974), at 812.

⁷ Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period 1836-64* (New York: MacMillan Publishing Company, 1974), at 823.

⁸ Marvin R. Cain, *Lincoln's Attorney General Edward Bates of Missouri* (Columbia, MO: University of Missouri Press, 1965), at 188.

⁹ David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: University of Illinois Press, 1956), at 58.

¹⁰ J. G. Randall and Richard N. Current, *Lincoln the President: Last Full Measure* (New York: Dodd, Mead and Company, 1955), at 269. David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: University of Illinois, 1956), at 142.

¹¹ J.G. Randall and Richard N. Current, *Lincoln the President Last Full Measure* (New York: Dodd, Mead and Company; 1955), at 268.

¹² Frederick J. Blue, *Salmon P. Chase: A Life in Politics* (Kent, OH: The Kent State University Press, 1987), at 139.

¹³ Emanuel Hertz, *The Hidden Lincoln, From the Letters and Papers of William H. Herndon* (New York: Blue Ribbon Books, 1940), at 338.

¹⁴ Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period 1836-64* (New York: Macmillan Publishing Company, 1974), at 828.

¹⁵ Davis's name was sent to the Senate December 1, 1862; it was referred to the Judiciary Committee, reported favorably by the committee and confirmed by the Senate within a week. See David M. Silver, *Lincoln's Supreme Court* (Urbana, IL: University of Illinois Press, 1956), at 79.

¹⁶ Senator Benjamin Wade ironically noted "No man ever prayed as hard as I did that Taney might outlive James Buchanan's term and now I'm afraid I have overdone it." See J. G. Randall and Richard N. Current, *Lincoln the President: Last Full Measure* (Urbana, IL: University of Illinois Press, 1955), at 270.

¹⁷ *Ibid.* at 272.

¹⁸ Charles Fairman, *The Oliver Wendell Holmes*

Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88, Part 1. (New York: Macmillan Publishing Company, 1971), at 8.

¹⁹ Quoted in Benjamin P. Thomas, **Abraham Lincoln a Biography** (New York: Alfred A. Knopf, 1952), at 491.

²⁰ Charles Fairman, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88**, Part 1. (New York: MacMillan Publishing Company, 1971), at 9.

²¹ Marvin R. Cain, **Lincoln's Attorney General Edward Bates of Missouri** (Columbia, MO: University of Missouri Press, 1965), at 311.

²² David H. Donald, **Lincoln** (New York: Simon and Shuster, 1995), at 536.

²³ J.G. Randall and Richard N. Current, **Lincoln the President: Last Full Measure** (New York: Dodd, Mead and Company, 1955), at 271.

²⁴ *Ibid.* at 265.

²⁵ *Ibid.* at 273. David M. Silver, **Lincoln's Supreme Court** (Urbana, IL: The University of Illinois Press, 1956), at 203.

²⁶ See generally Carl Sandburg, **Abraham Lincoln the War Years**, vol. 3 (New York: Harcourt, Brace & World, 1939), at 587; Charles Fairman, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88**, Part 1. (MacMillan Publishing Company, 1971).

²⁷ David H. Donald, **Lincoln** (New York: Simon and Shuster, 1995), at 508.

²⁸ David M. Silver, **Lincoln's Supreme Court** (Urbana, IL: The University of Illinois Press, 1956), at 200.

²⁹ Charles Fairman, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88**, Part 1. (New York: MacMillan Publishing Company, 1971), at 6.

³⁰ David M. Silver, **Lincoln's Supreme Court** (Urbana, IL: The University of Illinois, 1956), at 203.

³¹ Frederick J. Blue, **Salmon P. Chase: A Life in Politics** (Kent, OH: The Kent University Press, 1987), at 241.

³² David M. Silver, **Lincoln's Supreme Court** (Urbana, IL: The University of Illinois, 1956), at 203.

³³ J.G. Randall and Richard N. Current, **Lincoln the President Last Full Measure** (New York: Dodd, Mead and Company, 1955), at 283. David H. Donald,

Lincoln (New York: Simon and Shuster, 1995), at 552. J. G. Holland, **The Life of Abraham Lincoln** (Springfield, MA: Gurdon Bill, 1866), at 497. Stephen B. Oates, **With Malice Toward None The Life of Abraham Lincoln** (New York: Harper and Row, 1977), at 402.

³⁴ Lincoln remained close to Davis until his death and thereafter Davis administered his estate. See B. Benjamin P. Thomas, **Abraham Lincoln: a Biography** (New York: Alfred A. Knopf, 1952), 450-511.

³⁵ David H. Donald, **Lincoln** (New York: Simon and Shuster, 1995), at 552. J. G. Randall and Richard N. Current, **Lincoln the President Last Full Measure** (New York: Dodd, Mead and Company, 1955), at 274.

³⁶ Legend has it that Lincoln stated that he would "rather have swallowed his buckhorn chair than to have nominated Chase." See J.G. Randall and Richard N. Current, **Lincoln the President Last Full Measure** (New York: Dodd, Mead and Company, 1955), at 273.

³⁷ *Ibid.* at 274.

³⁸ David M. Silver, **Lincoln's Supreme Court** (Urbana, IL: The University of Illinois, 1956), at 203.

³⁹ J.G. Randall and Richard N. Current, **Lincoln the President Last Full Measure** (New York: Dodd, Mead and Company, 1955), at 274.

⁴⁰ In April 1864 Lincoln said, "Was it possible to lose the nation, and yet preserve the Constitution? By general law, life and limb must be protected; yet often a limb must be amputated to save a life: but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel, that, to the best of my ability, I had ever tried to preserve the Constitution, if, to save slavery, or any minor matter, I should permit the wreck of Government, Country, and Constitution, altogether." (April, 1864) See **The Presidents' Words: A Selection of Pages from the Speeches Addresses and Letter of Abraham Lincoln** (Boston: Walker, Fuller and Company, 1865), at 50-51.

⁴¹ See generally Elizabeth W. Matthews, **Lincoln as a Lawyer: An Annotated Bibliography** (Carbondale, IL: Southern Illinois University press, 1991). Herbert Mitgang, "Document Search Shows Lincoln the Railsplitter was Polished Lawyer," *The New York Times* (Feb. 15 1993), at A12.

Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court

Garrett Power

The Question

The Supreme Court reheard arguments in *Village of Euclid v. Ambler* on October 12, 1926. The case was on appeal from a 1924 decision in the United States District Court in Cleveland, Ohio, which had held the village's zoning ordinance unconstitutional under the Fourteenth Amendment to the United States Constitution. It was the long-awaited test case that would determine whether 24,000,000 Americans could continue to enjoy the benefits of comprehensive building zone laws.¹

Village Attorney James Metzenbaum argued on behalf of Euclid. Although by tradition governmental police powers were limited to situations involving health and safety, and suppression of nuisances, Metzenbaum opined that they were "elastic enough" to protect the "general welfare" from threats posed by the new conditions of urban life. He averred that since Euclid's ordinance promoted the "gen-

eral welfare," it was a constitutional exercise of governmental power.²

Alfred Bettman appeared as an *amicus curiae* defending zoning on behalf of the National Conference on City Planning. His brief made a significant tactical departure from the Metzenbaum brief. Rather than expansively defining zoning as a promoter of the general welfare, Bettman narrowly justified it as a nuisance suppressant. "Zoning . . . ha[s] the same fundamental basis as the law against nuisance," he said. It is merely a "new application of sanctioned traditional methods for sanctioned traditional purposes."³

As a matter of appellate advocacy, these two arguments seem consistent. They afforded the Supreme Court a choice—if the Court chose to openly embrace the new "sociological" jurisprudence, it could expand the police power to include city planning; if the Court preferred to pay lip service to *stare decisis*, it could rationalize zoning as consistent with precedent.⁴

But in a surprising turn, Metzenbaum notified the Court that in order to avoid “prejudice to any rights,” his client “earnestly” disassociated itself from Bettman’s brief. The Village rejected the argument that zoning could be constitutionally justified as a suppressant of nuisances.⁵

The advocates for zoning were at cross-purposes. Metzenbaum and Bettman were both staunch defenders of zoning and both presented complementary views. Yet Metzenbaum adamantly rejected Bettman’s line of argument. This essay considers why. The answer may shed light and cast shadows on the still debated conflict between public power and private property.⁶

The Zoning Movement

Building zone laws were part of the turn of the century Progressive Movement, which also advocated municipal reform, civil service, plebiscites, “trust-busting,” railroad legislation, and wage and hour laws. The movers were middle-class businessmen, intellectuals, lawyers, and journalists, all with an interest in preserving the quality of their society.⁷

These reformers were intent on planning urban growth. Thoughtful public choices with respect to the location of sewers, streets, parks, and public buildings, and suburban development, and the design of transit and utilities system, were intended to create cities, beauti-



Because the Euclid ordinance discriminated on the basis of wealth, it could be interpreted as being discriminatory to blacks and immigrants who could not afford to live in single family dwellings. In *Yick Wo v. Hopkins* (1886) the Court had considered a San Francisco ordinance regulating the location of laundries and held it unconstitutional upon a finding that it was administered in a biased fashion so as to exclude laundries operated by Chinese immigrants.

ful and efficient. The first step along the road to the creation of a city plan was zoning, “. . . the creation by law of districts in which regulations, differing in different districts, prohibit injurious or unsuitable structures.”⁸

Building zone laws had an immediate appeal. New York City adopted the first comprehensive ordinance in 1916 and by 1926 there were at least 425 zoned municipalities. Chicago, Boston, Baltimore, Pittsburgh, Los Angeles, Buffalo, and San Francisco headed the list of other zoned cities.⁹

The Fourteenth Amendment

Notwithstanding their legislative successes, zoners had a nagging concern. In 1868, in the aftermath of the Civil War, the United States Constitution had been amended to limit the regulatory power of state and local governments. Language in the amendment read as follows:

No State . . . shall . . . 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.¹⁰

Was zoning consistent with the Fourteenth Amendment of the United States Constitution?

Soon after enactment of the Fourteenth Amendment, the Supreme Court had reaffirmed in *Munn v. Illinois* (1876) that the states continued to possess: “the police powers . . . inherent in every sovereignty. . . to govern men and things.”¹¹ Two decades later in *Chicago, Burlington and Quincy Railroad Company v. Chicago* (1896) the Court qualified this power with a requirement found implicit in the Fourteenth Amendment that “. . . compensation be made for private property taken for public use.”¹²

Early in the twentieth century, the Supreme Court reconstructed the Fourteenth Amendment so as to allow the Court actively to second-guess the wisdom of social and economic legislation. Regulations were made vulnerable to attack on three interrelated constitutional grounds: first, that they were a taking of private property without just compensation; sec-

ond, that they were a denial of due process of law, and; third, that they denied equal protection of the law.¹³

The first Fourteenth Amendment argument challenging the validity of zoning laws was that their application resulted in the confiscation of private property. Some land owners necessarily found their properties devalued as the effects of zoning constraints played out in the real estate market and the laws made no provision for compensation. As Justice Oliver Wendell Holmes, Jr., concluded for the majority of the Court in *Pennsylvania Coal Co. v. Mahon* (1922), if that loss reached a “certain magnitude” and “went too far” it would become a “taking” for which the landowner would be entitled to just compensation. Hence zoning was subject to attack by owners whose property was substantially diminished in value.¹⁴

The second ground for constitutional attack was that zoning laws violated due process since their goals were not limited to the legitimate concerns with “public health, safety and morals.” Traditional nineteenth century regulations suppressed nuisances such as sewers, stables, smokestacks, and the like. But zoning aimed to do more—it aimed to promote amenity and aesthetics.

Twentieth century reformers had been attempting to convince the Court to expand the police power to allow the promotion of the “general welfare,” but the Court proved reluctant. Between 1920 and 1926 it had struck down more state legislation under the Fourteenth Amendment than in the preceding fifty-two years of the amendment’s existence. Among the general welfare laws struck down were wage and hour regulations, compulsory arbitration requirements, and regulations of weights and measures. When zoning promised to plan city growth, it likewise was subject to constitutional attack as being beyond the scope of the police power and therefore violative of due process.¹⁵

The third ground for questioning the constitutionality of zoning was that it amounted to “[i]nvidious discrimination in favor of certain persons to the prejudice of others” and therefore denied equal protection of the law.¹⁶ The Fourteenth Amendment did not prevent the

states from resorting to classification for the purpose of legislation, “[b]ut the classification must be reasonable, not arbitrary, and must rest upon some grounds of difference . . . so that all persons similarly situated shall be treated alike.”¹⁷

Buchanan v. Warley (1917) provided a then current example of a law wherein unreasonable classification amounted to a denial of equal protection. Therein the Court considered:

[a]n ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making . . . provisions requiring. . . the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively,¹⁸

and held it to be an invidious discrimination rather than a legitimate exercise of the police power. Hence proof of the unreasonableness of zoning’s classifications might be used in Justice Holmes’ words as “. . . the last resort of constitutional arguments.”¹⁹

The Test Case

The case testing the constitutionality of zoning came from the Village of Euclid, a town of 4,000 inhabitants on the outskirts of Cleveland. The Ambler Realty Company had purchased sixty-eight acres of vacant land in 1912. The 1922 zoning ordinance prevented it from using the parcel’s Euclid Avenue frontage for industrial, commercial, or apartment purposes. Only single-family and two-family dwellings were permitted along the avenue. Ambler challenged the ordinance under the Fourteenth Amendment as taking of private property, a denial of due process, and a deprivation of equal protection.²⁰

On the taking issue, allegations were presented that the Ambler tract had a free market value of \$10,000 an acre, but not in excess of \$2,500 as restricted by the zoning ordinance. The only real question was whether the magnitude of the loss suffered by Ambler was great enough under the Penn-

sylvania Coal rationale to require compensation. When answering this question the courts would be mindful of Holmes’ qualifying admonition therein that “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in [the] general law.”²¹

The due process challenge to the Euclid ordinance was that it was not within the scope of the village’s police power. The leading authority on this constitutional issue was Professor Ernst Freund, a member of the law faculty at the University of Chicago, who had written a treatise on the Police Power in 1904. Therein he classified and analyzed all of the hundreds of cases on the subject that had arisen in the thirty or forty years since the Fourteenth Amendment’s enactment.²²

From Freund’s point of view it required no great departure from old principles to recognize the regulatory power to exclude industry and commerce from residential neighborhoods. Courts and legislatures had done that under the rubric of nuisance control for centuries: “zoning simply removes practical difficulties — it does not create any legal problems with which we have not been long familiar.”²³

“[T]he crux of the zoning problem” in Freund’s words “lay in the residential district.” When it came to the designation of “one family home districts” he observed that real justification was “amenity” rather than “health and safety.” Since the Euclid ordinance created a “residential preference” along the Avenue, it called into constitutional question the willingness of the Court to expand the police power to include this pursuit of the “general welfare.”²⁴

The Euclid ordinance also raised the specter of invidious discrimination. A decade before, in *Buchanan v. Warley*,²⁵ the Court had struck down a zoning ordinance that divided Louisville, Kentucky, into white blocks and black blocks, holding the law to be in direct violation of the Fourteenth Amendment. The Euclid ordinance contained no racial classification, but its residential preference certainly discriminated on the basis of wealth. Ambler Realty’s brief seemed to be on the mark when it argued :

All the people who live in the village and are not able to maintain single family residences of the size and lot area herein prescribed, are pressed down into the low-lying land adjacent to the industrial area, congested there in two-family residences and apartments, and denied the privilege of escaping for relief to the ridge or lake.²⁶

The ordinance excluded lower class people from upper class neighborhoods.

More particularly, the effect of “one family home districts” was to discriminate against blacks and immigrants who for the most part lived in tenement buildings and apartment flats. In *Yick Wo v. Hopkins* (1886) the Court had considered a San Francisco ordinance regulating the location of laundries and held it unconstitutional upon a finding that it was administered in a biased fashion so as to exclude laundries operated by Chinese immigrants. The Euclid ordinance was likewise subject to constitutional challenge if it could be shown to be conceived with an “evil eye and unequal hand” so as to exclude colored people and foreigners.²⁷

The Lower Court Decision

In May of 1923, Ambler filed suit in the United States District Court for the Northern District of Ohio. The zoning ordinance was assailed on the grounds that it violated the Fourteenth Amendment. Judge David C. Westenhaver heard the evidence and issued his opinion. He focused on the Equal Protection argument and forcefully concluded:

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of sixteen square miles in a straight-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it

In the last analysis the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a man-

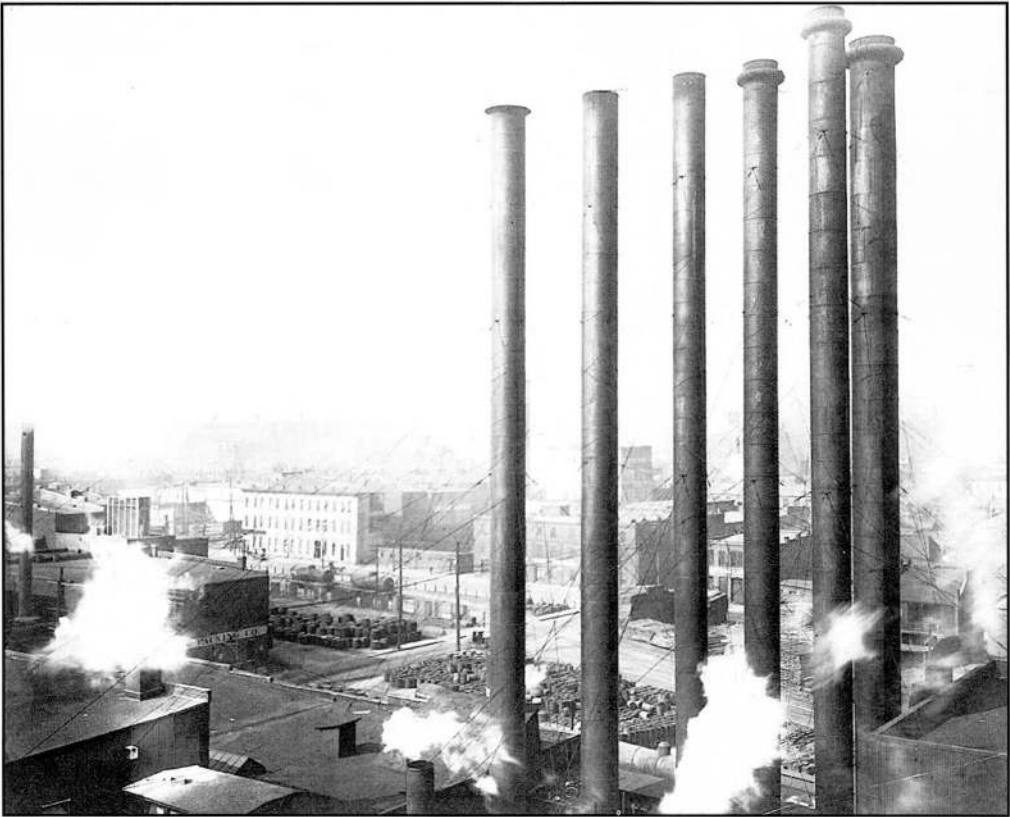
sion and others in a shack, why some live in a single-family dwelling . . . and others in an apartment. . . is primarily economic. [This ordinance]. . . furthers such class tendencies. . . [I]t may not be done without compensation under guise of exercising the police power.²⁸

The sincerity of Judge Westenhaver’s concern for the lumpenproletariat can be called into question. Elsewhere in the opinion he lamented the fact that the High Court had denied to cities the power to segregate “the colored or certain foreign races” even though their invasion of white neighborhoods disrupted the public peace and blighted property values. He wrote as a disgruntled inferior court judge reluctantly bound by the Supreme Court precedent of *Buchanan v. Warley*. But there is no discounting the acuity of his conclusion—zoning was well designed to segregate the population according to their situation in life. The Euclid ordinance had failed the first test of its constitutionality.²⁹

The Appeal

With little grounds for optimism, Metzenbaum determined to take an appeal to the Supreme Court. The nine-man Court had come to bear the conservative stamp of William Howard Taft, the former President of the United States who served as the Chief Justice. Among the Associate Justices only Holmes and Louis D. Brandeis had a record of commitment to legislative reform. Justice George Sutherland led the dominant conservative block. He was an ideologue and *laissez-faire* was his ideal. For him, the achievement of freedom was a simple matter of reducing governmental restraints to an absolute minimum.³⁰

When taking the village’s appeal to the Supreme Court, Metzenbaum was impressed by the importance of his task. He considered Judge Westenhaver’s decision a “challenge to American citizenry”; the *Euclid* case posed the question of whether “the Constitution was meant so to hamper and restrict the American people, or was intended to protect them in their right to make their cities, large and small, liveable and tenantable for the present as well as for the



The author argues that zoning laws have traditionally been a way of segregating the social classes by keeping smokestacks, slaughterhouses, and apartment flats or row houses that accommodated blacks and immigrants, on the other side of the railroad tracks from the wealthy.

coming generations.”³¹

The National Conference on City Planning had debated long and hard about joining in this appeal. Some argued that the case was weak and that the Conference should not be involved. Leader Alfred Bettman, however, convinced the Conference that there was too much at stake to remain silent.³²

Bettman undertook to prepare a brief *amicus curiae*, and hoped to argue before the Court in support of zoning. But to his embarrassment he had failed to file his brief on time. In January of 1926, Metzenbaum argued alone in defense of zoning before the Court. As luck would have it, Justice Sutherland was absent that day and most likely did not participate in the vote. The Court failed to reach a decision. Chief Justice Taft scheduled the case for reargument on October 12, 1926. The rehearing gave Bettman a chance to make amends. He was given leave to file a brief on behalf of the National

Conference on City Planning and to participate in the second round of oral argument.³³

Both James Metzenbaum and Alfred Bettman invoked the police power in defense of zoning. Metzenbaum argued that the police power should be expanded to include the “philosophy of zoning” because it promoted the “general welfare.” Bettman parted company. In his view no expansion of the police power was called for since zoning was just a new way of suppressing “nuisances” or “semi-nuisances” that had always been the subject of police power constraints. Metzenbaum disagreed. The village “studiously refrained” from arguing that zoning could be constitutionally justified as a suppressant of “nuisances” or “semi-nuisances.”³⁴

The Answer

Metzenbaum and Bettman disagreed and

we are now in a position to understand why. Zoning regulations, although publicized in terms of the physical constraints they imposed on the use of land, had a social dimension. They were well-conceived to put everything, and everybody in the appropriate place. Smokestacks, slaughterhouses, and stables were placed on the other side of the railroad tracks, and apartment flats and row houses that accommodated second class people (including colored people and foreigners) were not permitted in first-class neighborhoods.

The Supreme Court under the patrician leadership of Chief Justice Taft was an establishment of the ruling elite. Most of the Associate Justices (Pierce Butler, Holmes, James C. McReynolds, Edward Sanford, Harlan Fiske Stone, and Willis Van Devanter) were the well-educated sons of upper-class Protestants of old American stock. The two notable exceptions were Brandeis, who was a product of the German-Jewish aristocracy, and Sutherland who had escaped his background as a poor Mormon immigrant to become a parvenu plutocrat. To the extent that the effect of zoning was to re-enforce the existing social order and to keep everyone in his proper place, Metzenbaum and Bettman could expect a sympathetic ear from such substantial citizens. The task of the advocates was to provide a decision theory with which the Court's *laissez-faire* majority would be comfortable.³⁵

Both briefs had weaknesses. Metzenbaum's view was vulnerable to ideological attack. It required that traditional police power objectives (suppression of nuisances and promotion of public health and safety) be expanded to include the promotion of the "general welfare." The Court was being asked to embrace a "sociological jurisprudence" and to deprive private property owners of their investment-backed expectations.

Bettman's view provided the Supreme Court with a rationalization that it might employ to reconcile zoning with its precedents. But the argument that zoning was designed to suppress nuisances highlighted the fact that zoning discriminated on the basis of class. "One family home districts" were zones in which only the well-to-do could afford to live. Cheap, multi-family housing, nuisances by no stretch of the

traditional legal imagination, were excluded. In his widely read 1904 treatise *Police Power*, scholar Ernst Freund had dogmatically declared: ". . . in defining nuisances no standards may be established which discriminate against the poor."³⁶ Zoning violated that admonition.

By the 1920s, Freund had moderated his views and determined not to make "a fetish" of them. The reason for his change of heart was his residence on the South Side of Chicago. "The coming of colored people in the district" had convinced him of an overriding need for zoning as a means of racial exclusion.³⁷

It seems that the motivation behind zoning had more to do with social engineering than physical planning. The covert intention of the regulation was to exclude colored people (and other second class citizens) from white middle class neighborhoods. *Buchanan v. Warley*³⁸ had outlawed measures that overtly mandated *de jure* racial housing segregation but zoning accomplished the same goal, on the sly. Bettman's "nuisance suppressant" argument threatened disclosure of this "dirty little secret." Metzenbaum's "general welfare" argument avoided this exposure by maintaining the pretense that zoning established physical design standards that benefitted all members of the community.

The Opinion

Justice Sutherland was present along with his eight Brethren to hear the reargument in the *Euclid* case. Chief Justice Taft directed him to write the opinion for the majority. Sutherland likely had difficulty making up his own mind as to the constitutionality of zoning.³⁹

On one hand, the physical design standards mandated by zoning were an ideological anathema. Such constraints on the use of property were a novel and intrusive entry by government into a private market. But on the other hand, zoning promised to keep everything and everybody in its proper place. Zoning would protect the class system by segregating people according to their station in life. Blacks and immigrants could be kept out of first-class neighborhoods.

Writing for a 6-3 majority of the Court,

Justice Sutherland upheld the validity of the ordinance. On the confiscation issue, he discounted Ambler's evidence of economic loss, implicitly finding that the regulation did not go "too far." On the due process issue he followed Bettman's lead and held that zoning merely suppressed activities that came "very close to being nuisances." He dodged the equal protection issue by unapologetically assuming the plutocratic posture. Apartments were "parasites" degrading single-family detached neighborhoods by cutting off light and air, and by increasing noise and traffic. He ignored the fact that single-family zoning was designed to promote segregation by class and race.⁴⁰

Bettman's advocacy carried the day. In the final analysis Sutherland favored his social self-interest over his economic ideology. Bettman provided him with a rationalization that reconciled zoning with the precedents, and that made expansion of the police power unnecessary. Metzenbaum's concern that talk of nuisance would expose zoning's invidious discrimination proved misplaced; Sutherland overlooked the evidence of class and racial bias. The Village was free to put its ordinance into force and effect.⁴¹

And in a final note of irony Euclid Village lawyer James Metzenbaum gained a national stature. He became a nationwide expert and his book, **The Law of Zoning** became the standard legal treatise. All his fame and recognition seem based upon the success of an argument he studiously disdained.⁴²

Endnotes

¹ Arthur V. N. Brooks, "The Office File Box—Emanations from the Battlefield" in Charles M. Haar and Jerold S. Keyden, eds., **Zoning and the American Dream** (1989) 3-5; *Ambler Realty v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924); Metzenbaum "Briefs on Behalf of Appellants," 139, reprinted in **Landmark Briefs and Arguments in the Supreme Court of the United States**, vol. 24, 560.

² Metzenbaum "Briefs on Behalf of Appellants," 45, 81, 137 reprinted in **Landmark Briefs and Arguments in the Supreme Court of the United States**, vol. 24, (1975) 466, 502, 558.

³ Bettman, "Brief on Behalf of National Conference on City Planning," 23-28, 62, reprinted in **Landmark Briefs and Arguments in the Supreme Court of the United States**, vol. 24, (1975) 785-790, 824.

⁴ See, e.g., *Goldman v. Crowther*, 147 Md. 282, 128 A. 50

(1925).

⁵ Metzenbaum "Briefs on Behalf of Appellants," 42-43 reprinted in **Landmark Briefs and Arguments in the Supreme Court of the United States**, vol. 24, (1975) 870-871.

⁶ See, e.g., Richard Epstein, **Takings: Private Property and the Power of Eminent Domain** (1985).

⁷ Howard Gillman, **The Constitution Beseiged** (1993) 148.

⁸ John M. Gries, "The City Plan and What It Is," in "Zoning in the United States," *The Annals of the American Academy of Political Science*, Vol. 155 Part II (1931) 180.

⁹ United States Department of Commerce, **A Standing Zoning Enabling Act**, Washington (rev. ed. 1926) "Foreword"; United States Department of Commerce, **A Zoning Primer** (1926) 6.

¹⁰ U.S. Const. Amend. XIV.

¹¹ *Munn v. Illinois*, 94 U.S. 113 (1877).

¹² *Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1896).

¹³ Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harvard Law Review* 40 (1927) 943-44.

¹⁴ *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922).

¹⁵ Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harvard Law Review* 40 (1927) 943-44. See, e.g.: *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Wolff Co. v. Industrial Court*, 262 U.S. 522 (1923); *Burns Baking v. Bryan*, 264 U.S. 504 (1924).

¹⁶ *Hagar v. Reclamation District*, 111 U.S. 701 (1884).

¹⁷ *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

¹⁸ *Buchanan v. Warley*, 245 U.S. 60, 70 (1917).

¹⁹ Justice Holmes in *Buck v. Bell*, 274 U.S. 200, 208 (1927).

²⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

²¹ *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413 (1922).

²² Ernst Freund, **The Police Power: Public Policy and Constitutional Rights** (1904), reprint edition 1976 Arno Press.

²³ Ernst Freund, "Some Inadequately Discussed Problems of the Law of City Planning and Zoning," *Planning Problem Town, City and Region: Papers and Discussion at the Twenty-first National Conference on City Planning* (1929) 92.

²⁴ Freund, "Some Inadequately Discussed Problems . . ." 81, 92.

²⁵ *Buchanan v. Warley*, 245 U.S. 60 (1917).

²⁶ Newton E. Baker & Robert Morgan, "Brief on Behalf of Appellee" 79 reprinted in **Landmark Briefs and Arguments in the Supreme Court of the United States**, vol. 24, (1975) 649.

²⁷ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²⁸ *Ambler Realty v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

²⁹ *Ambler Realty v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924).

³⁰ Joel Francis Paschal, **Mr. Justice Sutherland: A Man Against the State** (1951) 236-238; Seymour Toll,

Zoned American (1969) 248-253.

³¹ James Metzenbaum, **The Law of Zoning** (2d ed. 1955) Vol. 1, 57.

³² Toll, **Zoned American**, 236.

³³ Metzenbaum, **The Law of Zoning** 56-58; Toll, **Zoned American**, 235-239. Timothy A. Fluck, "Euclid v. Ambler: A Retrospective" *J. Amer. Planning Association* 52 (1986) 330-35. Felix Frankfurter and James M. Landis in their preface to **The Business of the Supreme Court** (1928) vii-viii, suggest (but do not confirm) that in 1926 Supreme Court Justices who miss the oral argument do not participate in the decision.

³⁴ Metzenbaum "Briefs on Behalf of Appellants (On Rehearing)," 42-43 reprinted in **Landmark Briefs and Arguments in the Supreme Court of the United States**, vol. 24, (1975) 870-871.

³⁵ Toll, **Zoned American**, 245-248; Constance Perin, **Everything in its Place: Social Order and Land Use in America** (1977) passim.

³⁶ Freund, **The Police Power** 161.

³⁷ Freund, "Some Inadequately Discussed Problems. . ." 81, 92-93.

³⁸ *Buchanan v. Warley*, 245 U.S. 60 (1917).

³⁹ According to a law clerk's recollection Sutherland originally had been writing an opinion holding zoning unconstitutional and then changed his mind. But the clerk's recollection is almost certainly garbled. He remembers Sutherland as involved in writing an opinion for the Court following the first argument in the *Euclid* case who then requested a reargument after which he changed his mind and upheld the ordinance. Since Justice Sutherland was not present for the first argument in the *Euclid* case, it seems unlikely that he would have been writing the opinion. Alfred McCormack, "A Law Clerk's Recollections," 46 *Columbia Law Review* 710 at 712 (1946).

⁴⁰ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁴¹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁴² Metzenbaum, **The Law of Zoning**.

“Compelled by Conscientious Duty”: *Village of Euclid v. Ambler Realty Co.* as Romance

Michael Allan Wolf*

In early 1851, Nathaniel Hawthorne penned an intriguing preface to his latest work—**The House of the Seven Gables**. Hawthorne drew a meaningful (if rarely appreciated) distinction:

When a writer calls his work a Romance, it need hardly be observed that he wishes to claim a certain latitude, both as to its fashion and material, which he would not have felt himself entitled to assume, had he professed to be writing a Novel. The latter form of composition is presumed to aim at a very minute fidelity, not merely to the possible, but to the probable and ordinary course of man’s experience. The former—while, as a work of art, it must rigidly subject itself to laws, and while it sins unpardonably, so far as it may swerve aside from the truth of the human heart—has fairly a right to present that truth under

circumstances, to a great extent, of the writer’s own choosing or creation. If he think fit, also, he may so manage his atmospherical medium as to bring out or mellow the lights, and deepen and enrich the shadows of the picture. He will be wise, no doubt, to make a very moderate use of the privileges here stated, and, especially, to mingle the Marvellous rather as a slight, delicate, and evanescent flavor, than as any portion of the actual substance of the dish offered to the Public. He can hardly be said, however, to commit a literary crime, even if he disregard this caution.¹

Over the past seventy years, much has been said and written about the circumstances, import, and meaning of *Village of Euclid v. Ambler Realty Co.*²—perhaps too much.³ To this point, that writing has followed



The name for the Village of Euclid was chosen by a group of rebellious surveyors ("practicing" geometricians all) who, in 1796, extracted 16,000 acres from General Moses Cleaveland (above), the leader of the Connecticut Land Company's excursion into the Western Reserve that led to the founding of the city of Cleveland and its environs.

Hawthorne's "novel" ideal—"aim[ed] at a very minute fidelity . . . to the probable and ordinary course of man's [and woman's and law's] experience." But *Euclid* deserves more. This special case, whose very name conjures up both images of geometrically designed communities and arguments over the sanctity of private property, deserves a romance.

A Curse?

From its origins, the Village of Euclid was destined to be identified with the cookie-cutter nature of planning and zoning—and with Supreme Court challenges to land-use regulation. That Euclid was named after the Greek mathematician is no coincidence. The name was chosen by a group of rebellious surveyors ("practicing" geometricians all) who, in 1796, extracted 16,000 acres from General Moses Cleaveland, the leader of the Connecticut Land Company's excursion into the Western Reserve that led to the founding of the city of

Cleveland and its environs. Though most of the malcontents later reneged on their promises to settle on the parcel (their claims to the twenty-five-square-mile township reverted to the Land Company), the name, and the intimate association with things geometric, survived. So, too, it seems, did the legacy of contention over this soil on and near the shores of Lake Erie.⁴

Indeed, *Euclid v. Ambler*, in which the owner of roughly sixty-eight acres unsuccessfully contested the height, area, and use classification scheme enacted by the Village of Euclid in 1922, is but one of three challenges to the socioeconomic nature of zoning that have reached the Supreme Court from that unpropitious township. In *Moore v. City of East Cleveland*, the Court, citing the substantive protections afforded by the Fourteenth Amendment's Due Process Clause, attacked a zoning ordinance that branded a grandson an "illegal occupant" in his grandmother's home. Mrs. Moore's fine and jail sentence were held invalid, as was the narrow definition of "family" included in the city's regulations.⁵ In *City of Eastlake v. Forest City Enterprises*, the majority followed Chief Justice Warren Burger's lead in refusing to find that the city's use of a referendum to reverse a zoning change that would have permitted the construction of high-rise (and lower-income) apartments violated that same Due Process Clause.⁶ In High Court lore, therefore, the old Euclid tract is identified with efforts to erect and defend a bulwark for single-family dwellings.

Judge Cassandra

The village's first zoning ordinance appeared in 1922, only nineteen years after Euclid was incorporated (1903), and thus severed from the more expansive Euclid tract. Before fourteen months had passed, federal district judge David C. Westenhaver concluded that "the ordinance involved, as applied to plaintiff's property, is unconstitutional and void; that it takes plaintiff's property, if not for private, at least for public, use, without just compensation; that it is in no just sense a reasonable or legitimate exercise of police power."⁷ Judge Westenhaver was aware of the

national debate in the early years of the twentieth century over the legitimacy and efficacy of zoning and land-use planning. He knew, too, that the case was bound for a loftier tribunal: "This case is obviously destined to go higher."⁸ The jurist's precognition went beyond this simple prediction, however, for contained in but one paragraph of the opinion are insights concerning the nature of twentieth-century land-use controls that would not be widely shared by other jurists for several more decades.

First, Judge Westenhaver observed that zoning artificially controls the market in land: "The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket." He then noted the discriminatory intent of Euclid's scheme: "The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life." Next, the trial judge sensed the exclusionary nature of suburban land-use patterns:

The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.

There was a subjective, aesthetic nature to Euclid's controls as well: "Aside from contributing to these results and furthering such class tendencies, the ordinance has also an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful." Substituting his judgment for that of local government officials, Judge Westenhaver second-guessed the reasonableness of the challenged regulations:

"The assertion that this ordinance may tend to prevent congestion, and thereby contribute to the health and safety, would be more substantial if provision had been or could be made for adequate east and west and north and south street highways." Finally, the judge condemned the confiscation suffered by Ambler and other landowners: "Whether these purposes and objects would justify the taking of plaintiff's property as and for a public use need not be considered. It is sufficient to say that, in our opinion, and as applied to plaintiff's property, it may not be done without compensation under the guise of exercising the police power."⁹

In their consideration of Euclid's appeal, most of the Supreme Court Justices seemed to have paid little heed to the arguments and warnings provided by Judge Westenhaver, for the letter and spirit of Justice Sutherland's opinion indicated much more respect for the village's ends and means. Over the next five decades, Westenhaver's augury would, for the most part, remain unheeded by the Justices.¹⁰

During that half-century, popular and expert judicial dissatisfaction with perceived irregularities and excesses by government officials had grown slowly but steadily. By the late 1980s, the jurisprudential pendulum began to swing in a counter-Euclidean direction; the result has been a collection of holdings much less favorable to land-use regulators.¹¹ Today, long after its author's passing, Westenhaver's one key paragraph could serve as a primer for law students interested in newly successful theories employed by property owners to attack government regulation of land.

A Dogged Advocate

Euclid v. Ambler would never have become the central case in American land-use law if not for the tenacious drive of James Metzenbaum, counsel for the village. Consider the following chronology:

Spring, 1922: Euclid Mayor Charles X. Zimmerman appoints Metzenbaum, who also serves as village counsel, to a commission charged with drafting a zoning ordinance in accordance with the Ohio enabling legislation.



Newton D. Baker (above) represented Ambler Realty Company in the first federal lawsuit challenging zoning in 1923. The judge, David C. Westenhaver, had been Baker's mentor and law partner when both men lived in Martinsburg, West Virginia. Westenhaver had joined his former law partner in Cleveland in 1903 and the two teamed up in battles over street railway franchises. In 1911, Baker became mayor of Cleveland. Five years later, he assumed a post in Washington as Secretary of War in the Woodrow Wilson administration.

Metzenbaum had resided in the village with his wife "in a big house on Euclid Avenue" until her death in 1920. He then lives alone in Cleveland's Hotel Statler for more than three decades.¹²

November, 1922: The village legislature unanimously passes the ordinance put forward by the commission. Metzenbaum is elected as first chair of the Zoning Board of Appeals. As the only lawyer on the board, to Metzenbaum falls the responsibility of defending the ordinance. He does so by preparing, and widely distributing copies of, "a full and comprehensive presentation of the philosophy and of the principles of zoning" that includes "an effort to collate every then known decision which had been rendered upon the

subject."¹³

May 5, 1923: Although the village's zoning restrictions are relaxed in part, the Ambler Realty Company files, in the Northern District of Ohio, the first federal lawsuit challenging zoning. Metzenbaum defends the village and its ordinance. Newton D. Baker, of the newly formed firm, Baker, Hostetler & Sidlo, represents the disgruntled landowner before Judge Westenhaver.

Metzenbaum can not feel optimistic about the initial battleground. David C. Westenhaver had been Baker's mentor and law partner when both men lived in Martinsburg, West Virginia. Baker moved to Cleveland in 1899 and immediately became immersed in single-taxer Tom L. Johnson's reform struggles. Westenhaver joined his former law partner in Cleveland in 1903 and the two teamed up in battles over street railway franchises. In 1911, when Johnson died, Baker replaced him as mayor. Five years later, Baker assumed a post in Washington as Secretary of War in the Woodrow Wilson administration. Baker used his considerable influence in 1916 to help secure a Supreme Court seat for his friend, John H. Clarke. Opposing Baker in his lobbying effort were supporters of defeated President William Howard Taft (a sentimental favorite) and of George Sutherland, former United States Senator from Utah (championed by Ohio Senator Warren G. Harding). Westenhaver replaced Clarke; the *Plain Dealer* article proclaimed: "Westenhaver, Baker's Choice, Named U.S. District Judge."¹⁴

Metzenbaum is not alone in his defense of Euclid; he is joined by counsel for two amici: the Cleveland Chamber of Commerce (represented by W.C. Boyle of Squire, Sanders & Dempsey) and the Ohio State Conference on City Planning (represented by Alfred Bettman, the nationally prominent attorney and planning advocate from Cincinnati). Unfortunately, the village counsel has problems with both "allies." In his initial friend of the court brief, Boyle, while defending the constitutionality of the zoning ordinance as applied to the Ambler tract, concedes an important factual issue: "All unite in saying that the restriction of the first 150 feet for single- or two-family residences on Euclid Avenue is not the best or

most profitable use to which it could *and should* be put.” Metzenbaum forces Boyle to take back this concession in an amended brief, causing some embarrassment for the latter.¹⁵

Bettman’s amicus brief, a defense of American comprehensive zoning in principle, also concerns Metzenbaum. Before the Supreme Court, in fact, Metzenbaum would note “that in defense of its own position [the village] does not wish [Bettman’s] brief, like its predecessor in the Trial Court below, to prejudice any of the rights of the village.”¹⁶ Metzenbaum believes strongly that the ordinance that he helped draft and that he is charged with defending can withstand Baker’s assault *as is and on its own*.

January 14, 1924: Rejecting the arguments of Metzenbaum and the two amici, Judge Westenhaver issues an opinion finding Euclid’s ordinance null and void. Boyle and

Bettman, it is reported to the Ohio Conference on City Planning, “hope that the Euclid Village zoning authorities will amend their Ordinance in accordance with [Westenhaver’s] opinion, and not appeal the case.”¹⁷ In September, Bettman writes to the city attorney of Tulsa, Oklahoma, that the village’s limitation on industrial uses “was a piece of arbitrary zoning and on the facts not justifiable,” and that “[e]verybody advised against an appeal [from the District Court opinion], because on appeal the decision is sure to be affirmed, even though the upper court disagrees with the opinion.”¹⁸ In contrast, Metzenbaum is undeterred in his crusade to vindicate zoning. He takes an appeal to the Supreme Court of the United States, then headed by fellow Ohioan William Howard Taft.

December 1925: Two years after filing the appeal, Metzenbaum submits to the Court a



Euclid Avenue is pictured at left in 1905; now it is the main artery connecting downtown Cleveland with the Village of Euclid. James Metzenbaum resided in a big house on Euclid Avenue during his brief but happy marriage.

142-page brief for appellants, a document he would later label “short and concise.”¹⁹ He spends forty pages disputing Baker’s account of the facts before the trial court, thirty pages defending modern zoning practice and theory, fifteen pages defending zoning as a constitutional exercise of the police power, and thirty-five pages reviewing cases upholding zoning from throughout the nation. In the last case cited in the brief, *Pritz v. Messer*,²⁰ the Ohio Supreme Court gave its blessing to Cincinnati’s zoning ordinance (despite Newton Baker’s amicus arguments). Metzenbaum closed this part of the discussion by reminding the Justices of their history of deference in police power cases, quoting Justice Clarke’s opinion in *Thomas Cusack Co. v. City of Chicago*:²¹

[W]hile this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare.²²

Distilled to its essence, the “basic question,” according to Metzenbaum, is “the sole and completely *legal* and *fundamental* question as to whether there be a *constitutional power* to enact such ordinances as the one in question.”²³

January 27, 1926: Only a few days after Baker files the appellee’s brief, eight Justices participate in oral arguments in the old Senate chamber. Sutherland, named in 1922 by his friend Warren G. Harding to replace Justice Clarke, is not present.

Neither party requests a transcript, but Metzenbaum, in his 1930 treatise on zoning,

describes a humorous exchange. The Chief Justice began: “Mr. Metzenbaum, I notice that at one moment you speak of realtors and in the next sentence you refer to real estate men. What is the difference?” Justice Oliver Wendell Holmes, Jr., then “made a reply to the effect that from a case tried a week earlier, the court had learned that one received more money than the other.” Metzenbaum played along: “I presumed the distinction was about the same as that which exists between a statesman and a politician.” Taft “fairly shook with loud and unrestrained laughter, as he kept repeating: ‘Pretty good! Statesman and politician. Statesman and politician. Pretty good!’”²⁴

Not everything goes as swimmingly during the argument, however. Metzenbaum is particularly disturbed by Baker’s closing fifteen minutes (out of the allotted one hour), during which:

the attention of the members of the court was invited by counsel for the complainant, to a recitation which the writer felt to be at distinct variance with the facts as adduced by the testimony and as contained in the ordinance itself.

However, neither good breeding nor proper court decorum would permit of any interruption or spoken challenge.²⁵

Metzenbaum spends a restless night on the train back to Cleveland, during which he is sure that the case was lost in those last few minutes.

January 29, 1926: The following telegraph message is sent to Chief Justice Taft:

“Enroute to Cleveland,
January 29th, 1926.

In Ambler against Village of Euclid it is felt that the Village ought to file a Reply Brief to answer the concluding portion of Ambler oral argument and of Ambler Brief. Wanted to ask this privilege while in your court but hesitated. Upon

reflection and because of the importance of the cause and not for any mere purpose of winning, am compelled by conscientious duty to request permission to file short Reply Brief within such time as you may stipulate.

Ambler Brief was served and filed so few days before hearing, that Reply Brief was impossible. Intended telephoning to a Washington Attorney to appear in your court and move this request, but that will be impossible because prevailing storm has delayed train so many hours, train will not arrive in Cleveland in time to permit telephoning and appearance when Court opens. Understand today is last session before Court recesses and therefore take this manner of making application. Please forgive this method of request, as no disrespect or violation of rules is intended.

Respectfully,

Village of Euclid

By James Metzenbaum²⁶

What is not revealed in this very detailed (and perhaps unnecessary²⁷) message is the means by which the sender dispatched the form:

As the train slowed down along a siding where a great string of freight cars were being shoveled out of the snow, I opened the door of the car in which I was riding, leaned out from the car platform and shouted to one of the men who was engaged in the work of shoveling; wrapping the money around the telegram and tossing it to him. I saw it light on a great bank of snow. This was done with the trust that the man would understand what was wanted.

Metzenbaum's trust is rewarded; On February 2, Taft informs Metzenbaum that he has one week in which to file the brief and serve Baker,

who will then have another week to respond.²⁸

February 13, 1926: Alfred Bettman writes to Chief Justice Taft, a fellow Cincinnati lawyer, for permission to file an amicus brief on behalf of the National Conference on City Planning. Though opposed to the idea of an appeal, Bettman lobbies the Conference successfully to support the appellant, once Metzenbaum makes his move. However, Bettman, confused over the date of the original oral argument, waits too long to file his brief. Two weeks later, Taft informs Bettman that the Conference has the Court's permission to participate as an amicus.²⁹

March 1926: In an unusual move, the Justices decide to rehear arguments in the case. For seven decades, this decision has been the source of a great deal of speculation, most of it centering on two figures—Sutherland, the conservative “horseman” who splits from his conservative Brethren and writes the opinion favoring land-use controls, and Bettman, whose “Brandeis brief” tracks so closely with the Court's opinion. Two factors, already noted above, appear crucial: first, Sutherland did not participate in the original oral argument (and, therefore, is not likely to have “changed his mind”), and second, the Court's decision to rehear the case followed soon after Bettman's belated amicus request.³⁰

Regardless of the Court's motives, the decision sets off a new whirlwind of activity by Metzenbaum, including the compilation of a third brief that addresses the alleged inaccuracies of Baker's factual presentation, summarizes the most recent flurry of zoning activities nationwide, and again distances itself from Bettman's nuisance analogy arguments. Instead, Metzenbaum emphasizes the evolutionary and adaptive nature of American constitutional law, citing Justice Joseph McKenna, who denied that “the form [of a written constitution] is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion except by amendments of the organic law.”³¹ Metzenbaum also uses this time to prepare a new, and, it was hoped, more convincing oral argument.

October 12, 1926: Metzenbaum takes full advantage of a second chance “to raise my

voice in behalf of the cause of the people[;] there was but a single thought in mind, and every ounce of energy was thrown into the balance on that four-hundred and thirty-fourth anniversary of the discovery of America."³² His hometown newspaper was impressed with the village counsel's tenacity:

Metzenbaum, the hero of the *Euclid* case, has not the physique usually associated with trial lawyers. He is a bantamweight, hardly more than five feet tall, and the Supreme Court Justices had to crane their necks to see over the edge of the bench.

They had no trouble hearing him, however, for he has a reputation of being one of the most persistent men in town. He is an experienced debater and conversational grappler, and excels in discourse and argument.³³

Still, Metzenbaum was not prepared to rest.

November 1, 1926: Metzenbaum requests that the clerk of the Supreme Court distribute to the Justices additional copies of either the 1913 or 1916 report of the New York Investigating Committee, "which really furnished the very basis and foundation for comprehensive zoning throughout the country." Metzenbaum is "particularly anxious" that Justice Sutherland, who was absent at the first oral argument, secure one of the four copies that Metzenbaum sent to the clerk. The clerk complies with the request.³⁴

November 22, 1926: The Supreme Court announces its holding in *Village of Euclid v. Ambler Realty Co.*, a victory for the village, its persistent advocate, and zoning advocates and practitioners nationwide. Speaking for the majority, Justice Sutherland declines to follow Judge Westenhaver's lead in analyzing the effect of the ordinance as applied to Ambler's acreage, leaving to another day and another case the question of whether "the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, . . . or to particular conditions, or to be considered in connection with specific complaints . . ." ³⁵ That day and case arrive two years later, when Justice

Sutherland, writing for a new majority, concludes "that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question."³⁶

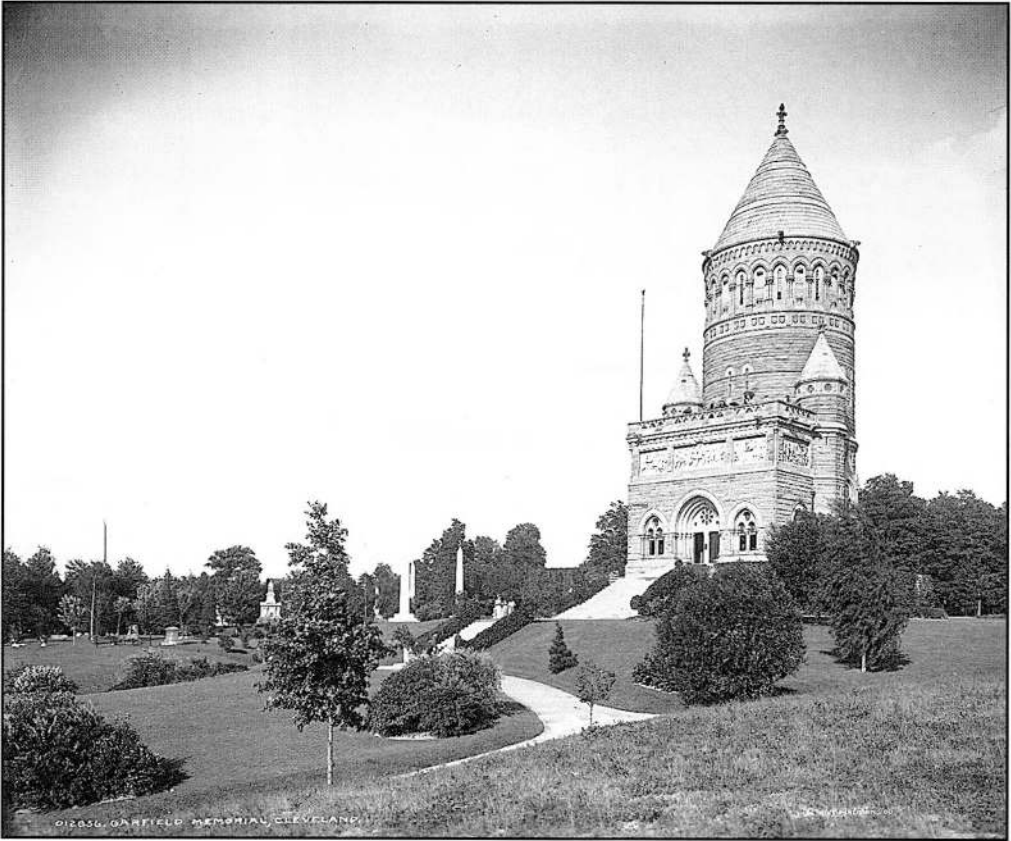
The Forgotten Warrior?

Many have given credit for the victory to the force of Bettman's arguments concerning the nuisance prevention and aesthetic preservation character of zoning; it is easy to spot these elements in Justice Sutherland's careful, well-reasoned opinion.³⁷ With the passage of time, the Bettman legend has grown. For example, a sixtieth anniversary essay on the case closes: "Few individuals could have personified the American city planning movement in the Court's eyes as ably as Alfred Bettman."³⁸

The time and energy Metzenbaum expended in refuting Baker's characterization of the village's actual and potential land uses and of the ordinance's effects on Ambler's parcel seem to have been ignored by Sutherland and the majority. The same should not be said for two other arguments raised in the village's three briefs: first, that the Court has traditionally been deferential to state and local police power regulations,³⁹ and second, that constitutional law is adaptable to changing conditions.⁴⁰

Four years after the village's victory, Metzenbaum published the first volume of his treatise, *The Law of Zoning*, in no small part a rendition of his "four years of unbroken effort."⁴¹ Although he never again appeared before the Supreme Court, Metzenbaum would be identified with zoning and planning law for the remainder of his life, as he continued his general practice in Cleveland (in the 1010 Euclid Building), served as a member of the Cleveland School Board and of the Ohio Senate (three terms), and devoted himself unwaveringly to his wife's memory.

That devotion appears to hold the key to the melancholy that plagued Metzenbaum for decades and to his indefatigable advocacy in the *Euclid* case. Shortly after Metzenbaum's



James Metzenbaum visited his wife Bessie's resting place two or three times a week, for four decades, at the Lake View Cemetery (pictured to the left of the memorial to James Garfield). Along with Bessie's ashes, the mausoleum contained small living quarters and a rocking chair, and was supplied with electrical power. Metzenbaum joined his bride in there in 1961 after suffering a heart attack on one of his visits.

death on December 31, 1960 (the date that would have been his fifty-fourth wedding anniversary), a column appeared in the *Cleveland Plain Dealer* titled "Brilliant Metzenbaum Led Melancholy Life." The columnist, a long-time observer of political life in the city and state, recalled his first interview with the local attorney:

[H]e told me of his life sadness, the death of his young wife, his devotion to her mausoleum, his sense of wretchedness at everything he did no matter how materially successful it might turn out. A part of his time, his speech was broken with anguish, and tears came several times.

A few years later, after the Supreme Court

announced its decision in *Euclid*, the two men met again. Metzenbaum looked "perturbed as ever, but actually with a heart brimming over his triumph. For he had been terrified . . . to go up against Mr. Baker, who by then was believed infallible in any lawsuit—his personal guiding star, to boot." That bittersweet moment stands out as an exception, however, in Metzenbaum's long, disconsolate life.⁴²

Bessie Benner Metzenbaum, who died suddenly in 1920 during a trip to Florida, inspired two legacies that last to this day. The first, the association of *Euclid* with the history and legitimacy of American zoning, can be traced to her widower's affection for the village that was their home during their short life together and for the cause of providing "shelter and protection" for the "American home."⁴³ Indeed, the dedication for **The Law of**

Zoning reads, "To the memory of one whose devoted care brought back the strength to do this work."

The second legacy, Bessie Benner Metzenbaum Park, sits on the site of a farm in Chester Township, Geuga County, Ohio. In 1948, Metzenbaum deeded a parcel to the Bessie Benner Metzenbaum Foundation and "undertook his latest crusade with characteristic fervor":

He would arrive at the Chester property at 3 or 4, morning after morning, working on the farm before going to his Cleveland law office by 9 AM. Many evenings were also spent on the project. His plan was to establish a facility for the use of deprived or handicapped children "regardless of race, color or creed, and without cost to such children." The foundation established a school for children and later a sheltered workshop for handicapped adults.

In 1991, the foundation gave sixty-five acres to the county's park district, allowing public access to the park and its wheelchair-accessible trail.⁴⁴

Metzenbaum's melancholy ended on New Year's Eve, 1960, when he suffered a heart attack while visiting Bessie's mausoleum at Lake View Cemetery. Nature again had played a fateful role in Metzenbaum's life story, for according to the obituary in *The New York Times*, "police said his car was stuck in snow and [Metzenbaum] may have over-exerted himself trying to push it free."⁴⁵ At the memorial service, Rabbi Philip Horowitz noted the link between the lawyer's activism and the memory of his wife:

He was uncompromising and incorruptible. He fought hard and sometimes bitterly for what he believed in.

If our suburbs are more beautiful, we owe that in part to him. His work affected thousands of schoolchildren. We remember him for his passionate devotion to social justice.

He converted his 40 years of

idolizing his wife into a life of benefaction.⁴⁶

Two or three times a week, for four decades, Metzenbaum frequented the cemetery. Along with Bessie's ashes, the mausoleum contained small living quarters and a rocking chair and was supplied with electrical power.⁴⁷ Lake View Cemetery, where Newton D. Baker was buried in 1937 and where James Metzenbaum joined his bride in 1961, sits on the eastern side of the city, at 12316 Euclid Avenue, directly in the path of urban sprawl between central city Cleveland and Euclid.

Euclid Today

Efforts to protect the Ambler parcel from industrial intrusion proved fruitless in the face of world military conflict. During World War II, General Motors opened a one-million square-foot plant to produce aircraft engines and landing gear. When peace arrived, GM produced automobile bodies until 1970, when the company turned out seats and trim in what was then called the Inland Fisher Guide Plant. In December 1992, GM officials announced that the plant would be mothballed in 1994, as part of the company's "struggle to restore profitability by reducing its size to match its shrunken share of the North American automotive market."⁴⁸

In March 1996, the GM parcel was purchased for \$2.5 million by a St. Louis investment company, which plans "to redevelop the property as a multitenant industrial complex."⁴⁹ These plans should fit in with the neighborhood—"a potpourri of residential, commercial, and industrial uses. Modest bungalows and high-rise apartments, including some subsidized developments, are intermingled in the streets that stretch north from Euclid Avenue to the railroad lines that bisect the city."⁵⁰

Even in a post-industrial economy, nearly one-quarter of the employment in 1990s Euclid is in manufacturing, supported in part by tax concessions and enterprise zone incentives. If, as some have posited, the Supreme Court majority coalesced around the effort to

preserve private property from an invasion of Eastern European immigrants,⁵¹ the strategy has backfired badly: As one recent commentator notes, "Tightly knit neighborhoods were formed by the many eastern European immigrants—Hungarians, Slovenians, and others—who settled in Euclid after the war." Today's ethnically diverse population in search of the Euclidean ideal—detached, single-family housing—has little to choose from, as "60 percent of the city's single-family housing is of one type—a 1950s bungalow on a very small lot."⁵² With very few available homes in the \$125,000-plus price range, planners are puzzling over ways to keep upwardly mobile families from leaving.⁵³

Current residents of Euclid are aware of their rich historical heritage. In 1989, the American Institute of Certified Planners recognized the city as a planning landmark. Five years later, the city marked its origins by dedicating Surveyors' Park—a green space featuring a circular reflecting pond, in the center of Euclid's retail district.⁵⁴ Perhaps by setting aside a small part of the original township to honor its mutinous founders, the people of Euclid can bring some peace to this contentious soil.

**The author thanks David Buckley, Nancy Martin, and Brandon Quarles for their keen legal detective work, and William Randle, Esq., for bringing Progressive-era Cleveland to life for his former teacher.*

Endnotes

¹ Nathaniel Hawthorne, "Preface" to *The House of the Seven Gables*, in *Nathaniel Hawthorne: Novels* (New York: Library of America, 1983), 351.

² 272 U.S. 365 (1926).

³ Your author, I'm afraid, is responsible for more than his fair share of ramblings on the topic. In addition to the other works cited in this romance, see, if you dare, Michael Allan Wolf, "The Prescience and Centrality of *Euclid v. Ambler*," in Charles M. Haar and Jerold S. Kayden, eds., *Zoning and the American Dream: Promises Still to Keep* (Chicago: Planners Press, 1989), 252; Michael Allan Wolf, "Euclid at Threescore Years and Ten: Is This the Twilight of Environmental and Land-Use Regulation?" 30 *University of Richmond Law Review* 961 (1996).

⁴ Harlan Henthorne Hatcher, *The Western Reserve: The Story of New Connecticut in Ohio* (Cleveland: World Pub. Co., 1966), 32-33; Eileen Beal, "Area Development Began Nearly Two Centuries Ago," *Cleveland Plain Dealer*, August 15, 1994, p. 8A.

⁵ *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

⁶ *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976).

⁷ *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 317 (N.D. Ohio, 1924).

⁸ *Ambler v. Euclid*, 297 F. at 308. Under federal jurisdictional law in effect at the time, the losing party in a case in which a federal district judge declared a state statute unconstitutional had a right to appeal to the Supreme Court. If the constitutional challenge to the ordinance had been brought a year later, after the "Judges' Bill" (Act of Feb. 13, 1925, 43 Stat. 936) went into effect, Judge Westenhaver may well have shared the case with two other judges. See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York: Macmillan, 1927), 273-80.

⁹ *Ambler Realty Co. v. Village of Euclid*, 297 F. at 316.

¹⁰ The Court fired one warning shot concerning the confiscatory potential of zoning—*Nectow v. City of Cambridge*, 277 U.S. 183 (1928)—then, with one exception (*Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding ordinance regulating dredging and pit excavating)), stayed out of the zoning arena until the 1970s.

¹¹ See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (requirement that group home secure special use permit violated Equal Protection Clause); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (invalidating imposition of public access easement as condition for coastal development permit); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (recognizing availability of compensation for total regulatory takings); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulations that deprive landowners of "economically viable use" deemed categorical takings); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (conditional permitting constituted unconstitutional taking); *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997) (landowner's regulatory taking claim ripe for adjudication); Michael Allan Wolf, "Fruits of the 'Impenetrable Jungle': Navigating the Boundary Between Land-Use Planning and Environmental Law," 50 *Washington University Journal of Urban and Contemporary Law* 5 (1996).

¹² Jay Abercrombie, *Walks and Rambles in Ohio's Western Reserve* (Woodstock, Vt.: Backcountry Publications, 1996), 153; Seymour I. Toll, *Zoned American* (New York: Grossman Publishers, 1969), 215; Obituary, *Cleveland Press and News*, January 2, 1961.

¹³ James Metzenbaum, *The Law of Zoning* (New

York: Baker, Voorhis and Company, 1930), 109.

¹⁴ William M. Randle, "Professors, Reformers, Bureaucrats, and Cronies: The Players in *Euclid v. Ambler*," in Haar and Kayden, eds., **Zoning and the American Dream: Promises Still to Keep**, 33-35; Toll, *supra* note 12, at 221-22.

¹⁵ Arthur V.N. Brooks, "The Office File Box—Emanations from the Battlefield," in Haar and Kayden, eds., **Zoning and the American Dream: Promises Still to Keep**, 10, 26 n. 18 (quoting amicus brief (emphasis added) and correspondence between Boyle and Baker).

¹⁶ Brief on Behalf of Appellants (On Rehearing), in Philip B. Kurland and Gerhard Casper, eds., **24 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law** (Arlington, Va.: University Publications of Virginia, 1975), 870-71.

¹⁷ Brooks, *supra* note 15, at 11 (quoting conference bulletin dated February 15, 1924).

¹⁸ Alfred Bettman to D.J. Underwood, September 29, 1924 (quoted in Daniel R. Mandelker and Roger A. Cunningham, **Planning and Control of Land Development** (Charlottesville, Va.: Michie, 3d ed., 1990), 73).

¹⁹ Metzenbaum, *supra* note 13, at 113.

²⁰ 149 N.E. 30 (Ohio 1925).

²¹ 242 U.S. 526 (1917).

²² *Id.* at 530-31 (quoted in Brief on Behalf of Appellants, in Kurland and Casper, eds., **24 Landmark Briefs**, 552).

²³ Brief on Behalf of Appellants, in Kurland and Casper, eds., **24 Landmark Briefs**, 475.

²⁴ Metzenbaum, *supra* note 13, at 114-115.

²⁵ This account is drawn from Metzenbaum, *supra* note 13, at 114-16.

²⁶ *Id.* at 117-18.

²⁷ One writer notes that the previous August, Metzenbaum had asked for and secured the Court's permission to file a reply brief. Toll, *supra* note 12, at 236. However, it is unclear whether that permission would have applied to a brief filed *after oral argument*.

²⁸ Metzenbaum, *supra* note 13, at 118-19.

²⁹ Robert Averill Walker, **The Planning Function in Urban Government** (Chicago: University of Chicago Press, 1941), 77-78.

³⁰ In addition to the works cited previously, see Hadley Arkes, **The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights** (Princeton, NJ: Princeton University Press, 1994) 70-71; Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (New York: Viking Press, 1956), 252; Joel Francis Paschal, **Mr. Justice Sutherland: A Man Against the State** (Princeton, NJ: Princeton University Press, 1951), 126-27, 242-43; Timothy Alan Fluck, "Euclid v. Ambler: A Retrospective," 52 *Journal of the American Planning Association* 326 (1986); Alfred McCormack, "A Law Clerk's Recollections," 46 *Columbia Law Review* 710, 712 (1946); A. Dan Tarlock, "Euclid Revisited," *Land Use Law and Zoning Digest*, January 1982, p. 4. Professor Garrett Power's "Advocates at Cross-Purposes," found on page 79 of

this volume of the *Journal of Supreme Court History*, continues the pursuit of these interesting questions.

³¹ *Merrick v. N.W. Halsey and Co.*, 242 U.S. 568, 587 (1917) (quoted in Brief on Behalf of Appellants (On Rehearing), in Kurland and Casper, eds., **24 Landmark Briefs**, 874).

³² Metzenbaum, *supra* note 13, at 121.

³³ Brooks, *supra* note 15, at 25 n. 13 (quoting *Cleveland Plain Dealer*, November 22, 1926).

³⁴ Toll, *supra* note 12, at 239-40 (quoting letter from James Metzenbaum to the Clerk of the Supreme Court of the United States, November 1, 1926).

³⁵ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

³⁶ *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928).

³⁷ See, e.g., Tarlock, *supra* note 30, at 6-8.

³⁸ Fluck, *supra* note 30, at 335. Similarly, Professor Power tells us that "Bettman's advocacy carried the day." *Supra* note 30 at 7.

³⁹ "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395 (citing, as did Metzenbaum, *Thomas Cusack Co. v. City of Chicago*).

⁴⁰ "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise." *Euclid*, 272 U.S. at 387.

⁴¹ Metzenbaum, *supra* note 13, at 122.

⁴² N.R. Howard, "Brilliant Metzenbaum Led Melancholy Life," *Cleveland Plain Dealer*, January 7, 1961, p. 13.

⁴³ Metzenbaum, *supra* note 13, at 122.

⁴⁴ Abercrombie, *supra* note 12, at 154-55.

⁴⁵ *The New York Times*, January 1, 1961, p. 48.

⁴⁶ *Cleveland Plain Dealer*, January 4, 1961 (quoting Rabbi Philip Horowitz).

⁴⁷ Abercrombie, *supra* note 12, at 153.

⁴⁸ "GM to Close Euclid, 8 Plants; 596 Workers in Euclid to be Cut by 1994," *Cleveland Plain Dealer*, December 4, 1992, p. 1A. Not all of the manufacturing news was bad for Euclid, however, as Lincoln Electric in 1995 announced plans to increase its already impressive investment in the city by \$44 million in a new motor manufacturing plant. David Prizinsky, "Lincoln Investing \$44M in Motor Unit," *Crain's Cleveland Business*, May 29, 1995, p. 1. Lincoln's founder, John C. Lincoln, like Tom Johnson and his fellow reformers a devotee of Henry George, established the Lincoln Foundation in 1947. In 1974, the foundation provided major support for the Lincoln Institute of Land Policy, a leading

international think tank specializing in land policy and taxation. In 1986, the institute sponsored a sixtieth anniversary *Euclid* symposium. See Charles M. Haar and Jerold S. Kayden, "Preface," in Haar and Kayden, eds., **Zoning and the American Dream**, vii.

⁴⁹ John F. Hagan, "Old Euclid GM Plant Sold to Investors," *Cleveland Plain Dealer*, March 13, 1996, p. 4B; Stan Bullard, "Fisher Guide Plant to be Converted for Multi-Use," *Crains Cleveland Business*,

May 13, 1996, p. 3.

⁵⁰ Ruth Eckdish Knack, "Return to Euclid," *Planning*, November 1, 1996, p. 4.

⁵¹ See, e.g., Randle, *supra* note 14 at 40-41; Wolf, "Prescience and Centrality," *supra* note 3, at 257-58.

⁵² Knack, *supra* note 50.

⁵³ Jay Miller, "Euclid Maintains Stability in an Era of Change," *Cleveland Plain Dealer*, April 6, 1996, Euclid Section, p. 2.

⁵⁴ Knack, *supra* note 50.

“Dear Mr. Justice”: Public Correspondence With Members of the Supreme Court¹

John W. Johnson

I

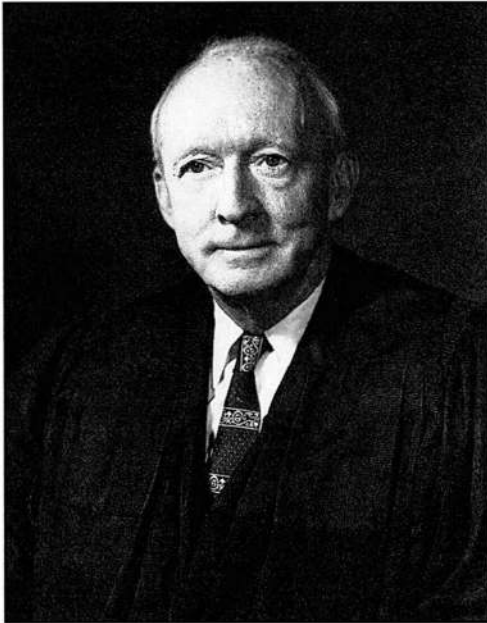
In February 1969 a Springfield, Illinois, physician wrote an angry letter to a man he considered a kindred spirit. The doctor lamented:

I'm sick and intolerant of permissive parents, permissive teachers, permissive law enforcement agencies, permissive legislators, and permissive courts. And I am particularly disappointed and ashamed of the many permissive Supreme Court decisions which have been coming down in recent years.²

In all, the Illinois doctor used the word “permissive” (or “permissiveness”) eight times in his two-page letter.³ The person to whom he addressed the letter was Hugo L. Black, Associate Justice of the Supreme Court. The occasion for the doctor's diatribe was the Supreme Court's recent student rights decision in *Tinker*

v. *Des Moines Independent Community School District*.⁴ In *Tinker* the Court majority had upheld the right of a small group of secondary school students in the Iowa capital city to wear black armbands to school to express their concerns about the Vietnam War. Justice Black had issued a stinging dissent in the case, decrying what he judged to be the armband-wearing students' disruptive behavior.⁵

Although countless Americans no doubt write letters to government officials, such letters seldom find their way into collections available to scholars. Or, if they do, scholars seldom draw upon collections of letters from “average” Americans to distinguished public figures.⁶ The legal papers of Supreme Court Justices, open to researchers who have taken the effort to seek and obtain the necessary grants of permission, contain some fascinating examples of the public's reactions to major decisions. The principal repository of letters written to Supreme Court Justices is the



The legal papers of Justice Hugo L. Black in the Library of Congress contain more than 250 pieces of correspondence from private individuals who wrote to express their views on his dissent in *Tinker v. Des Moines*.

Library of Congress in Washington, D.C. In its “manuscript division,” the Library of Congress houses all or a substantial portion of the Supreme Court papers of twenty former Justices.⁷ Copies of letters to Justices also reside in a variety of other locations around the country—mainly Ivy League law school libraries and state historical societies.⁸ The legal papers of Justice Black in the Library of Congress contain the above quoted letter and more than 250 other pieces of correspondence from private individuals writing to this Justice about the *Tinker* decision.⁹ In addition, the papers of some of the other Justices serving on the *Tinker* Court also contain a handful of letters written in the wake of the decision.¹⁰

Only a few passages from any *Tinker*-inspired letters have been cited previously by other scholars.¹¹ For the most part, the letters to Supreme Court Justices on the Iowa black armband case are *terra incognita*. I came across the aforementioned letters while performing research for a book on the *Tinker* case. These letters proved to be a small but provocative historical find—a scholarly bonus—that

helped to flesh out my account of the dispute. Besides presenting an intriguing array of public opinion on student rights at a turbulent time in recent U.S. history, this trove of letters may also offer some insights into how the public at large interacts with the nation’s highest court.

II

To establish the historical and legal context out of which the “*Tinker* letters” sprang, a few words about the case itself are in order.¹² The decision in *Tinker v. Des Moines* was handed down in February 1969, at the height of the Vietnam War. The facts that gave rise to the dispute, however, occurred in late 1965. Inspired by a large anti-Vietnam War march in Washington, D.C., that they had attended during the 1965 Thanksgiving weekend, a group of Des Moines secondary school students and their parents came up with a plan for students to wear black armbands to the city’s public schools to express their sorrow over the casualties in the war and to demonstrate support for a truce in the hostilities. When word reached school district authorities that such a “protest” was imminent, the district office issued an order banning black armbands from the city’s secondary schools. On two days in mid-December 1965 somewhere between twenty and forty students defied the ban. Five were suspended or sent home. Amidst growing public controversy, the school board conducted two stormy meetings on the student protest. Ultimately the board upheld the administrative prescription of the wearing of armbands.

Three students—Christopher Eckhardt, John Tinker, and Mary Beth Tinker—and their parents sought and received legal representation from the Iowa Civil Liberties Union (ICLU) to challenge constitutionally the suspensions. They filed an action in federal court asserting that the students’ right of symbolic expression under the First Amendment had been denied by the school district. After losing at the federal district court and circuit court of appeals levels, the students’ case was accepted for review by the Supreme Court. In oral argument before the Supreme Court on November 12, 1968—just a bare week after the contentious election that brought Richard Nixon to the presi-

gency and sent the Democratic Party into a downward political spiral destined to last more than two decades—attorneys for the students and the school board presented their appeals. Then, on February 24, 1969, with the Vietnam War and the controversy it engendered still raging, the Supreme Court handed down a 7-2 decision in favor of the three armband-wearing students.

At this tense moment in the country's history, Abe Fortas's majority opinion extended broad protection for symbolic expression and political speech to America's students. According to the Court majority, the right of free expression under the First Amendment to the U.S. Constitution could not be curtailed absent a factual showing that the wearing of armbands disrupted the normal curriculum of the Des Moines schools. The Court found no evidence in the record that the peaceful protest of a handful of armband wearing students adversely affected the education of the other 18,000 students then attending public school in Des Moines.¹³ The *Tinker* decision is also remembered for the impassioned ten-page dissent of Justice Black.¹⁴ At one point in his opinion, Black complained that the dictum "children are to be seen not heard" had sadly gone out of fashion in the 1960s.¹⁵

The *Tinker* decision was hailed by legal experts as one of the characteristically liberal and path-breaking rulings of the "Warren Court."¹⁶ Yet, just a few months after the Court's decision in the armband case, Earl Warren retired as Chief Justice and Abe Fortas resigned from the Court in the face of an ethical and financial scandal. With Warren's retirement and Fortas's resignation, an era of unprecedented federal judicial support of civil liberties had come to a close. Ultimately, decisions of the Supreme Court under Warren's successor, Chief Justice Warren E. Burger, would undercut much of the ground upon which the *Tinker* precedent rested.¹⁷

III

A few letters mentioning *Tinker v. Des Moines* were directed to the Supreme Court as a whole in the months after the decision. One example of such a letter to the collective mem-

bership of the Court was signed by a woman from Shawnee Mission, Kansas, who described herself in closing as "a liberal who went too far." She wrote: "I agree, dissent should be permitted, with reason. But at the child's level? . . . I speak from experience—we nearly ruined our 13-year-old with permissiveness. . . . Permissiveness makes weak children who have no respect for authority and much insecurity."¹⁸ Another such document was "an open letter to our erstwhile friends in the Supreme Court," written by a Kansas City minister. The clergyman personalized his letter, indicating how he had treated his own sons when they requested that family decisions be accomplished by majority vote. The minister reported: "I immediately served notice upon them that they were not living in a democracy under my roof but that it was most certainly a dictatorship and that I was the dictator. . . ." Using his experience as a model, he instructed the Court that its recent decisions on children's rights, *Tinker* paramount among them, "will serve to create a turmoil in future relationships between authority and those under it [that] you'll not (probably) live to contend with; but we and others after us may well be saddled with the struggle to undo your folly." In the final sentence of his letter, the clergyman re-affirmed his message to the Court in the form of a personal admonition to his children: "If my kids ever try to take advantage of your recent decisions in high school or college they'll find out just who the real supreme court is."¹⁹

Justice Abe Fortas received a number of letters, most of them critical, in the wake of his decision in *Tinker v. Des Moines*. The general point made by Fortas's correspondents was not so much to object to the right of students to wear black armbands, but instead to express concern about where this decision might lead. For example, a school principal from Portland, Oregon, wrote to inquire if, in light of the armband decision, "whether the schools are now . . . to be used as propaganda organs for any and all organizations . . . who [wish to] . . . distribute their sometimes corrosive literature." He attached to his letter a copy of a leaflet that had been confiscated in his school after it had been distributed without authorization. The pamphlet offered a nasty critique of school in-

tegration and related issues in unvarnished racist language. It was titled "Had Enough, Whitey?," carried the symbol of the swastika, and purported to be issued by the National Socialist White People's Party. The Portland principal declared that, if his school's right to ban the distribution of such literature must now be tested in light of the *Tinker* decision, "the purpose for which the schools have been established will indeed be subverted."²⁰ A letter from a woman from California made a similar point: "This decision, like other decisions of the Court in recent years, is like one of the new 'wonder drugs'—it may be a specific [remedy] for a certain illness, but it has the unfortunate side effect of killing the patient."²¹

Fortas also received a letter from the executive director of a Chicago children's agency, objecting to the majority decision in *Tinker* because it disturbed the "child's interaction with his teacher," a relationship that should be "far better left alone." This writer wondered if the principle in the *Tinker* case would now permit antiteacher armbands or placards in the classroom. He indicated that he would not support a "tyrannical teacher," but if the teacher does not have "adequate authority" a "red blooded child . . . [will be] tempted to take advantage of [the situation]."²² In a similar vein, a U.S. Navy Captain wrote to Fortas: "[Y]ou and those Justices who joined themselves with you in the majority opinion are wrong. So wrong. Wrong philosophically, humanly, morally and realistically." He stated that he had always believed that school authority should be an extension of parental authority, but that the Iowa black armband decision was significantly eroding that relationship. He expressed worry that the next step will be to "make it a violation of 'fundamental rights' for a parent to deny his child the right to wear protest armbands . . ."²³

In April 1969, Fortas received a letter from Jaime Benitez, Chancellor of the University of Puerto Rico and one of that island's leading constitutional scholars. Benitez enclosed a copy of a letter that he had sent to another academic administrator defending regulations placed on picketing at the University of Puerto Rico. In that letter Benitez predicted that the chaos on American campuses will eventually force courts to restrict certain modes of expres-

sion in the schools.²⁴ Fortas, in his response, expressed surprise that his old friend did not comprehend the "sharp line between speech and disruptive conduct" that he and the majority of the Court had drawn in *Tinker* and other recent freedom of expression cases. What Fortas suggested in his reply to Benitez is that reasonable rules and regulations for peaceful demonstrations can be adopted. These rules, in Fortas's view, must be "sensitive to the line that exists between suppressing the expression of views . . . and regulating the form of that expression so as to permit others to go about their work . . . without being subjected to interference or assault." In short, Fortas felt that his majority opinion in *Tinker* offered the opportunity for peaceful free expression, while properly respecting the authority of public officials to construct rules and regulations for that very speech.²⁵

Justice Douglas, although not himself the author of an opinion in the black armband case, received a letter from a Texas division manager of an insurance company that criticized him for joining in the *Tinker* majority. The insurance man contended that the armband decision will only serve to widen the "so-called generation gap" because the decision has "encouraged a small minority of irresponsible children . . . [to signify] their displeasure with certain policies of school administrators." He accused Justice Douglas and his Brethren on the Court of either never having been taught respect for discipline in their youth or of being strangers to child-rearing as adults. He continued: "I assure you that so long as . . . [my son] makes his home in my household he will not be one of those 'protestors.'" The letter concluded: "I think your majority vote was very far to the left of what the majority of Americans desire as I sincerely believe that most responsible people would like to see more law and order immediately."²⁶

IV

By far the greatest number of letters addressed to the Supreme Court in the aftermath of *Tinker v. Des Moines* were written to Justice Hugo Black. The files of Justice Black's legal papers contain two entire boxes of letters—260



Mary Beth Tinker and her brother John displayed the armbands they wore to school to protest the Vietnam War. Their action got them suspended from school in 1965. Abe Fortas wrote the 1969 opinion that armbands were symbolic speech protected by the First Amendment and that the children's suspensions were unconstitutional.

in all—that the Justice received concerning his dissenting opinion in the armband case. Interestingly, all but eight of these letters expressed agreement with Black's views. A fair assumption is that Black's impassioned defense of order and traditional values struck a chord among many Americans troubled by what they perceived as the turmoil in the nation's schools in the late 1960s. Hand-written notes on many of the letters concerning the *Tinker* case indicated that Black directed that a form letter be dispatched in response. It is possible that Justice Black received other letters about the *Tinker* case that did not find their way into the Library of Congress's collection. However, a sampling of the available letters is sufficient to yield the flavor of this unusual correspondence.

A majority of the many letters to Justice Black bestowed some form of praise upon the Court's oldest member. A California lawyer wrote: "Your dissent . . . in the Des Moines, Iowa, High School case was one bright ray of sunshine that brought hope and encouragement to the hearts of millions of Americans. I

salute you and encourage you to continue your battle for righteousness and sanity." That letter also contained several Bible verses.²⁷ Another California lawyer wrote: "I am not only sure that you are legally correct, but I likewise am very sure that from a practical standpoint you are dead right. You have rendered your country a distinct service. Please accept my sincere congratulations."²⁸ A woman from a small town in Kentucky conveyed similar sentiments: "Thank you and let me again say you are a man among men and a true and loyal American. Oh! Lord, how I wish there were more like you, we would have a much better world to live in."²⁹

A few of the individuals writing to Justice Black mentioned a personal connection. The most poignant of these was from an elderly gentleman educated in the Midwest but then living in San Diego, California. He wrote:

[Y]ou might be interested to know that you have grown tremendously in stature since your appointment to the Court

many years ago. I have somewhat of a confession. . . . At the time of your appointment to the Court . . . [I] was a student editor of the *Nebraska Law Review*. At that time I wrote a very short comment in the *Law Review* expressing . . . my doubt that you would be a good judge. In my youthful ignorance I envisioned that your political background and lack of trial experience would hamper you in the discharge of your duties. Needless to say, you proved me wrong. A number of years later I argued a case before the Court and you extended every courtesy to me as a young lawyer You later wrote a short opinion . . . affirming my position. . . . This letter is probably very boring to you but it makes me feel better to write it.³⁰

Justice Black must have been touched, because he sent back a hand-written note: "Your very nice expressions about my work on the Court are appreciated. HLB."³¹

A number of letters to Justice Black came from appreciative secondary school personnel. For example, a school counselor from Augusta, Georgia, wrote: "As a counselor in a junior high school, I appreciate and admire your stand angrily dissenting in the Iowa Students' case. . . ." She later stated that more discipline is necessary in the schools, not less. Then she continued: "Our whole system of free education . . . is in danger. With many decisions like the present one, we, as teachers, will be forced to throw in the 'towel'. . . . Maybe if your fellow Justices could sit where I sit for one day, a reversal of the present decision would be made."³² In a similar vein, a superintendent from Glasgow, Missouri, wrote: "We wish to applaud you on your recent dissent Every day we witness this very obvious lack of respect for authority exercised by the young people we come in contact with in our school system. . . . Again we thank you for taking a stand and want you to know there are other people who agree with you and support you." The superintendent's letter was signed by twenty-two other members of his school system, including principals, teachers, counselors, secretaries, and even the "cafeteria manager."³³

Justice Black's dissent had claimed that many of the problems he saw in American schools—at both the high school and college levels—were related to problems in the American family and society in general. Most of those writing him favorable letters shared this conviction. Like Black, they blamed an all too pervasive "permissiveness." A man from Catonsville, Maryland, wrote: "Far too many youths today are, to quote an old popular song, 'Runnin' Wild.' Permissiveness seems to be the name of the game. . . . One hears quite a bit about lack of communication between parent and child. I say Hogwash! When I was a youngster, my mother had a very good means of communication. It was called 'Hairbrush.' And I seldom failed to get the message."³⁴ The junior high counselor from Georgia quoted earlier had this to say about permissiveness in the family and the school: "Children are desirous of discipline and they tell me this, but the discipline must be just, consistent and positive. Deep down they do not want permissiveness, and they think less of the authorities in the home and in the school that allows [sic] them to be permissive."³⁵ The Springfield, Illinois, physician quoted at the outset of this essay also had this to say in his letter to Justice Black: ". . . [Y]ou speak eloquently my feelings and those of so many of my countrymen whose responsibility it is to keep our cities, counties, and states strong and effective against this new sweeping plague of Permissiveness over the entire United States."³⁶

Many of Justice Black's correspondents talked about college campus protests and how the majority opinion in the black armband case would increase the turmoil in higher education. An Alabama attorney stated that, in decisions like *Tinker v. Des Moines*, "our Courts have encouraged riots and insurrections on school campuses, in the name of free speech." His letter offered accounts of protests on several college campuses that he had culled from newspapers.³⁷ A fifty-one-year-old woman from Indiana wrote: "I want to stand up and be counted as one who advocates respect for authority in all areas. I am sick to death of demonstrations on campuses throughout our land." She went on to mention her second son, then in his first year at Dartmouth College: "I only hope that he

can get through his undergraduate years without being involved with confrontations with those shaggy, dirty, conniving members of our society whose aim it is to weaken all our educational institutions to the point where Communism follows without having to struggle for a foothold."³⁸

Several of the individuals writing letters to Justice Black indicated that, in their view, the quality of public education in the nation had declined since the Supreme Court's decisions earlier in the decade banning prayer (*Engel v. Vitale*³⁹) and Bible-reading in the classroom (*Abington School District v. Schempp*⁴⁰). A woman from Indiana, who had two sons attending school in Abington, Pennsylvania, when the 1963 decision banning Bible-reading in the classroom was rendered, wrote: "Perhaps it is a coincidence, but it seems to me that ever since that time the youth of our high schools and colleges have been pushing for concession after concession—usually in causes concerning the breaking down of the so-called 'establishment.'"⁴¹ Ironically, Black was in the majority in both the prayer and Bible-reading cases. In fact, he himself wrote the much maligned majority opinion in the school prayer case.

All of the Justices receive unsigned letters from time to time. Most of these are probably from harmless cranks, but some threaten injury to a Justice or someone else. The FBI and the Secret Service have been kept busy over the years, for example, examining and occasionally following up on the hostile letters sent to Justice Harry A. Blackmun, the author of the majority opinion in *Roe v. Wade*,⁴² the 1973 decision according the right to abortion partial constitutional status. Justice Black received a handful of anonymous letters shortly after the *Tinker* decision was announced. One that appeared to support his position was still frightening. It read: "You don't have to worry about the laws breaking down. We are organizing a secret club to bring criminals to justise [sic]. We won't dress any different but will FIX all trouble makers in our school. Everyone says we are helpless but we know different." The postscript read: "There are 8 of us."⁴³

As the senior member of the Supreme Court in 1969, Black's age and amazingly robust health were commented upon by a good percentage

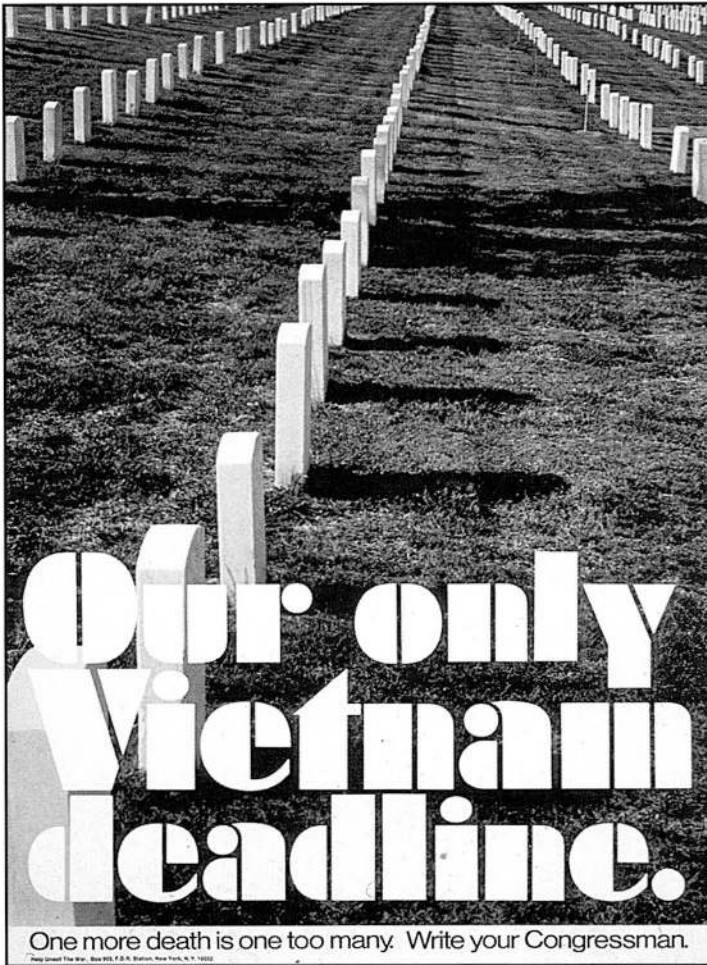
of those writing to him about the *Tinker* decision. A west coast attorney, for instance, wrote that he hoped that Black would "continue in good health and feel up to staying on the Court for a long time."⁴⁴ An Alabama attorney writing to Justice Black on March 5, 1969, congratulated him on reaching his eighty-third birthday.⁴⁵ And an Illinois physician invoked the memory of a recently departed relative in praising Black's opinion. He wrote: "My father would have been about your age, Justice Black, were he alive today. I believe he would have stood with me and cheered your 'wrathful outburst' . . ."⁴⁶

On the other hand, Black's age was singled out for concern by some of those voicing criticisms of his dissent in the black armband case. For example, one man wrote the Supreme Court a postcard a few days after the armband decision, saying: "As a former admirer of Justice Black, I would like to suggest that he has reached the age where he should graciously retire the judicial robe, even at the risk of a Nixon appointment."⁴⁷ A less sympathetic postcard writer addressed this comment to Justice Black: "Your [sic] 80 and losing your faculties yet you determine people's future."⁴⁸

Besides the concern about Black's age and health, expressed in the small number of critical letters addressed to him and found in the Library of Congress collection, there was another common theme: that Hugo L. Black of the 1969 *Tinker* decision was not the liberal Hugo L. Black that he had been for most of his Supreme Court tenure. A Union College undergraduate, for example, wrote:

With your dissenting opinion in this case you are, curiously, opining counter to your own previous record as a civil libertarian. . . . Sadly for the cause of individual liberties which you yourself once championed, you have placed the rights of the society above the rights of the man in a case involving no visible personal or property damage.⁴⁹

A correspondent with stationery bearing the logo of the Massachusetts Institute of Technology posed for Justice Black a rhetorical question that hinted at this liberal apos-



While this poster urged critics of the Vietnam War to write their Congressmen, only a few wrote to the Supreme Court to protest Justice Black's dissent in *Tinker*. Of the eight protest letters archived in the Hugo L. Black papers at the Library of Congress, only one received a reply. Many of the other 252 letters, all supportive, have a notation indicating that Justice Black issued a reply.

tasy: “[W]hat is ‘permissive’ about according students (or any person for that matter) rights which the Constitution guarantees them? Your judgment for once leaves me incredulous.”⁵⁰

A couple of the individuals writing Justice Black were blunt to the point of crudity. In a letter addressed to “Honorable Black,” one writer stated: “You kind sir would put a straight jacket on America and send it back to the stone age. We are civilized people and not barbarians.” He also asked Black to “thank Justice Fortas for overruling your ruling in the Des Moines high school case.”⁵¹ A college student in New York also expressed his feelings inelegantly: “I had always assumed that a man of your background and reputation of insight and erudition would not be prone to such neanderthal political, social and educational opinions. . . .”⁵² A group of a dozen high

school-aged students wrote to counter Justice Black’s broad-gauged assertion that “students all over the land are running loose.” They indicated that they were secondary school students who “abide by reasonable rules and regulations set up by the school” and, if they feel change is necessary, they employ peaceful means and work within the system. They added: “We are not barbarians!”⁵³

Finally, a handful of individuals writing to Justice Black posed rhetorical questions to challenge the dissenting Justice’s perspectives on student behavior. For example, a man from California wrote to ask, “How are we to prepare our young people to become full and responsible citizens if they are not allowed to experience the opportunity to exercise, peacefully, the rights of citizenship?”⁵⁴ Another correspondent, writing on American Federation of Teach-

ers stationery and identifying himself as a high school teacher with a special interest in constitutional law, submitted two similar queries:

How are we to expect our young to assume responsibility and participate in our society constructively and meaningfully if we condemn and restrict them by standards we do not condone for ourselves? If they are to be prohibited from expressing their concerns within the institutions in which they spend a great portion of their productive hours, institutions which purport to prepare them to think and to function effectively in the rest of society, where and when then are they to learn responsibility and constructive effectiveness?⁵⁵

Of the eight letters critical of Justice Black's *Tinker* dissent available in the Library of Congress's judicial papers, the Alabama Justice's hand-scrawled notes indicated that only one received a reply.⁵⁶ Perhaps Black found it easier to thank his supporters than to respond directly to his critics. It is also possible that Black, as a Supreme Court Justice, did not feel ethically comfortable engaging in an exchange with strangers concerning issues that might again someday reach the Court.

V

Whether the *Tinker* letters constitute a representative case study of public correspondence with members of the nation's highest court cannot easily be determined. My suspicion is that these letters are not that different from those received by the Justices in the wake of any controversial decision in the recent past. If so, what do they tell us about the interaction of the public with the Court?

The ideas of a group of 1930s law professors, jurists, and legal writers known as the "legal realists"⁵⁷ offer one possible window through which to view letters such as these. The principal tenet of legal realism was that judges, although far from infallible, played an important psychological role in maintaining public confidence in the rule of law. Jerome Frank, a leading legal realist, wrote in 1930 that

the "myth of certainty" in the law possessed "immense social value" and was reinforced by the image of the infallible judge.⁵⁸ Frank, who would himself become a federal judge in the 1940s, maintained that one of the reasons that Supreme Court Justices are accorded near reverence by the public is because they wear robes that suggest the garb of high priests.⁵⁹ Similarly, Max Lerner, another realist writing in the 1930s, submitted that the "Constitution and Supreme Court are symbols of an ancient sureness and a comforting stability" and the Court "wears the ancient garments of divine right."⁶⁰ Lerner argued further that the "cult of the Supreme Court is the . . . emotional cement" that helps hold the country together.⁶¹ For both Frank and Lerner, the public worship of the Court could be explained in psychoanalytical terms. Frank saw the Justices as father figures, and Lerner saw the cult of the Court as a form of "womb-retreat."⁶²

One does not have to embrace the psychoanalytical view of the judicial function posited by selected legal realists to recognize that individuals writing letters to Supreme Court Justices are, perhaps, seeking something more than a sounding board for their opinions. Following the lead of the realists, sociologists of religion for over a generation have argued that Americans hold the Supreme Court and its Justices in almost sacred awe. In a famous 1967 article, Robert Bellah employed the term "civil religion" to characterize the American homage for the republican system of government and its various texts, public holidays, and rituals.⁶³ Bellah credited the Enlightenment philosopher Jean-Jacques Rousseau, in his eighteenth century classic, *The Social Contract*, for first using the term, "civil religion."⁶⁴ In a subsequent essay, Bellah acknowledged that the concept of a civil religion accompanying and reinforcing political sovereignty may predate recorded history.⁶⁵

In defending and elaborating upon Bellah's thesis, some commentators have focused upon the place of the Supreme Court in the hierarchy of the civil religion. According to these theorists, the Justices of the Supreme Court, ensconced in the "temple-like" Supreme Court building, are the religion's "high priests" who interpret the "sacred text" of American government, the Constitution.⁶⁶ Supreme Court Jus-

tices do not hear confessions in a conventional religious sense, but they do encounter their “parishioners” from time to time via letters. While not exactly confessional, I suggest that letters to the Supreme Court fulfill a psychological function for their writers similar to that sought by individuals receiving conventional forms of religious confession.

How useful it is to characterize Supreme Court Justices as high priests ministering to a troubled population in need of counsel is, of course, subject to debate. A comparison between letters sent to Supreme Court Justices and disclosures made before priests should only be pushed so far. However, the fact that most letters to the Justices found in the *Tinker* sample manifest respect for the institution of the Supreme Court suggests a parallel to the respect accorded to priests by those taking confession.

Veneration for the institution of the Supreme Court can be measured by consulting public opinion polls. For years the organs of American opinion research have solicited public views of the degree of respect accorded the country’s principal institutions. The Supreme Court has consistently ranked near the top of the available choices.⁶⁷ For example, in April 1995—on the weekend following the bombing of the federal building in Oklahoma City—staffers for the Gallup Poll asked a random sample of Americans the following question:

I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one—a great deal, quite a lot, some, or very little?” The list of choices read: the military, the police, the church or organized religion, the presidency, the Supreme Court, banks, the medical system, public schools, television news, newspapers, organized labor, Congress, big business, and the criminal Justice system.⁶⁸

A variation of this question has been posed many times over the last sixty years by the Gallup Poll, the Harris Survey, and the National Opinion Research Center.⁶⁹

When the polling organizations first employed this particular line of questioning, most of the institutional options received high expressions of confidence from respondents, i.e. over fifty percent of those surveyed indicated their confidence in all the listed institutions was either “a great deal” or “quite a lot.”⁷⁰ Despite a mid-1960s decline in public confidence in some institutions—due perhaps to increased perceptions of racial injustice, the Kennedy assassination, and the divisive war in Vietnam⁷¹—American confidence in the Supreme Court has still remained relatively high. In a 1986 Gallup poll, for example, only the military and organized religion inspired more confidence among the available options than the Supreme Court.⁷² Moreover, in almost every year surveyed since the 1960s, respondents to such surveys have rated their confidence in the Supreme Court substantially higher than in Congress or the presidency.⁷³ Most tellingly, when respondents were asked about their confidence in the *people* running the government, Supreme Court Justices ranked higher in every survey than members of Congress or the executive department.⁷⁴

If one professes respect for an institution and for the people who represent that institution, and if one feels strongly—either in a positive or a negative way—about a decision of that institution, then a letter to a member of that institutional body might be in order. As the letters to the Supreme Court in the aftermath of *Tinker v. Des Moines* reveal, sometimes communications addressed to High Court personnel are triggered by a decision that has received ample media coverage. Occasionally, they spring from the hands of friends or acquaintances of the Justices. Frequently they are virtual “fan letters” from lawyers or law students. Some letters are addressed to the Court as an entity; some are directed to the attention of the Chief Justice. More often the letters are addressed to the Justice writing the majority opinion. Also, as we have seen, an impassioned dissent in a high-profile case may precipitate substantial correspondence.

Overall, the majority of letters that begin “Dear Mr. Justice” are epistles from ordinary people who just want to voice their pleasure or irritation with a Court decision or a particular

Justice's opinion. In communicating in this fashion, correspondents with the nation's highest judicial body are expressing a mixture of admiration, pique, and reverence.

Endnotes

¹An abbreviated version of this essay appeared in my book, *The Struggle for Student Rights: Tinker v. Des Moines and the 1960s* (Lawrence, KS: University Press of Kansas, 1997), 190-94. I gratefully thank the publisher for permission to draw from the book for this essay. I also want to thank my research assistant, Sonia Ingles, for her work on my behalf in procuring some of the letters of the Justices of the Supreme Court cited herein. Finally, I thank Karen Lystra and Robert Martin for their useful suggestions on an earlier draft of this essay.

²Jack R. Baldwin to Hugo L. Black, February 24, 1969, Hugo L. Black Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereafter cited as Black Papers], Box 409.

³*Ibid.*

⁴393 U.S. 503 (1969).

⁵*Ibid.*, Black, J., dissenting, at 515-526.

⁶One lengthy example of "nonelites" writing to government officials can be found in Jacquelyn Dowd Hall, et al., *Like a Family: The Making of a Southern Cotton Mill World* (Chapel Hill, NC: University Press of North Carolina, 1987), 289-357. The letters featured in this volume are from Southern mill workers in the Great Depression who wrote President Franklin Roosevelt and/or the National Recovery Administration (NRA) to comment on conditions in the 1930s and to express appreciation for New Deal programs of assistance. The authors of *Like a Family* describe this set of several hundred letters in the papers of the NRA as an "extraordinary correspondence between ordinary people and their government. . ." Hall, et al., 293.

⁷Excluding the current Justices, ninety-nine individuals have served on the Supreme Court in its slightly more than 200-year history. The twenty former Justices whose papers are deposited and available for study in the Library of Congress are the following: Hugo L. Black, William J. Brennan, Jr., Harold H. Burton, Salmon P. Chase, Benjamin Curtis, William O. Douglas, Felix Frankfurter, Melvin W. Fuller, John Marshall Harlan I, Charles Evans Hughes, Robert H. Jackson, Horace Lurton, Thurgood Marshall, William Moody, Harlan Fiske Stone, George Sutherland, William Howard Taft, Willis Van Devanter, Morrison Waite, and Earl Warren. See generally, Melvin I. Urofsky, *The Supreme Court Justices: A Biographical Dictionary* (New York: Garland Publishing, Inc., 1994).

⁸For the locations of the papers of individual Justices, see the bibliographies following the entry for each Justice in *The Supreme Court Justices: A Biographical Dictionary*. Regrettably, for about half of the individuals who have served on the Supreme Court

there are either no collections of judicial papers or the papers have not yet been archived in an accessible repository.

⁹Black Papers, Boxes 409 and 410.

¹⁰In addition to the Papers of Hugo Black, the most useful collections of letters to Supreme Court Justices on *Tinker v. Des Moines* are in the Papers of William J. Brennan, Jr., William O. Douglas, Thurgood Marshall and Earl Warren, all in the Manuscript Division of the Library of Congress.

¹¹Laura Kalman cited a few letters to Justice Abe Fortas on *Tinker v. Des Moines* from the Abe Fortas Supreme Court Papers, Yale University Archives, in her excellent *Abe Fortas: A Biography* (New Haven, CT: Yale University Press, 1990), 286-290.

¹²Besides the opinions on *Tinker v. Des Moines* in the U.S. Reports, details on the case can be found in the record of the case in the federal trial court—available through the clerk of court for the Federal District Court of the Southern District of Iowa—and countless issues of the *Des Moines Register* and the *Des Moines Tribune* from 1965 to 1969.

¹³*Tinker v. Des Moines*, 393 U.S. 503, 504-514.

¹⁴*Tinker v. Des Moines*, Black, J., dissenting, 393 U.S. 503, 515-526 (1969).

¹⁵*Ibid.*, at 522.

¹⁶See, for example, "The Supreme Court, 1968 Term," *Harvard Law Review* 83 (Fall 1969): 154-161; Theodore F. Denno, "Mary Beth Tinker Takes the Constitution to School," *Fordham Law Review* 38 (October 1969): 35-62; and Sheldon H. Nahmod, "Beyond Tinker: The High School as an Educational Public Forum," *Harvard Civil Rights & Civil Liberties Law Review* 5 (April 1970): 278-300.

¹⁷See, for example, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986); and especially, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁸Mrs. Richard R. McConnell to the Supreme Court, February 27, 1969, Black Papers, Boxes 409/410.

¹⁹Rev. James L. Bachert to the Supreme Court, n.d., Black Papers, Boxes 409/410.

²⁰Edwin Schneider to Abe Fortas, March 25, 1969, Black Papers, Boxes 409/410.

²¹Mrs. Clement Evans to Abe Fortas, March 19, 1969, Black Papers, Boxes 409/410.

²²G. Lewis Penner to Abe Fortas, February 27, 1969, Black Papers, Boxes 409/410.

²³James H. Barry to Abe Fortas, March 7, 1969, Black Papers, Boxes 409/410.

²⁴Jaime Benitez to Abe Fortas, April 21, 1969, quoted in Laura Kalman, *Abe Fortas: A Biography*, 288-89.

²⁵Abe Fortas to Jaime Benitez, April 25, 1969, quoted in *Ibid.*, 289.

²⁶E. E. Biscamp to William O. Douglas, March 3, 1969, Papers of William O. Douglas, Manuscript Division, Library of Congress, Washington, D.C. [hereafter cited as Douglas Papers], Box 1430.

²⁷Paul J. Henry to Hugo L. Black, February 25, 1969, Douglas Papers, Box 1430.

²⁸L. H. Henderson to Hugo L. Black, March 14, 1969, Black Papers, Boxes 409/410.

²⁹Mrs. Rose Mueller to Hugo L. Black, February 27,

1969, Black Papers, Boxes 409/410.

³⁰ L. H. Henderson to Hugo L. Black, March 14, 1969, Black Papers, Boxes 409/410.

³¹ Hugo L. Black to L. H. Henderson, March 17, 1969, Black Papers, Boxes 409/410.

³² Mrs. Marian C. Bentley to Hugo L. Black, February 27, 1969, Black Papers, Boxes 409/410.

³³ Jesse E. Walters, et al. to Hugo L. Black, February 27, 1969, Black Papers, Boxes 409/410.

³⁴ Arthur V. Watkins to Hugo L. Black, February 28, 1969, Black Papers, Boxes 409/410.

³⁵ Mrs. Marian C. Bentley to Hugo L. Black, February 27, 1969, Black Papers, Boxes 409/410.

³⁶ Jack R. Baldwin to Hugo L. Black, February 24, 1969, Black Papers, Box 409.

³⁷ Charles Tomason to Hugo L. Black, March 5, 1969, Black Papers, Boxes 409/410.

³⁸ Mrs. Leonard C. Bastian to Hugo L. Black, February 25, 1969, Black Papers, Box 410.

³⁹ 370 U.S. 421 (1962).

⁴⁰ 374 U.S. 203 (1963).

⁴¹ Mrs. Leonard C. Bastian to Hugo L. Black, February 25, 1969, Black Papers, Box 410.

⁴² 410 U.S. 113 (1973).

⁴³ Anonymous to Hugo L. Black, n.d., Black Papers, Boxes 409/410.

⁴⁴ L. H. Henderson to Hugo L. Black, March 14, 1969, Black Papers, Boxes 409/410.

⁴⁵ Charles Thomason to Hugo L. Black, March 5, 1969, Black Papers, Boxes 409/410.

⁴⁶ Jack R. Baldwin to Hugo L. Black, February 24, 1969, Black Papers, Box 409.

⁴⁷ Indecipherable to Hugo L. Black, February 27, 1969, Black Papers, Boxes 409/410.

⁴⁸ Anonymous to Hugo L. Black, March 16, 1969, Black Papers, Boxes 409/410.

⁴⁹ James Meyer to Hugo L. Black, February 4, 1970, Black Papers, Box 409.

⁵⁰ Peter Georgi to Hugo L. Black, February 26, 1969, Black Papers, Boxes 409/410.

⁵¹ Anonymous to Hugo L. Black, February 29, 1969, Black Papers, Boxes 409/410.

⁵² James Meyer to Hugo L. Black, February 4, 1970, Black Papers, Box 409.

⁵³ Donna Lindh, et al. to Hugo L. Black, January 27, 1970, Black Papers, Boxes 409/410.

⁵⁴ David M. Peterson to Hugo L. Black, February 26, 1969, Black Papers, Boxes 409/410.

⁵⁵ Joseph E. Andrews to Hugo L. Black, February 25, 1969, Black Papers, Box 410.

⁵⁶ Hugo L. Black to Joseph E. Andrews, March 4, 1969, Black Papers, Box 410.

⁵⁷ On legal realism generally, see Laura Kalman, *Legal Realism at Yale, 1927-1960* (Chapel Hill: Univer-

sity of North Carolina Press, 1986); William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973); Wilfrid E. Rumble, Jr., *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968); John W. Johnson, *American Legal Culture, 1908-1940* (Westport, CT: Greenwood Press, 1981), 122-150; and William W. Fisher III, Morton J. Horwitz and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993).

⁵⁸ Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930), 207-216.

⁵⁹ Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949), 254-61.

⁶⁰ Max Lerner, "Constitution and Court as Symbols," *Yale Law Journal* 46 (1937): 1290-1319, at 1291.

⁶¹ *Ibid.*, 1306.

⁶² Frank, *Law and the Modern Mind*, 253-260; Lerner, 1315-19. Both Frank and Lerner hoped that the Americans would eventually grow up and slough off their infantile worship of the cult of the robe.

⁶³ Robert N. Bellah, "Civil Religion in America," *Daedalus* 96 (Winter 1967): 1-21.

⁶⁴ *Ibid.*, 5.

⁶⁵ Bellah, "Introduction," in Robert N. Bellah and Phillip E. Hammond, eds., *Varieties of Civil Religion* (New York: Harper & Row, Publishers, 1980), vii-viii.

⁶⁶ See especially, Phillip E. Hammond, "Pluralism and Law in the Formation of American Civil Religion," in Robert N. Bellah and Phillip E. Hammond, eds., *Varieties of Civil Religion*, 138-163.

⁶⁷ Dennis A. Gilbert, *Compendium of American Public Opinion* (New York: Facts on File Publications, 1988), 16.

⁶⁸ George Gallup, Jr., *The Gallup Poll: Public Opinion 1995* (Wilmington, DE: Scholarly Resources Inc., 1996), 70-74.

⁶⁹ See, for example, *Ibid.*, 70-74; Dennis A. Gilbert, *Compendium of American Public Opinion*, 15-31; and Louis Harris, *Inside America* (New York: Vintage Books, 1987), 255-61.

⁷⁰ Harris, *Inside America*, 255-56.

⁷¹ These are Louis Harris's reasons for the 1960s decline in confidence in American institutions. Harris, *Inside America*, 255.

⁷² Quoted in Gilbert, *Compendium of American Public Opinion*, 16.

⁷³ Gallup, *The Gallup Poll: Public Opinion 1995*, 70-74; Gilbert, *Compendium of American Public Opinion*, 17-19.

⁷⁴ Gilbert, *Compendium of American Public Opinion*, 18.

Personal Rights, Public Wrongs: The *Gaines* Case and the Beginning of the End of Segregation

Kevin M. Kruse

From its founding in 1909, the National Association for the Advancement of Colored People (NAACP) searched for a strategy with which it could better the lives of African-Americans. The legally sanctioned institutions of racial segregation, though only a few decades old, appeared to be firmly entrenched on the American landscape. In the eyes of most, the daunting task of changing the racial status quo seemed impossible and most mass-action programs suffered accordingly. Hoping to reverse this trend, the NAACP sought a course of action that would only require a small group of activists but would affect wide populations of black Americans. The courts seemed to hold the answer.

The early years of the legal campaign did little to fulfill the hopes of the NAACP leadership. Under the watch of the archconservative Taft Court, the battle in the courts had degenerated into a pendulum swing of victories and setbacks. The seeming victory over residen-

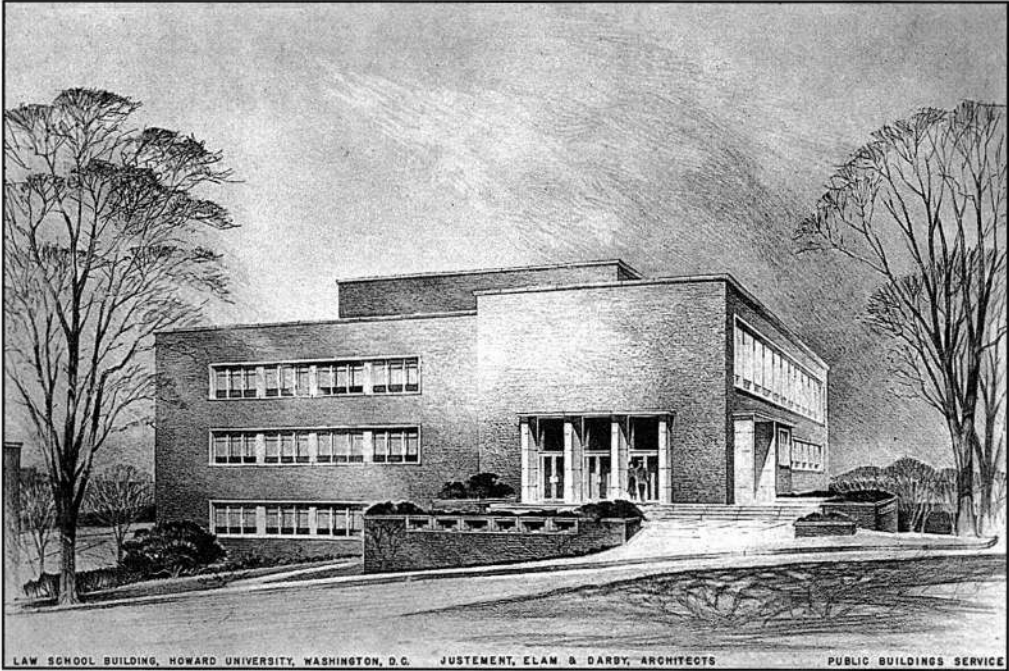
tial segregation in *Buchanan v. Warley* (1917) was erased by the unanimous upholding of restrictive covenants in *Corrigan v. Buckley* (1926). The Court then went out of its way to crystallize its belief in segregation by applying it to elementary education with *Gong Lum v. Rice* (1927). Political discrimination remained, despite the nominal successes in *Nixon v. Herndon* (1927) and its descendants. By the close of the 1920s, the Supreme Court seemed impervious to any frontal assault on segregation and discrimination.¹

In the early 1930s, a new self-reliant generation of black leaders took command of the NAACP.² In their reexamination of the legal campaign, these new leaders latched onto a plan put forth by Nathan Margold, who advocated an attack on segregation from the safest possible ground. Instead of immediately seeking the overruling of *Plessy v. Ferguson* (1896), Margold argued, the NAACP should do nearly the exact opposite: it should force a strict ob-

servance of “separate but equal” on the Southern states, by striking the South where it could most easily be proven negligent—educational funding. Through relentless litigation, the NAACP hoped to force segregated society to provide blacks with educational facilities truly equal to those of the whites and therefore make Jim Crow schools a costly luxury for Southern states. By holding segregationists to the very letter of their own doctrine, the NAACP planned to make that same doctrine impossible to keep. Faced with the option of integration

or financial ruin, the South would grudgingly choose the lesser of two evils—integration.³

In hammering out the specifics of this broad structure, the new NAACP leadership forged an informal alliance with another rising force in civil rights activism, the Howard University Law School. Radically overhauled in 1930 and 1931, the institution was fast becoming a crucial weapon of the movement, teaching a new generation of lawyers a hands-on civil rights legalism that interpreted the law specifically as it applied to blacks. Dean Charles Hamilton



LAW SCHOOL BUILDING, HOWARD UNIVERSITY, WASHINGTON, D.C. JUSTEMENT, ELAM & DARBY, ARCHITECTS PUBLIC BUILDINGS SERVICE

When Charles H. Houston (right) served as dean of the Howard University Law School in the 1930s, he turned the school into a powerful force for civil rights activism. He also directed the NAACP’s legal campaign, which focused on graduate education, where the most blatant inequalities of Jim Crow schooling existed. Houston fervently believed that the “graduate and professional cases were essential to the development of ‘the leadership of the race’” and committed himself to winning them.

Above is a blueprint of Howard University’s law library, constructed in 1951.



Houston, the driving force behind the law school's new spirit, was soon guiding the NAACP legal campaign as well, first as an advisor and then as its official head.⁴ Houston viewed education as "a preparation for the competition of life" and therefore saw it as a logical focus for the NAACP's plans.⁵ The dean honed the legal strategy, deciding to concentrate their efforts on graduate and professional education, where the most blatant inequalities of Jim Crow schooling existed.⁶ Houston fervently believed that the "graduate and professional cases were essential to the development of 'the leadership of the race'" and committed himself to winning them.⁷

In 1936, Houston's legal team secured its first victory in the legal fight against segregation. In *Murray v. Maryland*, that state's Court of Appeals struck down Maryland's out-of-state scholarship program, a ruse by which the segregationist state could claim it had fulfilled its responsibility to its undesirable citizens by "awarding" them small sums in return for their promise to seek their education elsewhere.⁸ The Court of Appeals ruled that offering a limited number of out-of-state scholarships to those black students seeking graduate education was not, in fact, "equal" to offering in-state graduate education for whites.⁹ This decision was the first blow to the scholarship provision used by many segregating states as a means of avoiding their responsibility to provide graduate education to black citizens.¹⁰ Although the ruling set a precedent, it did not directly apply to the nation as a whole, because Maryland authorities had not pressed for a hearing beyond the state level.¹¹ The NAACP lawyers knew that their fight had only just begun. "The University of Maryland case is a wedge, but such a little wedge," Houston warned. "And if we do not remain on the alert and push the struggle farther with all our might, even this little hole will close upon us."¹² After the small but significant advance of the *Murray* ruling, Houston searched for a new case, one he could use to drag the scholarship issue before the nation's highest court.¹³ He found it in St. Louis.

Lionel Lloyd Gaines wanted to go to law school. In the summer of 1935, he had graduated from Lincoln University, Missouri's state-

supported black college, as both an honor student and the president of his senior class.¹⁴ Because Lincoln had no law school, Gaines applied to the University of Missouri. The application of a black youth to the century-old white institution presented the University officials with an unforeseen crisis.¹⁵ Because Missouri's segregation statutes made no mention of colleges and the University had no admissions criteria other than academic merit, the administration was unable to find any concrete legal means with which they could rid themselves of his bothersome request. Dean W. E. Masterson reluctantly advised the University's board that "it would be unconstitutional to deny Gaines' application solely because of his race."¹⁶ The board disagreed and did exactly that, citing the state's public policy of school segregation in the letter of rejection sent to Gaines.¹⁷ Instead of trying to attend the University of Missouri, they advised, he should apply either to Lincoln, which by state statute¹⁸ was empowered to construct a law school upon demand, or to another state's law school, where Gaines would be financially assisted by Missouri's out-of-state scholarship program.¹⁹ Lloyd Gaines decided to pursue neither course and instead opted for a third—seeking the legal assistance of the NAACP.

Charles Houston was only too willing to help.²⁰ Following the successful blueprint of the *Murray* victory, the NAACP lawyers filed a suit seeking a writ of mandamus. Historian Mark Tushnet notes why:

Mandamus was thought to be more appropriate for individual relief [than an injunction and] more appropriate for relief that would direct officials to take certain positive actions . . . This analysis led the lawyers to favor mandamus in the graduate and professional cases, where they were trying to force university officials to admit individual applicants to their schools.²¹

On January 24, 1936, Houston's legal team entered a suit in the Circuit Court of Boone County, Missouri, for such a writ of mandamus, this time against the registrar of the University of Missouri, Silas Woodson Canada.²²

In the legal styling of the day, the case was termed *Missouri ex rel. Gaines v. Canada*.²³

Houston plunged into the case, determined not to lose the opportunity to expand upon the gains of the *Murray* decision. Having spent several days prior to the trial in St. Louis honing his presentation, Houston, his fellow lawyers, and Gaines gathered early on the morning of July 10, 1936, to trek the 120 miles to the Columbia courthouse, where the heat, the distance, and the lack of public transportation all contributed to the scarcity of African-American faces in the courtroom audience.²⁴ Furthermore, the lingering memories of a brutal lynching in Columbia some years before helped scare off those Missouri blacks who had the wherewithal to make the journey.²⁵

Surprisingly for Houston, the courtroom was almost congenial—the seating was unsegregated, the University's lawyers were polite and shook hands with the NAACP counsel, and everyone addressed the plaintiff as "Mr. Gaines."²⁶ Although another lawyer feared that Judge Walter S. Dinwiddie was "working with the officials of the University of Missouri" against them, Houston was by now reasonably convinced that the judge's earlier promise that "he would give justice regardless of [the] feeling of [the white] community" was a sincere one.²⁷ After a civil agreement on numerous minutiae, the proceedings commenced.²⁸

The shirtsleeve trial began with the argument for Gaines' petition for the writ of mandamus. Sidney Redmond, Houston's co-counsel, opened the argument by asserting that Gaines, a citizen, resident, and taxpayer of the state, had been denied admission to the law school solely because of his race. He secured a quick and crucial point:

Mr. Hogsett [counsel for the university]: I think that [Gaines' academic qualification] is a fact, and we therefore admit it.

The Court: It is admitted that . . . would be sufficient to admit him to the Law School.

Mr. Hogsett: Provided he were otherwise eligible.

The Court: Very well.²⁹

To their own astonishment, the NAACP had quickly crystallized the reason Gaines had been

denied admission—his race. "God, I couldn't believe it when [they] made it clear . . . that Gaines was being rejected solely because of his race," marveled Thurgood Marshall, then an advisor to Houston on the lawsuit. "Hell, the curators saved the NAACP about a hundred thousand dollars, which it didn't have, by that admission."³⁰ With the real reason for his rejection acknowledged, Gaines' lawyers now had to prove that this denial was a violation of his Fourteenth Amendment right to equal protection.

First, Redmond sought to establish that the alternatives offered by Missouri to black applicants, the theoretical law school at Lincoln and the out-of-state scholarships, were not substantially equal to the nearby law school at the University of Missouri. Gaines stated that he "thought it would be to [his] advantage to be in a school where Missouri Law came before the class room with sufficient frequency to give [him] some familiarity with the law where [he] would wish to practice."³¹

In an attempt to show that the University of Missouri's law school was better than all others for training students to practice in the state, Houston took over. He began by questioning none other than W. E. Masterson, the dean who had a year earlier advised the board to admit Gaines. This time, however, Masterson was not so ready to acknowledge the unconstitutionality of the board's rejection and Houston had an excruciating time trying to extract any information from him. As a tongue-in-cheek NAACP press release noted, Masterson suffered "a severe lapse of memory" in his refusal to substantiate facts about the state law school.³² Charles Houston remarked that the dean "wiggled like an earthworm . . . and made just about the sorriest and most pitiable spectacle" in his attempts at evasion.³³ Masterson's slippery responses proved to be indicative of all of the university officials called to the stand. As a result, Houston dropped that line of questioning without "any acknowledgment from the university officials he put on the stand that the Missouri law school was a particularly good place to be trained if you wanted to be a lawyer in Missouri."³⁴

Houston then turned to the educational opportunities offered to blacks by the state—the

possibility of creating a law school at Lincoln University upon demand, and the out-of-state scholarships. Through a series of witnesses, Houston established a list of ways in which Lincoln University was not equal to the University of Missouri. By verifying that Lincoln paled in comparison to its white counterpart in a variety of aspects—in the degrees held by its faculty, the salaries given to its professors, the assets in its building fund, and the holdings of its library, to name a few—Houston hoped to undermine the state's contention that Lincoln was the equal of the University of Missouri and thereby show that the equality the state offered its black citizens was a farce.

In an ironic twist, Houston's plan of attack meant that the NAACP lawyers would spend much of the trial trying to show the inferiority of the black college while the University of Missouri's counsel would have to counter by claiming that the Jim Crow college was in every way the equal of the white institution. Because of this odd situation, the Lincoln administrators wound up caught in the middle. In his questioning of Dr. J. D. Elliff, President of the Board of Curators of Lincoln University, Houston nearly had to treat the black educator as a hostile witness. He was, however, eventually able to wrest an admission from Elliff that Lincoln was merely "a university in the making . . . , an embryo university."³⁵

In his cross-examination of Senator Frank M. McDavid, President of the Board of Curators of the University of Missouri and by one witness's account "a thoroughly crotchety old gentleman," Houston pressed the issue further:³⁶

Q. Do you know whether it [Lincoln] is a university in fact?

A. I do not know except I have full confidence—I have read the language of the bill [the Lincoln University Act of 1921], and I have read the opinion of the Court construing the act. . . .

Q. They give Negroes a piece of paper, while the white citizens have an actuality—

A. How is that?

Q. Merely a piece of paper, just a legislative fiat, whereas the white citizens have an actual, existing School of Law?³⁷

No answer would come, however, as the judge rescued the Senator by forcing Houston to drop the matter. In a parting shot, Houston remarked to the Senator, "Mr. McDavid, you can't stand in the way of progress forever." Without hesitation, the legislator lashed back: "Mr. Houston, I don't know what you mean by progress."³⁸

Houston then attacked the second option furnished by Missouri, the out-of-state scholarship program. He denied "that it is constitutional to exile Negroes to study in other states solely on account of race while white students are offered the same subjects in a public institution in Missouri. . . ."³⁹ Insisting on the unconstitutionality of the scholarship provision, Houston logically drew upon the precedent he had forged, *Murray v. Maryland*.

The main thrust of Houston's argument before the circuit court was that the state of Missouri had violated Lloyd Gaines' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. Gaines had been denied admission to the University of Missouri law school solely because of his race—both sides agreed on this point. Houston maintained that what the state offered as "equal" alternatives to admission, the future growth of Lincoln University and the out-of-state scholarship fund, were by no means equal to the existing law school of the University of Missouri. Because the state denied Gaines educational opportunities equal to those offered to white citizens, it followed, the state had obviously violated Gaines' rights to equal protection. Hence, a writ of mandamus was in order to correct that violation. The entire case of the NAACP rested on the interpretation of the equality of those alternative means of education. The state sought to destroy that interpretation.

The counsel for the University of Missouri, a trio of well-heeled lawyers from St. Louis and Kansas City, began their case rather benignly. "Talking more to the press table than to the court," chief counsel William Hogsett tried to portray the University officials as unbiased men merely following the letter of the law as they understood it.⁴⁰ He claimed that they were "legally forbidden to admit" Gaines.⁴¹ Though he applauded "Mr. Gaines" for his "laudable" decision to study law, Hogsett insisted that Gaines' legal education awaited him not at the

University of Missouri but rather at Lincoln.⁴² If he had applied there, the college would have either erected a law school for him or given him the financial support to study outside Missouri. Through those options, Hogsett maintained, the state had thoroughly fulfilled its obligation to provide its citizens equal protection.⁴³

The University's counsel called upon a stream of college and state officials to refute every word of the NAACP petition, denying everything from Gaines' status as a taxpayer to the superiority of a University of Missouri law degree for practicing in the state.⁴⁴ Their refutation of each of Houston's points with their own dubious counterpoints served to cloud the underlying constitutional issue of equal protection.

Hogsett then countered Houston's application of the *Murray* decision to the *Gaines* case. He noted that unlike Maryland, the state of Missouri had taken adequate steps to ensure the education of its black citizens not only by empowering Lincoln University to expand its programs upon demand but also by making a *bona fide* offer of a substantial amount of

money for out-of-state scholarships.⁴⁵ Maryland's situation was completely inapplicable to Missouri because Maryland, unlike Missouri, had no state-supported black college and only inadequate funding for the scholarship program. The Maryland Court of Appeals, furthermore, had not invalidated the practice of out-of-state scholarships. Therefore, Hogsett claimed, there was no applicable precedent.

Thus, the state's defense was that Missouri had fulfilled its constitutional duties as prescribed by the Fourteenth Amendment. It held that the provisions of the 1921 Lincoln University Act—the out-of-state scholarship fund and the intent to create a black law school—were an adequate response to the needs of the state's black citizens. Therefore, Lloyd Gaines' constitutional rights had not been denied. Rather, he had merely been given a different means to obtain his legal education than had white Missourians.

The Honorable Walter M. Dinwiddie of the Circuit Court of Boone County cut through the haze of points and counterpoints and pared the case down to two issues. At the trial's conclu-



In 1921 Missouri passed an act mandating that Lincoln University, a black college in Jefferson City, create a law school that black law students could attend if they did not choose the state's scholarship money to attend an unsegregated out-of-state law school. Although this women's dormitory, built in 1941, was comfortable, the law school never came close to being equal to the one reserved for whites at the University of Missouri.

sion, Houston recalled,

the judge indicated that he was interested in just two questions: whether the act of 1921 establishing Lincoln U[niversity] expressed the state policy to exclude Negroes from [the] U[niversity] of M[issouri] taken in connection with the state constitution, laws and uniform educational policy; and whether pending development of Lincoln U[niversity] the state scholarships offered equal protection under the 14th Amendment.⁴⁶

Receiving briefs from both sides on these two questions, Judge Dinwiddie retired to make his decision. At this point, Houston assumed the worst. "It is beyond expectation that the court will decide in our favor," he wrote the NAACP office, "so we had just as well get ready for the appeal."⁴⁷ His prediction was correct. On July 24, 1936, Dinwiddie dismissed their petition for a writ of mandamus against the university officials.

The case then passed onto the Missouri Supreme Court for review.⁴⁸ This court had long defended the institutions of segregation, which it justified on the grounds of "natural race peculiarities" and the "practical results" furnished by segregation.⁴⁹ In his ruling of December 9, 1937, Judge William P. Frank employed Dinwiddie's two questions as yardsticks for the case. As for the first question, he listed a long series of legislative acts dealing with the education of the two races. This collection of statutes, "couched in language too plain to be misunderstood," showed "a clear intention on the part of the [Missouri] legislature to separate the white and negro races for the purposes of higher education."⁵⁰ Thus the 1921 Act was in accord with the long-standing, though implicit, establishment of segregated educational facilities. As for the second question, Judge Frank declared that "the opportunity offered appellant [Gaines] for a law education in . . . an adjacent state is substantially equal to that offered to white students by the University of Missouri."⁵¹ Stating that "equality and not identity of school advantages is what the law guarantees to every citizen, white or black," the

Court denied Houston's interpretation of equality of opportunity.⁵² Gaines' refusal to take advantage of the opportunities established by the state did not mean the state had not offered them. As to whether the *Murray* decision applied to Gaines' case, the Supreme Court of Missouri agreed with the university's counsel.⁵³ "In Missouri the situation is exactly opposite" that of Maryland, because of the "legislative declaration to establish a law school for negroes" and because "adequate provision has been made for the legal education of negro students in recognized schools outside of this state."⁵⁴ The court unanimously held that Missouri had fulfilled its Fourteenth Amendment duty to Gaines.⁵⁵ The lower court's denial of the mandamus writ was upheld.

Despite these setbacks, Charles Houston was becoming convinced that the *Gaines* case was the key to the entire NAACP legal campaign. "I firmly believe the Missouri case is going to set the pace for Negro professional and graduate education for the next generation," he wrote his co-counsel, Sidney Redmond, in late 1936. "We've got something bigger than I had dreamed of."⁵⁶ Though he had earlier agreed with NAACP Secretary Walter White's assertion that "the University of Missouri case is . . . but one link in the chain," he now felt that this one suit was essential.⁵⁷ The organization finally had the chance to destroy the southern scholarship programs, which they opposed "both in principle—they embodied the segregationist view that contact between blacks and whites in a segregated state was intolerable—and for [the] practical reasons" that the so-called scholarships did little to cover the additional expenses entailed in an academic "exile."⁵⁸ Setting aside work on similar cases in Arkansas, Oklahoma, Tennessee, and Maryland, Houston poured all of his energy into the *Gaines* lawsuit, doggedly urging his co-counsel to "live, sleep and breathe this case."⁵⁹ Realizing the importance of victory, Houston convinced the NAACP leadership that additional counsel was required. With their approval, he chose one of his former law students from Howard University, a young man named Thurgood Marshall.

Shortly after the Missouri high court ruled against his client, Houston submitted a motion

for rehearing, setting forth his argument as to why the United States Supreme Court should review the case. Rehashing his assertions before the Missouri courts, Houston still focused on the inequality of educational opportunity furnished by the state. "If any comparison" between the academic avenues offered to whites and blacks "is to be made, it must be on the basis of what the state does" and not on the basis of what the state could theoretically do.⁶⁰ Then Houston made one additional point. The state had held that the construction of a black law school was not warranted by Gaines' application alone and therefore the state, in keeping with the theory of "equality not identity" of opportunity, could decide that an out-of-state scholarship was its only responsibility to Gaines. Houston disagreed, arguing that Gaines' "constitutional rights are individual . . . and cannot be made to depend on how many or how few Negroes apply to the state for a legal education."⁶¹

In support of this notion of individual civil rights, Houston dusted off the 1914 Supreme Court ruling in *McCabe v. Atchison, Topeka & Santa Fe Railroad*.⁶² The case dealt with an Oklahoma law that sanctioned the denial of first-class sleeping and dining cars for blacks on the grounds that the demand for such items was not substantial. The 5-4 opinion of the court invalidated the law because "[i]t makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one."⁶³

Houston may have noted with pleasure that the author of this precedent⁶⁴ was none other than Charles Evans Hughes, then an Associate Justice, but by the time of *Gaines* Chief Justice of the United States.⁶⁵ What Houston could not have fully grasped was Hughes' private outrage over the issue. In a private memo to Oliver Wendell Holmes, Jr., Hughes had denounced the Oklahoma law as "a bald, wholly unjustified discrimination against a passenger solely on account of race."⁶⁶ However, this much must have been clear to the NAACP legal team: the *McCabe* ruling held that "if any black was denied a 'facility or convenience' available to others, the Constitution was violated."⁶⁷ Calling upon Hughes' own opinion

to invalidate the practice of out-of-state scholarships, Charles Houston hoped to win the Chief Justice over to his side.

The attorney searched for more allies on the Bench, but was not entirely sure where he could find them. To what must have been his delight, in the two years it had taken his case to make its way through the lower courts, two of the conservative "Four Horsemen" had retired from the Court. After two and a half decades of dogmatic conservatism, the seventy-eight-year-old Willis Van Devanter left the Bench in 1937 to be replaced by Senator Hugo L. Black. A few months after Black was sworn in, George Sutherland also stepped aside. His replacement was FDR's former Solicitor General Stanley F. Reed.⁶⁸

Both Black and Reed were ardent New Dealers, but they were also Southern whites. It was impossible for the NAACP attorneys to know in 1938 whether Van Devanter and Sutherland had merely been replaced by men with views just as conservative when it came to civil rights. What they did know of the two Justices' racial views could hardly have made them optimistic. Reed was perhaps a racial moderate, at least by the segregationist standards of his native Kentucky. But as the NAACP knew only too well, Black had once belonged to an Alabama chapter of the Ku Klux Klan. Rumors of the Senator's ties to the KKK had created quite a stir after Black's nomination to the High Court, so much so that a popular joke made the rounds in Washington: "Hugo won't have to buy a robe; he can dye his white one black."⁶⁹ Seeing the issue as no laughing matter, the NAACP urged the members of the Senate to explore their colleague's racial views. Because no evidence to corroborate the charges surfaced until after Black's confirmation, their crusade failed.⁷⁰ As the *Gaines* lawsuit arrived at the Supreme Court, African-American activists remained wary of the jurist they felt had eluded them once before. "We hope that the Association will win this case for the benefit of colored Americans," one editor wrote the NAACP's Roy Wilkins, before adding acidly that "[i]t will be interesting to observe the position Justice K.K.K. Black will take."⁷¹

Charles Houston's already cloudy understanding of the Supreme Court became further

muddied when Benjamin N. Cardozo passed away in the summer of 1938. Justice Cardozo, as Houston well knew, had struck down a piece of segregationist sleight-of-hand—similar to that presented by Missouri in the *Gaines* case—in *Nixon v. Condon* (1932), when he denied the constitutionality of Texas’s “unofficial” white primary.⁷² His absence from the Bench deprived the NAACP attorneys of a likely ally.

As the Supreme Court gathered in November to hear the arguments on *Missouri ex rel. Gaines v. Canada*, there were only eight sitting Justices. The NAACP felt it could expect the support of the moderate-liberal bloc of Chief Justice Hughes, Harlan Fiske Stone, and Louis D. Brandeis and the opposition of the two remaining archconservatives, James C. McReynolds and Pierce Butler. Owen J. Roberts, the unpredictable moderate-conservative, might go either way. As for Black and Reed, their stance on civil rights was anyone’s guess. *Gaines* would be their first test.⁷³

Still uncertain of the reception he would receive before this restructured Court, Houston opened his argument on November 9, 1938. A journalist present in the courtroom described Houston’s presentation as “dignified and restrained, . . . heard by the bench with closest attention, and virtually without interruption.”⁷⁴ The NAACP attorney began by repeating the two main points he had set before the Missouri lower courts. First, Missouri had denied Gaines the equal protection dictated by the Fourteenth Amendment by refusing to admit him to the University of Missouri law school solely on the grounds of his race.⁷⁵ Second, the opportunities for a legal education that were given to Gaines, the out-of-state scholarships and the intent to expand Lincoln University, were not substantially equal to the opportunities provided whites.⁷⁶ Then Houston added a new wrinkle. He claimed that the burden of proof fell on the state to show that it had carried out its obligation to Gaines as prescribed by the Fourteenth Amendment. Houston maintained that in the previous trials the state had not sufficiently proven it had fulfilled its constitutional duty.⁷⁷ Therefore, he argued, the Court must furnish Gaines with a writ of mandamus against the University.

The only difficulty Houston faced during the course of his argument was Justice McReynolds. A product of the Old South, McReynolds frequently displayed a racist streak and continuously voiced his “segregationist thinking” on the Bench.⁷⁸ The cantankerous jurist had once broadly described African-Americans as

ignorant, superstitious, immoral, and with but small capacity for radical improvement. They are improvident, lazy, and easily imposed upon by designing men. They have a low order of intellect, learn with difficulty, and apparently make small use of what attainments they have acquired.⁷⁹

Charles Houston, despite his exquisite style and formidable credentials,⁸⁰ was in the Justice’s view nothing more than an official at what he more than once described as the capital’s “nigger university.”⁸¹ McReynolds, Chief Justice Taft once noted, seemed to take delight in others’ discomfort.⁸² As if to prove this point, the Justice turned his back on Houston during the attorney’s oral argument and stared petulantly at the rear wall of the courtroom.⁸³ Later, he suddenly stood and walked out of the room.⁸⁴ Little wonder that Harold Laski once remarked that “McReynolds and the theory of a beneficent deity are quite incompatible.”⁸⁵

As rough as the going was for Houston, the University’s attorneys had an even rougher time before the Bench. Their argument rested on the same two points that had swept them to easy victories in the Missouri courts: that Gaines had never availed himself of the state’s offerings for a legal education to blacks and, therefore, the state had not violated his Fourteenth Amendment rights in denying him entry to the University of Missouri law school. Claiming that an individual could not dictate how the state must provide equal protection, the University counsel argued that University officials had acted properly by barring Gaines from attending the white college.⁸⁶

Unlike the Missouri judges, the Justices of the Supreme Court were unwilling to let the state’s assertions go unchallenged. At virtu-



Young attorney Thurgood Marshall (left) read aloud to Charles Houston (right) as they worked on legal strategy for Donald Gaines Murray in his suit against the University of Maryland in 1935. In *Murray v. Maryland*, that state's Court of Appeals struck down Maryland's out-of-state scholarship program, a ruse by which the segregationist state could claim it had fulfilled its responsibility to its undesirable citizens by "awarding" them small sums in return for their promise to seek their education elsewhere.

ally every turn, one or another member of the Bench interrupted the University's counsel to challenge its conclusions. Early in the state's presentation, Fred Williams asserted that the Missouri statutes made it mandatory for Lincoln University to establish a law school as soon as an applicant requested it. Justice Roberts protested the use of the word "mandatory" because of the state's frequent use of its other alternative, the out-of-state scholarships.⁸⁷ Chief Justice Hughes agreed with his colleague, asking why, if the statute was indeed "mandatory," the Missouri Supreme Court did "not order forthwith that Lincoln establish a law school?"⁸⁸ In an ensuing series of objections, Hughes repeatedly countered Williams' assertions that Lincoln was a viable educational opportunity for blacks.

Stymied in their defense of Lincoln

University's capability to provide a legal education for blacks, the state's attorneys tried to show that Missouri's duties were fulfilled by the out-of-state scholarship fund.⁸⁹ Here again, the Justices jumped in. "How can you say," Hughes asked incredulously, "that Negroes have equal educational opportunities in Missouri, when they are compelled to leave their own state to find such equality of professional training in other states?" Williams replied that blacks actually had an advantage over whites, in that the scholarships gave them access to \$150 more than whites got at the University of Missouri. This was too much for Justice Black: "Do you mean to suggest that a pecuniary payment would be adequate compensation for loss of civil rights?"⁹⁰

Williams was on the ropes. When the attorney tried to regain his footing by declaring

as a nondebtable issue “the constitutional right of a state to segregate the white and black races in educational institutions,” Justice Stone interrupted, reminding him: “That is the law in some states. But there is also a national point of view, which is opposed to racial discrimination.”⁹¹ Later, Justice Brandeis pointedly asked whether there was any state law that explicitly barred blacks from attending the University of Missouri. The answer was no.⁹² Despite the Justices’ prolonged attack on their argument, the University’s counsel insisted that the state had obviously met its constitutional duty and, therefore, the *Gaines* case did not even merit the Supreme Court’s attention.⁹³ The Court felt differently and, on December 12, 1938, told the nation why.

Chief Justice Hughes, writing for the six-man majority, flatly rejected the arguments of the University’s attorneys. First, Hughes brushed aside their claim that the provisions of the 1921 Lincoln University Act were an adequate fulfillment of the state’s equal protection duty.⁹⁴ The state’s intent to establish a black law school, “commendable as is that action,” could not be viewed as a concrete educational opportunity.⁹⁵ Because “the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough,” Missouri had not satisfactorily fulfilled the state’s Fourteenth Amendment duty.⁹⁶

Next, the Chief Justice turned to Missouri’s other ruse, the out-of-state scholarship fund. As Charles Houston had hoped, Hughes harkened back to *Murray v. Maryland*, in which a similar “provision for scholarships to enable negroes to attend colleges outside the state . . . was found to be inadequate” by the Maryland Court of Appeals.⁹⁷ He recalled the Missouri Supreme Court’s logic in dismissing the Maryland decision as a precedent: namely, that Missouri’s situation was different because of its stated intent to establish a law school for blacks and its *bona fide* offer of substantial scholarship awards.⁹⁸ The first of these differences Hughes had already discounted. In dealing with the second, the Chief Justice enumerated a long series of arguments both for and against the state court’s line of reasoning.

But Hughes ultimately disagreed with the Missouri Supreme Court’s decision on the applicability of *Murray v. Maryland*. He brushed aside Missouri’s scholarship defense, noting that the opportunities furnished by other states were “beside the point:”

The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the grounds of color. . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes for reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the state has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.⁹⁹

The state must provide equally for its citizens within its borders. The lack of substantial demand did not excuse the discrimination.¹⁰⁰ “[P]etitioner’s right was a personal one,” the Chief Justice asserted. “It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education.”¹⁰¹ Here, as Houston had hoped, Hughes called upon the precedent he had created in the *McCabe* ruling, using it for the first time as a binding constitutional duty.¹⁰² The Chief Justice resurrected his twenty-four-year-old point that a constitutional right could not be made to “‘depend upon the number of persons who may be discriminated against.’” Reversing the lower courts, Hughes ruled that, “in the absence of other . . . proper provision for his legal training within the State,” *Gaines* must be admitted to the law school of the University of Missouri.¹⁰³

McReynolds, who “easily held first honors

in acidity” among the Supreme Court Justices, penned a predictably vitriolic dissent.¹⁰⁴ He thoroughly mocked Gaines’ professed desire to study law. But “if perchance that is the thing really desired,” McReynolds held that Missouri had more than fulfilled its constitutional duty to Gaines.¹⁰⁵ The Justice had long viewed the matters of public education as his specialized area of competence and lamented his Brethren’s ignorance of the “grave difficulties of the situation.”¹⁰⁶ McReynolds felt that Missouri had made a “fair effort” to deal with such a “difficult and highly practical” dilemma.¹⁰⁷ He balked at overturning the established policies of the state and the University.¹⁰⁸ To “break down the settled practice concerning separate schools,” he warned, would only serve to “damnify both races.”¹⁰⁹

Justice Butler also clashed with the six-man majority. A jurist who “took a special interest in higher education, being especially vigilant against academic liberals,” Butler was wary of any steps toward the integration of public schools.¹¹⁰ He thought that “Missouri should continue to handle the ‘delicate’ issue as it had in the past.”¹¹¹ To the surprise of no one, the Justice once known by educators at the University of Minnesota as “Bully” Butler sided with McReynolds in the bitter dissent.¹¹²

Few commentaries on the decision backed McReynolds and Butler.¹¹³ Not even white Southerners, whose institutions were seemingly at stake, supported the dissent blindly. Virginius Dabney, a prominent liberal and the editor of a Richmond newspaper, voiced the impressions of many other Southern liberal whites in an article for *The New York Times*.¹¹⁴ He described the *Gaines* decision as a “notice to all the Southern States that they must make far-reaching adjustments.” Dabney painted a picture of “severely jolted” Southerners deliberating in “hurried conferences” over how to bolster their provisions for black higher education, which were “practically non-existent” in some areas and “entirely lacking” in others.¹¹⁵ While applauding the decision, Dabney grimly warned that the recalcitrance of Southern states could mean that “the practical effect of the court’s ruling upon them might be virtually nil.”¹¹⁶

Very few Southerners, however, joined Dabney in cheering the ruling; most rallied to

the conservative Justices’ defense. For example, a piece in the *Georgia Bar Journal* chided the majority for striking down the scholarship program, which it glorified as “an effort to harmonize the right to equal protection with the segregation of the races in education.” Contrasting the stands taken by Hughes and McReynolds, the note concluded that the “opinion of the dissenting justices seems to be the better view as a fair effort to solve a difficult problem.”¹¹⁷

These Southern comments could have been expected, but the more widespread outburst coming from the North was somewhat puzzling. A piece in the *Georgetown Law Journal* assumed an almost petulant tone in noting that, because of *Gaines*, “it appears that when the state offers educational facilities, even if of a professional nature, nothing short of substantial equality for all students, regardless of color, will satisfy the requirements of the Fourteenth Amendment.”¹¹⁸ A more vitriolic note in the *Fordham Law Review* mocked the majority’s conclusions about the unconstitutionality of the scholarship practice: “Their decision is rooted deeply in a view of the Union as a collection of strange countries. It seems concerned with some mythical impregnability of state borders.” The comment held that the position of the two dissenting Justices was “a fair one.”¹¹⁹ Similarly, a note in the *Temple Law Quarterly* applauded the dissenters for understanding that “[e]thnological problems are but rarely solved by legal fiat.” The author dourly predicted that “he whom the legislature cannot prevent from studying law at a state institution may well find himself in the first year’s casualty list.”¹²⁰

Most scholarly reviews, however, praised the majority’s decision. A note in the *George Washington Law Review*, for instance, heralded the Supreme Court’s newfound “determination to prevent discrimination, however camouflaged or sugar-coated.”¹²¹ A comment in the *National Bar Journal* praised the “sound and realistic attitude [which] eloquently reveals the spirit of our Supreme Court.”¹²² A note in the *Harvard Law Review* admired the Court for having “not only squarely applied its dicta on equality of treatment [as set up in *Plessy v. Ferguson*] but also set a fairly rigid standard of equality.”¹²³ The *Michigan Law Review*’s com-

ment summed up the attitude of many: “the decision of the majority is not only logical but commendable as well.”¹²⁴

The remaining academic critiques tended to highlight the decision’s likely impact. A comment in the *University of Chicago Law Review* noted that three distinct courses of action were open to the state: the abolition of white professional schools, the admission of black students to those same schools, or the construction of separate higher institutions. “Of the three courses the first has been dismissed as an improper solution,” the journal observed. “Rather than comply with the second, it is likely that the states will seek to extend segregation to the professional schools.”¹²⁵

The state of Missouri quickly fulfilled the expectation. Segregationists immediately introduced a plan for the construction of a bare-bones law school for blacks.¹²⁶ “Although the state could ill afford to spend considerable funds on Lincoln [University] in those depression days,” one author notes, “the legislators decided to pay the price of prejudice” and quickly approved funding.¹²⁷ Despite the protestations of Missouri blacks over the blatant inadequacies of the plan, the state plowed ahead, soon opening a Jim Crow school in a lower-class district of St. Louis.¹²⁸ “The ‘campus’ was an ancient building—former site of a hair tonic factory and a cosmetics school—part of which houses a hotel and a movie theater,” *Newsweek* reported. “As the first [students] enrolled, the theater’s sound amplifier echoed through the classrooms.”¹²⁹

The NAACP declared the Jim Crow “school” a farce and quickly filed a suit against the state, denying that the black law school was in any way equal to the University of Missouri’s. “If Missouri thinks it is going to get away with this makeshift arrangement, it is in for a rude awakening,” Walter White warned.¹³⁰ Backed by the Supreme Court ruling in *Gaines*, the attorneys were becoming more and more convinced that they could finally break the color line at the Missouri law school. “I went in [to the] court fully convinced that we were simply to go thr[o]u[gh] the motions, that the court’s mind had already been made up and it was just a question of the formalities of a hearing to make things look regular,” Houston

wrote shortly after the trial began. “During the course of the argument my opinion changed sufficiently to believe we have an open chance to get the court to order the writ issued” for Gaines’ admission to the University of Missouri law school, on the grounds that the sham school was not truly “equal.”¹³¹

If the NAACP could secure this victory, it would be able to force segregationists to live up to their own rhetoric of “separate but equal” and expend enormous amounts to make Jim Crow graduate and professional schools every bit as good as their white counterparts. “I told [the University of Missouri lawyers] that we were opposed to segregation, but that if segregation were forced on us we wanted to make it serve our purposes as far as possible and to make it ultimately defeat itself,” Houston noted.¹³² They would make segregated education a luxury too costly for the state of Missouri to keep.

Through this one case, the NAACP had the opportunity to bring down the entire system of segregation. “After seventy years of fighting to get issues involving our fundamental rights as American citizens determined favorably by the U.S. Supreme Court, we can now stand upon several recently constructed peaks, from which we can get a new vista of hope for the future,” Houston remarked.¹³³ Just as convinced that the final victory was at hand but somewhat less prone to flowery phrasing, Thurgood Marshall said the feelings of the NAACP could “be summed up in the words of the master, Joe Louis: ‘I glad I wonned.’”¹³⁴

Confident that they had within their grasp an even greater victory against educational segregation, the NAACP lawyers sought to take their case the final step of the way. To advance the case, as Marshall noted, the team merely needed their plaintiff to “present himself as a matter of record” at the Missouri law school.¹³⁵ Charles Houston agreed with Marshall and urged their co-counsel Sidney Redmond “to get ahold of Gaines and get him in the mood of pushing through.”¹³⁶ Reviewing the success they had experienced before the Supreme Court and noting with considerable understatement that “Lloyd Gaines has not sacrificed three years of his life in vain,” Houston felt sure that the young man would carry the case this small

final step.¹³⁷ There was just one problem—he had vanished.

No one had heard from Lloyd Gaines in over a year. After spending some time studying at the University of Michigan with funds raised through the NAACP, he drifted away from the organization.¹³⁸ His family, too, was unaware of his whereabouts and went so far as to hire a private investigator to find him.¹³⁹ A former classmate spoke of receiving a card from Gaines, postmarked in Mexico, stating that he was having “a jolly time on the Two Thousand Dollars he had been given to leave the country,” but then recanted his story.¹⁴⁰ Others believed he had been kidnapped or even killed by Missouri whites. No one knew for sure. “Rumor has had Gaines working in an institution in Illinois, spending money like a sailor in Vera Cruz, and teaching under a false name in Chase City, Virginia,” a bewildered Charles Houston noted. “We have tried to verify these clues but they have all evaporated.”¹⁴¹

Even after an exhaustive search by friends, family, and the NAACP, Lloyd Gaines was never found. “Since we cannot find Gaines we cannot go on,” Houston lamented.¹⁴² Without their plaintiff, the NAACP lawyers had no choice but to drop their suit against the state’s sham law school and thus abandon what promised to be an even larger victory against educational segregation in general. The attorneys were understandably disheartened. “I remember *Gaines* as one of our greatest victories,” Thurgood Marshall noted some six decades later, “but I have never lost the pain of having so many people spend so much time and money on him, only to have him disappear. The sonofabitch just never ever contacted us again.”¹⁴³

The NAACP could have significantly upped its legal timetable by securing the loose ends of the Missouri case. Because of Gaines’ disappearance, however, the organization’s lawyers had to wait twelve years before they could again bring the attack against unequal segregated facilities before the Supreme Court. The issue would finally be raised in *Sweatt v. Painter* (1950), when Heman Marion Sweatt challenged the equality of a similar Jim Crow “law

school” in Texas. While still upholding the doctrine of segregation, the Vinson Court employed in the *Sweatt* decision a broader interpretation of equality to assert, in effect, that separate-but-equal institutions had to be *truly* equal.¹⁴⁴ Whether the Hughes Court would have gone that far in deciding the matter is, of course, speculation. Without Lloyd Gaines, the NAACP never had the chance to find out.

Despite its somewhat unsatisfactory ending, the *Gaines* case was a tremendous milestone on the road to desegregation. As the first Supreme Court decision to strike down a state’s program for school segregation, it signaled a new era of federal judicial oversight in the realm of race relations. No longer would states be given free rein in their implementation of racial policies. Whereas earlier courts had let states trample the spirit of “separate-but-equal” as long as they paid lip service to the ideal, the Hughes Court demanded that their actions be aligned more closely to the letter of that law. Seriously undermining the twisted notion of “equality” as manifest in most forms of state-sanctioned segregation, the *Gaines* decision also marked the beginning of the end of those same systems of discrimination.¹⁴⁵

“Our highest tribunal has placed us in clear sight of the promised land of equality in education, the foundation of all other democratic equalities,” a jubilant Charles Houston exclaimed after the Court handed down the landmark decision.¹⁴⁶ Much like the biblical seeker of the promised land, Houston would not live to witness the realization of his dream. In his stead, others would secure the end of legally sanctioned segregation through the *Brown* decision. The skilled labor that he performed in the *Gaines* case, however, was an essential, initial step toward that ultimate victory. Before the highest court in the nation, Charles Houston had secured the first breach in the seemingly impenetrable walls of segregation. The battle was far from over, but through the gaping hole he had carved out, the promised land was indeed within clear sight.

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sistance and encouragement in the production of this article.

Endnotes

- ¹Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1975), 118-123.
- ²For a detailing of this change, see Laurence R. Marcus and Benjamin D. Stickney, *Race and Education: The Unending Controversy* (Springfield, IL: Thomas, 1981), 47.
- ³Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), 25-28.
- ⁴Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983), 62-85, 112-113.
- ⁵*Ibid.*, 132.
- ⁶Jessie P. Guzman, "Twenty Years of Court Decisions Affecting Higher Education in the South," *Journal of Educational Sociology* 32 (February 1959): 247.
- ⁷Tushnet, *The NAACP's Legal Strategy*, 34.
- ⁸169 Md. 478, 182 Atl. 590 (1936). The case is also referred to as *University of Maryland v. Murray and Pearson v. Maryland*.
- ⁹Frank Thomas Miller, Jr., "Notes and Comments," *North Carolina Law Review* 17 (April 1939): 282.
- ¹⁰"Recent Cases," *George Washington Law Review* 7 (May 1939): 901.
- ¹¹McNeil, *Groundwork*, 143.
- ¹²Charles H. Houston, Preliminary Draft of Article for *The Crisis*, May 1936, Papers of the National Association for the Advancement of Colored People, Part 2, 1919-1939: Personal Correspondence of Selected NAACP Officials (hereafter referred to as "NAACP Papers, Part 2"), Group I, Box C-84.
- ¹³Bill Weaver and Oscar C. Page, "The Black Press and The Drive For Integrated Graduate and Professional Schools," *Phylon* 43 (March 1982): 15-16.
- ¹⁴Lucile H. Bluford, "The Lloyd Gaines Story," *Journal of Educational Sociology* 32 (February 1959): 243.
- ¹⁵Larry Grothaus, "'The Inevitable Mr. Gaines': The Long Struggle to Desegregate the University of Missouri, 1936-1950," *Arizona and the West* 26 (Spring 1984): 23.
- ¹⁶Tushnet, *The NAACP's Legal Strategy*, 71.
- ¹⁷The University initially stonewalled Gaines and refused to give a reason for his rejection, but ultimately pointed to his race as the sole factor. See Letters from Lloyd Gaines to NAACP Legal Department, September 27, 1935; Sidney Redmond to Charles Houston, 14 September 1935, September 24, 1935; and Charles W. Florence to Lloyd Gaines, September 23, 1935, NAACP Papers, Part 2, Group I, Box D-94.
- ¹⁸Sections 9618 and 9622 R. S. Mo., 1929. These two statutes were an integral part of the 1921 Lincoln University Act.
- ¹⁹Kluger, *Simple Justice*, 202. Missouri's out-of-state scholarship program was administered by the Office of the Superintendent of Public Schools, which had been given the responsibility under the 1921 Lincoln University Act. The program did not offer full scholarships to black appli-
- cants. Instead, it was authorized to pay the difference between the University of Missouri's tuition and that of an applicant's chosen out-of-state university. The program had a biennial allotment of \$10,000 from which it could draw and, in the summer of 1935, when Gaines was seeking admission to the University of Missouri, the fund still had over \$2,300 left. It was to these funds that the University officials directed Lloyd Gaines. See Briefs for *State of Missouri, ex rel. Lloyd Gaines, Petitioner, v. S. W. Canada, Registrar of the University of Missouri, and the Curators of the University of Missouri*, 305 U.S. 337, 163-169. Hereafter referred to as "Briefs, 305 U.S. 337."
- ²⁰As a rule, Charles Houston refrained from soliciting clients to avoid the appearance of "fomenting legislation," and he was also extremely selective in championing the causes of those who approached him for legal representation. "We do not want to back anybody as to whom there could be the slightest personal objection," he reminded an NAACP field representative. Only once he was satisfied that Gaines was "an A-1 qualified student," did he take up the young man's lawsuit. Letters from Charles Houston to Sidney Redmond, July 15, 1935, September 26, 1935, October 4, 1935, NAACP Papers, Part 3, Series A, Group I, Box D-94.
- ²¹Tushnet, *The NAACP's Legal Strategy*, 49. See also "Case Notes," *Tulane Law Review*, 13 (April 1939): 465-466.
- ²²Louis La Coss, "State Expected to Act," *The New York Times* (18 December 1938): 10E.
- ²³Kluger, *Simple Justice*, 203. "The term 'ex rel.' is an abbreviation of *ex relatione*, which is defined . . . this way: 'Legal proceedings which are instituted by the attorney general (or other proper person) in the name and behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter, are said to be taken "on the relation" (*ex relatione*) of such person, who is called "the relator".' Lloyd Gaines' case was instituted not by the attorney general, however, but by Houston, who exercised the plaintiff's prerogative of captioning his suit and was apparently indulging in the then permitted formalism of invoking the state of Missouri as the party he believed legally obliged to act in Gaines' behalf. . . ."
- ²⁴"Office Memorandum re Gaines vs. U. Missouri," July 10, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94.
- ²⁵The victim of the 1923 brutality, James T. Scott, was lynched, his legs broken, and his lifeless body then dragged from the end of an automobile around the town. Shortly before the trial, Houston noted to his colleagues that "reliable information places some University of Missouri students in the lynching mob." "Memorandum re Lloyd Gaines vs. S.W. Canada, Registrar, U. Mo.," January 24, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94; Preliminary Draft of Article for *The Crisis*, May 1936, NAACP Papers, Part 2, Group I, Box C-84.
- ²⁶"Office Memorandum re Gaines vs. U. Missouri," July 10, 1936, NAACP Papers, Part 2, Group I, Box C-81.
- ²⁷Letter from Sidney Redmond to Charles Houston, March 12, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94; "Memorandum re Lloyd Gaines vs. S.W. Canada, Registrar, U. Mo.," January 24, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94.
- ²⁸Briefs, 305 U.S. 337, 56.

²⁹*Ibid.*, 2, 61.

³⁰Cited in Carl T. Rowan, **Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall** (Boston: Little, Brown, 1993): 73.

³¹Briefs, 305 U.S. 337, 76.

³²Press Release, "U. Missouri Case Before Court," July 10, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94.

³³"Office Memorandum re Gaines vs. U. Missouri," July 10, 1936, NAACP Papers, Part 2, Group I, Box C-81. The *Gaines* case eventually proved to be too much for Dean Masterson. In May 1938, citing the "constant attempt at meddling in the affairs of the school by a small and noisy group of politically-minded lawyers," he resigned from the University of Missouri Law School. "Meddlers Blamed as M.U. Law Dean Resigns," *St. Louis Globe-Democrat*, 25 May 1938, clipping in NAACP Papers, Part 3, Series A, Group I, Box D-94.

³⁴Kluger, **Simple Justice**, 204.

³⁵Briefs, 305 U.S. 337, 131-138, 139, 80.

³⁶Letter from Ursula Genung to Charles Houston, 7 February 1938, NAACP Papers, Part 3, Series A, Group I, Box D-94.

³⁷Briefs, 305 U.S. 337, 179-180.

³⁸Cited in letter of Ursula Genung to Charles Houston, 7 February 1938, NAACP Papers, Part 3, Series A, Group I, Box D-94.

³⁹Briefs, 305 U.S. 337, 46.

⁴⁰"Office Memorandum re Gaines vs. U. Missouri," 10 July 1936, NAACP Papers, Part 2, Group I, Box C-81.

⁴¹Briefs, 305 U.S. 337, 28-31.

⁴²"Office Memorandum re Gaines vs. U. Missouri," July 10, 1936, NAACP Papers, Part 2, Group I, Box C-81.

⁴³Briefs, 305 U.S. 337, 37.

⁴⁴*Ibid.*, 23-38.

⁴⁵*Ibid.*, 163

⁴⁶"Office Memorandum re Gaines vs. U. Missouri," July 10, 1936, NAACP Papers, Part 2, Group I, Box C-81.

⁴⁷*Idem.*

⁴⁸Because both the NAACP and the University lawyers applied jointly for a motion to advance the case on the docket, the review happened relatively quickly. Letter from Sidney Redmond to Roy Wilkins, July 30, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94.

⁴⁹A. Leon Higginbotham, Jr. and William C. Smith, "The Hughes Court and the Beginning of the End of the 'Separate But Equal' Doctrine," *Minnesota Law Review* 76 (1992), 1123.

⁵⁰Briefs, 305 U.S. 337, 210-214.

⁵¹*Ibid.*, 222.

⁵²*Ibid.*, 218.

⁵³Harry Bitner, "Recent Decisions," *Kansas City Law Review* 6 (February 1938): 156.

⁵⁴Frank Thomas Miller, Jr., "Notes and Comments," *North Carolina Law Review* 17 (April 1939): 282; Briefs, 305 U.S. 337, 222, 224.

⁵⁵Higginbotham and Smith, "The Hughes Court," 1123.

⁵⁶Letter from Charles H. Houston to Sidney R. Redmond, September 24, 1936, NAACP Papers, Part 2, Group I, Box C-84.

⁵⁷Letter from Walter White to Charles Houston, June 8, 1936, NAACP Papers, Part 3, Series A, Group I, Box D-94.

⁵⁸Tushnet, **The NAACP's Legal Strategy**, 71.

⁵⁹Letter from Charles H. Houston to Sidney R. Redmond, September 24, 1936, NAACP Papers, Part 2, Group I, Box C-84.

⁶⁰Briefs, 305 U.S. 337, 229.

⁶¹*Ibid.*, 230.

⁶²235 U. S. 151, 161.

⁶³Higginbotham and Smith, "The Hughes Court," 1108.

⁶⁴Though the case dealt with discriminatory railroad practices, it was indeed a viable precedent for the education case, chiefly because of its description of constitutional rights as personal rights. Furthermore, because educational segregation could be traced back to the Court's ruling in another "railroad case," *Plessy v. Ferguson*, there was poetic justice in Houston's decision to use this railroad case to fight segregation.

⁶⁵Long an admirer of Hughes, Houston kept a prized portrait of the Chief Justice in his Washington law office. Letter from Charles H. Houston to William L. Houston, NAACP Papers, Part 2, Group I, Box C-81.

⁶⁶Samuel Hendel, "Charles Evans Hughes," **The Justices of the United States Supreme Court: Their Lives and Major Opinions**, Leon Friedman and Fred L. Israel, eds., Vol. 3 (New York: Chelsea House, 1969), 1898. Hereafter, referred to as **The Justices**.

⁶⁷Tushnet, **The NAACP's Legal Strategy**, 24. As a biographer of Hughes notes, the *McCabe* ruling "paved the way for future decisions which made such discrimination impossible." Dexter Perkins, **Charles Evans Hughes and American Democratic Statesmanship** (Boston: Little, Brown, 1956), 43.

⁶⁸Through his advocacy of New Deal legislation, "Reed had become a confirmed believer in government power when wielded discerningly in the public interest." See C. Herman Pritchett, "Stanley Reed," **The Justices**, 2373; Kluger, **Simple Justice**, 211.

⁶⁹Cited in William E. Leuchtenburg, **The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt** (New York: Oxford, 1995): 190.

⁷⁰NAACP Secretary Walter White, who would later write that Hugo L. Black seemed to be "an advance guard of the new South he had dreamed of," had a long conversation with the senator on the day his nomination to the Supreme Court was announced. When the allegations of Black's ties to the KKK became known, White fired off several public statements calling for an investigation, but privately assured Black of his confidence in his character. Gerald T. Dunne, **Hugo Black and the Judicial Revolution** (New York: Simon and Schuster, 1977): 56.

⁷¹E. Washington Rhodes of *The Philadelphia Tribune* to Roy Wilkins, October 12, 1938, NAACP Papers, Part 3, Series A, Group I, Box D-95.

⁷²Kluger, **Simple Justice**, 138.

⁷³*Ibid.*, 212.

⁷⁴Richard L. Stokes, "Quotations," *School and Society* 48 (December 3, 1938): 727.

⁷⁵Supplemental Authorities for the Petitioner, 305 U.S. 337, 1.

⁷⁶*Ibid.*, 2.

⁷⁷*Ibid.*, 2-3.

⁷⁸David Burner, "James C. McReynolds," **The Justices**, 2023. McReynolds' segregationist beliefs were mixed with his generally stern attitude, the inevitable result of his Southern fundamentalist upbringing at the hands of a father whom the town "dubbed the 'pope' because of his

- assumption of his own infallibility” and a mother who once wrestled a pistol away from a man who was frightening women and children. *Ibid.*, 2024.
- ⁷⁹James E. Bond, **I Dissent: The Legacy of Chief [sic] Justice James Clark McReynolds** (Fairfax, Virginia: George Mason University Press, 1992), 126.
- ⁸⁰One achievement even McReynolds should have appreciated was Houston’s status as a former writer for the *Harvard Law Review*.
- ⁸¹Higginbotham and Smith, “The Hughes Court,” 1110. Justice McReynolds was not alone in his denigration of Howard University. In fact, the slurs against the African-American university had become so commonplace that one German academic institution actually addressed a 1935 letter to none other than Dean Charles Hamilton Houston care of “Nigger Howard University Law School.” In a concerned but restrained letter, Houston explained that, despite the opinions of certain American observers, the offensive word was not a part of the school’s name and in fact an insult to African-Americans. The offending party and even the head of the German consulate in Washington offered their profuse apologies. Letters from Charles Houston to I.A.V. Erckert, *Academie Fur Deutsches Recht*, August 27, 1935; Erckert to Houston, September 7, 1935; R. Leitner, Counselor of German Embassy, Washington, D.C., to Houston, September 14, 1935; NAACP Papers, Part 2, Group I, Box C-81.
- ⁸²G. Edward White, **The American Judicial Tradition: Profiles of Leading American Judges** (New York: Oxford, 1976), 187.
- ⁸³Higginbotham and Smith, “The Hughes Court,” 1110.
- ⁸⁴“Missouri University ‘Belongs to Whites Only,’ State’s Lawyers Tell Supreme Court,” Press Release, November 11, 1938, NAACP Papers, Part 3, Series A, Group I, Box D-95.
- ⁸⁵Cited in Burner, “McReynolds,” 2024.
- ⁸⁶Respondent’s Supplemental Brief, 305 U.S. 337, 1-11.
- ⁸⁷Stokes, “Quotations,” 726. The support from Justice Roberts was somewhat surprising in that he had penned an opinion hostile to civil rights in *Grovey v. Townsend* 295 U.S. 45 (1935), which unanimously upheld the exclusion of blacks from political primaries.
- ⁸⁸*Ibid.*, 727.
- ⁸⁹Statement of the Case, 305 U.S. 337, 16, 32.
- ⁹⁰Stokes, “Quotations,” 727. Justice Black’s question was the first sign that he might support the NAACP’s case. Meanwhile, the other riddle on the Court—Justice Reed—said not a word during the entire oral argument. “Missouri University ‘Belongs to Whites Only,’ State’s Lawyers Tell Supreme Court,” Press Release, November 11, 1938, NAACP Papers, Part 3, Series A, Group I, Box D-95.
- ⁹¹Stokes, “Quotations,” 727.
- ⁹²*Idem.*
- ⁹³McNeil, **Groundwork**, 150.
- ⁹⁴Dennis J. Hutchinson, “Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958” *Georgetown Law Journal* 68 (January 1979): 5.
- ⁹⁵305 U.S. 337, 345.
- ⁹⁶*Ibid.*, 346.
- ⁹⁷*Ibid.*, 345.
- ⁹⁸Briefs, 305 U.S. 337, 210-222.
- ⁹⁹305 U.S. 337, 349-350.
- ¹⁰⁰Robert M. Cover, “The Origins of Judicial Activism in the Protection of Minorities,” *Yale Law Journal* 91 (June 1982): 1287, 1309.
- ¹⁰¹305 U.S. 337, 351.
- ¹⁰²Randall Kennedy, “Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt,” *Columbia Law Review* 86 (1986): 1622, 1646.
- ¹⁰³305 U.S. 337, 351 (quoting 235 U.S. 151, 160), 352.
- ¹⁰⁴Merlo J. Pusey, **Charles Evans Hughes 2** (New York: MacMillan, 1951), 670.
- ¹⁰⁵305 U.S. 337, 353.
- ¹⁰⁶White, **The American Judicial Tradition**, 187; 305 U.S. 337, 353.
- ¹⁰⁷*Idem.*
- ¹⁰⁸Burner, “McReynolds,” 2029.
- ¹⁰⁹305 U.S. 337, 353.
- ¹¹⁰David Burner, “Pierce Butler,” **The Justices**, 2185.
- ¹¹¹*Ibid.*, 2189.
- ¹¹²Leuchtenburg, **The Supreme Court Reborn**, 14.
- ¹¹³Tushnet, **The NAACP’s Legal Strategy**, 75.
- ¹¹⁴*Idem.*
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- ¹²⁹“Jim Crow’ Law School,” *Newsweek*, October 2, 1939, 32-33.
- ¹³⁰Letter from Walter White to N.B. Young, Editor, *St. Louis American*, September 5, 1939, NAACP Papers, Part 3, Series A, Group I, Box D-95.
- ¹³¹Letter from Charles Houston to Walter White, May 22, 1939, NAACP Papers, Part 3, Series A, Group I, Box D-95.
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¹³⁶Letter from Charles Houston to Thurgood Marshall, August 3, 1939, NAACP Papers, Part 3, Series A, Group I, Box D-95.

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¹³⁸Letters from Lloyd Gaines to Charles Houston, August 5, 1936; Walter White to Lloyd Gaines, September 10, 1936; and Lloyd Gaines to Walter White, September 12, 1936; NAACP Papers, Part 3, Series A, Group I, Box D-94.

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ary 23, 1940, NAACP Papers, Part 3, Series A, Group I, Box D-95.

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¹⁴³Cited in Rowan, **Dream Makers, Dream Breakers**, 78.

¹⁴⁴See Tushnet, **The NAACP's Legal Strategy**, 125-132; Kluger, **Simple Justice**, 260-266, 280-284; Guzman "Twenty Years of Court Decisions," 249-250; Weaver and Page, "The Black Press," 26-27; and Hutchinson, "Unanimity and Desegregation," 14-15.

¹⁴⁵Higginbotham and Smith, "The Hughes Court," 1124.

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The Life of John Marshall Revisited

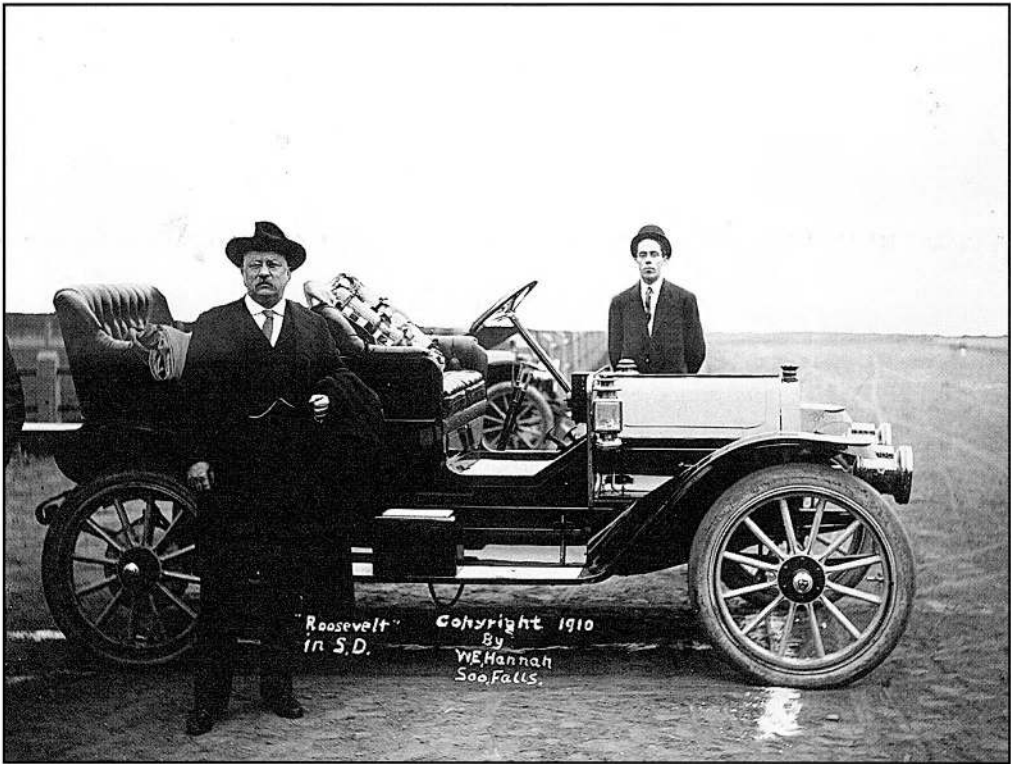
Alexander Wohl

While perusing the law section of a used bookstore recently, I was pleased to find for only thirty dollars a somewhat worn, but handsomely bound copy of Albert Beveridge's classic four-volume *The Life of John Marshall*. Having intended for some time to read this Pulitzer Prize-winning biography, I eagerly snatched it up, pausing only briefly to consider a \$250.00 set that had been autographed by the author. I was interested to see how this masterpiece had stood the test of time since 1916, when the first two volumes were published, particularly in light of a number of new books about Marshall¹ and a renewed interest in judicial biography generally.²

I was not disappointed. Although no one is likely to mistake Beveridge's work for any of the books on the current bestseller list, given its often dated prose style and weighty subject matter, it nonetheless holds up well from both a literary and historical point of view. The

author offers a rich and engaging description of Marshall's life, legal opinions, and impact, as well as the formative historical period in which Marshall lived, capturing fully the frequent overlap of law, politics, and history.

This approach is no doubt a direct consequence of Beveridge's background which, as a former U.S. Senator, is anything but traditional for a biographer. As one reviewer noted, "it is encouraging to learn that an ex-Senator of the United States has the ability and the inclination to give several years to the preparation of so careful a piece of historical scholarship."³ Another reviewer, citing the uniqueness of such a "public man of Mr. Beveridge's eminence" turning "historian and man of letters," compared the book to President Theodore Roosevelt's "Winning of the West."⁴ And Roosevelt himself, in reviewing favorably his political supporter's work, wrote:



President Theodore Roosevelt (above) praised Albert Beveridge upon publication of his biography of Chief Justice John Marshall in 1916. "During his brilliant service of twelve years in the United States Senate" gushed Roosevelt, "he championed with fidelity all the honorable causes for which Marshall and his fellow-Federalists stood a century before."

Mr. Beveridge is peculiarly fitted to write the biography of the great Nationalist Chief Justice. He has himself played a distinguished part in our political life, and during his brilliant service of twelve years in the United States Senate he championed with fidelity all the honorable causes for which Marshall and his fellow-Federalists stood a century before[.]⁵

Albert Jeremiah Beveridge's passion for politics, law, and government began early in life. Born in 1862 in an old fashioned farmhouse in rural Ohio, he quickly demonstrated an interest in political oratory, at a young age attending Republican debating society meetings.⁶ He also began to hone his own speaking skills, and as a college student at Asbury (later DePauw) University in Indiana, he was a champion debater and orator, so eloquent that a Republican party

leader enlisted his skills in the 1884 presidential campaign of James G. Blaine.⁷

After graduating from college Beveridge gravitated to the study of law, and in 1886 began practicing in Indiana. His reputation for political oratory continued to grow, and ten years later, at the age of thirty six, his fellow Hoosiers sent him to the Senate. He was one of the Progressive Republicans, and a strong supporter of President Teddy Roosevelt, supporting an agenda of labor reforms and imperialism.⁸ After two terms in which he made a mark as a first-rate orator, Beveridge lost his bid for a third term in 1911. He stayed active in organized politics, including Roosevelt's Bull Moose Party, and in 1922 mounted an unsuccessful primary challenge to the Republican Senator Harry S. New. He never again held elective office, instead beginning a new career as an historian and biographer.

Beveridge was first exposed to Marshall

during his legal studies. From the beginning, he felt that Marshall's nationalist opinions mirrored his own Anglo-Saxon nationalist political philosophy, and when he learned that no "adequate biography" had been written about Marshall he began to consider undertaking such a project.⁹ The loss of his Senate seat afforded him the time to begin the undertaking, which he did in 1913, with little training or background in historical or biographical writing. As his biographer noted, Beveridge "had no more idea of the methods and obligations of historical scholarship than the average casual reader."¹⁰

One thing he did understand was that there was an absence of a quality history of Marshall—precisely at a time when Marshall's reputation and nationalist philosophy were being celebrated. Since Marshall's death in 1835, few authors had attempted to write any extended treatments of the great Chief Justice's life and career. Some of them, like Harvard Professor James Bradley Thayer's slim volume (an expansion of a speech and magazine article by the author), were intended to appeal primarily to the lay public, so much so that the author encourages the reader to skip over the chapter on the Marshall Court's decisions if he or she is so inclined.¹⁰ Other works, like Justice Joseph P. Story's "Discourse on John Marshall," offer a fascinating historical log, but still are only a celebration in the form of a memoir.¹¹

Beveridge's study was more ambitious, detailed, and scholarly than any of these earlier efforts. Not only did it cover Marshall the Chief Justice, but also Marshall the soldier, the diplomat, and the legislator. It was a study of history, not simply biography, intended for the scholar as much as for the general public.

From its initial publication, the book received high praise. *The New York Times* acknowledged its "instant classic" status in a 1920 review of the second two volumes, noting that:

the two preceding volumes . . . [have] already taken [their] place among the world's great biographies. . . . The most painstaking research is shown on every page; yet the story is told with

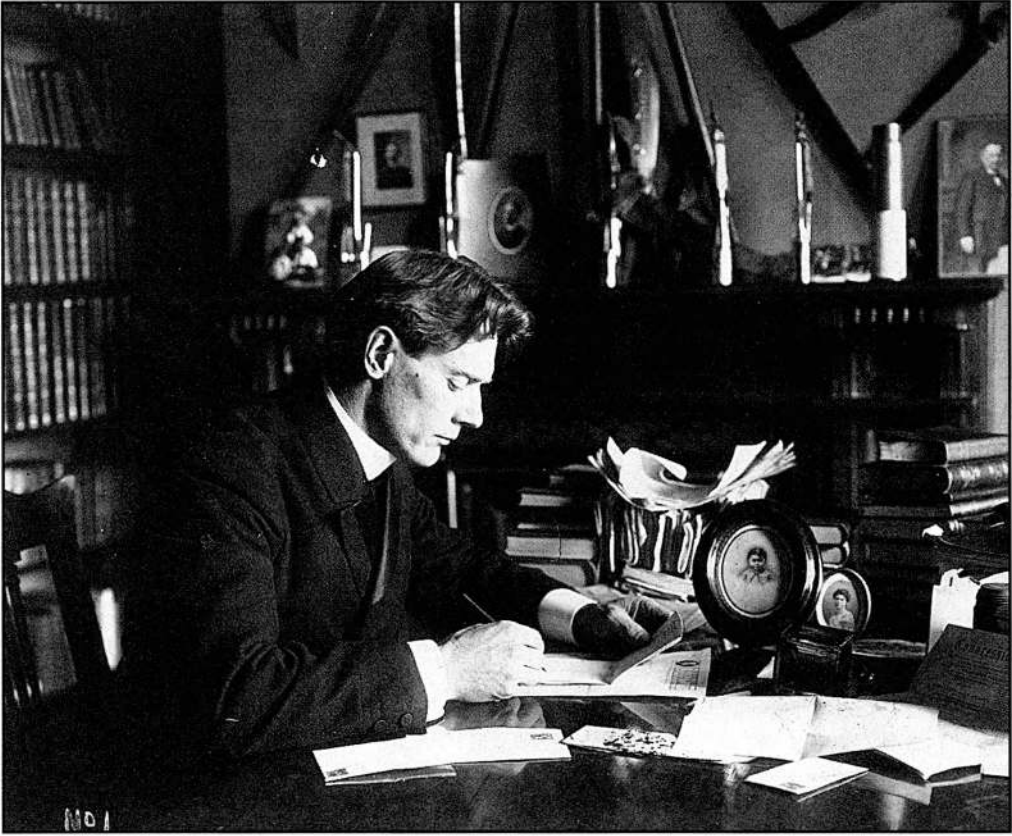
such clearness and brilliance that the biography has all the color, quality, and interest of a great historical romance. . . . [Beveridge] has set a high mark for future biographers; he has produced a historical work of the highest order.¹³

A 1921 review in the *American Law Review* concluded similarly: "Beveridge has devoted deep study and research in bringing together his data and has produced a work which will rank with the great biographers of this country. . . . [The biography] should be rated along with that of Boswell's 'Johnson'—and so it will be when judged by those possessing 'the wise and judicious temper and the generous, appreciative judgement that are the marks of really great historical writings.' . . . The work is not alone a great biography but is also a contribution to our historical literature of Revolutionary days and the generation following."¹³

Indeed, what gives **The Life of John Marshall** its landmark quality is not just that it is good biography, but entertaining and gripping historical writing. "In reading the early volumes about Marshall's role as a soldier in General Washington's army (the formative event in his life) one might even forget that the book is a biography at all. Beveridge's descriptions of the battles for independence and his depiction of the sad state of affairs of Washington's army, including a great deal of Washington's own language from letters and speeches, are compelling and dramatic. They reveal the long odds of the American victory over the British, while capturing the passions and politics of that time in succinct and moving prose that still resonates today.

Sick, ill-fed, dirty, and ragged, but with a steady nucleus of regular troops as devoted to their great commander as they were disgusted with the hybrid arrangement between the States and Congress, Washington's army worried along.¹⁵

Not surprisingly, in light of both



Albert Jeremiah Beveridge (1862-1927) was elected to the Senate from Indiana at age thirty six. He supported Roosevelt's reforms, and when he lost his bid for a third term in 1911 became a supporter of the Bull Moose Party. After an unsuccessful primary challenge in 1922, Beveridge turned to writing history.

Beveridge's interest and Marshall's influence, a central focus of the book is the political and constitutional battles that led to the creation of our national government. Beveridge gives the reader a dramatic accounting of the debate in the Virginia Convention for the adoption of the U.S. Constitution to which Marshall was a delegate. And his excellent and detailed descriptions of the debates concerning repeal of the 1789 Judiciary Act and the Republican attacks on Federal judges have renewed resonance today with the increase in political attacks on judges and the apparent lapse in understanding of the principle of judicial independence. This section of the book remains, as one reviewer wrote at the time "a chapter that holds the reader spellbound, if he cares at all for American history and politics."¹⁶

None of which is to say that Beveridge's extensive exposition on individual subjects is

flawless—or at times even necessary. For instance, he spends more than 250 pages discussing the conspiracy trial of Aaron Burr, a dramatic and important piece of history, but one in which the passage of time and the opportunity for historical hindsight probably would alter the attention given this particular subject. And his zeal for impassioned writing often leads to unusual phraseology. On one occasion, for instance, he makes the unique analogy that Bushrod Washington (the nephew of the first President, an Associate Justice, and a friend of Marshall) "had no more political acumen than a turtle."¹⁷

Ultimately, however, Beveridge's work must be evaluated as a biography, and its story must rise or fall with the subject. An essential part of good biography—judicial or otherwise—is having a subject worthy of the attention and time spent on it—both by the

author and the reader. In this, Beveridge had the pleasure and privilege of studying the life of one of the most dramatic and important individuals in American history—a man who was not only Chief Justice of the United States for longer than any other, but a Congressman, an influential member of the Virginia Constitutional Convention, an international diplomat, a Secretary of State, and a trusted advisor of Presidents and party leaders.

Beveridge makes the most of this life, and while he is clearly in Marshall's corner on policy issues, he is careful to maintain a certain level of scholarship in reaching his conclusions. His premise for his study is stated in the preface of Volume I:

The work of John Marshall has been of supreme importance in the development of the American Nation, and its influence grows as time passes. Less is known of Marshall, however, than of any of the great Americans. Indeed, so little has been written of his personal life, and such exalted, if vague, encomium has been paid him, that, even to the legal profession, he has become a kind of mythical being, endowed with virtues and wisdom not of this earth.

He appears to us as a gigantic figure looming, indistinctly, out of the mists of the past, impressive yet lacking vitality, and seemingly without any of those qualities that make historic personages intelligible to a living world of living men. Yet no man in our history was more intensely human than John Marshall.¹⁸

Beveridge captures and records this humanity and uses—more than any prior or subsequent biography of Marshall—the words of Marshall and his contemporaries in doing so. A vast assortment of historical papers and documents facilitate his telling of the story, and even with eight subsequent decades of historical research, his resources are largely complete. While Beveridge certainly would have benefited from the compilation of

Marshall Papers being done at the College of William and Mary,¹⁹ for instance, the additional documents identified and compiled in that project would not necessarily have made his biography more insightful.

What is most remarkable when comparing Beveridge's work with subsequent biographies is how similar in structure and style they are after accounting for the passage of time. The two most significant (discounting studies that focused on individual opinions or particular aspects of Marshall's legal philosophy) are Leonard Baker's massive 1974 work²⁰ and Jean Edward Smith's wonderful recent biography of Marshall.²¹ Although neither of these books can match Beveridge's detailed discussion of the revolutionary period, both do somewhat better in explaining the impact of Marshall's opinions as well as placing them in political and historical context, in part because they had fifty and seventy-five years more extrapolation of those opinions to consider. Smith's book, in particular, captures the personal, historical, and political framework for these cases.

It is in discussing these cases, as well as the related and broader political struggles over national power that were taking place, that **The Life of John Marshall** reveals its greatest failing—its persistent glorification of Marshall's nationalist views. At one point, for example, when Marshall was writing his opinion in *Marbury v. Madison* and worrying about the possibility of impeachment, Beveridge describes Marshall's actions in nothing less than heroic terms:

[D]espite the peril, Marshall resolved to act. Better to meet the issue now, come what might, than to evade it. If he succeeded, orderly government would be assured, the National Judiciary lifted to its high and true place, and one element of National disintegration suppressed, perhaps destroyed. If he failed, the country would be in no worse case than that to which it was rapidly tending.²²

This is not to suggest that Beveridge was never critical of Marshall. He straightfor-

wardly details the future Chief Justice's recurring problems relating to a Virginia land purchase. He notes that the financial burden from these dealings "caused Marshall to break his rule of declining office and to accept appointment as one of our envoys to France [which subsequently led to the XYZ Affair and] from that public employment of less than one year, Marshall, as we shall see, received in the sorely needed cash, over and above his expenses, three times the amount of his annual earnings at the bar."²³

Nor did Beveridge pull any punches in evaluating Marshall's own biographical effort—the multi-volume life of George Washington with which he struggled for years. He records the anger of Marshall's publisher upon receiving a manuscript that was far too long ("his Quaker blood was heated to wrath. Did

Marshall's prolixity know no limit?"), and then Beveridge adds bluntly, "By midsummer of 1804 the first two volumes appeared. They were a dismal performance."²⁴

Notwithstanding this kind of even-handed reporting, however, Beveridge's evaluations of Marshall too often reflect an overly-partisan view of the Chief Justice and his Federalist opinions that mirror Beveridge's own nationalist convictions. Nowhere was this partisanship more evident, and nowhere did it attract more criticism, than in Beveridge's treatment of Thomas Jefferson. The connections and conflicts between Jefferson and Marshall provide the basis for one of the most fascinating personal and professional relationships in history. The two were lifelong political antagonists, yet they shared a number of traits, from their rejection of religion to the lack of



The author argues that Beveridge occasionally spills a disproportionately large amount of ink on subjects that do not merit such lengthy scrutiny in a biography. For instance, he spends more than 250 pages discussing the conspiracy trial of Aaron Burr. Above is a romanticized scene of the 1804 duel in which Burr killed Alexander Hamilton.

care given to their personal appearance, to the fact that each was the product of a strong father and an accomplished mother. Moreover, the two men were distantly related, and Marshall even ended up taking over Jefferson's law practice when the latter became governor of the Commonwealth of Virginia.

They were linked in political terms as well. Jefferson's election in 1800 precipitated Marshall's departure as John Adams's Secretary of State, but it also led, fortuitously, to his appointment as Chief Justice. President Adams needed to act quickly before his term expired in order to fill the position left vacant by the resignation of Oliver Ellsworth. When his top choice, the first Chief Justice, John Jay, rejected the position, Marshall, as Secretary of State, was perfectly positioned to be next in line for the job. For years afterwards, Marshall and his ever-stronger national judiciary was the primary thorn in Jefferson's anti-federalist side. Thus, it was particularly ironic that in 1801 Marshall would find himself on the opposite side of a Bible from Thomas Jefferson administering the presidential oath of office.

Beveridge's accounting of the political differences of these two men is one-sided to say the least. To a certain degree, this behavior can be excused. A biographer certainly has the right—indeed, even the duty, some might say—to select the materials from which to create his narrative. As Leon Edel, the masterful biographer of Henry James, once said, "Biographers are invariably drawn to the writing of a biography out of some deep personal motive."²⁵ But in this case, Beveridge at times goes too far. Even those who might agree with many of Marshall's views on the need for an independent judiciary and a strong national government (and therefore disagree with Jefferson's views of these subjects), would nonetheless concede that Jefferson played an essential role in the development of the nation. Beveridge rarely acknowledges the good side of Jeffersonian Republicanism, and it is in this imbalance and capacity for excessiveness that this otherwise excellent and scholarly study slipped a few notches.

The examples are plentiful. In his lengthy discussion of the conspiracy trial of Aaron Burr, for instance, Beveridge makes Hamilton

and Jefferson the clear villains, and Marshall the hero of that drama. In fact, the case was anything but clear cut, and even as Beveridge was writing there were those who felt "the case [was] a blemish on Marshall's career."²⁶ In another instance where his nationalist, anti-Republican stance negatively affects his overall analysis, Beveridge describes the revolt that became known as Shay's Rebellion as nothing more than "the mobs erupting from this crater of anarchy, now located in New England,"²⁷ and failing to give this important episode in American history any broader political or popular meaning.

Beveridge's assault on Jefferson was not the result of a lack of research or understanding, but was merely the manifestation of his own vision of constitutional interpretation. In fact, as his biographer reveals, Beveridge had submitted his manuscript to a number of historians, including several experts on Jefferson, and he received constructive criticism on many of his depictions of the third President. He did nothing to adapt his text or conclusions, however, choosing instead to use Jefferson as a foil for Marshall.²⁸

Much of Beveridge's celebration of Marshall can be excused as the natural inclination of a biographer who has spent years studying a subject and sharing the subject's views. Similar depictions of the two men, albeit more muted, are also evident in the works of subsequent Marshall biographers.³⁰ Moreover, there is no denying that Marshall *was* a remarkable American, sometimes neglected by historians, particularly in comparison with such peers as James Madison, Patrick Henry, and Jefferson (about whom more than 200 volumes have been written alone). As Chief Justice of the United States, he brought respect and power to an institution that had neither, removing the Court from politics while increasing its stature as a political institution. He strengthened the relationship between the judiciary and the other branches of government, molded consensus among the Justices so that their opinions reflected a constitutional mandate rather than raw politics, and established that it was "the province and the duty" of the Court to say what the law is. John Marshall is nothing less than the George

Washington of the federal judiciary. As one reviewer accurately pointed out:

[These four volumes] have for their main character in a great drama—the making and establishment of a nation—a man of marked ability and of noble nature holding a position of peculiar influence, a position which was strengthened and lifted to its height because of the sagacity and energy with which he unfolded its powers.³⁰

With this in mind, perhaps Beveridge can be granted some leeway in his glorified portrayal of the man that John Adams called “my gift to the American people.”

Examining this work more than three quarters of a century after its publication, it remains a remarkable accomplishment. Though modern readers might do well to read a more recent treatment of Marshall’s life, such as Jean Edward Smith’s compelling new biography, they would indeed be missing a literary and historical opportunity if they did not supplement their study of the great Chief Justice with Albert Beveridge’s undertaking. As one commentator wrote in 1920, “It is encouraging to learn that a successful American publisher believes that there is in America a scholarly reading public large enough to warrant the publication of such a work. We are not all readers of cheap magazines and transient novels.”³² Albert Beveridge’s *Life of John Marshall* is an investment, but one worth the effort.

Note: *The author gratefully acknowledges the research contribution of William Ford, a former judicial intern of the Supreme Court.*

Endnotes

¹ See, e.g., Jean Edward Smith, *John Marshall: Definer of A Nation* (1996); Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (1996); Frances H. Rudko, *John Marshall and International Law: Statesman and Chief Justice* (1991). Thomas C. Shevory, *John Marshall’s Achievement: Law, Politics, and Constitutional Interpretations* (1989).

² See Alexander Wohl, “Read All About Them—

Supreme Court Justices Have Become Popular Subjects for Biographers,” 81 *ABA J.* 46 (May 1995).

³ Lyman Abbott, “The Book Table: Devoted to Books and Their Makers—John Marshall,” *Outlook Magazine*, February 11, 1920, at 249-49.

⁴ Edward Corwin, “Review of ‘Life of John Marshall,’” *Mississippi Valley Historical Review* 581, 583 (March 1920).

⁵ Theodore Roosevelt, “Beveridge’s Life of Marshall—a Review,” *Outlook Magazine*, July 18, 1917, at 448-49.

⁶ Claude G. Bowers, *Beveridge and the Progressive Era* 9 (1932).

⁷ *Id.* at 22.

⁸ Speaking in 1900 on U.S. policy towards the Philippines, Beveridge stated: “God has not been preparing the English-speaking and Teutonic peoples for a thousand years for nothing but vain and idle self-contemplation and self-admiration. . . . He has made us the master organizers of the world to establish system where chaos reigns. . . . He has marked the American people as His chosen nation . . . [to be] trustees of the world’s progress, guardians of its righteous peace.” 33 *Cong. Record* 711 (January 9, 1900).

⁹ Bowers, *supra* note 6, at 35.

¹⁰ *Id.* at 547.

¹¹ James Bradley Thayer, *The Riverside Biographical Series*, Number 9, “John Marshall,” 82 (1901).

¹² Joseph Story, “A Discourse upon the life, character, and service of the Honorable John Marshall, LL.D., Chief Justice of the United States of America,” as published in *An Address by Mr. Justice Story on Chief Justice Marshall* (1901). Beveridge cites Story’s work numerous times in his biography of Marshall.

¹³ “Senator Beveridge’s Life of Marshall,” *The New York Times*, January 25, 1920 at 6.

¹⁴ “The Life of John Marshall,” 55 *American Law Review* 941, 942 (1921).

¹⁵ Albert Beveridge, *The Life of John Marshall*, Volume I, 91 (1916).

¹⁶ Albert Shaw, “The American Review of Reviews” 619, 621 (December 1916).

¹⁷ Albert Beveridge, *The Life of John Marshall*, Volume II, 413 (1916).

¹⁸ Albert Beveridge, *The Life of John Marshall*, Volume I, Preface (1916).

¹⁹ *The Papers of John Marshall*, now edited by Charles Hobson, Volumes 1-V (1974-1987).

²⁰ Leonard Baker, *John Marshall: A Life in Law* (1974).

²¹ Jean Edward Smith, *John Marshall: Definer of a Nation* (1996).

²² Albert Beveridge, *The Life of John Marshall*, Volume III, 114 (1919).

²³ Albert Beveridge, *The Life of John Marshall*, Volume II, 211 (1916).

²⁴ Albert Beveridge, *The Life of John Marshall*, Volume III, 239 (1919).

²⁵ James Atlas, “Whose Life Is This, Anyway?” *The New York Times Magazine*, 1, 22 (June 13, 1991).

²⁶ Andrew McLaughlin, “The Life of John Marshall,” 7 *ABA J.* 231, 233 (May 1921) (citing Edward

Corwin's "John Marshall and the Constitution" (1919)).

²⁷Albert Beveridge, **The Life of John Marshall**, Volume I, 299 (1916).

²⁸Bowers, *supra* note 6, at 557-58.

²⁹Jean Edward Smith, **John Marshall: Definer of a Nation** (1996); Leonard Baker, **John Marshall—A Life in the Law** (1974).

³⁰McLaughlin, *supra* note 26, at 231.

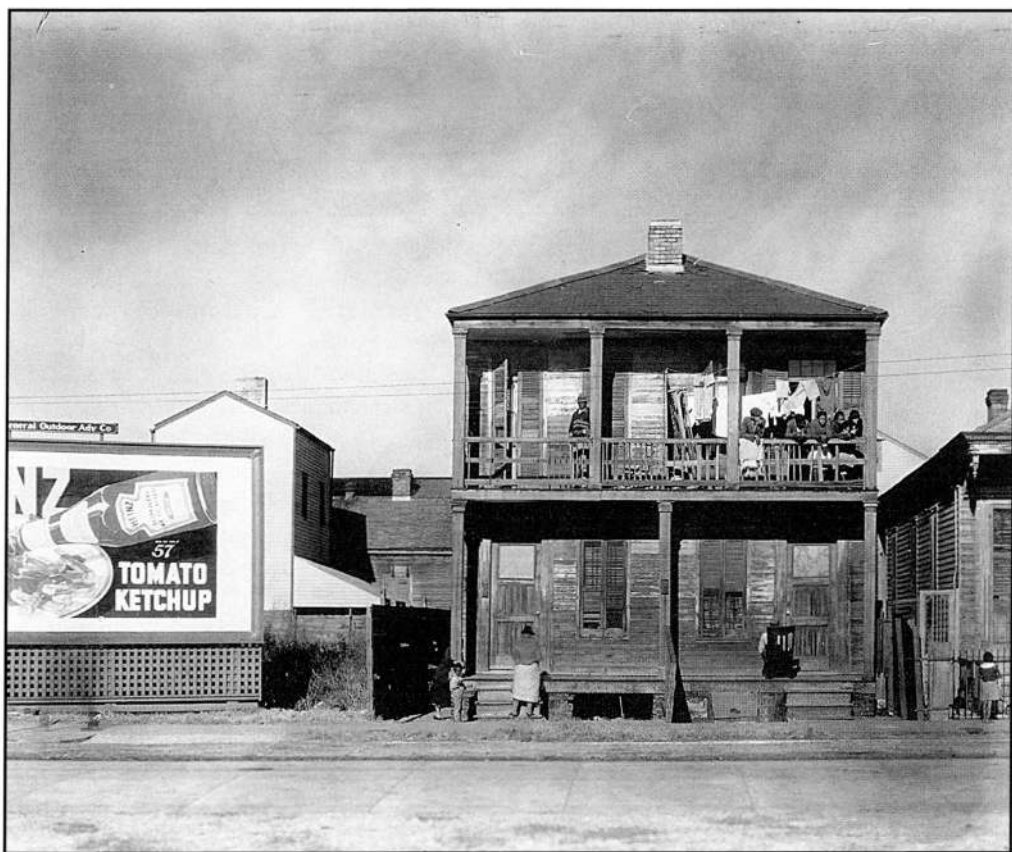
³¹Abbott, *supra* note 3, at 248.

**Review of Mark V. Tushnet,
*Making Civil Rights Law:
Thurgood Marshall and the
Supreme Court, 1936-1961*
and
*Making Constitutional Law:
Thurgood Marshall and the
Supreme Court, 1961-1991***

Elizabeth Garrett

On a cold day in January 1992, nearly 2,000 people lined the streets of Capitol Hill, waiting to enter the imposing Great Hall of the Supreme Court building. As they filed past the coffin and official portrait of Justice Thurgood Marshall, some were silent, but many parents whispered to their children, telling them about Thurgood Marshall, sharing how his work had changed America and their lives, and describing opportunities open to them that he helped to establish and institutionalize. Many left flowers or other items before the portrait; one remembrance particularly captured the somewhat contradictory feelings of loss and hope that could be seen on the faces during the twelve-hour vigil. One mourner left behind a copy of the petitioners' brief in *Brown v. Board of Education* with the following inscription at the top: "We will always remember."

Two recent books by Mark V. Tushnet, the Carmack Waterhouse Professor of Constitutional Law at Georgetown University Law School, ensure that we will continue to learn from Marshall's work, both as an advocate and a jurist. In the first, and more substantial, book, **Making Civil Rights Law**, Professor Tushnet, a law clerk of Justice Marshall during the Supreme Court's 1972 Term, focuses on Marshall's years as the lead civil rights lawyer for the National Association for the Advancement of Colored People (NAACP). The second volume, **Making Constitutional Law**, describes the development of several constitutional issues during the nearly twenty-four years Thurgood Marshall served as the first African-American Associate Justice on the Supreme Court of the United States. Neither of these books is a biography of Justice Marshall; rather, they both



At a 1945 conference convened by Thurgood Marshall, the NAACP devised a strategy for attacking racially restrictive covenants and housing segregation ordinances. They also hoped to educate the public about the problem and force legislative change.

deal with the public policies, litigation strategies, and legal principles that Marshall shaped as attorney and judge. As Tushnet writes in the preface to his first volume, “Thurgood Marshall’s work as a civil rights lawyer provides the main line of my discussion, but I also deal with litigation that did not involve Marshall directly. Marshall’s career, though, shows what the work of civil rights litigation was, and the length and depth of his involvement in civil rights litigation provides an opportunity to explore the ambiguities that characterized the effort to transform civil rights through litigation.”¹ In short, Marshall is the unifying theme of the books, but his life and character are not their sole, or even primary, focus.

Making Civil Rights Law describes and analyzes modern public interest litigation (or litigation aimed at reforming major social and political institutions) as the practice was devel-

oped by Marshall and others at the NAACP who “constructed the job of [the] civil rights lawyer.”² Unlike other books on civil rights litigation, notably Richard Kluger’s excellent **Simple Justice**,³ Tushnet does not deal only with the education cases, but he tries instead to give an in-depth picture of the varied caseload of the NAACP and the relationships among the many issues Marshall and the group tackled. Although a study of the education cases—beginning with those attacking inequitable teacher salaries, continuing through those seeking to eliminate segregation in higher education, and culminating with *Brown* and its immediate aftermath—involves more than half of the first volume, Tushnet also discusses the NAACP’s involvement in defending blacks in criminal cases, attacking restrictive covenants and other discriminatory housing policies, and dismantling white political primaries and other

schemes used to deprive African-Americans of their right to vote. His objective is to give readers an understanding of the breadth of the civil rights agenda and of the difficulties inherent in such wide-ranging litigation, a goal that he ably meets.

His topical organization contributes to this achievement, but it can obscure the fact that cases in all these areas were being pursued simultaneously by the NAACP's small and under-funded legal staff. Readers will get an accurate sense of the complicated path of each ball that Marshall juggled, but they may not become aware of how many were in the air at any one time. Tushnet partly overcomes this drawback to his otherwise successful narrative strategy by spending two chapters on the organization of the NAACP's legal office and on the routine work of its lawyers, topics analyzed in significantly greater detail in Jack Greenberg's memoir, **Crusaders in the Courts**.⁴

These studies of the quotidian aspects of a civil rights practice are invaluable to understanding Marshall's "unstructured" management style.⁵ Marshall delegated a great deal of responsibility while retaining ultimate control over projects and coordinating the various parts and players. He thrived on the intellectual energy produced in "free-wheeling discussions"⁶ in which he would listen a great deal of the time, requiring other lawyers to defend their positions or injecting a note of practical wisdom to ground more abstract theories. His ability to see beyond "technical details" allowed him to "capture[]the core of the opposing position, the aspects of the position that made it morally credible," and then to develop his own successful line of attack.⁷ In the second volume, the parallel chapter that deals with daily life at the Supreme Court reveals that Marshall retained this style in his interactions with his law clerks, similarly eliciting from them their best work.

Tushnet's focus, however, concerns the substance of the work of the office and the Chambers. In the first book, he conveys to readers the theoretical and practical difficulties that face those who seek to institute political and social reform through the courts. Marshall, in the tradition of Charles Houston, his mentor at Howard Law School and the NAACP, saw law

as "social engineering.' As social engineers, lawyers had to decide what sort of society they wished to construct, and then they had to use the legal rules at hand as tools."⁸ At a conference in 1945 convened by Marshall to establish a strategy for the legal attack against restrictive covenants and housing segregation ordinances, Houston told the assembly that "the litigation should be used as a forum for public education, and so should 'broaden the issues just as much as possible on every single base'."⁹ The issues raised and framed by the advocates in court were intended to affect public discourse in other policy institutions. The NAACP, like all those who work in public interest law, aimed for spillover effects; the litigation should force broader legislative change, as well as responses by local and national officials who implemented the law.

Moreover, the very existence of complex, high-profile civil rights lawsuits that were spearheaded by black lawyers worked to shape public attitudes. Marshall's audience in this effort comprised all Americans, but the example of his leadership may have particularly heartened and empowered black Americans. For example, in 1941 Marshall participated in the criminal defense of W.D. Lyons, a black Oklahoman accused of murdering a couple and their young son. Marshall was convinced both that Lyons was innocent (a prerequisite for NAACP involvement in criminal cases) and that his confession had been coerced by a severe beating and the police's tactic of placing the victims' bones in Lyons' lap during his interrogation. In a letter written shortly after the trial, Marshall described the atmosphere in the crowded Chickasha courtroom. Students from several white schools attended, receiving "a lesson in constitutional law and the rights of Negroes that they wouldn't get in their schools." He observed that his presence was partly responsible for the horde of onlookers because "word [had gone] around that 'a nigger lawyer from New York' was on the case," and he continued that the court personnel had "explained that this was their first experience in seeing a Negro lawyer try a case—first time they had seen such an animal."¹⁰

Although undermining racial stereotypes held by the white community was important to

Marshall, his letter reveals a more crucial educative mission. Marshall, who excelled at careful and devastating cross examination of hostile witnesses, took on the police "because we figured they would resent being questioned by a Negro. . . . They all became angry at the idea of a Negro pushing them into tight corners and making their lies so obvious. Boy, did I like that—and did the Negroes in the courtroom like it. You can't imagine what it means to those people down there. . . .to know that there is an organization that will help them."¹¹ It probably meant even more to those black Oklahomans—who lived in a segregated world, a world where mob violence was hardly unthinkable, and a world of marginal economic and social opportunities—to see the imposing figure of Thurgood Marshall striding fearlessly to meet the enemy.

The case also taught, as so many of his cases did, that the NAACP could expect only small victories in criminal cases. W.D. Lyons was sentenced to life imprisonment; the failure of the jury to impose the death penalty convinced Marshall that they shared his belief in Lyons' innocence. Tushnet's recounting of the civilian and military criminal trials in which Marshall participated reveals starkly the sobering reality the lawyers faced. To win was to convince a jury to impose only a life sentence or a judge to overturn a death penalty but usually not the underlying conviction. Justice Marshall's firm opposition to the death penalty, detailed in several chapters of **Making Constitutional Law**, may have had more to do with his experiences in these cases than with his strong distaste for retribution as a justification for capital punishment. Or as Marshall put it: "If you put a man in jail wrongfully, you can let him out. But death is rather permanent. . . . What do you say? 'Oops?'" He concluded, "That's the trouble with death. Death is so lasting."¹² Tushnet's treatment of the death penalty cases demonstrates one of the strengths of these two volumes: the ability to follow themes through Marshall's years as an advocate and then as a judge. Tushnet's detailed analysis of Marshall's criminal caseload for the NAACP allows the reader to see traces of his earlier experiences in his later legal opinions.

Notwithstanding the positive effect of the

words and example of the NAACP lawyers on social norms and the confidence and strength of the black community, their major mission was to change public policies. Accordingly, they devoted a great deal of energy toward planning their litigation strategies. Both through cogent explanation and, most usefully, through concrete examples, Tushnet provides a clear analysis of the strategic decisions confronted by civil rights lawyers. Any particular case was assessed by the NAACP lawyers primarily to determine whether and how it fit with the larger objectives. Often the attorneys would decide what kinds of cases would provide the best vehicles to advance certain legal principles and then hope to find plaintiffs who could assert appropriate claims. They had to be careful not to solicit their plaintiffs, which is an ethical violation, but the nature of public interest law means such litigators may be more active in finding clients with certain characteristics than are lawyers in private practice.

Marshall was "always quite sensitive to the ethical requirements, repeatedly admonish[ing] cooperating attorneys and lay people associated with the NAACP to be extremely cautious in their statements and actions."¹³ This course was a wise one; many of the attacks on the NAACP after the victory in *Brown* were charges of ethical violations or sometimes violations of provisions specifically drafted to target the NAACP. Tushnet describes the organization's tribulations in a short chapter in **Making Civil Rights Law**. In the end, the Supreme Court recognized that civil rights and other public interest litigation is a form of political expression and thus traditional ethical principles may have to be adapted in this context. The judicial acceptance of the unique role of the public interest lawyer may be Marshall's most lasting contribution to the institutionalization of this type of legal practice.

The public interest lawyer has a broader agenda than winning a particular case for a particular client, and this characteristic presents unique conflicts for the lawyer. Occasionally, public interest attorneys find they have come to see their clients, like the lawsuits themselves, to be only instruments to achieve greater objectives. Thurgood Marshall resisted this tendency, always remembering the humanity of his



Thurgood Marshall gave President Lyndon B. Johnson a piece of his mind in June 1967 upon being appointed to the Supreme Court. No prior nominee had such an extensive and successful record of arguments before the Court.

clients and understanding that their lives were changed, often in dramatic ways, by the result of the immediate lawsuit. W.D. Lyons is one of the most poignant examples; Marshall continued to correspond with him while he served his long sentence in state prison. The success of Marshall's greatest oral arguments was in part a product of his ability to bring his clients to life. When the Justices in the first argument in *Brown* were worried that desegregation might cause social disorder, Marshall responded that "in the South, where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together." As Tushnet concludes, "Marshall had seized the opportunity. . . to introduce the powerful image of children playing together, only to be separated in schools by force of law."¹⁴

But the conflicts among representing the interests of a particular client, pursuing a strategy to effect changes in social policy through litigation, and working to satisfy the objectives

of the NAACP's contributors who funded the lawsuits could not be resolved merely by acknowledging the humanity of the plaintiffs. Other scholars have raised concerns about the serious ethical dilemmas faced by public interest lawyers, dilemmas left unresolved by the Supreme Court cases protecting the NAACP from ethical attacks brought primarily by Southern politicians resisting desegregation. Derrick Bell, himself an NAACP litigator in some important cases, wrote of the tension facing the civil rights lawyer who often tries to "serve two masters," and he identified the difficulty of providing "standards for the attorney and protection for the client where the source of the conflict is the attorneys' ideals."¹⁵ Unfortunately, Tushnet does not seize the opportunity presented by his careful explication of the litigation strategies to grapple with these unresolved challenges for the legal profession.

Although public interest lawyers, planning their assault on a flawed institution, can devise intricate strategies at the outset, the nature of litigation demands that they remain flexible. All

their well-laid plans can be undermined by the inherent randomness of litigation. When many cases raise the same issues—some more forcefully or in a better posture—much turns on which case proceeds faster through the appeals process or which case the Supreme Court chooses to review. Marshall tried to control the progress of all relevant lawsuits, his staff was small. Some local attorneys did not coordinate their efforts with the NAACP, or they asked for help only when the case was on appeal after they might have committed irremediable errors at the trial level. Moreover, the cases themselves can spark a reaction in other political institutions that may force changes in tactics. Once challenges to more obvious forms of discrimination began to succeed, for example, some people merely shifted to more subtle ways to achieve the same ends, necessitating new legal maneuvers. Tushnet frequently illustrates the clash between the public interest lawyers' objective of using lawsuits to form coherent policy and the realities of litigation that threaten to overwhelm their efforts.

Finally, **Making Civil Rights Law** and parts of **Making Constitutional Law** detail the life cycle of public interest litigation and the different challenges facing lawyers at each stage. Tushnet calls this progression the litigation's "rhythm." "At first, the lawsuits deal with a large number of issues, because a client's interests can be served by winning on any one of them."¹⁶ The early education cases concerned the disparate material conditions of separate educational facilities, in addition to beginning to raise the claim that separate was inherently unequal, notwithstanding the state of the building and the student-to-teacher ratios. Next, "[i]f the litigation effort begins to succeed, an issue of clarifying principle eventually emerges,"¹⁷ here, the direct challenge to *Plessy v. Ferguson*. At this juncture, the cases are carefully shaped to present the issue clearly, sympathetically, and singly. Success relies on the ability to coordinate related cases, the willingness of the judges to cooperate, and a number of fortuitous events outside the advocates' control.

The final stage is particularly tricky, and it is one that Tushnet discusses in both books with respect to the education cases. It is the process of interpreting the new legal principle

and enforcing it. Did *Brown* require more than the elimination of segregation and the ban on using racial classifications to deny people opportunities, or did it require affirmative actions to integrate? How was the Supreme Court's direction to local school boards to comply with *Brown* with "all deliberate speed" to be implemented? A problem facing civil rights lawyers at this stage is the tremendous amount of time and human resources that such cases demand. The NAACP could not challenge every recalcitrant school board, nor could it offer assistance to every local group that did. Much like the cases at the first of the cycle, remedial cases require extensive development of factual trial records. One advantage for the civil rights lawyers, however, was the additional soldiers that victory in the second stage brings into the battle, here government lawyers in the Department of Justice. In several chapters of the first volume, Tushnet analyzes the resistance to *Brown* and the NAACP's work to translate abstract legal principles into social change. The theme carries through to the second volume, which offers Tushnet's discussions of the internal deliberations of the Supreme Court with regard to important integration cases and the affirmative action cases decided in the 1970s and 1980s.

Rather than concentrating on those cases, however, I will discuss briefly two other areas of constitutional jurisprudence that Justice Marshall influenced but which are less firmly associated with him in the public mind. As a preliminary matter, Tushnet's work in the second volume represents a major contribution because he was able to make extensive use of Thurgood Marshall's papers. These papers were made available after Marshall's death and contain internal Court communications, memos his clerks sent to him that he annotated, and drafts of all the opinions issued during his tenure. The Library of Congress's decision to allow extensive public access to these materials was controversial; his family, friends, and many law clerks believed it to be inconsistent with Marshall's frequently-stated belief in the confidential nature of internal court deliberations. Nonetheless, their use in these books is certainly within Marshall's direction for the Library to make his papers available to "scholars en-

gaged in serious research.” With them, Tushnet is better able to illuminate the Justices’ legal analysis of and the politics surrounding major opinions of modern constitutional law, including the ones I will note here—cases developing the theoretical basis of equal protection law and cases affecting the poor and relatively powerless in our country.

The legal tests employed by the Court in its equal protection jurisprudence, at least until recently, are part of a tiered system of review, formally with two (and sometimes three) levels of judicial scrutiny, depending on the interests at stake. For example, economic regulations, such as laws imposing more burdensome requirements on opticians than on optometrists, are reviewed under a deferential rational basis test, and the law will be upheld as long as the government has not acted irrationally. The highest level of review, strict scrutiny, is reserved for cases of racial discrimination or laws burdening fundamental rights and requires that the laws be narrowly tailored to achieve a compelling state objective. During Marshall’s years on the Court, an intermediate level of scrutiny was also developed by some Justices in cases of gender discrimination. Tushnet uses the unpublished drafts of opinions and internal memoranda to demonstrate the Court’s difficulties with this system, many of which are not evident from the final opinions themselves. The traditional, rule-oriented test emphasizes the initial classification; if the Court labels the right involved as fundamental, strict scrutiny virtually ensures the invalidation of the law, but if the interest does not rise to such importance, very deferential review occurs. Because intermediate scrutiny is unusual and controversial, the rigid process works very much like an on/off switch. Fundamental rights, as the Court determines them, are well-protected, but in the vast majority of other cases, legislatures need not fear the Court’s review.

Marshall preferred using a flexible and pragmatic standard to decide equal protection challenges. He acknowledged that determining which interests are fundamental is a contested and uncertain process and advocated that the Court adopt a sliding scale approach. Not all cases can be appropriately placed in one of two categories, and some important rights need

more protection than rational basis review but do not merit the nearly absolute protection of strict scrutiny. For example, the Court in *Massachusetts Board of Retirement v. Murgia*,¹⁸ was faced with an equal protection challenge to a state mandatory retirement law for police officers. According to internal documents and insights obtained from a recent biography of Justice Lewis F. Powell, Jr.,¹⁹ the Court struggled to fit the case into one of the two categories and then to determine whether the rational basis test (which was believed to apply) might have more teeth than it had seemed to show in early cases and thereby result in an invalidation of the law.²⁰

Justice Marshall argued that his test was eminently suited to such a situation. He conceded that the police officers’ right to work might not be fundamental enough to trigger strict scrutiny, but the mandatory retirement law was a “significant deprivation” and a burden on older workers who could not “readily find employment.” Why should the Court proceed, Marshall asked, as though such a law was equivalent to economic regulation of business interests? Would it not be better for the Court to have available a variety of levels of review and to choose the one best calibrated to take account of “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn”? (This last phrase is drawn from one of his greatest dissents, *San Antonio Independent School District v. Rodriguez*,²¹ to which I shall return.) In *Murgia*, he worried that “there remain rights, not now classified as ‘fundamental,’ that remain vital to the flourishing of a free society, and classes, not now designated as ‘suspect,’ that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members.”

Marshall’s equal protection analysis raises several questions. If his test merely replaces two tiers with multiple tiers, what are the rules for applying the different levels of review? If, instead, his approach is designed to focus the Court’s attention on various factors that might be weighed differently by different judges and does not lay down any firm rules, does the test leave too much to judicial discretion, allowing

the law to change with changes in the Court's personnel? Interestingly, the Court's current formulation of equal protection theory resembles Marshall's sliding scale review and seems to move away from the traditional and rigid tiers, but it has been used in most cases to reach results that Marshall would no doubt vehemently reject. Might he have thought in hindsight that his standard leaves too much to his colleagues' judgment? Tushnet recognizes the indeterminacy of Marshall's approach but argues that it was actually the one often used by the Supreme Court during Marshall's tenure although it cloaked its rhetoric in the language of the tiered system. Sometimes the brittle approach would obviously break—as it did in the gender discrimination cases—but often the tensions are apparent only in nonpublic communications (and perhaps in the absence of persuasive force in the published majority opinions). Tushnet believes that Marshall's more honest and open application of discre-

tion shaped by a general standard is preferable to masking the political nature of the Court's decision with a seemingly neutral rule.

Justice Marshall's impatience with his colleagues' wooden reasoning in these cases was exacerbated by his keen awareness of the plaintiffs' often desperate conditions. Many of these cases concerned "the forlorn, the easily forgotten members of society," as Marshall wrote in *Furman v. Georgia*,²² the case invalidating, only temporarily, capital punishment. Time and again, Thurgood Marshall's opinions resonate with compassion for the parties' relatively deprived educational, social, or economic situations. In *Dandridge v. Williams*,²³ a case involving the standard of need for recipients of public assistance, he was outraged that the Court analyzed for equal protection purposes "the literally vital interests of a powerless minority" with the same rational basis test it used to review laws affecting corporate interests "that have more than enough power to protect them-



Friends and like-minded Brethren, Thurgood Marshall and William J. Brennan, Jr., served on the Court together from 1967 to 1990. They dissented in every case upholding the death penalty.

selves in the legislative halls.” In a series of cases dealing with restrictions on abortions, Marshall strove to protect women’s autonomy, most memorably in his dissent in *Harris v. McRae*,²⁴ the case upholding the federal ban on the use of Medicaid funds for indigent women’s abortions. In a passage not quoted by Tushnet, Marshall wrote: “The Court’s opinion studiously avoids recognizing the undeniable fact that for . . . poor women[,] denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves. If abortion is medically necessary and a funded abortion is unavailable, they must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term.” He concluded with the ringing statement that he refused to believe that “a Constitution committed to equal protection of the laws can tolerate this result.” As Marshall detailed the “grotesque choices” that Congress, abetted by the majority, forced on these women, we can hear echoes of the civil rights lawyer who was intimately familiar with the conditions in which his clients lived and saw the limitations brought about by economic deprivation and discrimination.

Tushnet also focuses on Marshall’s great dissent in *Rodriguez*, where the Court rejected a challenge to state school financing systems that relied primarily on local property taxes. Marshall’s powerful anger in this opinion is hardly surprising; his work as an advocate reflected and reinforced his belief that education was the best hope for the marginalized in society. First, he objected to the majority’s refusal to find the children’s interests to be fundamental, and thus to trigger strict judicial scrutiny, because education is necessary for citizens to exercise their First Amendment rights meaningfully and serves as “the dominant factor affecting political consciousness and participation.” Of course, Marshall would have applied a different kind of review—his sliding scale—and his analysis would have allowed the Court to vindicate the disadvantaged students’ right to adequate education and to ensure them “an

equal start in life.” He asked, in a passage that Tushnet does not include, “[W]ho can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.”

In these opinions, as well as in his briefs and arguments as a civil rights lawyer, one hears the thundering voice of Thurgood Marshall. My disappointment with these volumes is that such brief passages are the only places one catches glimpses of this tremendous historical figure. Indeed, one of the greatest lawyers and raconteurs of the twentieth century becomes rather bland and two-dimensional within these pages. Tushnet seems not to have wanted to portray Marshall vividly; he tells readers that his books are not biographies, and he distinguishes his work from more “journalistically-oriented works” that try to “humanize” Marshall. Tushnet believes these efforts “make it difficult for readers to appreciate how Marshall was a great lawyer.”²⁵ Tushnet fails to realize that the reason Marshall was a great lawyer, why he can serve as the focal point for these two strong books, lies in large part in the kind of man he was. Throughout his career, Marshall succeeded as an advocate—whether as a lawyer or a Justice—because his parables brought to life people affected by the law and emphasized the unvarnished facts of their lives to policymakers whose actions could improve their condition. His stories showed in practical, down-to-earth ways how abstract legal theories related to the reality of the condition of the poor, the convicted, racial minorities, women, and others who need the law’s protection.

Like many fables, his stories often had a sharp edge, but so did Thurgood Marshall. He was not the stereotypical “do-gooder” who saw the possibilities in the world in rosy hues; he was angry and directed his anger as a weapon against bigotry, intolerance, and hatred. In a memorial service, Professor Scott Brewer, one of his clerks in his last Term, used a passage from Emerson to describe Justice Marshall’s character and virtue. In “Self Reliance,” Emerson wrote: “I ought to go upright and vital, and speak the rude truth in all ways. . . . If

an angry bigot assumes this bountiful cause of Abolition, and comes to me with his last news from Barbadoes, why should I not say to him, 'Go love thy infant; love thy wood-chopper; be good-natured and modest; have that grace; and never varnish your hard uncharitable ambition with this incredible tenderness for black folk a thousand miles off. Thy love afar is spite at home.' Rough and graceless would be such a greeting, but truth is handsomer than the af-

fectionation of love. Your goodness must have some edge to it,—else it is none."²⁶ Tushnet never captures the roughly-edged and vital goodness of Thurgood Marshall, but his scholarly contribution is nonetheless significant both for those who want to learn more about the work of civil rights advocates over the last sixty years and for those who seek to put those lessons into practice in new areas of social and political reform.

Endnotes

¹Mark V. Tushnet, **Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961**, (Oxford University Press 1997) p. vii.

²*Id.*, p. 27.

³Richard Kluger, **Simple Justice** (Knopf 1975).

⁴Jack Greenberg, **Crusaders in the Courts** (Basic Books 1994).

⁵Tushnet, vol. I, p. 33.

⁶*Id.*, p. 39.

⁷*Id.*, p. 40.

⁸*Id.*, p. 6.

⁹*Id.*, p. 88.

¹⁰*Id.*, p. 62.

¹¹*Id.*, p. 62, emphasis added.

¹²Mark V. Tushnet, **Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991**, (Oxford University Press 1997) p. vii.

¹³Tushnet, vol. I, p. 274.

¹⁴*Id.*, p. 181.

¹⁵"Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation," 85 *Yale L.J.* 470 (1976).

¹⁶Tushnet, vol. I, p. 270.

¹⁷*Id.*, p. 270.

¹⁸427 U.S. 307 (1976)

¹⁹John C. Jeffries, Jr., **Justice Lewis F. Powell, Jr.** (Charles Scribner's Sons 1994).

²⁰Tushnet, vol. II, pp. 108-111).

²¹411 U.S. 1 (1973).

²²408 U.S. 238 (1972).

²³397 U.S. 471 (1970).

²⁴448 U.S. 297, 338 (1980).

²⁵Tushnet, vol. I, p. 371.

²⁶Ralph Waldo Emerson, **The Complete Works of Ralph Waldo Emerson** (1968), p. 51.

The Judicial Bookshelf

D. Grier Stephenson, Jr.

From the beginning, the Supreme Court has been of absorbing interest not only to the Justices themselves and the litigants in cases they have decided, but to sitting and aspiring Presidents, members of Congress, state officials, journalists, polemicists, and, occasionally, the electorate. Remarkably, as Charles Warren's classic history demonstrated nearly seventy-five years ago,¹ with but a handful of notable exceptions,² the recorded commentary on the Court through much of the nineteenth century derived almost *entirely* from such sources. For a long time, published matter about the Court was mainly *ad hoc*: event-driven, advocative, and frequently partisan.

Systematic study of the Court, as distinguished from the law it declared, came later, emerging little more than a century ago, shortly before the births of future Justices Felix Frankfurter, Hugo L. Black, and Robert H. Jackson in 1882, 1886, and 1892, respectively, or about a hundred years before Sandra Day O'Connor

reached the High Bench. As this phenomenon unfolded, the Court and its decisions were perceived to be too multifaceted, complex, and consequential to remain the province of a single academic discipline. Students of the older disciplines of law, jurisprudence, and history were soon joined by those who embraced political science. This subject acquired official status as a discrete discipline upon the organization of the American Political Science Association in 1903,³ only four years before the birth of the Chief Justice, Warren E. Burger, whose retirement in 1986 opened the way for the appointment of Justice Antonin Scalia.

Ever since, political scientists within the field of public law and what came to be called the judicial process have been joined at the head with historians and legal scholars because of a common interest: judicial decisions, the Justices who make them, and the institution within which they work. Historians and students of politics in particular have wanted to

know *what* courts do, not because of the client-centered necessity to win cases but because of the reason-centered demand to comprehend courts as components of the political system. Moreover, they have sought to proceed beyond or beneath the “what” by seeking also to explain judicial decisions, to probe the *why* as well. This doubled-barreled objective accounts for much of the multidisciplinary character of judicial studies today, as these scholars look across their own fields into those tilled by statisticians, philosophers, economists, psychologists, and sociologists.⁴

The result has been a flourishing literature that reflects not merely a variety of old and new methodologies, but a tacit or express reliance on one or more of at least four explanatory approaches—some would say “models”—to the study of the Supreme Court (and other courts, too). The first of these is the “legal” approach, which emphasizes the influence of law, whether constitutional or statutory, including the accumulated mass of judicial constructions. The second is “attitudinal,” which looks to the role of a judge’s values, whether religiously, philosophically, or politically based, as principal variables.

“Small-group analysis,” the third approach, is applied to collegial bodies such as the Supreme Court where decisions are the product of a group, not a single individual. The operating assumption is that, along with the influences of legal rules and the judges’ values, judgments and the writing of majority opinions are interactive; they reflect the bargaining and give-and-take of collective decisionmaking. A fourth perspective takes “institutional and process” influences into account. Unlike the White House or Congress, appellate tribunals like the Supreme Court are almost entirely reactive. Cases arise and judges respond within a process that shapes the development and presentation of issues and sets the parameters for their resolution. Thus the existence of the Court’s certiorari jurisdiction injects a preliminary decision into every decision the Justices reach on the merits: deciding what to decide. A variation on the fourth approach, sometimes called “neo-institutional,” points to concern for the political strength and integrity of the Court. For example, a justice might prefer not to accept a

case for review if the issue presented might entangle the Bench in the politics of a presidential campaign.

In different ways, each of the books surveyed in this review seems premised on the utility of at least one of these approaches. Moreover, each of the books views the Court from one of four perspectives: biography, the appointment process, the internal dynamics of the institution, and the traditional case study.

Biography

The judicial biography and its less encompassing variants have been among the most common and well-received vehicles of writing about the Court for over half a century. Nonetheless, any author will admit that one’s choice of subject poses particular challenges. For Charles E. Hobson⁵ and Jean Edward Smith,⁶ they are captured by the name “John Marshall.”

The fourth Chief Justice casts a large shadow on the Constitution and on the development of American political institutions. Surely few early national political leaders are more difficult to portray adequately in a single volume. To write about Marshall after 1800 is to write about the Supreme Court, and, with only a few exceptions such as William Johnson and Joseph P. Story, to write about the Supreme Court in the first third of the nineteenth century is to write about John Marshall.

Second, his place in the American pantheon means that he has rarely been allowed to stray far from the center of scholarly attention. Alongside at least three older biographies⁷ is a host of more narrowly focused volumes, reams of articles, plus countless other studies in which Marshall’s handiwork figures prominently. So, it must be exceedingly difficult today even for two accomplished and well-positioned scholars to find something new to say about John Marshall: Hobson’s co-editorship of the ongoing Marshall papers project means that he may know more about the fourth Chief Justice than any other living person, and Smith’s research has yielded the most extensive use to date of Marshall’s papers, outside the project itself.

Third, the Supreme Court of Marshall’s time was a vastly different institution from the con-



Jean Edward Smith's *John Marshall: Definer of a Nation* and Charles F. Hobson's *The Great Chief Justice: John Marshall and the Rule of Law* attest to a continuing fascination with Chief Justice John Marshall (above). Both biographies succeed partly because the authors resisted the temptation to do all things.

temporary Court. Measured by the bulk of its docket, it was only marginally a constitutional court, even though modern readers tend to think of Marshall solely in terms of his contributions to constitutional law. The fact remains that the total number of constitutional cases the Court decided during Marshall's entire tenure was roughly equal to the number of constitutional cases the Court decides today in a single term. Moreover, many of those "other cases" that occupied the Marshall Court's time involved questions as unfamiliar to contemporary audiences as they were important to the commerce and society of his day.

To understand how Hobson and Smith coped with those realities is to grasp much of what each has to say. The books succeed partly because the authors resisted the temptation to do all things.

The Great Chief Justice by Hobson is no pocket-sized, warmed over, refashioned, and updated version of Albert Beveridge's four-volume, larger-than-life portrayal.⁸ Rather, the book is carefully focused on precisely what the subtitle promises: . . . **the Rule of Law**. The book is thus not a biography in the ordinary sense, but an example in the best sense of a bioprofile and jurisprudentially centered analysis. In Hobson's estimate, Marshall's major contribution lay in his efforts—sanctioned by succeeding generations—"to 'legalize' the Constitution, to make it amendable to the familiar and routine methods of resolving legal disputes."⁹ These efforts drew from Marshall's intimate knowledge of two distinct judicial phenomena: the discretion inherent in common law adjudication and from occasional and well-known instances of judicial review in some state courts in the 1780s and 1790s and equally well-known assumptions of it by Supreme Court Justices during the Jay/Rutledge/Ellsworth decade.

Marshall's legacy derives from the use he made of each. His stature rests less on "his particular interpretations of the Constitution as [on] his largely successful effort to infuse constitutional pronouncements with the qualities of an ordinary legal judgment." The result was the "assimilation of constitutional exegesis to the methods of common law. . . ."¹⁰ When he delivered the opinion in *Marbury v. Madison*,¹¹ therefore, judicial review was no more novel than its future place and shape were assured. Marshall stated more of a possibility than a result.

This theme unfolds through seven chapters. Chapters One and Two lay out a prologue, the first depicting the man, and the second placing Marshall within the common law setting of late eighteenth-century Virginia. Indeed, the second chapter—titled, "The Common Law Background"—is a gem. Laid out in sufficient detail is not merely the common law method of adjudication but a description of pleadings and Marshall's law practice in the Virginia courts of the 1780s and 1790s. The following three chapters develop the important (and well-known) components of Marshall's constitutional jurisprudence: judicial review, property rights and the contract clause, national supremacy ver-

sus state prerogatives. Against Marshall's reputation as a progenitor of judicial review, a concluding pair of chapters explore his contribution to this republican response to the development of political parties and presents Marshall as one whose conception of judicial review, by current standards at least, was exceedingly narrow, principally a tool to defend the central government against the centrifugal forces of disunion.

All reveal Marshall's role in developing a system that attempts to differentiate rulers from rules through the clever medium of assigning different tasks to different rulers: some are charged with making ordinary rules and others with judging those ordinary rules against yet another body of rules with paramount authority. The analysis would be more serviceable had Hobson made a clearer distinction between the earliest examples of judicial review (which the author terms "defense of fundamental law") and Marshall's (which he exalts as "judicial exposition" of the constitutional text).¹² As it stands, the distinction seems more a matter of degree than of kind.

Smith's **John Marshall**, a full-blown biography, should now be the standard against which future books about the Great Chief Justice are measured. As with Hobson's, Smith's volume should benefit readers who are only dimly familiar with Marshall as well as those who are thoroughly acquainted with the Marshall Court's accomplishments. For the former, Marshall's career emerges in a way that is both accessible and comprehensible. For most of the latter who have long given Marshall high marks in statecraft, fresh details and insights abound. In allocation, method, substance, **John Marshall** stands out.

Alongside three widely consulted biographies¹³ of Marshall, Smith's allots more space to his subject's pre-Court years: about fifty-three percent of the 524 pages of text (excluding the nearly 200 pages of notes and bibliography). Of Beveridge's 2,253 pages of text, the figure is forty-four percent; of Leonard Baker's 770, it is forty-six percent; and of Francis Stites's compressed 167, it is forty-five percent. Because of the constitutionally significant events and the intricacy of the political currents from Jefferson to Jackson, the temptation

must surely be strong for an author to move through the "preliminaries" (such as Marshall's Revolutionary War experience, Virginia law practice, Federalist party politics, and diplomatic efforts) as quickly as possible in order to confront the "main event" (the Chief Justiceship). Smith's redrawn emphasis is productive, as Hobson knows too, not merely because of the variety and significance of Marshall's accomplishments before February 1801, but because understanding what Marshall did between 1801 and 1835 cannot fairly be separated from the first forty-four years of his life.

Methodologically, Smith weaves Marshall's relations with colleagues into the cases and events largely by allowing Marshall and others to speak for themselves whenever possible. Particularly after Chapter Four, the reader becomes a close-in observer, as it were, privy to developments. The result is salutary: a straightforward chronicle, greater and lesser historical figures who come to life on the pages, modest doses of interpretation, and little speculation by the author on intentions and feelings except where the record is clear.

Substantively, the book contains only brief excursions into Marshall's jurisprudence. It is no criticism to suggest that those in search of lengthy discourse on Marshall's decisions will want to look elsewhere. Rather, treatment of cases conforms to the methodological objective that characterizes the book as a whole: judicial decisions appear as Marshall presumably saw them. So in *Marbury v. Madison*, "Marshall did not say that the Supreme Court was the ultimate arbiter of the Constitution. He did not say that the authority to interpret the Constitution rested exclusively with the Court, and he certainly did not endorse grandiose schemes that envisaged the Supreme Court as a board of review sitting in judgment on each act of Congress. . . . He simply stated that the Constitution was law, and that as a judicial matter, it could be interpreted by the Court in cases that came before it."¹⁴ In *McCulloch v. Maryland*,¹⁵ cited chiefly today to justify expansion of national power at the expense of state prerogatives, ". . . Marshall could not have envisaged the modern federal government. . . . His decision was a defensive one. . . . *McCulloch* did not so much expand federal sovereignty as re-

strict state sovereignty.”¹⁶

In the first chapter Smith assesses Marshall as a “great man in an era that brought forth great men.” Marshall was blessed with a personality and demeanor that made him “a friend to all who approached,” with “the best-organized mind of his generation,” with unusual insight into the requirements for nationhood, and with an unrivaled ability to articulate those requirements in the context of deciding cases. These qualities and talents combine to make the book’s subtitle—**Definer of a Nation**—entirely credible: Marshall “transformed the Constitution from a compact among the states into a charter of national life and created a political role for the Supreme Court at the very center of the nation’s development.”¹⁷

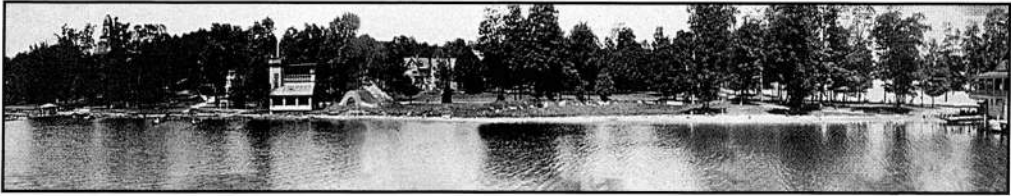
Emphasis on intellectual and social skills, transformation, and creation are of course other ways of writing about leadership, and Smith’s book only reinforces Marshall’s reputation on this count. Altogether, Marshall sat with ten Justices appointed by Presidents after John Adams. The first (William Johnson, 1804) was replaced by the tenth (James M. Wayne, 1835).¹⁸ Democratic-Republican Presidents Jefferson, Madison, and Monroe made six appointments to a Bench that after 1807 had seven Justices, and that after 1811 contained a majority of Democratic-Republican members. Yet with few exceptions most of the legendary decisions that exasperated Jefferson’s party (and sealed Marshall’s jurisprudential legacy)—rulings on federal judicial power, the implied powers of Congress, the commerce clause, and limitations on the states—were decided after 1815. If Jefferson and his two successors wanted a Bench opposed to Federalist-Hamiltonian ideas, they were singularly unsuccessful. Major shifts in doctrine had to await Marshall’s death and the full impact of President Jackson’s six appointees, a number only one less than the total number of Justices named by his four White House predecessors.

So far as this reviewer is aware, Jeffrey Hockett’s **New Deal Justice**¹⁹ is the first comparative study of Justices Black, Frankfurter, and Jackson. All appointees of the second Roosevelt, this was a trio of considerable distinction and accomplishment. Moreover, only one justice since Black—Harold Burton in

1945—has come directly from the United States Senate. Frankfurter was the last Justice appointed directly from the professorate. No justice since Jackson has entered the legal profession the old fashioned way: by apprenticeship. Among Justices of the twentieth century probably no pair has been more thoroughly studied and written about than Black and Frankfurter. Of Justices who have served on the Court since the constitutional revolution of 1937, Jackson reposes in a class of one: attracting considerable interest in the literature during and shortly after his tenure, he quickly dropped out of scholarly sight.

How then does a book of about 300 pages of text both enlarge an understanding of the first two and redeem the third from neglect? The author manages these formidable tasks by linking their constitutional jurisprudence to the intellectual milieu in which each was immersed during his formative, pre-Court years. The assumption seems to be that, first, milieu shapes one’s outlook on politics and society, and, second, once on the Bench this outlook has a profound effect on one’s notion of the proper use of judicial power. The result is a challenging and tightly written and reasoned volume. In a project that began as a study of Jackson alone,²⁰ Black and Frankfurter appear as contrasts against which the author assesses Jackson’s judicial service. “In neglecting Jackson, scholars have not only failed to appreciate fully the diversity of the New Deal Justices; they have also overlooked the insights of an individual who saw both merit and flaws in the opinions of Black and Frankfurter.”²¹

The seeds of Black’s jurisprudence lay in the industrial transformation that he witnessed as a young attorney and politician in an Alabama only several decades removed from Reconstruction. Like the Populists, he developed a “hierarchical view of society and politics”²² and championed the interests of common people. Far from fearing judicial power, Black became a profoundly result-oriented jurist. His well-advertised opposition to judicial discretion (that Hockett terms “the danger of judicial abstraction”) and his insistence on textualism were devices to “aid marginal social groups” and to “prevent courts from impeding social reform and to ensure judicial involvement for



In Jeffrey Hockett's new book, he argues that, unlike Justices Hugo L. Black and Felix Frankfurter, Robert H. Jackson (right) demonstrated a pragmatic jurisprudence that emanated from his background as a "generalist country lawyer" from Chautauqua County, New York (pictured above).



important antihierarchical objectives."²³ Or, as Hockett might have said, Black was a programmatic liberal,²⁴ emphasizing particular policy outcomes, rather than an institutional or procedural liberal, emphasizing merely an open democratic process.

Instances where Black took positions at odds with those objectives (as suggested by his dissents in *Griswold v. Connecticut*,²⁵ which invalidated a ban on the use of birth control devices, and *Katz v. United States*,²⁶ which brought electronic surveillance squarely under the Fourth Amendment) were the price necessary to maintain consistency in constitutional interpretation. That results, not fear of judicial discretion, Hockett maintains, drove Black is demonstrated by his opinions in such cases as *Wesberry v. Sanders*²⁷ that, mandating one person/one vote for congressional districting, depart from fealty to the text. Ordinarily, Black excelled in cloaking a "significant use of judicial power" within "the norm of self-denial."²⁸

Black's opinions in cases such as *Bell v. Maryland*, *Brown v. Louisiana*, *Adderley v. Florida*, *Amalgamated Food Employees Union v. Logan Valley Plaza*, and *Tinker v. Des Moines School District*²⁹ make this argument difficult to accept entirely, as the author acknowledges but discounts.³⁰ Each of these involved both free speech and ordinary people, with three containing the added element of racial discrimination. Black vigorously opposed the claimed right each time. If constitutional consistency was the governing principle, its costs had become dear indeed. Alternatively, Hockett's ex-

planatory principle may be burdened with more than it can convincingly carry. As influential as intellectual background no doubt is, one must be careful, with Black or any other Justice, to take account of the force of later events and circumstances as well as the Court's own collegial setting.

In contrast to Black, Frankfurter's jurisprudence, taking shape as it did in the Progressive environment of the industrialized northeast, seems less enigmatic. Despite judicial opinions that appeared to retain considerable discretion for judges, Frankfurter's views reflected just the opposite: "a desire to reduce radically the Court's influence in American life." A profound faith in the ordinary workings of the legislative and regulatory processes (institutional or process liberalism) thus led him to be highly suspicious of the "institutional competence of the judiciary."³¹ Those instances where he resorted to the aggressive use of judicial power (as in Establishment Clause cases) occurred

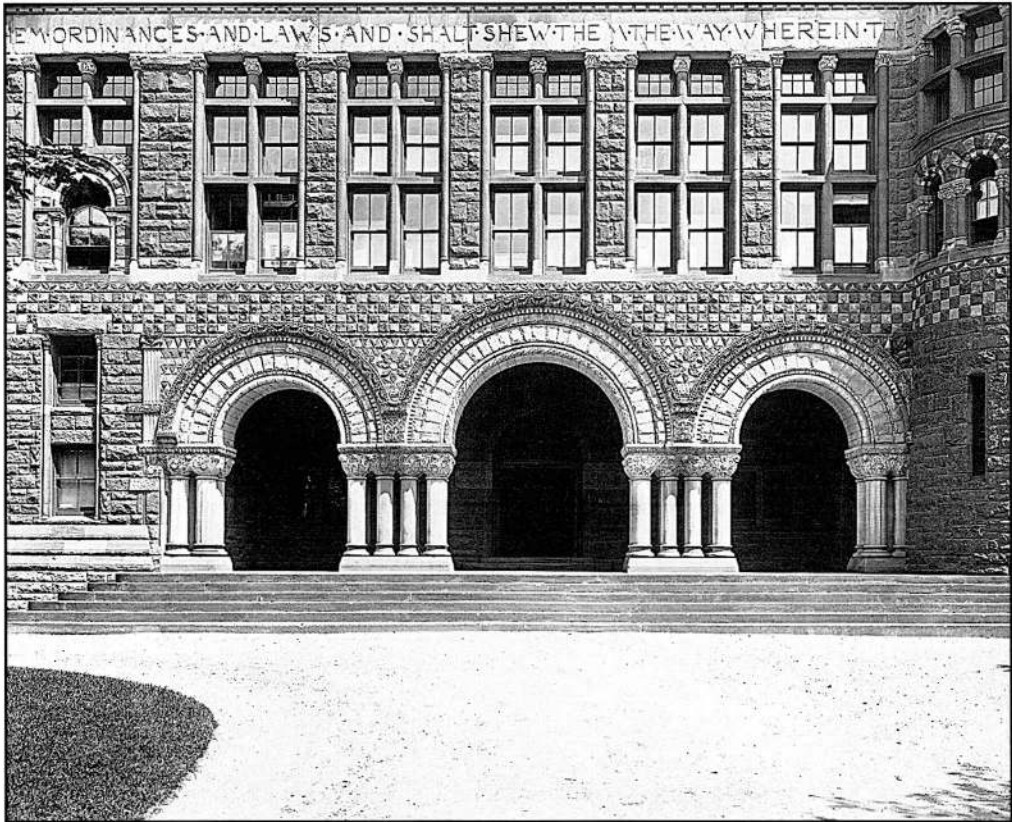
when other values of unusual importance to him were at stake.

Reflecting a blend of Black's fear of political oppression and Frankfurter's hostility to judicial abstraction, Jackson evinced a contextual or "pragmatic jurisprudence"³² that seemed unaffected by the political movements that moved Black and Frankfurter. Instead, Jackson's thinking emanated from his background as a "generalist country lawyer"³³ from Chautauqua County, New York. Yet the analysis leaves in doubt the reasons why Jackson seized on certain interests (to the exclusion of others) that were worthy of a judicial shield against majority rule.

Hockett departs from the conclusions of some Jackson scholars in at least two respects. First, being more comfortable with the exercise of judicial power, Jackson was more jurisprudentially akin to Black, not Frankfurter—this in spite of the notorious Black-Jackson feud of

the mid-1940s. Second, Hockett finds that Jackson's Nuremberg War Crimes Trial experience had a "liberalizing influence" on his post-war decisions, in "occasion[ing] a heightened appreciation . . . of the Constitution's procedural guarantees."³⁴ Otherwise, his repudiation of the preferred freedoms concept in free speech cases "did not represent a fundamental shift in his constitutional jurisprudence [but] . . . most certainly signified a change in tone." Hockett leaves unsaid what a "fundamental change" might have entailed, but the author admits that Nuremberg was "the cause of his adopting an approach toward seditious speech that was even more deferential toward legislatures than the approach Frankfurter took."³⁵ Perhaps that is not "fundamental," but it is surely consequential.

Because Jackson's "traditional background"³⁶ may have caused him jurisprudential difficulty, it may also account for his



Richard Brisbin notes in his new work on Antonin Scalia's jurisprudence that the instrument to change politics through judge-made law is a modification of "Reasoned Elaboration," an approach associated with Felix Frankfurter that was later prominent at the Harvard Law School (above) during Scalia's education there in the late 1950s.

neglect today. He lacked the generally uncluttered “underpinnings of . . . [Black’s and Frankfurter’s] interpretive models,” thereby opening himself to the charge of *ad-hoc* judging. Against the social expectation that judges discover, rather than make, law, credible constitutional luminaries must develop and apply a strategy for reconciling their values with this expectation. Judges who ignore or cope inadequately with this necessity do so at the peril of their legacies. Nonetheless, Hockett believes that those who look more closely at Jackson will find that he speaks to contemporary debates about the Court. He “alone raised the vexing possibility that the judiciary is at once the branch of government most qualified to correct the inadequacies of the political process and the one least able to make needed adjustments among competing social claims.”³⁷

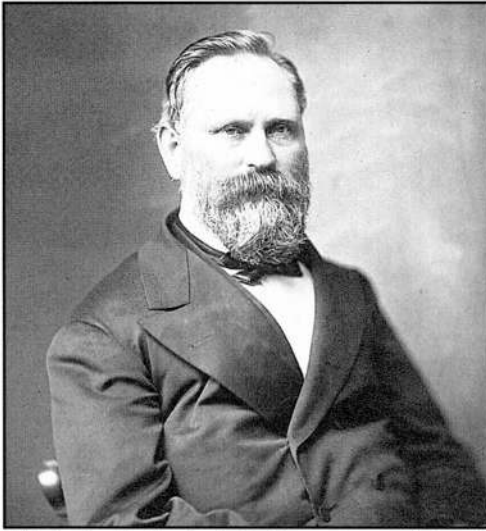
Hockett’s linkage of milieu, political outlook, and jurisprudence approximates Richard Brisbin’s treatment of Justice Antonin Scalia. In place of the Progressive era and industrial turmoil are a pair of revolutions, American-style: the New Deal and the programmatic liberalism of the Warren (1953-1969) and Burger (1969-1986) Courts. Brisbin’s thesis in **Justice Antonin Scalia and the Conservative Revival**³⁸ is that his subject has reacted against this background by articulating judicially a contrasting vision for the nation.

Brisbin’s is the third intellectual biography of Scalia in four years.³⁹ Counting also the wealth of periodical literature about the 103rd Justice, Scalia has probably received more scholarly attention than any other member of the current Bench. That fact carries a risk. Even in light of a decade in public life before appointment to the Court in 1986, Scalia’s is a career in progress. With exceptions such as Felix Frankfurter and the second John Marshall Harlan, most Justices of the past who are today identified closely with a particular legal tradition had not fully developed that identity in their first decade on the Bench. By 1811, John Marshall’s Court had scarcely decided *Fletcher v. Peck*,⁴⁰ and Marshall had written only nine of the thirty-seven constitutional opinions that comprise his legacy.⁴¹ By 1947 Justice Black had just finished work on his famous dissent in *Adamson v. California*⁴² that signaled his “com-

ing out” as a total incorporationist on the Fourteenth Amendment. Justice William J. Brennan, Jr.’s considerable accomplishments by 1966 exposed only the bare outlines of what the next twenty-four years would reveal. With Scalia, scholars must discern not only a jurisprudence worth evaluating but perhaps even one that is reasonably set. Scalia himself has both facilitated and complicated their task: Brisbin’s book concludes with a twenty-two-page bibliography of publications by Scalia, including his judicial opinions from the U.S. Court of Appeals for the District of Columbia Circuit and the Supreme Court (through November 1995), articles, addresses, and testimony before congressional committees.⁴³ This is no paper trail; it is a free-way.

There are three parts to Brisbin’s interpretation of Scalia. First (and as others have shown), Scalia’s votes are overwhelmingly on the conservative side, at least among cases that can be perceived as presenting a choice between a liberal and a conservative outcome.⁴⁴ By a “conservative,” Brisbin means someone who (1) contests “the New Deal and public interest liberal definition of legitimate state power and private rights;” (2) contests “changes in interest group roles in American political and social life” that have opened the political process to traditionally non-influential groups such as racial minorities and the poor; and, (3) credits the first two with “moral discord” in that they have frustrated “the development of a moral consensus or a shared religious vision of social and political life.”⁴⁵ (Brisbin’s middle element may be over-inclusive. The conservative political revival in the past two decades has been swelled by traditionally non-influential and even previously apolitical groups such as the so-called Christian right.)⁴⁶

Second, the interpretive vehicle or instrument to change politics through judge-made law is a modification of “Reasoned Elaboration,”⁴⁷ an approach associated with Felix Frankfurter that was later prominent at the Harvard Law School during Scalia’s education there in the late 1950s. Intent on curtailing policy innovations by the judiciary, this school advocated passivity, so that “the course of the nation” would be “charted by elected representatives who considered and



Efforts by Rutherford B. Hayes to appoint railroad lawyer and former Senator Stanley Mathews (above) on the Court in 1881 were stymied by progressive groups like the Grange. When President James Garfield renominated Mathews later that year, he was confirmed only by the whisker-thin margin of a single vote that broke party lines.

refined public sentiments, not by an unelected judiciary or a tumultuous interest group conflict.⁴⁸ This part of Brisbin's argument is significant because, in contrast to several other scholars, he believes that Scalia does not ordinarily rely upon Burkean or religious conservatism, natural law, or even the Founders' intent. He is at most a "faint-hearted" originalist,⁴⁹ and so differs in this respect from the former judge, Robert Bork. Ironically, Scalia's version of Reasoned Elaboration requires an active judiciary to ensure passivity: "the revocation of precedents that he thinks encourage the disregard of constitutional text or longstanding legal traditions." The objective is the pretended isolation "of the judiciary from politics . . . to make it appear that juridical craft and reasoning are of a different order than other forms of public debate."⁵⁰

Third, Scalia's opinions and other writings reflect a "constitutive discourse" that addresses fundamental "normative beliefs about social, political, and economic power relations" in the nation.⁵¹ This fact places him within the tradition of "lawyer-politicians" from Thomas Jefferson and John Marshall to Louis D.

Brandeis and Thurgood Marshall, who have contributed vision to public debates, helping to shape popular attitudes about politics and government.⁵² Scalia's vision is "distinctly conservative and legalistic" in order to "conserve the American faith in rule-based politics and to keep bureaucracy, Congress, and interest groups from generating a more chaotic politics of conflicting interests and—to a far lesser extent—moral discord." Talk of "rule of law," moreover, is "an artifice" to secure "the conservative revival: executive policy leadership and a reinforcement of the status of interests that are already powerful."⁵³

This is the vision that hides behind the mask of legal impartiality. It thrusts to the foreground the authority of legal text in order to obscure the ever-present judicial discretion in the background.⁵⁴ In Brisbin's grim assessment, Scalia's vision is inhospitable to remedies for inequality and injustice.⁵⁵

Appointment and Disappointment

If law, values, and institutional factors are apparent in biography, it is the second and third of these that dominate study of Supreme Court appointments. As a process, judicial selection has been political from the outset in that both Presidents and Senators have taken a nominee's views and party identification into account. The federal judiciary had been busy "erecting themselves into a political body to correct what they deem the errors of the Nation," fumed Jefferson in a letter to President Madison in 1810. "The death of [William] Cushing gives an opportunity of closing the reformation, by a successor of unquestionable republican principles. . . ."⁵⁶ Moreover, Presidents from Washington (with John Rutledge in 1795) to Ronald Reagan (with Robert Bork in 1987) have had their choices for the Court rebuffed by the Senate. Aside from the temporary exception of a recess appointment, no one sits on the Supreme Court without the express concurrence of the upper house of Congress, no matter how highly praised the nominee may be by the President. Except for appointees to the cabinet, surmised Lord Bryce early in this century, the Senate "early assumed the right of rejecting a nominee to any other office on any ground which it pleased, as for



When Louis D. Brandeis was nominated to the Court in 1916, debates on the Senate floor about judicial nominations were still closed to public scrutiny (the veil of secrecy was lifted in 1929). Threat of direct electoral retaliation against U.S. Senators had, however, been present since ratification of the Seventeenth Amendment in 1913.

instance, if it disapproved his political affiliations, or wished to spite the President.⁵⁷ Bryce was thoroughly familiar with confirmation politics in the nineteenth century when the Senate failed to approve more than a quarter of nominations to the Supreme Court. By contrast, the failure rate for the twentieth century is barely eleven percent, even after some stormy nominations in the past thirty years.⁵⁸ There never seems to have been a golden age when merit alone mattered in the executive and legislative decisions that have shaped the Bench.

Shaping America, by George Watson and John Stookey,⁵⁹ and **The Selling of Supreme Court Nominees**, by John Maltese,⁶⁰ are recent books about the appointment process that complement, rather than duplicate, each other.⁶¹ Each volume successfully interweaves both historical and contemporary materials. Both illustrate the transformation in nomination poli-

tics that has occurred since the mid-nineteenth century.

For decades nomination politics was a matter almost entirely between the President and the Senate; indeed, the process that is so visible today was practically closed to public scrutiny for more than half of American national history. No nominee testified before the Judiciary Committee until 1925, and such testimony did not become *de rigueur* until 1955. Judiciary committee deliberations and floor debate typically went forward in secret. The Senate usually acted quickly on a nomination, but without roll-call votes. Only relatively recently have Presidents routinely launched public campaigns in support of their nominees. Two generations ago few imagined "live" telecasts of Senate committee hearings, much less those that would out-score baseball's League Championship Series in the

Nielsen ratings, as happened with the nomination of Clarence Thomas.

Maltese accounts for changes chronologically through a series of brief case studies. He starts with the rise of organized interest groups in the late nineteenth century as forces in national politics, with the third chapter marking precisely when and how interest groups first became involved in appointment politics: the effort by two Presidents to place railroad lawyer and former U.S. Senator Stanley Matthews on the Court in 1881. In the waning days of President Rutherford Hayes's administration, the Grange, other groups who would later be known collectively as Populists, and the National Anti-Monopoly League successfully blocked the Matthews nomination. When President James Garfield renominated Matthews later that year, Matthews was confirmed only by the whisker-thin margin of a single vote that broke party lines.⁶²

Structural factors for a time made interest group involvement more the exception than the rule. Threat of direct electoral retaliation against U.S. Senators was absent until after ratification of the Seventeenth Amendment in 1913. Not until 1929 did the Senate lift the veil of secrecy by routinely opening floor debate on nominations to public scrutiny.⁶³ Probably not coincidentally, as the fourth chapter demonstrates, the nominations of Charles Evans Hughes and John J. Parker by President Herbert Hoover in 1930 then generated the most noticeable Court-focused displays of interest group activity since President Woodrow Wilson's 1916 nomination of Brandeis.⁶⁴

Later chapters illustrate how in more recent confirmation conflicts "players" in the nomination process—organized interests, the nominees themselves, Senators, and Presidents—have responded to changes in rules and technology (such as the advent of television, computers, and direct mail) to mold public opinion as a force in determining the voting outcome on the Senate floor. The most dramatic recent development, Maltese believes, may be presidential behavior. Only since Ronald Reagan have Presidents "routinely spoken out on behalf of their nominees throughout the Senate confirmation process. . . . Before Reagan, Supreme Court nominees were lucky if the presi-

dent *ever* publicly uttered their name after nominating them."⁶⁵ Even the circumstances of an announcement are entirely different. Nominations now appear with great fanfare in contrast to the practice in the not-too-distant past when Presidents revealed their choice in a news conference. President Harry S Truman made Harold



The nominations of Charles Evans Hughes and John J. Parker (above) by President Herbert Hoover in 1930 generated the most noticeable Court-focused displays of interest group activity since President Woodrow Wilson's 1916 nomination of Brandeis. Parker, an appeals court judge, was opposed by the American Federation of Labor and the NAACP.

H. Burton's nomination the last of six brief announcements in front of reporters in 1945, while President Richard Nixon announced the nominations of Lewis F. Powell, Jr., and William Rehnquist in a prime-time television address in 1971.⁶⁶

Many of these changes are apparent in **Shaping America**. However, rather than proceeding as Maltese did from Presidents Hayes to Bill Clinton, Watson and Stookey organized their informally written book according to the steps in the contemporary (post-1981) nomination process. Drawing on published sources and interviews with participants, they begin with "the vacancy"⁶⁷ and a discussion of factors that motivate Presidents to select a particular nominee. Attention then shifts to the "interim," the period of time between the announcement of the nomination and the onset of formal proceedings in the Senate.

With an almost certain gap of several months, even when the Senate is in session, this interval has become critical for the success of the nomination. As Maltese would agree, "Public opinion seems destined now to play a significant role in Supreme Court confirmations, at least in controversial nominations. In large part this is due to the fact that advocacy groups . . . have made grassroots appeals a basic tactic in the confirmation battle."⁶⁸ Ultimately the several players strive mightily to shape that opinion in ways that will bring about an outcome in the Senate favorable to them.

A separate chapter explains how hearings in the Judiciary Committee have become the focal point of each nomination, testing the effectiveness of previous efforts by the players to "define" the nominee in ways that are appealing or unappealing, acceptable or unacceptable. The important new variable at this stage is the nominee who wants "to appear competent, and exhibit the appropriate amount of integrity, thoughtfulness, sensitivity, and temperament" and also to remain aware of "how the opposition seeks to frame the nomination and avoid responses that will permit a spin in support of that frame."⁶⁹ As examples, the authors cite the skillful responses of two nominees, Frankfurter in 1939 and Brennan in 1956. The former deflected Senator Pat McCarran's effort to depict Frankfurter as sup-

portive of Harold Laski's sympathetic 1927 book, **Communism**. The latter provided what subsequent events proved to be an astonishing reply to a question posed by Senator Joseph McCarthy: "Do you approve of congressional investigations and exposure of the communist conspiracy setup?" "Not only do I approve, Senator," responded Brennan, "but personally I cannot think . . . of a more important or vital objective of any committee investigation than that of rooting out subversives in government."⁷⁰ If the committee is representative of the Senate as a whole, the committee vote is a good predictor of the final step of the process, the Senate's floor action. "[T]he careful observer will pay attention to the partisan and ideological split. . . , anticipating that the Senate will pretty much follow suit."⁷¹

Because some recent nominations have generated political pandemonium—at least one author has labeled the process the "confirmation mess"⁷²—it is not surprising that all three authors comment on the sweeping modifications proposed by some observers to save the Senate from itself by restoring calm, dignity, and reflection. A 1988 report by the Twentieth Century Fund, for example, recommended the depoliticization of the process by returning to an earlier day when nominees were not expected to appear in person and by basing the confirmation decision on the nominee's written record and the testimony of legal experts as to the nominee's competence, among other things.⁷³ For Watson and Stookey as well as Maltese, such measures are neither wise nor efficacious. The former argue that the process would actually be improved were it even more explicitly political in terms of ideology and partisanship.⁷⁴ Senators should not resort to shadow objections to hide their real ones. For Maltese, the "mess has less to do with the specifics of the confirmation process . . . than with the underlying political climate of any given era. The recent . . . mess was mostly a product of an unusually long period of divided government, coupled with . . . a 'cultural civil war,' . . . over some of the most divisive issues imaginable, with race and abortion at the forefront."⁷⁵ In short, the process can certainly be more civil, but in no way can it be nonpolitical.

Perhaps the issue should be rephrased.

While the nominations of Ruth Bader Ginsburg and Stephen Breyer were relatively agreeable, one wonders whether their experience will be the rule. Should scholars take seriously concerns about the potential for negative consequences of nomination warfare on the Court itself? If political eunuchs have never been responsible for staffing the Supreme Court, is there nonetheless a maintainable middle ground for Supreme Court confirmations that falls between a process akin to article-selection at a refereed journal and one that resembles Saturday night television wrestling? Indeed, a strong case can be made that incentives for nomination combat have not diminished. The range of emotionally contentious matters that routinely occupy the Court's time not only remains broader than that found during the nineteenth and early twentieth centuries, but remains just as broad as a decade ago. Not only are there now more groups potentially affected by judicial decisions, but they can communicate that connection to their members more directly and with greater speed than ever before. Campaigns and television news dominated by "sound bites" and a public averse to thorough coverage of most issues⁷⁶ reinforce a nomination process that remains susceptible to partisans on all sides.

The Court as a Small Group

Mention of conflict and the Supreme Court calls to mind not only confirmation struggles, but classic episodes of interbranch tension: Jefferson and Andrew Jackson versus Marshall, Lincoln versus Taney, and Franklin D. Roosevelt versus the Hughes Court.⁷⁷ Those encounters are reminders that, all the while the Constitution's separation of powers provides independence for the federal judiciary, its shared powers entangle the Court in partisan and ideological discord from time to time. One would also expect conflict within any institution or organization that stems from intellectual differences among strong-willed individuals as well as personal quirks and foibles. With the Court in particular, an additional cause of conflict is also the reason why conflict should be managed: no single justice prevails in a decision without the agreement of at least four oth-

ers. Some intramural skirmishes have been truly fabled: Justice James C. McReynolds's rudeness to Justice Brandeis⁷⁸ that made it easier for Harold Laski to write, "McReynolds and the theory of a beneficent deity are quite incompatible;"⁷⁹ the Black-Jackson feud that probably cost Jackson the Chief Justiceship;⁸⁰ and the long-running bitterness between Justices Frankfurter and Douglas.⁸¹

Phillip Cooper's **Battles on the Bench**⁸² argues that conflict within the Court is more extensive than even those legendary illustrations might suggest. Focusing mainly on the period since 1940, the author draws from the papers of Justices Black, Brennan, Burger, Douglas, Jackson, Marshall, and Rutledge, from interviews and oral histories, and from dozens of biographies and periodicals⁸³ to document conflict as persistent and pervasive. His examples encompass the varieties of internecine combat. Disagreements may be professional or personal, and either may be "pursued internally or [be] taken into the public arena."⁸⁴ Professional conflict is both necessary and desirable but may become troublesome when carried on externally. Personal conflict, often a by-product of professional differences, is even more damaging to intra-Court relations when it becomes public.

In content, the book is largely anecdotal with an emphasis on personal friction. Here in one place must be very nearly every verifiable snub and other unkind act in recent Supreme Court history, plus examples of important people who sometimes take themselves too seriously—all the grist any screenwriter would need for "Justices Behaving Badly." Even the location of material can be suggestive of conflict, as in the 1943 clipping from the *Chicago Tribune* tucked within the Douglas Papers titled "Frankfurter's Hold on Court Losing Force."⁸⁵ Laughter is a good antidote for tension in any setting, but on a page-by-page count spleen-venting at the Court easily surpasses humor: the section titled "The Crucial Presence of Humor" is a mere five pages long.⁸⁶

The book is also provocative. Because Cooper is considerably longer on examples of conflict than on its effects, the reader is left to ponder institutional consequences. The matter may be timely because Cooper is dubious of

“the contention that there is no more conflict [in the 1980s and 1990s] than at any other time in the Court’s history.”⁸⁷ Indeed conflict may now be more frequent and intense, thanks to increased attention to Justices’ extracuriam remarks in the media that further strains already strained relations. Admitting that the Court may still “make a credible claim to being the most collegial of the three major governmental bodies in Washington,” he nonetheless urges the Justices to be acutely conscious of “the best interests of the institution.”⁸⁸ Personal conflicts that erupt into the public arena may “encourage noncompliance [with decisions] because it suggests that a ruling is but a temporary victory in a particular case and does not announce a carefully considered principle that the Court is likely to apply uniformly in the future.” Over time, public battles may undermine “public respect for the institution because open conflict appears to mimic the behavior of other political bodies. . . .”⁸⁹

One thinks of other possible consequences as well. What are the effects, if any, of personal conflict on the quality of the Court’s opinions? Do fractious relations unnecessarily fragment the Bench, making majority opinions more difficult to achieve? What is the impact of feuds, slights, and hurt feelings on a Justice’s decision to retire (or remain)? The departure of Justice John H. Clarke in 1922, for example, is usually explained in part by his inability to ignore or to cope with McReynolds’ “antics and hostilities.”⁹⁰ Should Presidents take into account a prospective nominee’s reputation for conflict management, avoidance, or instigation? A hope of quelling the feuding and unifying the Bench was among Truman’s objectives in naming Fred Vinson as Chief Justice in 1946, although the divisiveness proved even too much for the new Chief’s conviviality.⁹¹

Perhaps because constitutional law remains caught up in the wake of Justices who sprang from the New Deal era, it is easy to forget just how long the more senior members of the contemporary Court have served. As of mid-1997, Justice O’Connor has already sat three years beyond Jackson’s thirteen, nearly half of Black’s thirty-four, and more than two-thirds of Frankfurter’s twenty-three. She is within three years of the median career tenure of the forty-

three Justices (current members excepted) appointed in the twentieth century.

According to Nancy Maveety’s **Justice Sandra Day O’Connor**,⁹² overweening interest in O’Connor’s status as a “first” and a reputation (like Jackson’s) for *ad-hoc* adjudication have perpetuated “scholarly oversight” of, and “capricious inattention” to, her “truly remarkable characteristics as a judicial actor.”⁹³ These consist of O’Connor’s “coalitional contributions” as revealed in a pair of “accommodationist strategies.” The first of these strategies is “jurisprudential accommodationism” that is manifested in fact-centered, rule-averse, situational, nonideological opinions that reflect “pragmatic centrism” and eschew bright lines.⁹⁴ Instead of adjudication by categorization or doctrine is the “balancing of conflicting values.”⁹⁵ The second strategy that Maveety finds reflected in her work is “behavioral accommodationism.” The term indicates swing voting, conditional cooperation with allies, and a propensity to write concurring opinions, although Maveety admits that O’Connor is not among the most concurrence-prone members of the Court. These behavioral examples in turn are “tempered by a certain amount of shrewdness.”⁹⁶

One of the volume’s virtues is that it challenges the occasional observations of some commentators who construe O’Connor’s fifth vote (coupled with a concurring opinion) in a 5-4 split as evidence that she could easily have been on the other side. Maveety argues that in many instances, her vote may have been “there” all along. Instead, her accommodationism points to other ends to be served. Moreover, in contrast to Cooper’s **Battles**, Maveety’s presents a Court less rife with personal animosities and more amenable to cooperation.

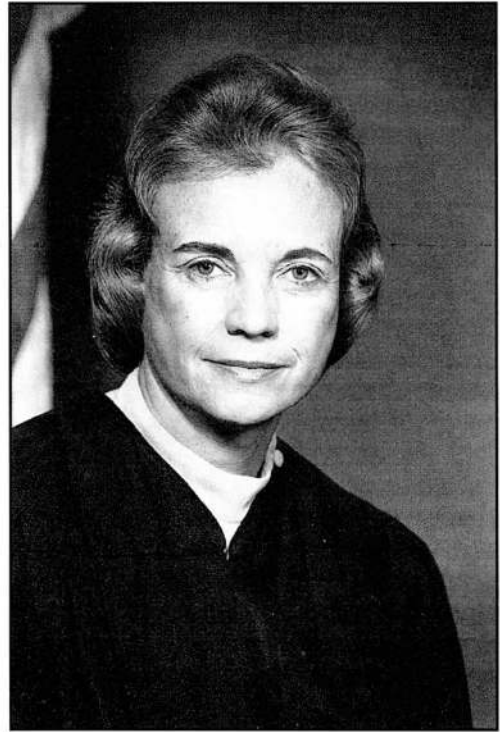
Maveety acknowledges that, of various forms of separate opinions, concurrences “most defy understanding.”⁹⁷ Particularly in light of the heavy workloads that are supposed to burden the Bench, what, after all, do concurrences accomplish other than a feeding of one’s ego? As suggested by inferences from published opinions, by O’Connor’s responses in a written interview, and by memoranda from the Thurgood Marshall papers, her concurrences in particular are “distinct messages in intercourt

communication” that induce as well as evidence “fluidity” and promote “incremental and collegial methods for legal change.”⁹⁸ (This reviewer could find no reference to the Brennan papers.)

Relying on insights from small-group theory into various forms of court leadership, Maveety finds both accommodationist strategies at work in the three constitutional arenas that she examines: religious freedom, reproductive rights, and race. O’Connor’s endorsement and undue burden tests in the first two areas appeared first in separate opinions. Her views on race as a permissible factor in drawing majority-minority districts, on a Court where four colleagues are set against the practice and four are inclined to look approvingly, have meant that counsel defending or attacking a particular plan make their arguments to a Bench of one. Whether O’Connor’s strategy extends across other cases remains to be seen. Nor does this study address that other forum—the certiorari process—in which behavioral accommodation might well be important.⁹⁹ But the evidence for the subjects included here is, as the Court sometimes says, compelling.

Paradoxically, the contextual approach that may have given O’Connor her influence on the contemporary Bench is itself heavily dependent upon context for its success. Most probably, O’Connor would not be on the Supreme Court had there been no Reagan administration and a drive to remake the Bench. This fact gives her something in common with John Marshall, Black, Frankfurter, and Jackson, who sat when other Presidents labored to rechart the judicial course. Without Reagan, there would today be no ideologically conservative bloc of Justices. It has been O’Connor’s good fortune that this bloc has frequently needed her vote to make five. Five sure votes without O’Connor would have made her strategy largely an exercise in futility. Her influence thus seems to depend heavily on the accident of appointment and the range of issues before the Court. It will be interesting to learn whether Maveety’s findings hold up once additional manuscript materials from O’Connor’s years become available, as well as whether Justices in earlier periods practiced the same strategy under similar circumstances.

The Unpublished Opinions of the



The author argues that Justice Sandra Day O’Connor most probably would not be on the Supreme Court had there been no Reagan administration and a drive to remake the Bench. This fact gives her something in common with John Marshall, Black, Frankfurter, and Jackson, who sat when other Presidents labored to rechart the judicial course.

Rehnquist Court by Bernard Schwartz¹⁰⁰ nicely complements Maveety’s study. The volume is a workbook depiction of the bargaining and persuasion, the give and take, that characterize the decisionmaking process in the Marble Palace.¹⁰¹ The book follows the design of two earlier books by Schwartz: **The Unpublished Opinions of the Warren Court** (1985) and **The Unpublished Opinions of the Burger Court** (1988). All three are presumably inspired by Alexander M. Bickel’s insightful **The Unpublished Opinions of Mr. Justice Brandeis** (1957), which sketched a portrait of the internal dynamics of an earlier Court.

The latest **Unpublished Opinions** opens with an introduction to decisionmaking procedures in the Supreme Court that allows the author to question the prudence of the current practice whereby most of the actual opinion-writing is done by the law clerks. “The indi-

vidual flair that makes the opinions of a Holmes or a Cardozo literary, as well as legal, gems has become a thing of the past."¹⁰² As *Los Angeles Times* reporter David Savage has written, "these days no one confuses Court opinions with literature."¹⁰³ "There is all the difference in the world," Schwartz continues, "between writing one's own opinions and reviewing opinions written by someone else. It is hard to see how an editor can be a great judge. Can we really visualize a Holmes or a Cardozo coordinating a team of law clerks and editing their drafts?"¹⁰⁴ Brandeis' comment that the Justices "are almost the only people in Washington who do their own work"¹⁰⁵ seems today a partial truth at best.

Although the Justices are at least one step removed from the words that bear their names, the book, like its predecessors, reprints *draft* opinions (majority, dissenting, and concurring) in important cases. Each set of opinions in turn is both preceded and followed by brief explanatory essays by Schwartz highlighting the issues involved in the litigation and, more important, the movement within the Court that results in resolution of the case. Readers will profit most from Schwartz's exercise if they read the draft opinions alongside the published ones, where applicable, in the **United States Reports**.

Unpublished Opinions includes ten cases that present a range of issues and outcomes. They begin with *Missouri v. Blair* and *Hodel v. Irving*¹⁰⁶ in 1987 and conclude with *United States v. France*¹⁰⁷ and *Ford Motor Credit Co. v. Department of Revenue*¹⁰⁸ in 1991. The first of these was a complex case arising from a traffic stop: after nearly thirty pages of opinions had been drafted, the Court decided to dismiss the writ of certiorari as "improvidently granted."¹⁰⁹ *Hodel* raised an important Fifth Amendment takings question, while *France* demonstrated the difficulties that the decision process encounters when a case proves to be an unsuitable vehicle for resolving an issue. *Ford Motor* involved the Commerce Clause in its "dormant" state and consumed much judicial energy, but yielded only an affirmance by an equally divided Bench. There are eight opinions by John Paul Stevens, five by Harry A. Blackmun, four by Byron R. White and

O'Connor, three by Marshall and Scalia, and one each by Brennan, Powell, Rehnquist, and Anthony Kennedy—everyone in this period but Justice David Souter.

Schwartz has had access to Justice Brennan's papers for some time, although Schwartz acknowledges that most of the materials reprinted in the Rehnquist Court volume are also in the Thurgood Marshall papers, a collection that, unlike Brennan's, is generally open to all researchers. Obviously there will be no successors to this volume in the short term unless Schwartz or someone else acquires access to the papers of a Justice who has served since Marshall's retirement in 1991.

Access to Court memoranda and other documents containing contributions by sitting Justices has been a subject of controversy at least since Alpheus Mason's pioneering biography of Chief Justice Harlan Fiske Stone appeared more than forty years ago.¹¹⁰ Openness serves the Court well and "reflects favorably" on what the Justices do, Schwartz contends. "No other governmental institution could be subjected to comparable scrutiny of its internal processes and come out so well," he states.¹¹¹ He may be correct, but the claim remains unsubstantiated.

There is insufficient space in this essay to review the debate on access, except to note that Schwartz is very much aware of the continuing sensitivity of the issue, inside the Court as well as out. The introductory essay quotes from a memorandum to the Conference and to retired Chief Justice Warren E. Burger and Justice Powell by retired Justice Brennan dated December 19, 1990: "Sandra and the Chief have expressed to me the concern—shared, they tell me, by others of you—that researchers who examine my official papers thereby gain access to memoranda written to me by other Justices. They have suggested that, to avoid embarrassment to any of our colleagues, I should not grant access to files that may include any written material from Justices who are still sitting on the Court." Explaining that he had been granting selective access to scholars for about a decade, Brennan announced that the practice would continue and expressed his belief "that scholarly examination of the Court's workings would serve the public interest."¹¹²

For any individual justice, there is the initial question whether one's papers should be preserved, and if so, whether and how long access should be delayed. Ideally the Conference would decide on a policy that all would agree to follow. Scholars are hardly in a position to police the Justices; nor should they be expected to look the other way when previously locked drawers are opened to them.

Case Study

"[T]he safeguards of liberty," Justice Frankfurter once observed, "have frequently been forged in controversies involving not very nice people."¹¹³ More charitably perhaps, he might have said that those safeguards have been forged in controversies involving people who have been accused of doing not very nice things. So modified, the statement applies to the seventeen-year-old juvenile (R.A.V.) who, along with a companion, was arrested for burning a small cross on the front lawn of the home of Russell and Laura Jones in St. Paul, Minnesota, in the early morning hours of June 21, 1990. These facts led to charges against R.A.V. under the city's bias-motivated disorderly conduct ordinance: "Whoever places on public or private property a symbol, object, . . . or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct. . . ." The ensuing litigation culminated in a unanimous holding by the Supreme Court in *R.A.V. v. City of St. Paul*¹¹⁴ that the ordinance violated the First and Fourteenth Amendments: the ordinance was impermissibly viewpoint-based in its ban (as five members of the Court held) or overbroad (as four members of the Court asserted). The case is the subject of Edward J. Cleary's **Beyond the Burning Cross**.¹¹⁵

A private criminal defense attorney in St. Paul, Cleary first encountered R.A.V. when he was assigned the case as a paid part-time public defender. After the initial constitutional ruling in R.A.V.'s favor in the trial court, Cleary continued his efforts on his client's behalf on a *pro bono* basis when the city appealed. A rul-

ing in the city's favor by the Minnesota Supreme Court led to Cleary's first opportunity to argue a case before the Supreme Court.

The experience would provide any attorney with a story to tell. What makes this book succeed is the skill with which Cleary marshals and exploits his knowledge and perspective in demonstrating the strategic and tactical factors at work in the appellate process. What does one do to maximize the probability that a particular case will attract the interest of at least four members of the Court? To whom does one turn for advice? How does one prepare for oral argument? Why has anticipated support from certain *amici* not been forthcoming?

While leaving no doubt that he believes in the correctness of the constitutional position he advocated all the while deploring the cross-burning itself, Cleary maintains sufficient detachment and balance to make the book much more than an ego-enlarging account of one attorney's victory in the Supreme Court. The book is at once an informative depiction of the legal process at work and a study of First Amendment jurisprudence and *R.A.V.*'s place in its development. That lends the significance to the word "beyond" in the title of the book.

Cleary shows the professional and personal difficulties inherent in translating the Constitution into reality. In a case like this one, a court applies principle to facts. Although the principle (free speech, in this instance) may enjoy wide appeal, the beneficiary of a particular ruling is often no hero. Cleary learned first-hand that opprobrium may attach to others too, as decisions align both Bench and counsel in the public's mind with unpopular or even unsavory individuals. **Beyond the Burning Cross** thus teaches several larger, and vital, lessons.

In this mission to teach, Cleary's book happily is not alone. Early in this century Charles Warren opened a chapter with an admonition: "An American citizen will never understand the form of government under which he is living, unless he understands why we must have a Supreme Court. And he will never understand why we must have a Supreme Court, until he understands the form of government under which he is living."¹¹⁶ His words were a challenge not merely to ordinary citizens, but to those who inform them. He had education in

mind. Fred Graham, who was once the Supreme Court reporter for *The New York Times* and CBS Television and is now associated with "Court TV," has said, "The only groups who don't appear on television are the Supreme Court and the Mafia."¹¹⁷ Graham had education in mind too, although one can agree with the necessity of educating the public about the Court without necessarily agreeing that televised coverage of the Court's proceedings is an answer. What is apparent is the essential civic function of books such as those surveyed here about the Court and the judicial process in conveying that "understanding" of constitutional government to the news media, to advocacy groups, and to the public at large.

THE BOOKS SURVEYED IN THIS ARTICLE
ARE LISTED ALPHABETICALLY
BY AUTHOR BELOW

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Endnotes

¹ Charles Warren, **The Supreme Court in United States History**, 3 vols. (1923). A revised edition in two volumes appeared in 1926.

² For example, the *North American Review*, which began publication in 1815, gave increased attention to social and political movements as the years passed. The *American Law Magazine*, the *American Law Register*, and the *American Law Review* began publication in 1843, 1852, and 1866, respectively.

³ Although the study of "politics" began in ancient Greece, it was not until 1876 that a university (Johns Hopkins) established a separate department of political science; Columbia University enrolled graduate students in the subject for the first time in 1880. The American Political Science Association was formed at the annual meeting of the American Historical Association in New Orleans in 1903. Gregory M. Scott, **Political Science: Foundations for a Fifth Millennium** (1997), p. 38.

⁴ Eliot E. Slotnick, "Judicial Politics," in William Crotty, ed., **Political Science: Looking to the Future**, vol. 4 (1991), p. 67.

⁵ Charles E. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (1996) (hereafter cited as Hobson).

⁶ Jean Edward Smith, **John Marshall: Definer of a Nation** (1996) (hereafter cited as Smith).

⁷ Albert J. Beveridge, **The Life of John Marshall**, 4

- vols. (1916-1919); Leonard Baker, **John Marshall: A Life in Law** (1974); and Francis N. Stites, **John Marshall: Defender of the Constitution** (1981).
- ⁸ Beveridge, **The Life of John Marshall**.
- ⁹ Hobson, p. 181.
- ¹⁰ *Id.*, p. 213.
- ¹¹ 5 U.S. (1 Cranch) 137 (1803).
- ¹² Hobson, p. 213.
- ¹³ See note 7.
- ¹⁴ Smith, pp. 323-324.
- ¹⁵ 17 U.S. (4 Wheat.) 316 (1819).
- ¹⁶ Smith, p. 445.
- ¹⁷ Smith, pp. 19-20.
- ¹⁸ Wayne, the third Jackson appointee, was the last addition to the Court before Marshall's death. Smith incorrectly states that Wayne had served "on the Georgia supreme Court" (p. 521), an error that Henry J. Abraham and Charles Warren make as well. Abraham, **Justices and Presidents**, 3d ed. (1992), p. 99; Warren, **The Supreme Court in United States History**, vol. 1, p. 795. Prior to election to Congress, Wayne was a judge on a superior (or circuit) court in Georgia. The state had no supreme court until 1845. Law of December 10, 1845, **Georgia Acts** 18 (1845). Beginning in 1830, a year after Wayne entered the U.S. House of Representatives, conflicts among the circuits were settled by a conference of all superior court judges that met twice each year. See Mason W. Stephenson and D. Grier Stephenson, Jr., "To Protect and Defend" Joseph Henry Lumpkin, the Supreme Court of Georgia, and Slavery," 25 *Emory Law Journal* 579, 579-580 (1976).
- ¹⁹ Jeffrey D. Hockett, **New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson** (1996) (hereafter cited as Hockett).
- ²⁰ For example, see Hockett's "Justice Robert H. Jackson and Segregation: A Study of the Limitations and Proper Basis of Judicial Action," *Supreme Court Historical Society Yearbook* 1989, p. 52.
- ²¹ Hockett, p. 5.
- ²² *Id.*, p. 14.
- ²³ *Id.*, pp. 129, 124, 15.
- ²⁴ Sidney M. Milkis, **The President and the Parties: The Transformation of the American Party System since the New Deal** (1993), pp. 13, 240-241.
- ²⁵ 381 U.S. 479 (1965).
- ²⁶ 389 U.S. 347 (1967).
- ²⁷ 376 U.S. 1 (1964).
- ²⁸ Hockett, p. 291.
- ²⁹ 378 U.S. 226 (1964), 383 U.S. 131 (1966), 385 U.S. 39 (1966), 391 U.S. 308 (1968), and 393 U.S. 503 (1969).
- ³⁰ Hockett, pp. 128-9, 139.
- ³¹ *Id.*, pp. 16, 297.
- ³² *Id.*, p. 241.
- ³³ *Id.*, p. 215.
- ³⁴ *Id.*, pp. 278-279.
- ³⁵ *Id.*, pp. 274-275, 277.
- ³⁶ *Id.*, p. 292.
- ³⁷ *Id.*, pp. 293, 298.
- ³⁸ Richard A. Brisbin, Jr., **Justice Antonin Scalia and the Conservative Revival** (1997) (hereafter cited as Brisbin).
- ³⁹ Christopher E. Smith, **Justice Antonin Scalia and the Supreme Court's Conservative Moment** (1993); and, David A. Schultz and Christopher E. Smith, **The Jurisprudential Vision of Justice Antonin Scalia** (1996). The latter volume was surveyed in this space last year: "The Judicial Bookshelf," *Journal of Supreme Court History* (1996), vol. II, pp. 178-179.
- ⁴⁰ 10 U.S. (6 Cranch) 87 (1810).
- ⁴¹ Joseph P. Cotton, Jr., ed., **The Constitutional Decisions of John Marshall**, 2 vols. (1905).
- ⁴² 332 U.S. 46 (1947).
- ⁴³ Because of the timing, Brisbin was unable to quote from the tentative draft of Scalia's Tanner Lectures at Princeton University in March 1995. Brisbin, p. 456. Scalia's remarks appear as "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in **A Matter of Interpretation: Federal Courts and the Law** (1997), published by Princeton University Press. Justice Scalia's essay is followed by comments by Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, Ronald Dworkin, and editor Amy Gutmann.
- ⁴⁴ There are exceptions. See Brisbin's discussion of some criminal justice cases, at pp. 265-266, and the flag-burning cases, at pages 195 and 205.
- ⁴⁵ Brisbin, pp. 3-5.
- ⁴⁶ Clyde Wilcox, **God's Warriors: The Christian Right in Twentieth-Century America** (1992), p. 118.
- ⁴⁷ Brisbin, p. 63.
- ⁴⁸ *Id.*, p. 15.
- ⁴⁹ *Id.*, p. 331.
- ⁵⁰ *Id.*, pp. 327-328.
- ⁵¹ *Id.*, p. 291.
- ⁵² *Id.*, p. 2.
- ⁵³ *Id.*, p. 325.
- ⁵⁴ *Id.*, p. 329.
- ⁵⁵ *Id.*, p. 179.
- ⁵⁶ Letter of September 25, 1810, quoted in Warren, **The Supreme Court in United States History**, vol. 1, p. 404. Jefferson recommended Levi Lincoln, who declined Madison's offer, as did John Quincy Adams. Cushing's seat eventually went to Joseph Story.
- ⁵⁷ James Bryce, **The American Commonwealth**, new edition, revised, vol. 1 (1914), p. 61.
- ⁵⁸ This figure includes both Justice Abe Fortas, whose nomination for Chief Justice was withdrawn in 1968, and Judge Douglas Ginsburg, whose name was withdrawn from consideration before the nomination was official.
- ⁵⁹ George L. Watson and John A. Stookey, **Shaping America: The Politics of Supreme Court Appointments** (1995) (hereafter cited as Watson and Stookey).
- ⁶⁰ John Anthony Maltese, **The Selling of Supreme Court Nominees** (1995) (hereafter cited as Maltese).
- ⁶¹ Mark Silverstein's study appeared a year earlier: **Judicious Choices: The New Politics of Supreme**

- Court Confirmations** (1994). All three seem inspired by recent spectacles in the Senate Judiciary Committee.
- ⁶² Maltese, p. 37. In terms of percentage of negative votes cast against a successful Supreme Court nominee, the 52-48 vote for Justice Clarence Thomas ranks second to the 24-23 for Matthews.
- ⁶³ *Id.*, p. 52.
- ⁶⁴ Many bar and business groups, and former President William Howard Taft too, unsuccessfully fought the Brandeis nomination.
- ⁶⁵ *Id.*, pp. 113, 114.
- ⁶⁶ *Id.*
- ⁶⁷ This is the title of the second chapter. Watson and Stookey, p. 23.
- ⁶⁸ *Id.*, p. 120.
- ⁶⁹ *Id.*, p. 160.
- ⁷⁰ Quoted in *id.*, pp. 161-162. At the time of the hearings, Brennan was sitting with a recess appointment. McCarthy must not have been fooled by his exchange with Brennan; he cast the only audible dissent when the Senate confirmed Brennan by a voice vote on March 19, 1957. Stephen Wermiel, "William J. Brennan, Jr., in Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789-1993** (1993), p. 448.
- ⁷¹ Watson and Stookey, p. 170.
- ⁷² Stephen L. Carter, **The Confirmation Mess: Cleaning Up the Federal Appointments Process** (1994).
- ⁷³ David M. O'Brien, **Judicial Roulette** (1988), pp. 8-9.
- ⁷⁴ Watson and Stookey, pp. 177, 223.
- ⁷⁵ Maltese, p. 149.
- ⁷⁶ "The Age of Indifference," a report of The Times Mirror Center for The People and The Press, June 1990.
- ⁷⁷ For example, see Walter F. Murphy, **Congress and the Court** (1962); Robert J. Steamer, **The Supreme Court in Crisis** (1971); and William Lasser, **The Limits of Judicial Power** (1988).
- ⁷⁸ Bernard Schwartz, **A History of the Supreme Court** (1993), p. 214.
- ⁷⁹ Letter to Oliver Wendell Holmes, Jr., April 13, 1923. Mark DeWolfe Howe, ed., **Holmes-Laski Letters**, vol. 1 (1953), p. 493.
- ⁸⁰ Alpheus Thomas Mason, **Harlan Fiske Stone: Pillar of the Law** (1956), pp. 644-645.
- ⁸¹ H. N. Hirsch, **The Enigma of Felix Frankfurter** (1981), pp. 177-178.
- ⁸² Phillip J. Cooper, **Battles on the Bench** (1995) (hereafter cited as Cooper).
- ⁸³ Endnotes reveal the variety of sources. *Id.*, pp. 185-209.
- ⁸⁴ *Id.*, p. 3.
- ⁸⁵ *Id.*, pp. 23, 188, n. 60.
- ⁸⁶ *Id.*, pp. 161-165.
- ⁸⁷ *Id.*, p. 179.
- ⁸⁸ *Id.*, p. 179.
- ⁸⁹ *Id.*, pp. 7-8.
- ⁹⁰ Abraham, **Justices and Presidents**, p. 185.
- ⁹¹ James F. Simon, **The Antagonists** (1989), pp. 166-167.
- ⁹² Nancy Maveety, **Justice Sandra Day O'Connor: Strategist on the Supreme Court** (1996) (hereafter cited as Maveety).
- ⁹³ *Id.*, pp. 2, 127.
- ⁹⁴ *Id.*, pp. 29, 131.
- ⁹⁵ *Id.*, p. 31.
- ⁹⁶ *Id.*, p. 52.
- ⁹⁷ *Id.*, p. 53.
- ⁹⁸ *Id.*, pp. 55, 128.
- ⁹⁹ H.W. Perry, Jr., **Deciding to Decide: Agenda Setting in the United States Supreme Court** (1991).
- ¹⁰⁰ Bernard Schwartz, **The Unpublished Opinions of the Rehnquist Court** (1996) (hereafter cited as Schwartz).
- ¹⁰¹ This epithet for the Supreme Court became the title of a book about the Court by John P. Frank, published in 1958.
- ¹⁰² Schwartz, p. 24.
- ¹⁰³ David Savage, **Turning Right: The Making of the Rehnquist Supreme Court** (1992), p. 74.
- ¹⁰⁴ Schwartz, p. 24.
- ¹⁰⁵ Quoted in Charles Wyzanski, Jr., **Whereas—A Judge's Premises: Essays in Judgment, Ethics, and the Law** (1944), p. 61.
- ¹⁰⁶ 481 U.S. 704 (1987).
- ¹⁰⁷ 498 U.S. 335 (1991).
- ¹⁰⁸ 500 U.S. 172 (1991).
- ¹⁰⁹ 480 U.S. 698 (1987).
- ¹¹⁰ See note 80.
- ¹¹¹ Schwartz, p. 26.
- ¹¹² *Id.*, pp. 3-4.
- ¹¹³ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (dissenting opinion).
- ¹¹⁴ 505 U.S. 377 (1992).
- ¹¹⁵ Edward J. Cleary, **Beyond the Burning Cross: The First Amendment and the Landmark R.A.V. Case** (1994) (hereafter cited as Cleary).
- ¹¹⁶ Charles Warren, **Congress, the Constitution, and the Supreme Court** (1925), p. 4.
- ¹¹⁷ Quoted in Cleary, p. xiv.

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800985
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the United States
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- Page 108, Library of Congress
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258322-800750
- Page 114 (bottom), Corbis-Bettman
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- Page 134, Library of Congress, LC-USZ62-
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- Page 136, Library of Congress, LC-USZ62-
075928
- Page 141, Library of Congress, LC-F342-
1284-A
- Page 144, Photo by Y.R. Okamoto, Courtesy LBJ
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- Page 147, Collection of the Supreme Court of
the United States
- Page 155 (top), Library of Congress
- Page 155 (bottom), Library of Congress
- Page 156, Library of Congress LCD4-11977
- Page 158, Library of Congress LCBH832-30043
- Page 159, Library of Congress LCB2-5213-10
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was painted by Simmie Knox.
Courtesy of the Collection of the Supreme Court of the United States.**

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