

Introduction

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Despite complaints from scholars (including myself) that periodizing Supreme Court history by the tenures of Chief Justices is historically inaccurate, scholars (including myself) continue to do that. We know that there are problems. Sometimes Associate Justices, such as Holmes, Brandeis, Black, Frankfurter, and Brennan are more important in determining the Court's direction than the multiple Chiefs under which they serve. Black and Douglas, for example, began their careers on the Court under Hughes, and outlasted Stone, Vinson and Warren, finally retiring under Burger. Moreover, the Chief has only one vote out of nine, and **U.S. Reports** is full of decisions in which the Chief Justice is in the minority.

Why, then, do we look so much at the man in the center chair when we study the history of the Court? One reason is that while the Chief Justice may have only one vote, he is, at the least, "primus inter pares"—first among equals, and a strong Chief Justice can and will lead the Court. There is a big difference between the behavior of the Court under strong Chiefs such as Taft, Hughes and Warren, and weak Chiefs such as Stone and Vinson. Even when the make-up of the side judges, as Holmes called them, does not change very

much, the tone of the Court as a whole is greatly affected by the skills of the Chief. The Court that Earl Warren welded together to hand down a unanimous decision in the segregation cases consisted of the same people who had fractured the Bench in the preceding decade.

In addition, just as we see the President as the head and the embodiment of the executive branch, so we see the Chief Justice as the head and embodiment of the judicial branch. The Constitution gives the Chief two roles, one as leader of a particular court, and the other as "Chief Justice of the United States," leader of the judiciary.

In the essays in this volume we see how six of the men who have sat in the center chair have shaped the judicial history of this country. For those whose appetites are whetted by these essays, John Taylor provides an extensive bibliography by which to pursue further readings.

John Marshall's story may be the most familiar, but as Herbert Johnson shows, it is one always worth retelling, to remind ourselves how great men have influenced our history. Roger Brook Taney is remembered chiefly as author of the infamous *Dred Scott* decision, but his lengthy career on the Bench left the

nation a legacy in some ways second only to that of Marshall in establishing the judiciary as a co-equal branch of the government. James O'Hara argues that Taney's reputation has been unfairly tarnished by that one decision, and offers a different light on evaluating Taney.

Melville W. Fuller is not a name that leaps to our lips, and even students of the Court may be hard-pressed to say much about him. James W. Ely, Jr., however, believes that Fuller acted in the finest traditions of his predecessors in leading the Court through a period of rapid economic, social, and political change in this country.

Two of the essays that may prove most enlightening to longtime devotees of Court history are those by Robert Post and Barry Cushman. Post, who is writing the **Holmes**

Devise volume of the Taft Court, shows how the former President reshaped the role of Chief Justice to become chief administrator of the court system, and in doing so greatly strengthened the federal judiciary. Cushman is one of the leading revisionist historians about the Court crisis of the 1930s, and in this essay he suggests that Hughes, rather than being an enemy of the New Deal, tried to show the administration how its controversial program could pass constitutional muster.

Finally, we note with sorrow that the essay by Bernard Schwartz will be the last by the one-time dean of American constitutional history. Shortly after delivering this lecture on Earl Warren, or the "Super Chief"—a phrase that Schwartz popularized, the Tulsa Law School professor was hit by a car and died December 23, 1997. We shall miss him greatly.

Chief Justice John Marshall (1801-1835)

Herbert A. Johnson*

The Supreme Court Historical Society is to be complimented upon its decision to focus upon the changing place of the Chief Justice of the United States throughout history. Both the legal profession and society in general, have become very presentist in their perceptions, and all of us tend to forget that today's Supreme Court just "ain't what it used to be." This is not to make a value judgment concerning either past or present membership of the Court. Quite the contrary, our focus must be on the evolution of what for many of us is the most important branch of our federal government—the Supreme Court of the United States and the constitutionally denominated "inferior courts" established by Congress in accordance with Article III of the Constitution. It is within that framework that we are asked to take a close look at a group of Chief Justices who have played a significant role in shaping the Court into the institution of today.

John Marshall's Significance

Few of us have not spent some time studying the contributions of Chief Justice John Marshall to American constitutional law. However, on this occasion it will help to put matters in perspective by way of a brief review. In *Marbury v. Madison*, Marshall brought judicial review into the Supreme Court's case law, adopting the rationale of **Federalist Number 78**, and following the lead of a number of state tribunals and lower federal courts.¹ *Marbury's* importance lies not in its originality, but rather in its establishment of the Supreme Court as the primary instrument for constitutional interpretation within the United States. In *Fletcher v. Peck* and *Dartmouth College*, the Chief Justice provided an expansive interpretation of the Contract Clause necessary to the Supreme Court's task of invalidating state economic regulation subversive of private property rights. In

conjunction with other cases, *Fletcher* and *Dartmouth College* encouraged American economic development by providing federal guarantees to both foreign and domestic investors.² Free trade among the American states still rests upon Chief Justice Marshall's encyclopedic decision in *Gibbons v. Ogden*, which killed the dragon of state mercantilism and opened the channels of commerce throughout the Union.³ These economic decisions have not gone without criticism,⁴ but they were critical to the survival of what we today would call a "third world nation," shaken by political disunity and threatened by economic chaos.

The cornerstone in Marshall's constitutional arch was *McCulloch v. Maryland*, the case that upheld the constitutionality of the Second Bank of the United States and defended it from a Maryland state tax imposed upon its bank note issue. Following a careful cataloging of the concepts of enumerated and implied powers, the Chief Justice read into law a broad, or loose, construction of the Necessary and Proper Clause. *McCulloch* provided a sound constitutional basis upon which to exempt federal governmental activity from state interference. Finally, it recognized that taxing power was concurrent in both the federal and state governments, and began the tedious process of delineating what state taxes might legitimately be imposed on federal operations.⁵

To this catalog of Marshall's constitutional law decisions we must add those important opinions that defined the Supreme Court's jurisdiction. Principal among these was *Cohens v. Virginia*, which was a criminal prosecution in Virginia, based upon the defendants' sale of a District of Columbia lottery ticket. In their defense, the Cohens brothers argued that since the lottery was established by Congressional statute, it was supreme over state criminal law. Ultimately, the Court held that the District of Columbia lottery was a local matter, and that Congress had not intended the statute to apply throughout the United States. Thus Chief Justice Marshall was able to deny relief to the defendants, and avoid confrontation with the Virginia authorities. However, the key decision in the case was the Supreme Court's acceptance of jurisdiction. Virginia had argued that the Supreme Court lacked authority to hear an

appeal brought against the state, which claimed the protection of the Eleventh Amendment. Marshall rejected this assertion of immunity from appellate review by the Supreme Court of the United States. In doing so, he held that in situations where jurisdiction is based upon a federal question as well as upon the status of the parties, the primary authority for Supreme Court jurisdiction is found in the fact that the case raises issues concerning the Constitution, statutes, or treaties of the United States. Thus *Cohens* was an important assertion of Supreme Court jurisdiction that clarified some of the ambiguities inherent in the provisions of the Eleventh Amendment.⁶

Unquestionably, these are noteworthy accomplishments. Standing alone, they qualify Marshall for the title of "The Great Chief Justice." Yet, I have come to the conclusion that Marshall's greatness is to be measured more by his contributions to the institutional development of the Court than to his undeniable accomplishments in constitutional law. The former tend to be overlooked, simply because they are less accessible for study, and because the evidence tends to be more obscure. We need to spend more time studying Chief Justice Marshall's leadership. This requires close attention to how he and the Associate Justices related to each other. We also have to examine the lasting changes Chief Justice Marshall made to the management of the Court, and to the shaping of its traditions.

Supreme Court Justices in the Circuit Courts

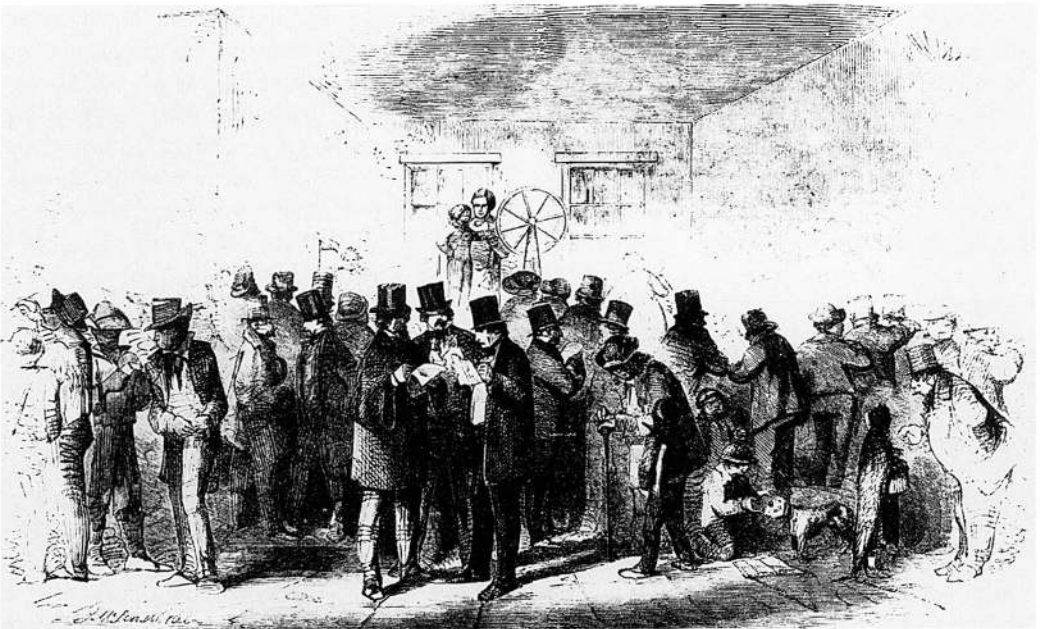
The most striking difference between John Marshall's Supreme Court and the Court of today is that he and his colleagues rode circuit. Indeed, the Justices continued to do so until the enactment of the Evarts Act in 1891, which left only one vestige of that assignment—the practice of assigning surveillance of some circuit business to a Supreme Court Justice designated to monitor that circuit.⁷ In John Marshall's day, riding the circuit meant being a trial judge for most of the year, and moving among the state capitols and some other major cities hearing cases in the principal federal trial courts.⁸

Although the District Court judge sat with the Supreme Court Justice and presided jointly over the Circuit Court, it was the Supreme Court Justice who delivered virtually all of the opinions and who was responsible for the business of the Circuit Court. The need for knowledge of state procedures, imposed by the Process Act of 1789, required study and experience on the part of the Supreme Court Justice.⁹ To a degree, the practice of assigning a Supreme Court Justice to a circuit where he had experience in one of its states helped the Justices better perform their duties. However, no extent of law practice or time on a state court bench was fully adequate preparation for dealing with the variety of issues raised in the Circuit Courts. Chief Justice Marshall, for example, had virtually no familiarity with admiralty law before he was confirmed as Chief Justice. His judicial correspondence shows that in matters of maritime law he sought the advice of Justice Joseph Story or Justice Bushrod Washington, both of whom handled large admiralty dockets in their respective circuits.¹⁰

Riding the circuits put Supreme Court Jus-

tices at the cutting edge of evolving federal judicial power. There are advantages and disadvantages in occupying that role—depending on whether one is the cutter or the cuttee. In a positive sense, traveling throughout the nation brought the Justices into contact with the problems and legal issues of the various states and regions. With a small executive branch mainly represented locally by customs and revenue officers, the Supreme Court Justices on circuit were the highest ranking federal officials readily accessible to the people. Although the Marshall Court wisely refrained from the earlier practice of delivering partisan grand jury charges, its Justices nevertheless continued to be very visible embodiments of federal authority in every state of the Union.

However, public accessibility cut both ways, as Chief Justice Marshall discovered when President Thomas Jefferson maneuvered him into being the trial judge for former Vice President Aaron Burr.¹¹ We shall probably never know exactly what Burr planned to do in the Midwest between 1805 and 1807, but it was John Marshall's ruling on the constitutional



At issue in *Cohens v. Virginia* (1821), the landmark Marshall decision ruling that the Supreme Court had the authority of appellate review, was the criminal prosecution in Virginia of the Cohens brothers for selling a lottery ticket in the District of Columbia. In their defense, the Cohens argued that since the lottery was established by Congressional statute, it was supreme over state criminal law. The illustration above shows the drawing of prizes at a Baltimore lottery.

definition of treason that protected Burr from Jefferson's prosecutors. For our purposes, the case illustrates how a highly politicized trial can generate strong criticism of a trial judge and inflict great stress. Chief Justice Marshall began the proceedings with the clear recognition that he would be subject to close scrutiny by the Jeffersonians and the public press. His fears proved well-founded.¹² On the other hand, it was mere chance that he attended one of his usual "lawyers' dinners," at which he found the defendant enjoying both his release on bail and a good meal. The Jeffersonian press squealed in delight as it detailed the Chief's purported fraternization with the accused, and Marshall was hung in effigy in Baltimore.¹³ There were obvious dangers in riding the circuit.

The Burr trial's historical prominence dramatically illustrates the threat to health and well being that Supreme Court Justices faced on circuit. Later in the Court's history, Justice Stephen J. Field became embroiled in a dangerous encounter with a disgruntled and armed litigant. To Field's good fortune, the would-be assailant met his death at the hand of a United States marshal assigned to protect him.¹⁴ Less well-known is the sad case of Marshall's predecessor on the Supreme Court Bench, Justice James Iredell of North Carolina. As a Southern-born Justice, Iredell drew the unenviable task of riding the 1,900 mile Southern circuit—which covered Georgia as well as North and South Carolina. Despite Iredell's successful lobbying for Congress to direct a statutory rotation of Southern circuit duties, he rode the long circuit five times before his death, which occurred just two weeks after his forty-eighth birthday.¹⁵

Supreme Court Justices gained some procedural advantages from riding the circuit. One of these was the ability to refer difficult questions to the Supreme Court, in cases where they and the District Court judge disagreed. Thus, it was possible to hasten the adjudication of legal conflicts that might not otherwise have been appealed by the parties.¹⁶

The other advantage of Circuit Court duties may have been that it reduced the size of the Supreme Court's appellate docket. The federal Circuit Courts were the largest source of

cases heard on appeal by the Supreme Court.¹⁷ However, disappointed litigants faced the prospect that the Supreme Court Justice who had tried the case would also write the Court's opinion on appeal. That rarely happened, but the possibility must have had a depressing impact upon the appellate caseload. Marshall and William Johnson never reviewed their own cases on appeal; Smith Thompson and Bushrod Washington affirmed themselves twice. Story and John McLean affirmed their own Circuit Court decisions four times, and it is Story's affirmance that hammers home the appellant's dilemma:

The grounds upon which a decree of condemnation was pronounced in the Circuit Court fully appear in the opinion of that court which accompanies this record. That opinion has been submitted to my brethren, and a majority of them concur. . . .

Just to make sure the point was well taken, the Supreme Court reporter reprinted the Circuit Court opinion by Justice Story.¹⁸

Chief Justice Marshall was sensitive to the disruptive effect that appeals from Circuit Courts could have upon Supreme Court collegiality. Justice Story and Justice Johnson presided over many admiralty trials, and they disagreed on admiralty jurisdiction in contract matters. Their professional conflicts and personality clashes often inflamed tempers among the Justices. Marshall wisely went out of his way to discourage these confrontations. When a Story or Johnson Circuit Court admiralty case was on appeal, Marshall never assigned authorship of the reviewing opinion to the other warring Justice. Instead, he delegated the task to a neutral admiralty expert, usually Justice Washington or Justice Brockholst Livingston.¹⁹

When Supreme Court Justices rode the circuits they worked closely with the federal District Judges, and gained not only the technical support they needed in local procedure but also a close acquaintance with judges in the lower federal courts. As a consequence, the Supreme Court collectively knew both the problems that affected the lower federal courts and the competence and personality of the judges who

staffed those tribunals. There was no need for an Administrative Office of United States Courts in John Marshall's day! Furthermore, the presence of the Justices in the Circuit Courts helped to unify the federal judiciary and to reenforce the independence of lower federal court judges who otherwise might have been isolated by their office and judicial activity.

The Authorship and Delivery of Supreme Court Opinions

One of the most notable changes in Supreme Court procedure implemented by John Marshall was the issuance of an opinion of the Court rather than allowing the delivery of *seriatim* opinions. Chief Justice Oliver Ellsworth may have started this process by using brief *per curiam* opinions to dispose of less significant cases on the Supreme Court's docket. However, it was Marshall who established the unitary opinion of the Court, and then apparently asserted his personal right to deliver the opinions whenever he was present on the Bench. Marshall's preeminence in opinion delivery may well have been based upon his seniority by virtue of being Chief Justice. This entitled him to preside at Court sessions, and either by tradition or through the acquiescence of his elderly colleagues, he was the Justice who spoke on behalf of the Supreme Court.²⁰

Chief Justice Marshall's predominance in opinion delivery continued for about ten years after he became Chief Justice. After that, the arrival of Justice Story, and a spate of dissents concerning War of 1812 prize cases, broke the pattern. By the end of his chief justiceship, Marshall delivered about one-third of the Court opinions issued.²¹ Although manuscript evidence is not available to document my belief, I suspect that Marshall authored most, if not all, of the opinions that he delivered on behalf of the Court.²²

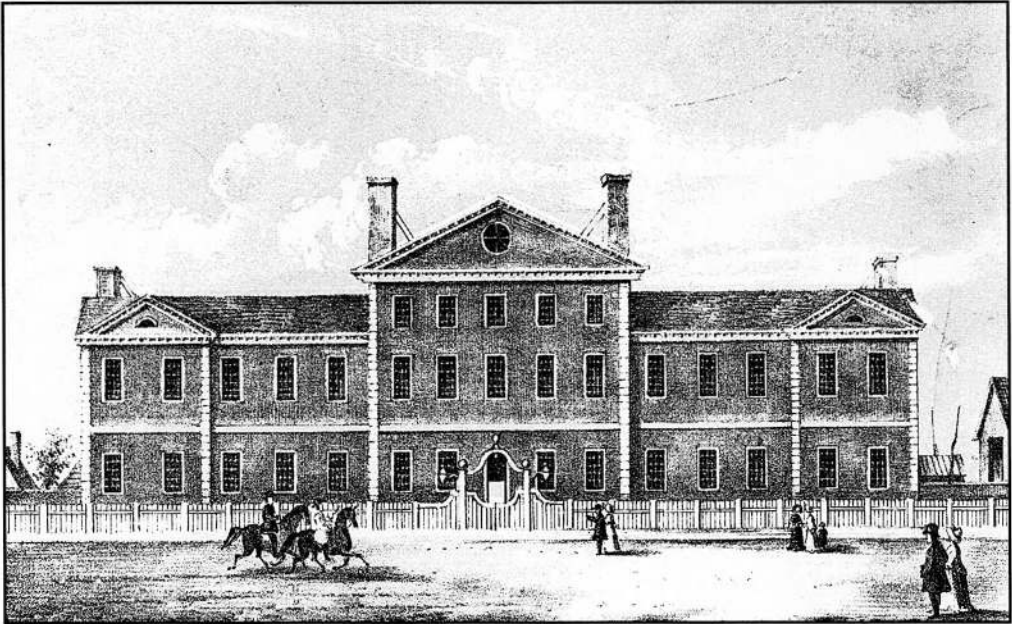
Unitary opinions of the Court were a vital part of the Supreme Court's rise to prominence in the public eye. Most significantly, they meant that the Supreme Court spoke as a unit in regard to most of the vital constitutional law decisions of the Marshall era. In addition, the Court opinions gave a modicum of protection to individual Justices at a time when the Court

was under heavy political attack. This may have been of particular comfort to Justices William Paterson and Samuel Chase, both of whom had been overbearing in presiding over prosecutions of Jeffersonian newspaper editors and accused insurgents indicted in connection with the Fries and Whiskey Rebellions.²³

On the other hand, gaining support for a majority opinion demanded then, as it still does, the compromise of differences among the Court members. During the Marshall years, the best documented record of such a compromise concerned New York state's insolvency laws enacted when there was no federal bankruptcy legislation. *Sturges v. Crowninshield*, decided in 1819, involved the New York state insolvency statute, which was found to be retrospective in its operation and thus violative of the federal Constitution's impairment of Contract Clause.²⁴ Eight years later, in his separate opinion in *Ogden v. Saunders*,²⁵ Justice Johnson explained the "compromise" by which the Court arrived at a judgment in *Sturges*. He wrote:

The court was, . . . greatly divided . . . and the judgment partakes as much of a compromise, as of a legal adjudication. The minority thought it better to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the State power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the constitution of the United States, yet, as denying the power to act upon anterior contracts could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court.²⁶

The *Sturges* disposition would suggest extraordinary efforts to arrive at a single opinion of the Court, even though it obscured views



Sturges v. Crowninshield, decided in 1819, involved the New York state insolvency statute, which was found to be retrospective in its operation and thus violative of the federal Constitution's impairment of Contract Clause. The statute had been enacted before the passage of federal bankruptcy legislation. Pictured is a 1789 illustration of a debtor's prison on Water Street, where insolvent New Yorkers were sometimes incarcerated.

strongly held by the Justices. Although Justice Johnson does not name the Chief Justice as the architect of this compromise, there would seem to be little doubt about his role in arriving at the majority decision. Since the Court could not agree on the more basic issues concerning federal bankruptcy power and property rights under the Contract Clause, it was best to postpone a decision since the retrospective nature of the New York statute was adequate basis for a holding of unconstitutional application.²⁷ As Justice Johnson observed, rather derisively, it was a compromise and not a legal judgment. And yet is it not the very nature of opinions of the Court that, to be collective, they must be the product of compromises worked out in Conference?

Chief Justice Marshall neither dominated his colleagues nor did he reshape his views to secure a tactical advantage through writing the Court's opinion. The hazardous political situation of the Court, coupled with Marshall's natural genius for interpersonal relations, made him a strong and effective leader at a critical stage in the history of the Supreme Court.²⁸ It will

be helpful to recall, if only briefly, the circumstances under which Marshall took office as Chief Justice of the United States.

The Court and Marshall in 1801

Although we have a less than complete picture of Chief Justice Marshall, the surviving bits and pieces of his papers, coupled with a cautious glance at oft-repeated anecdotes, provide some sense of his methods of small group leadership. Marshall was emphatically a "people person," an individual who kept friends for life, regardless of their political allegiances. Popular with the voters, he was highly successful in his youth as a candidate for the Virginia House of Delegates. In 1798 he won election to the United States House of Representatives in a strongly Jeffersonian-Republican district in and around Richmond. A member of the Masonic order, he served as master of his local lodge and deputy grand master for the Commonwealth of Virginia grand lodge. Within his family and in-law group, Marshall was known as the person who would bring strength and

solace when illness or death came to call.²⁹ His letters to Joseph Story on the death of his colleague's daughter reflect his deep compassion and empathy with the suffering of a fellow human being.³⁰ Marshall's friends were both numerous and loyal, for the Chief Justice's heart was even bigger than his ungainly and large frame.

Marshall joined the Supreme Court at a critical time in its existence. Under Chief Justices John Jay and Ellsworth, each of the Justices seem to have operated quite independently. To a degree, this may well have been due to the concentration of business in the Circuit Courts, and to the relatively light case load of the Supreme Court. The literary manifestation of this independence was the *seriatim* opinion, which, along with Circuit Court grand jury charges, exposed each Justice to public scrutiny.³¹

A persistent problem with the Supreme Court in the Jay-Ellsworth era was the rapid turnover of Justices. The Senate's rejection of John Rutledge's nomination to be Chief Justice in 1795 was a temporary setback. Both Chief Justice Jay and Chief Justice Ellsworth took leave of the Court to accept diplomatic appointments, and Jay resigned his seat to accept election as governor of New York state. The sense of drift, and the lack of "hands-on" leadership, may have depressed those left behind to conduct the Supreme Court's business with less than a full Bench. Within the Court that awaited Marshall's arrival, there may well have been a high group expectation for a stronger leadership style and some protection from the glare of publicity.³²

Marshall came to the Supreme Court with full appreciation of his age differential from his colleagues, but he also brought a reputation for astute political sensitivity in the exercise of both legislative and executive duties. In the last year of John Adams' administration, it was Marshall who had been most influential in the distribution of patronage to Federalist Party politicians. Marked as a respected Adams Federalist, Marshall nevertheless had maintained a reputation for intelligence, cooperation, and pragmatism, among his political adversaries in both parties.³³ Prior to his appointment as Chief Justice, Marshall served as Sec-

retary of State. That period of service from June 1800 through the March 1801 inauguration of President Thomas Jefferson, gave Marshall vastly increased status among members of both parties. He provided astute diplomatic leadership in stabilizing relations with Britain, and was successful in guiding negotiations with republican France, having persuaded President Adams to support his moderate stance in Franco-American relations. Finally, Marshall was the principal Cabinet officer in Philadelphia, then the federal Capital, when Adams took increasingly longer vacations in Massachusetts. The overall direction of the federal government, and the dispensation of patronage, became Marshall's primary responsibilities.³⁴ At a time when the Supreme Court remained as the sole surviving Federalist branch of the government, Marshall's stature as an astute and successful political leader gave the Justices new confidence and esprit. Marshall also brought stability. Dr. Charles Hobson, the editor of Marshall's papers, concludes that "caution, prudence, and moderation were the hallmarks of . . . [Marshall's] leadership."³⁵

That was a very important change for men who faced not only strong political opposition, but also a sharply diminished status in the eyes of their countrymen, and indeed, also of themselves. We have already mentioned the highly inflammatory conduct of Circuit Court trials by Justices Chase and Paterson, which left them and their Court colleagues in jeopardy of impeachment. In addition to the impeachment attempt, Justice Samuel Chase suffered from two skeletons in his closet: during the American Revolution, he was discovered to have speculated in wheat futures based upon his inside knowledge as a member of the Continental Congress; and he had campaigned against ratification of the Constitution in Maryland.³⁶ Justice Paterson also had reasons beyond the impeachment threat to feel insecure. A shopkeeper's son, he made good by attending Princeton and by being admitted to the bar. His efforts in support of the Revolution gained him preeminence in New Jersey politics, but his biographer details Paterson's largely futile efforts to maintain social contacts with former classmates at Princeton. Finally, Paterson had

been the leading contender for elevation to the chief justiceship at the time John Marshall was appointed.³⁷

The other Associate Justices also harbored a psychological need for a strong and astute leader as Chief Justice. Justice William Cushing owed his royal judgeship to his father, who refused to resign from the Massachusetts Supreme Court until his son was appointed. And Cushing had refused the chief justiceship when it was offered to him by President Washington in 1795.³⁸ Justice Alfred Moore delivered only one opinion in his five years on the Supreme Court; his biographer rightly concludes that his "career made scarcely a ripple in American judicial history," and that he was overshadowed by his colleagues.³⁹ Among the Justices awaiting Marshall's arrival, only Bushrod Washington possessed both the status and the ability to oppose the new Chief Justice. But he was an old friend of the Chief's. Indeed, it was John Marshall who in 1798 had refused appointment to the Supreme Court and urged President Adams to appoint Justice Washington in his stead.⁴⁰

By way of contrast to the Associate Justices, newly appointed Chief Justice Marshall was a combat veteran of the American Revolution who had the endorsement of George Washington in his political career. His friendship with the General's nephew, Justice Washington, already involved him in writing the President's biography. In addition, his performance as Adams' Secretary of State was both successful and highly commendable. Little wonder that he easily legitimated his leadership of the Supreme Court and took upon himself the obligation of pronouncing its unified opinion. Justice Johnson sized up the situation in 1804 when he joined the Supreme Court upon the death of Justice Moore. He recalled that Chief Justice Marshall wrote the Court opinions because:

Cushing was incompetent, Chase could not be got to think or write—Patterson [sic] was a slow man and willingly declined the trouble, and the other two judges [that is Marshall and Washington] you know are commonly estimated as one judge.⁴¹

The First Challenge

Ironically, the Marshall Court owed a great deal of its internal cohesion to its archenemy, President Jefferson. It was his adamant fight against Marshall and the Supreme Court that, more than anything else, made it possible for the judiciary to rise to new levels of distinction and power. As often as the "Great Lama of the Mountains" invoked public and political pressure against the Court, just as frequently Chief Justice Marshall developed adroit legal maneuvers to turn the situation into an enhancement of judicial power under the Constitution.

The familiar story begins with the repeal of the Judiciary Act of 1801, and the return of Supreme Court Justices to circuit duties. Since that statute created additional judgeships that were filled by John Adams' "midnight appointments" of Federalists, it was a prime target for repeal when the new administration took office. Other judgeships were created by a less controversial reorganization of courts in the District of Columbia. This act authorized justices of the peace for the federal capital district and thus formed the background for the *Marbury* case.⁴²

With Congress and the White House securely within their control, President Jefferson and his allies moved promptly to reverse what the Federalists had done in the Judiciary Act of 1801. The independent Circuit Courts were abolished, and the old system of circuit riding by the Supreme Court was reestablished. Through an oversight, certain justices of the peace commissions had not been delivered under the District of Columbia court act. The new Secretary of State, James Madison, refused the appointees' demands for these commissions. William Marbury and his fellow would-be justices of the peace brought an original jurisdiction case in Marshall's Supreme Court, asking that a *mandamus* be issued to compel delivery. To forestall the Court's entertainment of challenges to the Judiciary Act's repeal, and to delay action on Marbury's petition, the Jeffersonian Congress canceled the next two Terms of the Supreme Court.

Of the two issues raised by Congress's actions, the most significant was whether the 1801 statute had been repealed in such a way that

the Supreme Court Justices might constitutionally resume their circuit duties.⁴³ Given the delay imposed upon the Court by act of Congress, Chief Justice Marshall had more than adequate opportunity to write to his colleagues, requesting their advice concerning this matter. All of the Justices, with the exception of Chase, concluded that they should resume their circuit duties, and in deciding *Stuart v. Laird* the Court publicly affirmed that decision.⁴⁴ In his referral letter, Marshall indicated that he would be bound by the majority opinion. When the matter was raised in the *Stuart* appeal, Justice Chase acquiesced in the majority view, and Marshall recused himself since he had heard the case while sitting in the Virginia Circuit Court. The Court's decision was a circumspect acquiescence in congressional authority to establish the lower federal court system.⁴⁵

Marshall's consultation with the Associate Justices well in advance of hearing argument on the matter provides an interesting example of his leadership style. Even though he was new on the Court, he sought the advice of his colleagues. Such a procedure might well be construed as weakness on the part of Marshall. It might also be seen as what we now call TQM—total quality management. Sharing decision-making is a skill that enhances subordinates' morale and makes them part of the management team, but it can easily be construed as indecisive leadership. Doubtless these thoughts, even if considered by a different name, must have occurred to Marshall. However much his confidence and stature as Chief Justice conferred power, Marshall took a calculated risk at the very outset of his Supreme Court service when he sought his Associate Justices' counsel and advice before dealing with the circuit court question.⁴⁶

What occurred next validated Chief Justice Marshall's credentials as an astute politician. Six days after *Stuart v. Laird*'s acquiescence in congressional restructure of the federal courts, Marshall announced the Court's decision in *Marbury v. Madison*.⁴⁷ Deftly eliminating all issues other than the original jurisdiction of the Supreme Court to issue a writ of *mandamus*, the Chief Justice issued an opinion of the Court that incorporated the doctrine of judicial review into Supreme Court precedent. Shaped

by the doctrine of fundamental constitutional law and the Constitution's supremacy over legislative enactments, judicial review was in general use throughout many state and federal courts.⁴⁸ *Marbury* simply represents the Supreme Court's decision to apply the doctrine to the question of its own original jurisdiction.

What is unique in the Court's action, and hence in Marshall's strategy, was not adoption of judicial review, but rather the confluence of the Court's acquiescence in circuit duties under *Stuart v. Laird*, and its denial of original jurisdiction and assertion of judicial review in *Marbury*. If not before, certainly thereafter, Jefferson recognized an able adversary in the new Chief Justice.

The Jeffersonians perceived quite correctly that a judiciary controlled by Federalists, and now armed with judicial review, might well undermine their entire legislative program. The members of the Court, on the other hand, had good reason to fear the political power wielded by President Jefferson and his party in Congress. Impeachment proceedings were first initiated against District Court Judge John Pickering, a Federalist jurist who fluctuated between drunken stupors on the bench and insane ravings at home. After the Senate convicted Pickering, the House of Representatives proceeded to impeach Justice Chase—only to be frustrated by defections from the Jeffersonian majority. Chase was acquitted, and the independence of the judiciary was thus assured, but the Supreme Court was not secure from legislative attack. Indeed from 1801 until Jefferson's death in 1826, there was continual pressure to alter the jurisdiction of the Supreme Court, particularly in regard to its authority to hear appeals from the highest courts of the states in federal question cases.⁴⁹

The Jeffersonian Justices on the Marshall Court

The advanced age of Marshall's Federalist Brethren, with the exception of thirty-nine year-old Bushrod Washington, guaranteed that the Chief Justice would soon be required to deal with Jeffersonian appointees. Justice Johnson was the first Jeffersonian to join the Court. As we have already noted, Johnson did disrupt

the tranquility of the Supreme Court, but seems to have done so primarily after Story took his seat in 1812. Justice Thomas Todd, appointed to the Court in 1807 by an expansion of the Court membership to seven, was never exceptionally productive of opinions, and for at least part of his time, was preoccupied courting his second wife. Justice Brockholst Livingston, after distinguished service on the New York Supreme Court, joined the Court in 1806. Gabriel Duvall took his seat at the same time Story did, but he was notable more for his silence and lack of opinions, dissenting or otherwise. Although each appointee up to Story's appointment had impeccable Jeffersonian-Republican credentials, they all were men with extensive experience in practice and on the Bench. They varied in ability and in willingness to file concurring or dissenting opinions, but as a group they were much better equipped to challenge Marshall's leadership than were their Federalist predecessors. And so we must ask, why did Chief Justice Marshall's Court continue to follow what Jefferson most condemned—a pronationalist view of federalism, and a commercial, economic diversification, view of America's future?

To answer that question it is helpful to look briefly at the relationship between thirty-three year-old Story and fifty-seven year-old Marshall when the younger man joined the Court in 1812. The Massachusetts lawyer arrived in Washington with a sense of anxiety, and perhaps even depression. Yet, as a former member of the House of Representatives, and as appellate counsel in *Fletcher v. Peck*, he was already acquainted with many of his new colleagues. His first impressions of Marshall, Livingston, and Washington had been most favorable. Of Marshall, Story in 1808 exclaimed that he "loved his laugh, it is too hearty for an intriguer, and his good temper and unwearied patience are equally agreeable on the bench and in the study." Young Story quickly settled into the Court's routine, and his biographer, Kent Newmyer, suggests that it was undoubtedly Marshall who did the most to ease the anxiety of his first few days.⁵⁰

Professor Newmyer correctly assesses the position of Marshall on the Court, and the relationship that soon developed between the Chief

Justice and his newest Associate Justice:

... thanks to Marshall's genius for leadership, "together" was the way the Court worked, at least until the institutional crisis of the mid-1820s. Marshall was clearly the catalytic force on the Court at the time of Story's ascension and afterward as well.

... He did not usurp the duties of his associates but, by virtue of his patience, grace, and gentle humor, brought forth what they had to give. And this was the key to Story's easy matriculation as well as his contribution to the Marshall Court. The Chief Justices saw him for the legal genius that he was and harnessed his energy to the collective work of the Court, even if it meant, as it did, surrendering some of his own preeminence.⁵¹

Marshall's ready acceptance and encouragement of Story is a good example of an established group leader willingly endorsing the abilities of the newcomer,⁵² and thereby recruiting the neophyte into cooperation with the group. Such approval of the new member's superiority immediately relieves that individual of the need to impress others. At the same time, a leader's self-deprecation is disarming, and it obviates the need for the new member to resort to defensive behavior.⁵³

As a new member of the Court, Justice Story brought the gift of a thorough liberal arts education and a strong grasp of the Anglo-American and Continental legal systems. Marshall and the others would draw heavily upon his knowledge and strong reasoning in the years ahead. However, his integration into the group of sitting Justices depended to a considerable degree upon his becoming an attractive companion: by demonstrating shared values, and by establishing social links that did not represent a threat to the status of his fellow Justices.⁵⁴ It was in these matters that the Chief Justice's acceptance and assistance proved to be invaluable.

Story had "an unquenchable capacity for talking," a trait he acquired from his mother.



“Why did Chief Justice Marshall’s Court continue to follow what President Thomas Jefferson most condemned—a pronationalist view of federalism and a commercial view of America’s future?” asks the author. The answer can be found by examining Marshall’s relationship with his young ally, Joseph Story. At left is a lithographed silhouette of the Great Chief Justice.

Professor Newmyer, noting Story’s health problems, commented that, “Unfortunately, recreation for him was talking, not walking.” On the other hand, he respected his father’s “great and natural tact and sagacity with little pretense to learning.”⁵⁵ Story’s experiences in the rough and tumble politics of New England added to his natural combativeness and strong ambition. Yet he had been active in building political bridges between the remnants of the Massachusetts Federalist party on one hand, and like-minded Republicans on the other.⁵⁶

Despite their substantial personality differences, there was much about Chief Justice Marshall that Story admired. In turn, Marshall seems to have been something of a guardian angel, turning conflict away from the loquacious Story’s door. Since the American Revolu-

tion, when he mollified the anger of fellow officers who felt slighted by their commanders, the Chief Justice had been a peacemaker.⁵⁷ He doubtless performed the task for Story and many others, but one instance from Marshall’s judicial career is clearly documented. Apparently either during argument, or in the oral delivery of an opinion, Story had referred to attorney Littleton Waller Tazewell’s argument as being “subtle.” The characterization rankled because of extraneous circumstances, and it fell to Marshall to explain Story’s lack of malice to Tazewell and to persuade Story to remove the offending comment from the printed opinion.⁵⁸

After a modest contribution to the Court’s opinions in the 1812 Term, Story hit his stride from 1813 through 1817, since the docket was

heavily weighted toward maritime and prize cases, areas little known to Marshall and the other Associate Justices. The Court's Conferences undoubtedly became more heated as the full impact of Story's intellect and volubility were felt. As Newmyer suggests, these characteristics irritated colleagues on the Bench, but Chief Justice Marshall was able to soothe hurt feelings and move the Court forward in its business.⁵⁹

While it would be unwise to generalize from the relationship between Marshall and Story, it seems safe to suggest that many traits exhibited by the Chief Justice in this friendship were also present in his association with other members of the Supreme Court. The Court continued to be very much Marshall's Court, even after the accession of Jeffersonian Justices. Marshall's dissent in *Ogden v. Saunders*, striking though it appears in the hindsight of history, did not begin a series of dissents by the Chief Justice.⁶⁰ Justice Henry Baldwin's mental breakdown and aggressive behavior was taken in stride. The Court managed to achieve a modicum of unity in its approach to the Cherokee cases despite the fact that the litigation between reporters Henry Wheaton and Richard Peters had sharply polarized the Court.⁶¹

Chief Justice Marshall's ability to maintain unity among members of the Court suggests that his "people skills," supplemented by the circumstances of the Court in 1801, and the very nature of the Court's business, drew the Justices together into a coherent unit. At the outset of Marshall's chief justiceship there was a vacuum in leadership (and perhaps in prestige), which he immediately filled. His sagacity in political maneuver was demonstrated by the paired decisions in *Stuart v. Laird* and *Marbury*. Only after he had asserted this leadership did the Jeffersonian appointees begin to arrive. Marshall's quiet charm and willingness to share decisionmaking with his colleagues, facilitated the continued use of the majority opinion even after Marshall ceased to be the primary source of opinions of the Court. However, Court records show that Marshall's absence from the Bench triggered a tendency toward *seriatim* opinions. "When the cat was away, the mice did play,"⁶² quipped Justice William Johnson's biographer, Donald Morgan.

On the other hand, the very nature of the Court's work and the background of its members made for cohesion. This was, after all, a court of law composed of men trained for the Bench and bar. It was a court in which appointments for life insulated the members from political retribution, particularly after the debacle of the Chase impeachment trial in 1805. The equality of Supreme Court Justices in voting on case disposition made persuasion and exchanges of advice the way in which decisions were reached. The Court was what Professor Peter M. Blau has described as a work group that was a mutual partnership. Such groups exist when the individual members have about the same competence, and there is lessened anxiety concerning status because of that equality.⁶³

In addition, the Supreme Court decided cases by forming majority coalitions among the Justices. Only in that way could a common purpose be achieved. Professor Blau suggests that such a situation not only creates a need for leadership, but that it actually facilitates its development.

In groups that have common objectives, . . . , the individual who makes the major contribution to their attainment obligates all members to accept him as their superior in return for the advantages they all derive from his efforts.⁶⁴

Decisionmaking was also facilitated by the Justices' common background in the legal profession, and in many cases by past experience on state courts. While lawyers do not necessarily agree, a common foundation in legal reasoning makes it possible for them to identify the nature of their disagreements. In addition, practicing lawyers quickly learn the value of compromise, which in turn demands that discussion between opposing counsel take place on a professional level and not become personally offensive.

Isolation and Cohesion

Sociologists and social psychologists tell us that opposition by external forces makes an in-group more cohesive.⁶⁵ The Marshall Court



Chief Justice Marshall managed to maintain unity on the Court despite various tensions. Even the mental breakdown and aggressive behavior of Justice Henry Baldwin (above) was taken in stride.

certainly gives evidence of that phenomenon. Even after the appointment of a Jeffersonian-Republican majority, the Court retained its unanimity, and seemed to follow Marshall's lead. In a fury, former President Jefferson wrote to Justice Johnson in 1822, berating him for his failure to dissent from Marshall's opinions.⁶⁶ Although Johnson's dissent rate increased slightly, he was not persuaded to pose a continuing challenge to Marshall's leadership. Undoubtedly, there was far more disagreement among the Justices than the public record reveals, but each of them realized that institutional survival depended upon solidarity in the public eye. Significantly, Marshall's only dissent in a constitutional case occurred in *Ogden v. Saunders*, decided in 1827, two years after Jefferson's death.⁶⁷

The Justices' isolation from the social activities of the national capital added to their cohesion. Jefferson segregated the Justices from all but the most formal governmental and

ceremonial events, thereby driving them even closer together. Professor Blau suggests that exclusion and isolation promotes extensive in-group association and communication—and an excellent opportunity to discuss grievances against oppressors. Furthermore, he points out that isolation weakens the societal restraints that might otherwise be imposed on the excluded group through community norms.⁶⁸

Social exclusion of the Supreme Court Justices persisted throughout the Jefferson years, but the Court gained social respectability during the Madison administration—in fact, one might say it “married” into the social whirl. Justice Todd, who joined the Court in 1807, was a widower, and soon was paying court to Lucy Payne, Dolly Madison's niece. They married in the White House in 1812, and the Supreme Court gained a foot in the door. That claim to social acceptability was enhanced when Chief Justice Marshall's grammar school classmate, James Monroe, became President in 1817. However, the Court's initial seclusion from Washington's social life had given birth to a new tradition that would well serve the goal of Supreme Court unanimity.⁶⁹

Since their wives did not accompany the Justices to the Washington sessions of the Supreme Court, the Justices decided to room together in the same boarding house. We do not know if this predated Marshall's joining the Court, but the movement of the capital to Washington and the resulting lack of amenities, may well have made this a Marshall innovation. During Marshall's chief justiceship, the boarding-house arrangement permitted informal conferencing over meals and in the evening hours.⁷⁰ The conviviality of the boarding house provided an excellent background against which the Court might work out compromises that were necessary for unitary Court opinions. It was a situation that capitalized on Marshall's use of his formidable “people skills.”

As the city of Washington transformed from a swampy town with unpaved streets into a national capital, the boardinghouse tradition was undermined. In 1828 the Court repulsed a feminine assault upon its monastic living arrangements. Justice Story's wife accompanied him to Washington and arrangements were made for her to reside with Story in the Court's

boardinghouse. Marshall grudgingly acquiesced with a chivalrous comment about how pleasant it would be to have female company to lighten their social hours. However, he followed with a pointed observation to Story that he hoped Sarah Story's presence would not distract the Justice from attention to the Court's business. Either the Storys took the hint the following year, or the lady tired of legal table talk. In any event, she remained at home during the succeeding Terms of the Marshall Court. However, Marshall's fraternity of jurists was more vulnerable to the growing likelihood that newly appointed Justices would already have a residence in Washington, or would move their families there upon appointment. This began in 1829 when Justice John McLean, formerly Postmaster General and a resident of Washington, refused to move out of his own home to join the Court in its boardinghouse.⁷¹

While historians have known about Marshall's boardinghouse for many years, it is remarkable that it has not been highlighted as an important instrument for cohesion and tranquility among the Justices. Students of group dynamics point out that sound decisionmaking is the product of constructive disagreement and debate within a group, and this is called cognitive conflict. However, if the differences become personalized and feelings are damaged, animosity can develop and be destructive to future group efforts. This is called affective conflict.⁷² The only significant indication of affective conflict on the Marshall Court seems to be the competitiveness and personal aversion that persisted between Justice Story and Justice Johnson. To a degree, this may have been fueled by jurisprudential disagreements, but Justice Story's tendency to speak endlessly with a great show of erudition may well have irritated not only Johnson, but also annoyed other members of the Court. Johnson was known to have a quick temper and some behavioral aspects that we would today characterize as lacking in social graces. He may thus have had less tolerance for Story's law lectures than did the other Justices. They in turn deplored Johnson's verbal attack upon the Chief Justice in the course of Marshall's public delivery of an 1820 Supreme Court opinion.⁷³

The boarding-house arrangement maxi-

mized the pressure to resolve professional disagreements in a nonemotional and impersonal way. It is not easy to work with colleagues after an argument; it would be acutely painful to do so if they are the sole source of social companionship, and you are required to eat breakfast, lunch, and dinner with them. In such an atmosphere, unanimity of opinion is more easily achieved, and Chief Justice Marshall's interpersonal skills would have had their greatest impact upon his fellow Justices.

Chief Justice Marshall's Leadership Style

As Chief Justice, Marshall stepped into the role and status of being the designated leader of the Court, as has every Chief Justice before and after him. However, his unique contribution to that office was the manner in which he gained the confidence and support of his Associate Justices. His achievements in this regard deserve to be examined in terms of their impact on the Supreme Court as an institution. We tend to ignore the substantial continuity that exists from one chief justiceship to the next. Indeed, appointment to the Supreme Court would seem to confer not only lifetime tenure, but a long life in which to enjoy that tenure. For example, Justice McLean's service extended from Marshall's last five years through the Taney Court's *Dred Scott v. Sanford* decision in 1857. Such longevity can do much to institutionalize modes of decisionmaking and socialization. To what extent does Marshall's achievement continue to influence the Court and its members?

Since Marshall's day, the Supreme Court has continued its practice of usually speaking with a unified voice through a majority opinion. Reaching agreement among several very independent and strongly opinionated colleagues is no simple task. However, outright conflict and overt belligerence between members of the Court, such as emerged in the chief justiceships of Harlan Fiske Stone and Fred Vinson, has fortunately been a rare occurrence.⁷⁴ Majority opinions and collegial decorum are institutional hallmarks that bear the Marshall stamp. By way of corollary, concurring or dissenting opinions, even though they may contain barbed and sharp criticism of the

majority, do not descend to the level of personal attack. Members of the Court recognize that yesterday's opponent in Conference may be tomorrow's ally. Keeping cognitive (and therefore, constructive) conflict free from personal invective may well be one of Marshall's most valuable legacies.

One of Marshall's most useful talents was his ease in consulting with his Associate Justices. Telling group members of a difficult problem is a very useful way of getting advice without asking for it.⁷⁵ And asking for advice is preferable to commanding obedience, provided the leader does not lose respect in the eyes of his colleagues.⁷⁶ Consultative processes enhance the position of an established and confident group leader, and we find Marshall using them throughout his chief justiceship. Obtaining advice on admiralty law and procedure from Justices Story and Washington, Marshall not only saved himself from error, but also flattered his colleagues with recognition of their superior knowledge. Willingness to share expertise, working together for the good of the Court, and being sensitive to the abilities and limitations of others, were other institutional lega-

cies left to the Court by Chief Justice Marshall.

Before ending this consideration of Chief Justice Marshall and the Supreme Court of his day, it is wise to remember once more that today's Court is not what it used to be. The circumstances that faced Marshall were unique—as were his advantages in dealing with them. His methods were not only very personal, but they were more effective because of the times and mores in which they were used. Although Marshall left a rich legacy behind him when he died in 1835, the institutional development of the Supreme Court of the United States had only begun.

Endnotes

¹ 5 U.S. (1 Cranch) 137 (1803); for some analyses of judicial review theory in the early republic see H. Jefferson Powell, "The Political Grammar of Early Constitutional Law," 71 *North Carolina Law Review* 1949 (1993); David E. Engdahl, "John Marshall's 'Jeffersonian' Concept of Judicial Review," 42 *Duke Law Journal* 279 (1993); Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989); Christopher Wolfe, *The Rise of Modern Judicial Review: From Con-*



During Marshall's chief justiceship the Justices lived together in boarding houses, such as this one, where they took meals together and discussed cases in the evening hours. We do not know if this situation predated Marshall's joining the Court, but the movement of the Capital to Washington and the resulting lack of amenities, may well have made this a Marshall innovation.

stitutional Interpretation to Judge-Made Law (New York: Basic Books, Inc., 1986); and Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (New Haven: Yale University Press, 1990). See generally, Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801-1835** (Columbia: University of South Carolina Press, 1997), 57-62.

² 10 U.S. (6 Cranch) 87 (1810); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). For discussion of these cases see Robert L. Hale, "The Supreme Court and the Contract Clause," *57 Harvard Law Review* 512 (1944); Nathan Isaacs, "John Marshall on Contracts: A Study in Early American Juristic Theory," *7 Virginia Law Review* 413 (1921); C. Peter McGrath, **Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck** (Providence: Brown University Press, 1966). See generally, Johnson, **Chief Justiceship of Marshall**, 172-181.

³ 22 U.S. (9 Wheat.) 1 (1824); Johnson, **Chief Justiceship of Marshall**, 163-169; George L. Haskins, "John Marshall and the Commerce Clause of the Constitution," *104 University of Pennsylvania Law Review* 23 (1955); Maurice G. Baxter, **The Steamboat Monopoly: Gibbons v. Ogden, 1824** (New York: Alfred A. Knopf, 1972); Felix Frankfurter, **The Commerce Clause under Marshall, Taney and Waite** (Chapel Hill: University of North Carolina Press, 1937).

⁴ See Max Lerner, "John Marshall and the Campaign of History," *39 Columbia Law Review* 396 (1939).

⁵ 17 U.S. (4 Wheat.) 316 (1819); Johnson, **Chief Justiceship of Marshall**, 142-147.

⁶ 19 U.S. (6 Wheat.) 264 (1821); Johnson, **Chief Justiceship of Marshall**, 152-154; W. Ray Luce, **Cohens v. Virginia (1821): The Supreme Court and State Rights, a Reevaluation of Influences and Impacts** (New York: Garland Publishing Co., 1990); John V. Orth, **The Judicial Power of the United States: The Eleventh Amendment in American History** (New York: Oxford University Press, 1987), 37-40.

⁷ Circuit Court of Appeals Act of 1891, Mar. 3, 1891, 26 Stat. 826-830; see also Peter G. Fish, **The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade** (Charlottesville: University of Virginia, White Burkett Miller Center of Public Affairs, 1984), 38-39.

⁸ Johnson, **Chief Justiceship of Marshall**, 113-114.

⁹ Julius Goebel, Jr., **Antecedents and Beginnings to 1801, Vol. 1, History of the Supreme Court of the United States** (New York: Macmillan Co., 1971), 537-538. Writing of the expertise necessary to try cases on circuit, Alexander Hamilton cited the need to know the law of all of the circuit's states. The difficulty of gaining and updating this knowledge was a strong argument for life tenure for federal judges. See **Federalist 78**, in **The Federalist; or The New Constitution** (New York: Heritage Press, 1945), 526-527. For the Process Act provision see sec. 2, *An Act to regulate Processes in the Courts of the United States*, Sept. 29, 1789, 1 Stat. 93-94, at 93.

¹⁰ Johnson, **Chief Justiceship of Marshall**, 54-55, 135-137.

¹¹ The Burr trials are discussed at Johnson, **Chief Justiceship of Marshall**, 124-131. See also Thomas Perkins Abernethy, **The Burr Conspiracy** (New York: Oxford University Press, 1954), and Robert Kenneth Faulkner, **The Jurisprudence of John Marshall** (Princeton: Princeton University Press, 1968), 269-285. There is a thoughtful editorial note, with accompanying documentation in **The Political Correspondence and Public Papers of Aaron Burr**, 2 vols., Mary-Jo Kline, ed. (Princeton: Princeton University Press, 1983), 2: 919-1047.

¹² Johnson, **Chief Justiceship of Marshall**, 128-129.

¹³ Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (Boston: Houghton Mifflin Co., 1916-1919), 4: 535-540.

¹⁴ The incident is described in Robert McCloskey, "Stephen J. Field," **The Justices of the United States Supreme Court, 1789-1969**, 4 vols., Leon Friedman and Fred L. Israel, eds. (New York: Chelsea House, 1969), 2: 1083-1084.

¹⁵ Fred L. Israel, "James Iredell," *ibid.*, I, 121-132, at 128-129, 131-132. A realignment of circuits prior to Marshall's taking his seat permitted him to limit his Circuit Court service to Virginia and North Carolina, designated the Fifth Circuit.

¹⁶ See the discussion of the Judiciary Act of 1802 in George Lee Haskins and Herbert A. Johnson, **Foundations of Power: John Marshall, 1801-15, Vol. II History of the Supreme Court of the United States** (New York: Macmillan & Co., 1981), 628.

¹⁷ Johnson, **Chief Justiceship of Marshall**, 113-120, discusses the importance of federal circuit court cases to the Supreme Court's appellate caseload, and speculates on the relationship between those cases and the expertise of the Supreme Court Justices assigned to the circuits involved.

¹⁸ *Ibid.*, 122-123, quotation at 123; the case is *The Julia*, 12 U.S. (8 Cranch) 181, at 190 (1814).

¹⁹ *Ibid.*, 122-123; in a case reversing his circuit court decision Justice Henry Baldwin wrote a lengthy dissent accusing the majority of exceeding their authority as an appellate court, *ibid.*, p. 122.

²⁰ Charles F. Hobson suggests that the custom for the presiding judge to deliver a court's opinion may have been derived from the tradition established by Edmund Pendleton in the Virginia Court of Appeals. **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence: University Press of Kansas, 1996), 34.

²¹ Johnson, **Chief Justiceship of Marshall**, 90; Robert Seddig suggests that 1812 was the time when Marshall ceased to dominate opinion delivery, "John Marshall and the Origins of Supreme Court Leadership," *36 University of Pittsburgh Law Review* 785, at 813, 822 (1975).

²² Johnson, **Chief Justiceship of Marshall**, 87, 90; Haskins & Johnson, **Foundations**, 386, discusses the evidentiary difficulties of determining authorship prior to 1815. The problem remains, even after the Court's manuscript opinions began to be preserved after 1830, since most of them are "fair hand" copies that show no insertions in the hand of another Justice.

²³ James Morton Smith, **Freedom's Fetters: The**

Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1956), 324-328, 365-371; Haskins & Johnson, **Foundations**, 95, 126, 238-239; William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (Columbia: University of South Carolina Press, 1995), 163-172. Since the limited number of Marshall Court appellate opinions date from the later decades of the chief justiceship, and Chase and Paterson were on the early Marshall Court, it is an interesting speculation that the loss of papers and the preservation of only "fair copies" of the decisions, may in part be attributable to a desire to protect the identity of those who suggested unpopular changes in the text of opinions.

²⁴ 17 U.S. (4 Wheat.) 122, at 207-208 (1819).

²⁵ 25 U.S. (12 Wheat.) 213-369 (1827).

²⁶ *Ibid.*, 272-273.

²⁷ Charles Hobson points out that while Marshall did not indicate that the retrospective aspect of the case was the basis for the Court opinion, he did say that the Court's opinion should be limited in application to the actual case under consideration. **Great Chief Justice**, 100. Perhaps it was this ambiguity that caused Justice Johnson to make his later comment in *Ogden v. Saunders*.

²⁸ The Sheriffs suggested that within a small group the leadership role usually develops through group interaction. It implies certain obligations of the leader, and the group grows to expect he will assume those responsibilities. Among them is the more weighty responsibility of handling contacts with other groups and their leaders. Muzafer and Carolyn W. Sherif, **Groups in Harmony and Tension: An Integration of Studies on Intergroup Relations** (New York: Harper & Brothers, 1953), 43, 45.

²⁹ John Marshall to Agatha Marshall, July 1, 1820, Collection of the late Margaret Cardwell, Cambridge, Mass. (photocopy in The Papers of John Marshall, Omohundro Institute of Early American History and Culture, Williamsburg, VA). For discussions of Marshall's background see Johnson, **Chief Justiceship of Marshall**, 16-21, and Hobson, **Great Chief Justice**, 13-14.

³⁰ Hobson, *ibid.*, 19-20.

³¹ Casto, **Supreme Court in the Early Republic**, 110-112. Professor Casto notes that there is little evidence of friendly discussion in any correspondence between the Justices of the Jay and Ellsworth Courts. *Ibid.*, 112.

³² Professor Peter Blau suggests that past experiences of groups affect their social expectations of new leadership. The new leader must therefore either live up to the expectations generated by a popular predecessor, or in the alternative, generate reform against a predecessor who has either been unpopular or less competent than the group had anticipated. **Exchange and Power in Social Life** (New York: John Wiley & Sons, 1964), 147-148. Related to these aspects of leadership is the impact of rapport, and the convergence of goal identification among the leader and the group. Elton T. Reeves, **The Dynamics of Group Behavior** (New York: American Management Association, 1970), 189-192, 195-198.

³³ Jean Edward Smith points to Marshall's nomination to be Secretary of State as an example of bipartisan endorsement of his reputation, **John Marshall: Definer of a Nation** (New York: Henry Holt & Co., 1996), 268-269.

³⁴ *Ibid.*, 229-278; see also the editorial note in **The Papers of John Marshall**, 4: 156-161, and the documents that follow.

³⁵ **Great Chief Justice**, 155.

³⁶ John D. Cushing, "A Revolutionary Conservative: The Public Life of William Cushing, 1732-1810," (unpublished Ph.D. dissertation, Clark University, 1959).

³⁷ John E. O'Connor, **William Paterson, Lawyer and Statesman, 1745-1806** (New Brunswick: Rutgers University Press, 1979).

³⁸ Jane Shaffer Elsmere, **Justice Samuel Chase** (Muncie: Janevar Publishing Co., 1980).

³⁹ Leon Friedman, "Alfred Moore," in **Justices of the United States Supreme Court**, 4 vols., Leon Friedman and Fred L. Israel, eds. (New York: Chelsea House Publishers, 1969), 1: 269-279, quotation at 279.

⁴⁰ See the exchange of letters between Timothy Pickering and Marshall, Sept. 20, 1798, and Sept. 28, 1798, **Papers of John Marshall**, 3: 506-509.

⁴¹ Johnson to Thomas Jefferson, Dec. 10, 1822, quoted at Donald G. Morgan, **Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge** (Columbia: University of South Carolina Press, 1954), 182.

⁴² Haskins and Johnson, **Foundations**, 183-184.

⁴³ Haskins and Johnson, **Foundations**, 157-181, 184.

⁴⁴ The interchange between Marshall and the Associate Justices is covered in detail in *ibid.*, pp. 168-180; the *Stuart v. Laird* opinion is at 5 U.S. (1 Cranch) 299 (1803).

⁴⁵ According to Dr. Hobson, Marshall was acutely aware of the Supreme Court's vulnerability to political forces, and for this reason he was willing to concede Congress's ability to conduct its legislative business without judicial intervention. That was true even when Congress bestowed jurisdiction on federal courts to hear all cases involving the Bank of the United States. **Great Chief Justice**, 133-135, 159.

⁴⁶ Elton Reeves comments that involving the group in goal determination and decisionmaking is a rewarding but difficult method of leadership. **Dynamics of Group Behavior**, 202-204.

⁴⁷ Johnson, **Chief Justiceship of Marshall**, 56-57.

⁴⁸ Haskins and Johnson, **Foundations**, 186-191; a good discussion of the earlier decisions embracing judicial review is in Hobson, **Great Chief Justice**, 43-46, 55, 62-64. Hobson also considers *Marbury* to be a strategic retreat from the aggressive, partisan stance of the Jay-Ellsworth Courts. *Ibid.*, 49.

⁴⁹ The Chase and Pickering impeachments are discussed in Haskins and Johnson, **Foundations**, 205-245; for a summary of these matters and other political and legislative attacks on the Supreme Court or its Justices, see Johnson, **Chief Justiceship of Marshall**, 62-65, 76-84.

⁵⁰ R. Kent Newmyer, **Supreme Court Justice Joseph Story: Statesman of the Old Republic**

(Chapel Hill: University of North Carolina Press, 1985), 75-83.

⁵¹ *Ibid.*, 81.

⁵² By the time Justice Story joined the Court in 1812, Chief Justice Marshall had established and legitimated his leadership. Professor Peter Blau reminds us that,

A professional who manifests high respect and praise for a colleague implicitly subordinates himself to the other, unless he is a renowned authority widely respected in his field, in which case his praise of the colleague is a magnanimous gesture that does not at all reflect adversely on his own standing.

Exchange and Power, 324; see also *ibid.*, 142. Elton Reeves also comments that a leader's responsibility includes maximizing the growth and development of individual group members. **Dynamics of Group Behavior**, 209.

⁵³ Blau, **Exchange and Power**, 48-49, 62, 75, 137.

⁵⁴ Reeves, **Dynamics of Group Behavior**, 151-153.

⁵⁵ Newmyer, **Justice Joseph Story**, 15-16, 157.

⁵⁶ Newmyer, **Justice Joseph Story**, 45-48, 172-173.

⁵⁷ Marshall to Thomas Posey, Sept. 1, 1779, **Papers of John Marshall**, 1: 32-34.

⁵⁸ Johnson, **Chief Justiceship of Marshall**, 19-20.

⁵⁹ *Ibid.*, 82-83.

⁶⁰ Dr. Hobson claims that Marshall's singular dissent was due to the fact that he believed the majority's opinion violated the very essence of the Constitution. According to Hobson, Marshall believed that the Contract Clause formed an integral part of the prohibitions on state legislative action; these in turn were the substitute for the Congressional veto on state legislation proposed in the original Virginia plan. **Great Chief Justice**, 77, 107.

⁶¹ *Ibid.*, 110-111; Smith, **John Marshall**, 510-511, 516-522; Newmyer, **Justice Joseph Story**, 140-142.

⁶² The opportunity of Marshall's absence gave rise to two spurts of *seriatim* opinions, one in 1805 and the other in 1807. Morgan, **William Johnson**, 179.

⁶³ Blau, **Exchange and Power**, 170.

⁶⁴ *Ibid.*, 198; Blau also suggests that such patterns become social institutions that are perpetuated through historical methods, or through the creation of internalized social values transmitted through the process of socialization. *Ibid.*, 274. See also Muzafer Sherif, in editor's introduction to **Intergroup Relations and Leadership: Approaches and Research in Industrial, Ethnic, Cultural, and Political Areas** (New York: John Wiley & Sons, Inc., 1962), 6, 18.

⁶⁵ Peter M. Blau indicates that the out-group's hostility generates both cohesion in the in-group and a

sense of counter-hostility in the in-group. **Exchange and Power**, 295. Reeves suggests that the group's most innovative and creative action can result from its reaction to a threat. **Dynamics of Group Behavior**, 129-130.

⁶⁶ The incident is detailed in Morgan, **William Johnson**, 168-177. Professor Sherif suggests that when a group is in conflict with another group, deviate personalities and frustrated members are influenced to exhibit their intense reactions within levels of behavior acceptable to the group. Muzafer Sherif, "Introductory Statement," in **Intergroup Relations and Leadership: Approaches and Research in Industrial, Ethnic, Cultural, and Political Areas**, Muzafer Sherif, ed. (New York: John Wiley & Sons, 1962), 19. This would be in line with William Johnson's description of the pressures brought upon him not to dissent or concur separately, Morgan, **William Johnson**, 177-182.

⁶⁷ In *Ogden*, 25 U.S. (12 Wheat.) 213 (1827), Marshall adopted the position that a contract arises from the act of the parties, and should be interpreted to enforce their intention. The majority, freed from Marshall's selection of an author for their opinion, opted to write individual *seriatim* opinions, Johnson, **Chief Justiceship of Marshall**, 93.

⁶⁸ Blau, **Exchange and Power**, 232.

⁶⁹ Johnson, **Chief Justiceship of Marshall**, 97-99; G. Edward White, "The Working Life of the Marshall Court, 1815-1835," 70 *Virginia Law Review*, 1, at 32, 40 (1984); Robert J. Steamer, **Chief Justice: Leadership and the Supreme Court** (Columbia: University of South Carolina Press, 1986), 18, 19, 52-53.

⁷⁰ Professor Blau suggests that the supply of advice in a group is more readily available if the expert members of the group are not under time pressure, **Exchange and Power**, 181. The rooming house arrangement vastly increased the time available for each Justice to both consult and gain advice from his colleagues. See also the discussion in Morgan, **William Johnson**, 175-176,

⁷¹ Johnson, **Chief Justiceship of Marshall**, 97-99.

⁷² Allen C. Amason, "Distinguishing the Effects of Functional and Dysfunctional Conflict on Strategic Decision Making: Resolving a Paradox for Top Management Teams," 39 *Academy of Management Journal*, 123 (1996); James A. Wall, Jr. and Robert Callister Ronda, "Conflict and its Management," 21 *Journal of Management*, 515 (1995).

⁷³ Johnson, **Chief Justiceship of Marshall**, 33-34.

⁷⁴ This collapse of administrative leadership is detailed in Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953** (Columbia: University of South Carolina Press, 1997).

⁷⁵ Blau, **Exchange and Power**, 103.

⁷⁶ *Ibid.*, 130, 141.

Out of the Shadow: Roger Brooke Taney as Chief Justice

James B. O'Hara

Just as political historians rank Presidents,¹ judicial historians rank Supreme Court Justices. There are a dozen or so rankings of great Justices, some long, with many names, some short, with only a few.² John Marshall is always first on the lists, and invariably we find Oliver Wendell Holmes, Jr., the senior John Marshall Harlan, Louis D. Brandeis, and Joseph Story. Hugo L. Black, Felix Frankfurter, Charles Evans Hughes, Earl Warren, Benjamin N. Cardozo, and William H. Taft usually rank high. More obscure or more controversial Justices like Robert H. Jackson, Joseph P. Bradley, Samuel Miller, Stephen J. Field, John A. Campbell, William Johnson, William O. Douglas, and the second John Marshall Harlan sometimes appear.

But there is another name consistently found that jars the observer's eye. It seems inappropriate, always accompanied by an ominous shadow. The name is Taney, and the shadow is *Dred Scott*.

To us, accustomed to a long tradition of constitutionally guaranteed human rights, the

Dred Scott decision, and more particularly Taney's opinion in that case, seems bizarre. Not even a modern bigot would argue for a return to slavery as Taney understood it. Taney in retrospect looks himself like a bigot, a Simon Legree in judicial robes whose words are like lashes on a slave's back. Why then do historical scholars rank him so high? Where is his greatness? The story of this extraordinarily complex man, who lived in an extraordinarily complex and very perilous era, needs to be told again.

Roger Brooke Taney, fifth Chief Justice of the United States, was born on March 17, 1777, in a still-standing house on the family farm in Calvert County, Maryland, not far from the Chesapeake Bay.³ He was the second son of the six children of Michael and Monica Brooke Taney. Both the Taney and the Brookes had been in Maryland for more than one hundred years at the time of Roger's birth. The family was landed gentry, living comfortably but not opulently, on crops of corn and tobacco, sowed

and reaped by slaves. Maryland was one of the few places in English America where one could be respectable and still be Catholic; the family was of that faith. Taney's religion was a shaping factor in his life, and service to the church became a recurring feature as he matured. He was the first Roman Catholic to serve in a President's Cabinet, and the first to serve on the Supreme Court.⁴

Taney was frail and sickly even as a child, but he excelled at swimming and riding, skills learned on the plantation and in the nearby waters. Like many children raised in rural areas of the day, his early education was sketchy. He studied for a while at a little schoolhouse some ten miles from his home, but wretched roads and bad weather often made that a hit-or-miss experience. Later, a live-in schoolmaster tutored the Taney children; perhaps the schooling was assisted by a family library: Taney's father had been educated by the Jesuits in Europe.

At sixteen, the young man left for Carlisle, Pennsylvania, to study at Dickinson College, then very small with a faculty of three and a student body of fewer than one hundred. The single building was, in Taney's words, "small and shabby," and fronted "on a dirty alley."⁵ Dickinson, with its strong Presbyterian roots, might seem a strange choice for a devout Catholic family, but Taney flourished there. To the end of his life, he retained his carefully written student notes. And the brief biographical sketch he wrote about his early life shows great pride that he was chosen valedictorian by his classmates. Small though it was, Dickinson's early alumni lists were formidable. At one point in his life, Taney served on the Court with Justice Robert Grier, a fellow alumnus. President James Buchanan was also a Dickinson graduate.⁶

After graduation, the young man took up residence in the state capital of Annapolis to read law under the direction of Judge Jeremiah Chase, and four years later he was admitted to the Maryland Bar. He was at the same age—twenty-two—elected to the legislature, although his family name was probably more important in his victory than any special merit on his part. Voting was restricted to a very few landowners, and Calvert County was sparsely populated.



As a young lawyer, Taney was friendly with Mother Seton, the first American-born Catholic saint, whose school was not far from Frederick, where he practiced law. Elizabeth Seton founded the Sisters of Charity near Emmitsburg, Maryland, before her death in 1821.

His early legal practice was, because of the limited population, also restricted. He does recount his first appearance in court. At the last minute, there was a change in judges, and the neophyte lawyer found himself facing one of Maryland's most respected jurists, Gabriel Duvall, later himself to become a Supreme Court Justice. Taney was terrified but won the case.

In 1801, recognizing that the opportunities for a young lawyer were limited in his home county, and that Annapolis and Baltimore were already well served with leading lawyers, he determined to move to Frederick. It was a prosperous town in central Maryland where Taney had relatives,⁷ and where the death and retirement of several established attorneys created prospects for the future. His calculations proved wise, and for the next twenty years he grew in stature as a leading citizen, with a practice that established his reputation for legal competence and sound advice. His clients included Charles Carroll of Carrollton, last surviving signer of the Declaration of Independence and one of the country's richest men; and Thomas Johnson, Revolutionary War governor of the state and also a former Justice of the Supreme Court of the United States. His



Taney's friend and law partner was Francis Scott Key (above), the son of a prominent landowner and the future author of the *Star Spangled Banner*. His sister, Anne Key, became Taney's wife in 1806.

interest in matters relating to the church also continued. He was the lawyer for Mount Saint Mary's College in nearby Emmitsburg, was active in the growing parish of St. John's, and was host to Archbishop Maréchal of Baltimore, when that prelate conducted his pastoral visitations.⁸ He was friendly with Mother Seton, the first American-born Catholic saint, whose school was not far from Frederick.⁹

But the most important event during Taney's Frederick years was his marriage in 1806 to Anne Key, daughter of a prominent landowner and sister of Taney's dear friend and onetime law partner, Francis Scott Key. The marriage was happy, and the couple had seven children, six daughters and a young son who died in childhood. They settled in a little house on Bentz Street, modest and quite cramped for his growing family.¹⁰

To this point in his career, Taney had been a Federalist, the party of his father. Early in his Frederick days, Taney had helped to create and edit a party newspaper, *The Frederick Town Herald*, something of an anti-Jefferson screed, and he ran on the party ticket for a seat in the legislature, but lost. The events leading up to the War of 1812 brought a schism in party ranks,

however, and Taney veered to that element of the party that supported the war. Ultimately, he became a Jacksonian, ardently so, in a move that would profoundly influence his future.

A family scandal marred his Frederick years. In 1819, Michael Taney, his widowed father, became involved in a fight at a party during which too much wine was consumed. In a scuffle over a young woman, the elder Taney grabbed a knife and killed a neighbor, one John Magruder. Disgraced, Michael fled to Virginia, and died there in exile. Apparently, extradition for murder was never sought.

Roger, meanwhile, continued his successful career. In an age when the most renowned lawyers relied on flamboyant oratory, Taney was a conspicuous exception. Never physically impressive, he was earnest, sincere, well-organized, and logical as he spoke in conversational tone to a jury or an appellate bench. His reputation grew outside Frederick, and finally, in 1823, he moved to the more cosmopolitan city of Baltimore. In 1825, he became active in the national arena and argued his first cases before the Supreme Court.¹¹ In 1826, he was co-counsel with Daniel Webster, later his great nemesis, in *Etting v. Bank of the United States*.¹² During his preparation for this case, Taney was aghast at the unethical practices of the bank's directors and officers, and this probably set the stage for his war against the Bank of the United States later in his life. In the following year, he again argued before the Court in *Brown v. Maryland*,¹³ the case in which John Marshall formulated his "original package" doctrine, which decreed that states may not tax goods imported from foreign countries if the goods remain in their original packages.

Taney also continued his service to his church. He attempted to mediate a dispute between the Archbishop of Baltimore and the Jesuit Fathers at Georgetown University, with only modest success.¹⁴ He was one of the few laymen to attend the First Provincial Council of Baltimore in 1829, advising the assembled bishops from all over the country on matters of church incorporation and property.¹⁵ On his initiative, the Archdiocese of Baltimore was reincorporated in 1832,¹⁶ and this reincorporation subsequently became the legal model for many Catholic dioceses, even to the present.¹⁷ There-

after, he was regularly consulted by the bishops of Baltimore, New York, and Charleston on legal matters involving the church.¹⁸

By 1827, Taney's professional eminence brought about his appointment by Governor Kent, a political opponent, as Attorney General of Maryland. The entire bar recommended him for this distinguished position, although the duties of advising the governor on matters of law and representing the state in litigation did not require him to renounce his private practice. Four years later, in an unbelievable series of events, he was named Attorney General of the United States.

Andrew Jackson's Secretary of War, John H. Eaton, had recently married a young widow, Peggy O'Neill Timberlake, whose social standing and reputation for easy virtue was an affront to the wives of other Cabinet officers, and they refused to meet her socially. President Jackson was aghast at this treatment, and he sided gallantly with the Eatons. An impasse followed, and finally Jackson requested, and received, the resignations of his entire Cabinet.¹⁹

There is no record that Jackson had ever met Taney, who by now was a devout Jackso-

nian, although he had not taken part in national politics. On the advice of friends who assured him of Taney's political orthodoxy, Jackson brought the Marylander into his Cabinet as Attorney General. The duties here were not onerous; indeed, Taney continued to reside in Baltimore. Principally, the Attorney General was expected to give legal advice to the Cabinet, and to fill the role now the responsibility of the Solicitor General—arguing cases before the Supreme Court when the United States was a party. There was no Justice Department with staff or legislated responsibilities. But then as now, a Cabinet officer's influence could be greater or lesser than the actual portfolio, and the measure is, of course, compatibility with the President.

The patrician Taney and the rough and uneducated Jackson were compatible from the start, and their mutual distrust of the Bank of the United States was the glue that bonded them ever closer. In a short time, Taney was Jackson's most intimate and most trusted advisor.

Congress had chartered the Bank of the United States in 1816, for the purpose of stabilizing the banking system. The Bank had been



Andrew Jackson appointed Taney Attorney General despite his never having met the Maryland lawyer, who lacked experience in national politics. Jackson had to fill his entire Cabinet quickly, having gallantly dismissed his previous appointees for refusing to socialize with the new wife of his Secretary of War, John H. Eaton (left). Peggy Timberlake Eaton (right), a widow, was from a modest social background and had a reputation for easy virtue.

controversial from the start, particularly in the West, and its enemies opposed both its policies and its politics. The charter originally was granted for twenty years to expire in 1836, but the bank's directors decided to seek an early renewal in 1832 at a time when a majority of both houses of Congress and most of the members of the Cabinet were known to favor it, despite Jackson's own grave suspicions about its constitutionality and its practices. The bank miscalculated the President's resolve. Congress did indeed recharter, and a majority of the Cabinet did in fact approve, but Jackson vetoed the bill in a strong message written by Taney.

A political uproar followed, and Jackson ordered government deposits to be removed from the Bank of the United States, and to be placed in state banks. When Secretary of the Treasury William J. Duane was reluctant to do so, Jackson fired him and put Taney in his place. Taney removed the deposits with enthusiasm, and the Bank slowly died.

The public picture of Taney at this point in his life is interesting and somewhat amusing. Many of his critics (and there were many) saw him as Jackson's dupe, blindly following orders that were not in the public interest and that would bring financial ruin to the nation. Others saw him as a gray eminence who used Jackson as a puppet to settle old scores on the hated Bank. The truth was at neither extreme: Jackson was no one's puppet, but Taney and the President were in such complete agreement philosophically that their politics harmonized.

But Taney had to pay his price. His appointment to the Treasury had been given during a congressional recess. When Congress returned, the Senate refused to confirm him—the first Cabinet appointment in history to be rejected.

When Justice Gabriel Duvall resigned from the Supreme Court in January 1835, after almost a decade of profound deafness, Jackson appointed his friend Taney to be an Associate Justice and once again Taney went down to defeat. It appeared that his political life was over. He returned to legal practice in Baltimore.

In July 1835, Chief Justice John Marshall died. President Jackson waited almost six months, then once again sent Taney's name to the Senate, now for the office of Chief Justice.

One year had brought a change in the attitude of the Senate. Despite a flurry of unrealistic activity to secure the nomination of Justice Story for the chief justiceship, and despite the energetic opposition of Henry Clay, John C. Calhoun, and Webster, the Senate confirmed Taney by a vote of 29-15. His enemies believed he would destroy everything Marshall had stood for. They were wrong.

John Marshall's death signaled the end of an era, but realistically, the era was over before he died. Marshall's like-minded compatriots had predeceased him; no longer were the great constitutional decisions unanimous. Three of the seven Justices were already Jacksonian appointments: John McLean of Ohio, appointed in 1829; Henry Baldwin of Pennsylvania, in 1830; James MooreWayne of Georgia, in 1835. Only Justice Story of Massachusetts, appointed by President James Madison and now in his twenty-fourth year on the Court, and Justice Smith Thompson, named by President James Monroe and now in his twelfth year, were really Marshall Justices.

In all, twenty Justices, including Taney himself, served during the twenty-seven years he was Chief Justice, although four of these were Lincoln Justices named at the end of Taney's life. This constitutes almost a fifth of the entire membership of the Court to the present day.

Historians have not been gentle on the sixteen non-Lincoln Justices. Aside from Taney himself, and Justices Story and Benjamin R. Curtis, most have now been forgotten, but the verdict of many judicial historians is harsher than mere obscurity. The dean of Supreme Court scholars refers to the Taney Justices as "ciphers," "lesser lights who failed to measure up," "non-entities," and "less than mediocre men."²⁰

But many others disagree. If the overall record of the Taney Court is in many ways splendid, surely in some measure we must credit the wisdom, experience, judgment, and intelligence of the judges on the Court. All but four of the Taney Justices served for more than ten years, and nine served for more than twenty. As a group, they brought exceptional political experience and a richness and variety of backgrounds to their work.

It would tax both patience and time to mention each of the Justices individually, but four

stand out as exceptionally skilled and able.

Justice Story is one of the greatest figures in the history of American law. Only thirty-two years old at the time of his appointment, he was on the Court for thirty-four years. Concurrent with his judicial work, he was Dane Professor of Law at Harvard (the first teacher of law at Harvard) and author of a series of legal treatises that continued to endure long after his death. Story's volumes were the textbooks for three generations of legal practitioners through the nineteenth century.²¹

Justice McLean had served as a Congressman and as a judge before becoming Postmaster General under President John Quincy Adams and President Jackson—some say the greatest Postmaster General in history, except perhaps for Jim Farley! His strong intellect and personality were marred, however, by one huge and overarching flaw. During his entire time on the Bench he angled constantly for a presidential nomination, wherever he could get it. Four times he ran for the presidency while on the Supreme Court, each time on the ticket of a different party. It was always suspected, with some justification, that his judicial decisions were planks in his platform.²²

Justice Curtis of Massachusetts replaced Story in 1851, appointed by President Millard Fillmore. Curtis was one of the finest lawyers of his day, now chiefly remembered for his great dissent in *Dred Scott*. After his resignation from the Supreme Court, he was counsel for the defense of Andrew Johnson during the impeachment trial.²³

Finally, Justice Campbell should be singled out. Highly regarded as the South's leading lawyer, the entire membership of the Supreme Court asked President Franklin Pierce to appoint him, and the President obliged them. When the Southern states began to secede after Fort Sumter, Campbell attempted to mediate. But finally, when his home state of Alabama seceded, Campbell resigned to serve as an Assistant Secretary of War for the Confederacy. In the waning days of the war, Campbell met secretly with Lincoln in Richmond to negotiate terms and conditions for the fallen South, but Lincoln's death shortly thereafter ended the effort. He was jailed at the war's end, then pardoned at the request of Supreme Court col-

leagues, only to surface later as one of the advocates in the landmark *Slaughterhouse Cases*.²⁴ He regularly argued before the Court until his death in 1889.²⁵

In addition to these four, there were others who brought impressive credentials to the Court. Philip P. Barbour is the only Justice who had been Speaker of the House; Nathan Clifford had been Attorney General and chief negotiator of the treaty with Mexico after the Mexican War; Levi Woodbury served as governor of New Hampshire, a Senator, and Secretary of the Navy; Thompson was also a former Cabinet officer; James Moore Wayne had been mayor of Savannah and a member of Congress.

Justices John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, and Robert C. Grier, in addition to the above-mentioned Barbour, all had extensive experience on either the state or federal bench.²⁶ These Justices may now be forgotten, but they certainly were accomplished and powerful in their day.

It should be remembered that throughout the nineteenth century, Supreme Court Justices rode circuit, hearing cases at the trial level in federal courts scattered throughout the country. For most of the Justices this meant extensive travel, often over dusty or muddy roads, with frequent accidents. The discomfort, the low pay, the long months away from home led many potential Justices to decline appointment, or, at least, not seek it. Taney himself had the easiest circuit—Delaware, Maryland, and Virginia—and visits to Virginia involved only a cruise down the Chesapeake Bay to Norfolk. But still the circuit travel took its toll. Throughout his twenty-eight years as Chief Justice, his health was precarious.

The Justices came to Washington only once a year to hear appeals for a Term that lasted six weeks when Taney joined the Court, but that had become three months by the time of his death. The Justices boarded in hotels or stayed with friends. Their Courtroom was a small chamber in the basement of the Capitol, now open as a museum. The place where Marshall and Taney presided, and where Daniel Webster argued, was then variously described as dark, damp, cold, full of drafts, and smoky from whale oil lamps and malfunctioning fireplaces.²⁷ The Justices had no dining room,

no conference room, no offices, and an inadequate library. They had no clerks, no secretaries, and, except for the Marshal, the Clerk, and the Reporter, no staff. Cases often had to be postponed because the Term was so short. Illness or inability to travel sometimes meant the absence of a quorum and sometimes vacancies extended for many months because of battles between the Senate and the President. John Tyler alone had five Supreme Court nominations rejected.

But for all these difficulties, the Taney Court, and Taney himself, made enduring contributions.²⁸ There was, particularly, a sea change in the direction of American commercial law.

The Constitution quite clearly gives to the federal government all responsibility for the regulation of commerce "among the several states." But in the infancy of the nation, interstate commerce was negligible. Almost all business was small and local. The political forum most responsible for regulation was the state legislature, not the Congress.

When business issues came to the Supreme Court, the Justices usually were able to settle the disputes using the well-recognized principles of contract as they had developed in the common law. But, in truth, few real business transactions even came to the federal courts; state courts settled them. However, as the country grew in population and land area, as forests were leveled and cities were built, as canals were dug and roads were paved, the bright legal line between federally regulated interstate commerce and locally regulated commerce grew dimmer. Similarly, the old common law was stretched to its limits as the mercantile system began to decay in the face of industrialization.

When Taney became Chief Justice in 1836, less than a decade after the nation's first railroad tracks had joined Baltimore to Ellicott City, a new look at the Commerce Clause was required, along with a new understanding of the applications of the common law to commercial transactions. During the entire era when John Marshall presided over the Supreme Court, there was a consistent tendency for the Court to err in favor of established commercial entities and to look skeptically at developing trends. In retrospect, it is clear that this policy had to change.

During Taney's first year on the Bench, a case with profound implications came to the Court. In 1785, the legislature of Massachusetts had chartered a corporation to build a bridge connecting Boston and Cambridge. The corporation sold bonds to raise capital, built the bridge, and then charged tolls to pay off the bonded indebtedness. Now, some fifty years later, the debt had long since been paid, but the tolls continued as a source of regular income to bondholders. A new corporation, seeking to build a second bridge, parallel to the first, proposed to charge tolls only until the structure was paid for. It was afterward to be free.

Manifestly, a new free bridge would destroy the income flow of the older bridge. So the original company sued the new one, charging that the new charter was illegally granted in violation of the contractual agreement implied in the first charter. In some ways, the issues of the case resembled the Dartmouth College case of 1819, in which the Marshall Court held that a corporate charter was a contract that could not be modified in any way by a subsequent legislature. Had this reasoning prevailed, the old bridge company would have won the case. Obviously, this rigid reading would have imposed enormous obstacles to American commercial development. Justice Story, John Marshall's stalwart friend and closest collaborator, was the senior Justice on the Taney Court. He agreed with Daniel Webster that the owners of the old bridge should prevail.

Taney disagreed. A relatively young man, his political career as Secretary of the Treasury and Attorney General in the Cabinet of Andrew Jackson had made him something of a populist, with a profound distrust of the entrenched establishment embodied by the owners of the first bridge. He was able to win the support of a majority, and *Charles River Bridge v. Warren Bridge*²⁹ has become one of the landmark cases of American jurisprudence.

The Chief Justice insisted that legislatures could not give away a public benefit by implication, that monopolies could not be created accidentally in silence. He was concerned that the commercial and industrial growth of the country would be crippled if every canal company could claim a monopoly to prevent a railroad, if every manufacturer could use its own



One of Taney's greatest jurisprudential achievements is *Charles River Bridge v. Warren Bridge* (1857), which provides many of the legal underpinnings for modern corporate law. At issue was whether the owners of the Charles River Bridge (above), a toll bridge built in the 1780s to link Boston with Cambridge, could claim that their state charter gave them exclusive right to traffic across the river.

charter to forestall new technology, and if every bridge company could veto new bridges desperately required by territorial growth and a burgeoning population. Taney's reasoning did not reverse Marshall's earlier logic, but it nuanced it in subtle ways that changed its direction. The *Charles River Bridge* case provided many of the legal underpinnings of modern corporate law.

The Court also encouraged the growth and power of state-chartered banks,³⁰ and permitted companies incorporated in one state to do business without undue impediment in other states.³¹ In *Cooley v. Board of Wardens*,³² the Taney Court supplied the workable dividing line for federal and state regulation of business under the Commerce Clause.

The *Cooley* case brought an ordered end to the argument that the Commerce Clause gave exclusive power over interstate commerce to the federal government alone. But it also disposed of the pernicious idea that the states had an equal role with the federal government, a position that would have subjected a grow-

ing commercial development to often parochial and fickle local interests. The regulation of commerce, the Court declared, belonged to the federal government primarily and to state governments subordinately. This healthy rubric still prevails.

It was also the Taney Court that first announced the "political question" doctrine, which established that some issues belong properly, not to courts, but to the legislative branch of government, and that legislatures should be free of judicial interference with their work.³³

There were regular battles involving the reach of the admiralty powers. In English law, maritime jurisprudence applied only in waters where there was a tide, but England knew no rivers like the Ohio or the Mississippi, nor did England have the Great Lakes. Ultimately, both statute and court decisions settled the question in favor of federal jurisprudence on navigable waterways, despite great divergence on the Court. At opposite extremes were Justice Story, who it was said would apply admiralty

law for the theft of a toy boat from a bucket of water, and Justice Daniel, who seldom found for federal jurisdiction anywhere.³⁴ In extending admiralty jurisdiction, the Court overturned centuries of English precedent, along with its own earlier decisions.

Taney's personal contribution to this new vision was impressive. Modern concepts of conservatism and liberalism, strict construction and activism, cannot accurately be applied to a jurist who lived a century and a half ago. But there are characteristics of his jurisprudence that have a modern resonance. He was very much a Jacksonian populist, with a profound reverence for the good sense of the average man, not unlike Abraham Lincoln's similar view. He looked at the Constitution as a document of essential compromise, and he read it quite literally. His understanding of dual federal-state sovereignty made him a Jeffersonian. He was personally opposed to slavery, and emancipated his own slaves as a young man, but he accepted the constitutional compromise that made slavery a decision left to the states. But his abhorrence of the international slave trade, coupled with the constitutional prohibition of slave importation made him inflexible on that issue. He voted with the majority to free the African defendants in the celebrated *Amistad* case.³⁵

There is one other aspect of his jurisprudence that is thoroughly modern. Most of the early Justices, from Washington's appointees to Jackson's, following the lead of James Wilson, regarded the Constitution as subservient to a divinely established higher law—the "law of nature and of nature's God"—as Jefferson so eloquently put it in the Declaration of Independence. Of the twenty-three Justices before Taney, only Samuel Chase had hinted that the constitutional decisions of the Court had to be founded on the text of the Constitution, or on the text of laws, rather than on a "higher" law believed to be from God. Taney set out on a new course. He was the first constitutional *positivist* to serve on the Court.

Perhaps it might help us to understand Taney if we note that in his populism, in his reverence for the constitutional text, in his rural morality, in his clarity of expression, and in his common sense, he was a nineteenth-century

Hugo L. Black.

Taney aged gracefully. He was fifty-seven when appointed. As time progressed, his long hair turned white and his face became deeply lined. His life-long thinness made him appear ever more frail, and it seemed that each year would be his last. But he carried on with no impairment of his mental faculties.

By the early 1850s, the Supreme Court was at the height of its influence and reputation. It was universally respected, with a Chief Justice admired and even loved. But in 1855, when Taney was seventy-seven years old, there began a rapid succession of three tragedies that made Taney a star-crossed, bitter, dejected, and hated old man.

The first tragedy was personal. In the summer of 1855, while the family was vacationing at Old Point Comfort, Virginia, an epidemic of yellow fever broke out. On the same day Taney lost his wife and a daughter to the disease. Bewildered and numb, he returned to Baltimore, but was unable to remain in his home because of the memories. Somewhat hastily, he moved permanently to Washington, purchasing a town house on Indiana Avenue where he lived with two daughters. His family and his church were his only consolations and he became increasingly reserved in demeanor and isolated socially.

The second tragedy was the *Dred Scott* case.³⁶ Somewhat surprisingly, in the fifty years of the Supreme Court's existence it had heard relatively few cases bearing directly on slavery. The vast majority involved prosecution under the Fugitive Slave Laws; a few arose out of the continuing importation of slaves. The opposition to the laws on fugitives came mostly from northern circuits where the laws were unpopular—particularly in Ohio and Massachusetts. Ironically, the cases on importation also came from the North, since the shipowners were mostly from New England. But while the actual prosecutions usually did not reach the docket of the Court itself, the Justices on circuit regularly encountered them.

The *Dred Scott* case posed new questions potentially devastating for the preservation of the Union. The facts are well known. *Dred Scott* was a slave owned by a citizen of Missouri, Dr. John Emerson, an army doctor who

took Scott with him on tours of duty first to the free state of Illinois, then to federal territory in what is now Minnesota. Under the terms of the Missouri Compromise of 1820, the northern parts of these territories were free. Scott claimed that his living on free soil had freed him. Initially, he made his claim in the state courts of Missouri, which ruled against him.

Arguing essentially the same facts, Scott took his claim to federal court, alleging diversity of citizenship, since he himself was from Missouri, and John Sanford, an executor of Emerson's will, was from New York. The lower federal court found that since the courts of Missouri had already denied his claim, Scott was still a slave and had no standing to sue in federal court. It was the standing issue that brought the case to the Supreme Court.

Had the Court merely decided to limit its decision to the standing claim, *Dred Scott* would now be forgotten. And that was the Court's original disposition of the case. Justice Nelson was assigned to write the opinion. However, by this time, the case had achieved some notoriety. The abolitionist press agitated; members of Congress pleaded from the halls of the Senate and House that the Court should use the Scott case to settle the question of slavery in the territories once and for all. President Franklin Pierce, then later President-elect James Buchanan, watched apprehensively. The two dissenting Justices, McLean and Curtis, indicated that they intended to discuss the substantive questions in their dissent. McLean was running for President again when the case was first argued; the Justices voted to hear arguments a second time mainly to keep the Court from becoming embroiled in the presidential campaign of 1856.

Finally, Justice Wayne proposed that the Court broaden its decision to deal with the substantive constitutional questions, and that the Chief Justice write the opinion of the Court. He did, with disastrous results.

Taney began by holding that Scott did not have standing and was still a slave. That is where he should have stopped. He then took up the question of slavery in the territories, and ruled that Congress could make no law depriving citizens of property, even slave property. The Missouri Compromise was therefore



Dred Scott, a Missouri slave, appealed for freedom because his owner, an army surgeon, had taken him on several tours of duty in free territory. Although Scott lost the suit, his new owners freed him.

unconstitutional. (It had actually already been repealed by the Compromise of 1850, but since the events of Scott's life had occurred before then, the issue was before the Court.) Finally, Taney traced, none too accurately, the history of slavery in the United States from colonial days as a background to render a definitive legal definition of citizenship. He concluded that not only were slaves not citizens, freed slaves could not be citizens either.

In the course of his long opinion, the Chief Justice made reference to an "unfortunate race" that had no rights the white man was "bound to respect." While that language was used in the context of early colonial slavery, it was inflammatory and it inflamed.

Virtually every aspect of this case was star-crossed. One of Scott's lawyers was the brother of one of the Justices; one of the Justices was running for President; two of the Justices were privately communicating to the President-elect; one of the Justices asked the President-elect to use his influence to sway another Justice. The standards of judicial behavior are now happily different.

It is hard to believe now, but Taney was actually attempting to find a middle ground. The abolitionist movement had disintegrated the

old doctrine of nullification and had encouraged some northern states to ignore enforcement of the Fugitive Slave Laws. In the South, a growing movement for secession became more intense. Taney seemed to reason that the Union could only be preserved if the Court could steer a course between nullification and secession. For him, even though he had freed his own slaves years before, the perilous and ambiguous compromise of the Constitutional Convention was the only safe ground.

Obviously, the attempt failed. The rift between North and South widened. The abolitionist wing of the newly formed Republican party was outraged, while Southern voices hailed the decision as wise and statesmanlike. The fact that five of the nine members of the Court (Taney, McKinley, Daniel, Wayne, and Campbell) came from slave states, and that two others (Grier and Nelson) were “Doughfaces,”—Northerners with Southern sentiment—only made things worse.

Modern historians are unanimous in condemning the decision, calling it ruinous to the Court itself, and a cause of the Civil War. While the decision erred fundamentally in attempting to decide a constitutional issue not required by the litigation,³⁷ *Dred Scott* had virtually no lasting effect. It was overruled, after all, by one Civil War, three constitutional amendments, and hundreds of acts of subsequent legislation beginning with the Reconstruction Congress. One is also tempted to say that even without *Dred Scott*, the continuing abolitionist movement and Southern resistance to it would have brought about secession with the election of any Republican President in 1860. Nor was there any permanent damage to the Court. By the end of the Civil War, Lincoln had appointed five Justices, including his abolitionist Secretary of the Treasury Salmon P. Chase as successor to Taney, and criticism of the Court abated with each appointment. *Dred Scott* himself was freed by his new owners. The impact



Initially, Scott made his claim in the state courts of Missouri, which ruled against him. Arguing essentially the same facts, Scott took his claim to a federal court in St. Louis (above), alleging diversity of citizenship, since he himself was from Missouri, and John Sanford, an executor of his master's will, was from New York. The lower federal court found that since the courts of Missouri had already denied his claim, Scott was still a slave and had no standing to sue in federal court. It was the standing issue that brought the case to the Supreme Court.

of the case was chiefly symbolic, but symbols are often more important in the shaping of events than reality ever can be.

The third tragedy was the Civil War itself. Taney was almost universally regarded as a Copperhead, living in the North but secretly in sympathy with the Confederate cause. Two Supreme Court cases encouraged this view. In 1861, Lincoln authorized the army commander of Federal troops in Baltimore to suspend *habeas corpus*, if necessary. In May of that year, it was thought necessary, and more than one thousand citizens of Maryland, including the mayor of Baltimore, were arrested by the military and confined without charges at Fort McHenry. One of those arrested, John Merryman, petitioned Taney, sitting in circuit, for release. The Chief Justice ordered General Cadwalader to produce Merryman in federal court. Efforts to serve process on the general proved futile. Taney held that Merryman's arrest was illegal on two counts: first, the suspension of *habeas corpus* seems to be given by the Constitution not to the President or to the military, but to Congress; and second, the courts of the United States were open and sitting in Maryland. Charges against civilians properly belonged in those courts, Taney reasoned.³⁸ But the old man realized he had no power to enforce his ruling. He sent his opinion to Lincoln, who ignored it. Merryman was subsequently indicted for treason, but was never brought to trial. Interestingly, a few years later, the Supreme Court, in a strikingly similar case, voted 9-0 to order the release of a civilian arrested by the military and facing military trial. The decision was written by Justice David Davis, a Lincoln appointee and dear friend.³⁹

When Lincoln ordered a naval blockade of Southern ports before there had been a congressional declaration of war against the Confederacy, shipowners whose vessels were seized brought suit. By the slimmest of majorities, 5-4, the Court decided for Lincoln and the blockade; Taney dissented.⁴⁰ Although the vote was not on sectional lines, Taney's reputation suffered further.

The war was devastating to Taney in yet another way. In an age before stock markets, Taney had long ago placed his personal investments in State of Virginia bonds. He had done

so because he thought that a conflict could occur if he had a personal interest in United States bonds because so many cases before the Court could affect their value. When Virginia left the Union, his life savings were lost. Even though Taney was in his eighties, he could not resign, his modest salary was his only income.

When finally the old man died on October 12, 1864, he was in disgrace. The national mourning at the time of Chief Justice Marshall's death became a sigh of relief at the time of Taney's. He was denounced on the floor of Congress and in the press. Most of the Cabinet refused to attend the memorial service, although President Lincoln did come. Only Attorney General Edwin Bates rode on the train for the burial in Frederick.

Within the year, a pamphlet that attacked Taney was widely distributed. It was called "The Unjust Judge,"⁴¹ and the sentiments espoused were widely enough shared that Congress refused to appropriate funds for a bust of the Chief Justice to be commissioned, although a subsequent Congress changed this decision. It is safe to say that no other member of this Court has ever remained in such ignominy after his death.

The intriguing fact is that his chief antagonists like Charles Sumner and Horace Greeley did not know him. The people who really knew Taney invariably were deeply impressed by his simplicity and sincerity. Attorney General Bates, whose position in Lincoln's Cabinet brought him regularly before the Court, often to argue positions contrary to the philosophy of the Chief Justice, spoke warmly of his human qualities and rendered great kindnesses to the Taney children at the time of their father's death. Bates called Taney a "man of great and varied talents; a model of a presiding officer; and the last specimen within my knowledge, of a graceful and polished old fashioned gentleman."⁴²

Justice Curtis, who disagreed with Taney so deeply on *Dred Scott* said of him: "His dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them; and always for the better."⁴³

And finally, these words from the great Justice Samuel Miller, appointed to the Court by Lincoln:

When I came to Washington, I had never looked on the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the Bank of the United States, and I hated him for it. I remembered that he took his seat upon the Bench, as I believed, in reward for what he had done in that connection, and I hated him for that. He had been the chief Spokesman of the Court in the *Dred Scott* case and I hated him for that. But from my first acquaintance with him, I realized that these feelings toward him were but the suggestions of the worst elements of our nature; for before the first term of my service in the Court had passed, I more than liked him; I loved him. And after all that has been said of that great, good man, I stand always ready to say that conscience was his guide and sense of duty his principle.⁴⁴

Taney came to the Court as Marshall's successor. Working with a succession of fiercely independent Justices, appointed by eleven different Presidents, he led wisely and well. If his critics expected a revolution against Marshall's jurisprudence, there was none. What really occurred was subtle adjustment, nuanced reevaluation, a more balanced view of federalism, a deep appreciation of constitutional values, and a profound Jacksonian faith in the greatness of ordinary people. His miscalculation on *Dred Scott* may have destroyed his historical reputation, but nothing can destroy his real contribution to our country and its history.

In recent times that reputation has begun to be changed, at least a little. Modern historian Kent Newmyer has this to say: "He brought. . . a high intelligence and legal acumen, kindness and humility, patriotism, and a determination to be a great Chief Justice. . . ." He was a Southerner who loved his country, a states' righter dedicated to the Union, a slaveholder who regretted the institution and manumitted his slaves, and an aristocrat with a democratic political philosophy.⁴⁵ Chief Justice

Hughes called him "a great Chief Justice,"⁴⁶ and Justice Frankfurter deemed him "second only to Marshall."⁴⁷ But the cloud of *Dred Scott* will always remain. His positive contributions have been almost completely forgotten; his greatest mistake has defined him.

Endnotes

¹ The most recent examples of this genre are Arthur M. Schlesinger, Jr., "The Ultimate Approval Rating," *The New York Times Magazine* (Dec. 15, 1996) 46; and William J. Ridings, Jr., and Stuart B. McIver, *Rating the Presidents* (1997).

² Robert C. Bradley summarized the standard lists in his article "Who are the Great Justices and What Criteria Did They Meet?" in William D. Pederson and Norman W. Provizor (eds.), *Great Justices of the U.S. Supreme Court* (1993) 1. See also Bernard Schwartz, *A Book of Legal Lists* (1997), 3-27.

³ Taney is the subject of three twentieth-century biographies. The classic standard is Carl Brent Swisher, *Roger B. Taney* (1935). See also Bernard C. Steiner, *Life of Roger Brooke Taney* (1922) and Walker Lewis, *Without Fear or Favor* (1965). The factual details of this paper are drawn principally from Swisher.

⁴ Taney's Catholicism, while often criticized in the sectarian press, never seemed to be a liability in his political life, although a rather quaint book of letters attacking the Catholic Church was published in 1852 under the title *Romanism at Home: Letters to the Hon. Roger B. Taney, Chief Justice of the United States*, written by the Rev. Nicholas Murray, a Presbyterian polemicist who used the pseudonym Kirwin. See also Ray Allen Billington, *The Protestant Crusade 1800-1860: A Story of the Origins of American Nativism* (1938), 253.

⁵ Samuel Tyler, *Memoir of Roger Brooke Taney, LL.D* (1872), 38. The first chapter of Tyler's book, covering Taney's early life, was written by Taney himself.

⁶ Taney graduated in 1795, Grier in 1812, and Buchanan in 1809.

⁷ Only a dozen miles from Frederick, a little village called Taneytown already bore the family name.

⁸ Thomas W. Spalding, *The Premier See: A History of the Archdiocese of Baltimore, 1789-1989* (1989), 79.

⁹ Telephone interview with Sister Betty Ann McNeil, DC; Daughters of Charity, Emmitsburg, Maryland, May 5, 1997.

¹⁰ The house at 121-123 S. Bentz Street is now a museum under the direction of the Frederick County Historical Society.

¹¹ James B. O'Hara, "The Justices as Lawyers: Justices Who Have Argued Before the Supreme Court," *17 Supreme Court Historical Society Quarterly* (1996), 9. The cases were *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473 (1825) and *The Gran Para*, 23 U.S.

- (10 Wheat.) 497 (1825).
- ¹² 24 U.S. (11 Wheat.) 59 (1826).
- ¹³ 25 U.S. (12 Wheat.) 419 (1827).
- ¹⁴ Lewis, *supra* n. 3 at 94-96.
- ¹⁵ **Concilia Provincialia Baltimori Habita Ab Anno 1829, usque ad Annum 1840** (1842) 42. See also Peter Guilday, **A History of the Councils of Baltimore** (1932), 89.
- ¹⁶ 1832 Md. Laws 308.
- ¹⁷ James B. O'Hara, "The Modern Corporation Sole," 93 *Dickinson Law Review* (1988), 23-29.
- ¹⁸ Richard Shaw, **John DuBois, Founding Father** (1983), 34; Peter Guilday, **The Life and Times of John England 1786-1842** (1927), 592.
- ¹⁹ The "Peggy O'Neill Affair" is recounted in all the standard Jackson biographies. See e.g., Arthur M. Schlesinger, Jr., **The Age of Jackson** (1945), 54, or Donald B. Cole, **The Presidency of Andrew Jackson** (1993), 34-39.
- ²⁰ Schwartz, *supra*, n. 2 at 39.
- ²¹ Gerald T. Dunne, **Justice Joseph Story and the Rise of the Supreme Court** (1970); James McClellan, **Joseph Story and the American Constitution** (1971); R. Kent Newmyer, **Supreme Court Justice Joseph Story** (1985).
- ²² Francis P. Weisenburger, **The Life of John McLean** (1937).
- ²³ There is no modern biography of Justice Curtis, but the memoir by his son is still useful. See Benjamin R. Curtis, Jr., (ed.), **Memoir of Benjamin Robbins Curtis** (1879).
- ²⁴ 83 U.S. (16 Wall.) 36 (1873).
- ²⁵ Henry G. Connor, **John Archibald Campbell** (1920).
- ²⁶ Brief biographies of the Taney Justices can be found in Kermit L. Hall (ed.), **The Oxford Companion to the Supreme Court of the United States** (1992); Clare Cushman (ed.), **The Supreme Court Justices: Illustrated Biographies, 1789-1995** (2nd ed., 1995); Melvin I. Urofsky (ed.), **The Supreme Court Justices: A Biographical Dictionary** (1994); Henry J. Abraham, **Justices and Presidents** (3rd ed., 1992).
- ²⁷ See **The Supreme Court Chamber, 1810-1860** (n.d.). This publication is a small guidebook distributed at the old Supreme Court Chamber.
- ²⁸ The definitive study of the Taney Court is Carl B. Swisher **The Taney Period 1836-64** (1974). See also R. Kent Newmyer, **The Supreme Court under Marshall and Taney** (1968) and Felix Frankfurter, **The Commerce Clause under Marshall, Taney and Waite** (1937). A still useful study of Taney's jurisprudence is Charles W. Smith, Jr., **Roger B. Taney: Jacksonian Jurist** (1932).
- ²⁹ 36 U.S. (11 Pet.) 420 (1837).
- ³⁰ *Briscoe v. Commonwealth Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837).
- ³¹ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).
- ³² 53 U.S. (12 How.) 299 (1852).
- ³³ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).
- ³⁴ See Swisher, *supra* n. 28, 423-456.
- ³⁵ *Ibid.*, 189-196. The case itself was *U.S. v. The Amistad*, 40 U.S. (15 Pet.) 518 (1841).
- ³⁶ The classic study of *Dred Scott* is Don E. Fehrenbacher, **The Dred Scott Case** (1978). The case itself is *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).
- ³⁷ William H. Rehnquist, **The Supreme Court: How It Was, How It Is** (1987), 144.
- ³⁸ *Ex parte Merryman*, see James Mason Campbell (ed.) **Reports of Cases at Law and Equity and in the Admiralty Determined in the Circuit Court of the United States for the District of Maryland by Roger B. Taney** (1871), 246.
- ³⁹ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
- ⁴⁰ *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).
- ⁴¹ Lewis suggests that the anonymous author of the pamphlet was Charles Sumner. See Lewis, *supra* n.3 at 477-492.
- ⁴² Quoted in Swisher, *supra* n.3 at 578.
- ⁴³ Quoted in Lewis, *supra* n.3 at 473.
- ⁴⁴ Charles Fairman, **Mr. Justice Miller and the Supreme Court 1862-1890** (1939) 52.
- ⁴⁵ Newmyer, *supra* n.28 at 94.
- ⁴⁶ Quoted in Swisher, *supra* n. 3 at 582.
- ⁴⁷ Frankfurter, *supra* n. 28 at 73.

Melville W. Fuller Reconsidered

James W. Ely Jr.

Appointed Chief Justice by President Grover Cleveland in 1888, Melville W. Fuller presided over the Supreme Court during a pivotal era of American history.¹ Fuller and his colleagues were the first to grapple with a myriad of modern legal issues arising from the economic transformation of the United States into an industrial nation. In so doing, the Fuller Court rendered a host of important and well-known decisions—*Pollock*, *Debs*, *E. C. Knight Co.*, the insular cases, *Plessy*, *Lochner*—that defined economic and social institutions well into the twentieth century. The Court also ruled that compensation for private property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment, and invoked the dormant Commerce Clause to protect the national market from state-imposed obstacles to commerce.

By and large, however, history has not been kind to Fuller and his associates. Historians have been all too prone to echo the views of

the Progressives, who pictured the Fuller Court as a handmaiden of big business. Thus, Owen M. Fiss in his recent book expressed the conventional wisdom: “By all accounts, the Court over which Melville Weston Fuller presided, from 1888 to 1910, ranks among the worst.”² Yet such a bleak assessment is problematic. First, it is clearly subjective, because it depends upon the value choices of the evaluators. Several commentators have revealingly argued, for instance, that the problem with the pre-New Deal Court was that the Justices gave content to the property clauses of the Constitution and enforced rights associated with market freedom against government power. These apparently were the wrong rights.³ But is there a principled basis by which we can decide that constitutional guarantees ought to be enforced? Should historical reputation turn upon what claims of right are currently fashionable in political or academic circles? Second, it ignores an array of scholarship suggesting that the traditional

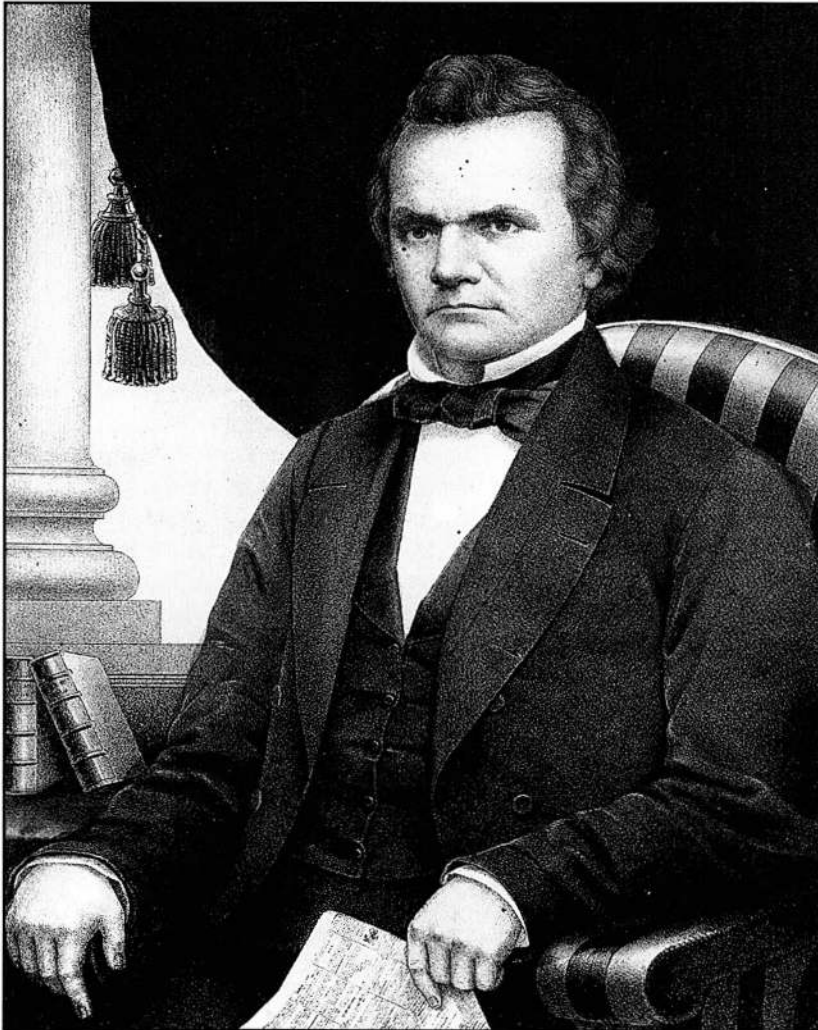
image of the Fuller Court is more a bogey constructed by the Progressives for political purposes than a product of careful investigation. The Progressives, of course, were far from dispassionate observers. On the contrary, they championed greater governmental intervention in American life and constructed a version of constitutional history serviceable for their purpose.⁴

Revisionist scholarship has increasingly challenged the once standard account of late nineteenth century jurisprudence espoused by Progressives and New Dealers.⁵ What has emerged is a more balanced portrait of the work of the Supreme Court at the turn of the century. Drawing upon this new literature, this article aims to take a fresh look at Fuller's leadership of the Court and to analyze the jurisprudence

of the Fuller years. A fundamental goal is to dispel the entrenched mythology that has long distorted our understanding of the Fuller era.

Formative Experience

Born in Maine in 1833 and educated at Bowdoin College, Fuller received most of his legal education through law firm apprenticeship. Like so many New Englanders of his generation, Fuller gravitated westward. He settled in Chicago, and over time established a thriving law practice focused on appellate advocacy. Fuller increasingly represented banks, railroads, and members of the Chicago business elite, such as Marshall Field. Despite this orientation toward a corporate practice, he valued professional independence. Fuller con-



Fuller became politically active in the Democratic Party in Chicago and supported Stephen A. Douglas's compromise solutions to the sectional conflict (Douglas is pictured on a Presidential campaign poster). With his fellow Democrats, Fuller sharply criticized the Lincoln administration, calling the Emancipation Proclamation an unconstitutional exercise of presidential power.

tinued to litigate on behalf of individuals and municipal bodies, and steadfastly declined offers to become the regular counsel for any business. His extensive and diversified practice reached many fields of law, ranging from real property and torts to commercial law and contractual litigation. Upon Fuller's appointment to the Supreme Court, *Harper's Weekly* declared that he "goes to the bench with probably a wider experience of all branches of the law than has been enjoyed at the bar by any member of the Court."⁶

The legal principles applied by Fuller and his colleagues had deep roots in Jacksonian Democracy, with its stress on equal rights and its aversion to class legislation. Promoting market freedom, the Jacksonians attacked state-conferred monopolies, and laws that gave special privileges to particular groups. Turn-of-the-century jurists drew upon Jacksonian ideology as they sought to protect economic liberty and distinguish between appropriate regulation for the public welfare and illegitimate laws advancing special interests.⁷ The importance of the Jacksonian ideology in shaping constitutional law applied with special force to Fuller. Reared in the Jacksonian political tradition, Fuller remained true to the political convictions forged in his youth. He frequently espoused the maxims of strict construction and states' rights. Indeed, this commitment to limited government would be the hallmark of Fuller's constitutional jurisprudence. "Paternalism," he observed in 1880, "with its constant intermeddling with individual freedom, has no place in a system which rests for its strength upon the self-reliant energies of the people."⁸

Soon after his move to Chicago, Fuller became active in Democratic Party affairs. In the late 1850s he supported Stephen A. Douglas and favored a compromise solution to the looming sectional crisis. Although Fuller backed military action to defeat secession, he was a sharp critic of the Lincoln administration. Elected to the Illinois House of Representatives in 1862, Fuller found himself quickly enveloped in controversy. He joined fellow Democrats in a series of resolutions assailing Lincoln's policies, and denounced the Emancipation Proclamation as an unconstitutional exercise of presidential power.

Notwithstanding the constant political wrangling, Fuller was able to gain the respect of political opponents. This ability to reach across party lines exemplified a crucial facet of Fuller's personality—his special capacity to establish harmonious personal relations with persons of diverse legal and political opinions. Fuller's genial nature and urbane sense of humor would serve him well both in professional life and as Chief Justice.

This brief stint in the legislature marked the extent of Fuller's interest in elective office. Yet he remained involved in politics and was a delegate to several Democratic Party national conventions. In time, Fuller formed a close relationship with Grover Cleveland. An enthusiastic backer of the Cleveland administration, Fuller shared the President's commitment to frugal government, a hard-money policy, and tariff reduction. The President was impressed with Fuller's ability, and the two began a frequent correspondence. Cleveland consulted Fuller on the distribution of political patronage in Illinois. In 1885 Cleveland offered to name Fuller chairman of the Civil Service Commission. Civil service reform was a major goal of the Cleveland administration, and the chairmanship was a powerful position. Citing family needs, Fuller refused the appointment. A year later Cleveland tried again, asking Fuller to accept the post of Solicitor General. Despite Fuller's repeated rejection of federal positions, he and Cleveland remained fast friends. When Chief Justice Morrison R. Waite died in March of 1888, Cleveland resolved to select a candidate from Illinois who shared his conservative economic philosophy. Given their past association, it was not surprising that he settled on Fuller. The future Chief was initially reluctant to accept the nomination and requested time to consider. But Cleveland declined to wait and sent Fuller's name to the Senate.

Since Fuller was not well-known nationally, the public reaction to his nomination was muted, if guardedly favorable. Some opposition to confirmation emerged in the Senate. A group of Republican Senators expressed concern over Fuller's political activities during the Civil War. Others hoped to delay confirmation until after the upcoming presidential election. A bipartisan coalition, however, insisted on a vote,



A Democratic Party faithful, Fuller backed the Cleveland administration's commitment to frugal government, a hard-money policy, and tariff reduction. President Grover Cleveland (above) was impressed with Fuller's ability, and offered him several high-level federal posts—including Solicitor General—before sending the Chicago lawyer's name to the Senate for confirmation as Chief Justice without waiting for Fuller's consent.

and Fuller was confirmed by a margin of forty-one to twenty.⁹

Cleveland's esteem for Fuller, incidentally, was enduring. The two corresponded regularly for years.¹⁰ When re-elected to a second term as President in 1892, Cleveland offered Fuller the position of Secretary of State. Fuller declined, explaining that the "surrender of the highest judicial office in the world for a political position, even though so eminent, would tend to detract from the dignity and weight of the tribunal."¹¹

Fuller as Chief Justice

The new Chief Justice confronted a variety of daunting tasks. Because Fuller has universally received high marks as a judicial administrator, we should give attention to this facet of his tenure. Fuller first had to establish himself with the sitting Justices. Although he had argued before the Supreme Court on several occasions, Fuller was hardly a known quantity

to his colleagues. Several Justices harbored private doubts that Fuller was a suitable choice. To complicate matters, Justice Stephen J. Field, the most influential jurist of the Gilded Age, had coveted the Chief's position for himself and was bitterly disappointed when Cleveland selected Fuller.¹² Nonetheless, through a combination of tact and deference, Fuller won the support and affection of his associates.

The composition of the Court changed frequently during Fuller's tenure. Eleven new Justices appointed by five Presidents joined the Court while Fuller was Chief. Yet Fuller maintained good working relations with the incoming Justices. He was especially close to David J. Brewer and Rufus W. Peckham. Fuller also formed a personal bond with Oliver Wendell Holmes, Jr.,¹³ and indeed Holmes was one of the Justices most in accord with Fuller in deciding cases during their period of joint service. A masterful social leader, Fuller harnessed the talents of his independent-minded associates and prevented destructive personal feuds from damaging a collegial working environment. To this end, Fuller inaugurated the practice of requiring each Justice to shake hands with other Justices each morning before Conferences.

Two developments attest to Fuller's management skills. First, under his leadership the Justices rarely divided along partisan lines. As historian Charles Warren perceptively noted: "the slight importance. . . which was to be attached to the party designations of the Judges upon the Court was never better illustrated than during Fuller's Chief Justiceship."¹⁴ Second, Fuller, like John Marshall, hoped to curtail dissenting opinions. Leading by example, Fuller wrote just thirty dissents during his years as Chief and compiled a low dissent rate of only 2.3 percent. Indeed, Fuller was remarkably successful in preserving consensual norms. Although unanimity proved difficult to secure in some prominent cases, that should not obscure the fact that the dissent rate under Fuller was consistently low.

As Chief Justice, Fuller was responsible for assigning the preparation of opinions when he was in the majority. Since Fuller generally voted with the majority, he assigned most of the opinions during his service on the Court. Through-



Fuller had to prove himself to his Brethren because, although he had argued several times before the Court, he was not well known to them and some doubted his capabilities. He was successful at gaining the independent-minded Associate Justices' respect, and even managed to foster a harmonious working relationship among them. To this end, he inaugurated the practice of having all the Justices shake hands with one another before each Conference.

out the Court's history, many Chief Justices have chosen to write the decision in cases of greatest interest. Early in his tenure Fuller kept some of the major opinions, such as *Pollock* and *E.C. Knight Co.*, for himself. Thereafter, at considerable cost to his historical reputation, he generally assigned significant cases to others.

The use of assignment power by the Chief has sometimes generated resentment among his Brethren. Fuller largely avoided this problem by following an eminently fair and evenhanded approach to assignment decisions. There is no evidence that he used assignments to reward or punish colleagues for their views. Such a policy would have undermined Fuller's effort to foster good will among the Justices. "In the assignment of decisions to the different judges," Holmes later observed, "his grounds

were not always obvious, but I know how serious and solid they were and how remote was any partiality from his choice."¹⁵

An indefatigable worker, Fuller shouldered far more than his share of opinions for the Court. He authored 840 majority opinions, writing for the Court more often than any other Justice during his period of service. According to one calculation, Fuller was the fifth most productive opinion-writer in the Court's history.¹⁶ Because he assigned most major cases to others, Fuller tended to write unglamorous opinions dealing with jurisdictional and procedural matters or commercial transactions. Few of these rulings had a long-term impact on the evolution of legal doctrine. Moreover, Fuller's judicial opinions suffered from his verbose and diffuse style of writing.¹⁷ Yet Fuller's influence cannot be measured only by the opinions he



Fuller's most important ruling as circuit justice arose from the controversy over opening the 1893 World's Columbian Exposition in Chicago on Sundays. Congress had appropriated funds to help underwrite the costs of the fair on express condition that the exhibition not be open on Sundays. When the fair directors voted to open on that day, the federal government sought an injunction to halt such operations as a breach of the condition. Relying on traditional equitable principles, Fuller denied the injunction on grounds that there was no proof of irreparable injury to the government. Shown above is the Women's Pavillion at the Exposition.

authored. Reflecting the prevalent commitment to limited government and the free market, he led the Supreme Court toward greater protection of property ownership and open access to interstate commerce.

When Fuller became Chief, he inherited a heavy backlog of appellate cases and an antiquated federal court structure. Spurred by industrial growth, numerous patent cases, and the impact of the Fourteenth Amendment, the workload of the Supreme Court increased steadily in the Gilded Age. There was a three year delay in the disposition of cases. Fuller had long favored the creation of intermediate courts of appeal to ease the burden of the Supreme Court, and as Chief Justice he actively supported the reform efforts that culminated in

the Evarts Act of 1891. Circuit Court duties also claimed a share of Fuller's time. Under the Judiciary Act of 1789, Supreme Court Justices were required to hold circuit court in their respective circuits. Between 1888 and 1891, therefore, Fuller spent much of each summer presiding over trials and adjudicating largely routine matters of private law in the Fourth and Seventh Circuit Courts of Appeals. After passage of the Evarts Act, Fuller as circuit justice participated in a number of decisions rendered by the Fourth and Seventh Circuit. At the least, Fuller's experience demonstrates that active circuit court responsibilities for the Justices did not end with the Evarts Act but continued into the early twentieth century.

Fuller's most important ruling as circuit jus-

tice arose from the controversy over opening the 1893 World's Columbian Exposition in Chicago on Sundays. Congress had appropriated funds to help underwrite the costs of the fair on express condition that the exhibition not be open on Sundays. When the fair directors voted to open on that day, the federal government sought an injunction to halt such operations as a breach of the condition. Relying on traditional equitable principles, Fuller denied the injunction on the ground that there was no proof of irreparable injury to the government. Although phrased in terms of equitable relief, the decision underscores Fuller's lack of sympathy with Sunday closing laws. It can perhaps also be viewed as a step toward a new understanding about the place of religion in a changing and more diverse society.¹⁸

Other challenges, too, tested Fuller's administrative ability. For instance, he helped to orchestrate the 1897 retirement of Justice Field, whose declining health had been an increasing source of worry for the Justices. At times the varied demands of the chief justiceship almost overwhelmed Fuller. "I am so weary that I can hardly sit up," he told the Court's Reporter in May of 1890.¹⁹ Yet Fuller proved adept at managing the Court's internal relations, keeping harmonious relations among the Justices, representing the Court in its dealings with other branches of government, and guiding the Court toward a more active role in American life. In sum, he made a significant contribution to the modern definition of the office of Chief Justice. The record fully justifies Felix Frankfurter's later observation that "there never was a better administrator on the Court than Fuller."²⁰

Jurisprudence of the Fuller Court

We should now turn to assess the jurisprudence of the Fuller era, and seek to uncover the premises that informed the exercise of judicial power. The constitutional foundation of the Fuller Court was the preservation of individual liberty. "The utmost possible liberty to the individual, and the fullest possible protection to him and his property," Justice Brewer asserted in 1892, "is both the limitation and duty of government."²¹ In contrast to modern liberalism, however, Fuller and his colleagues defined free-

dom largely in economic terms. To nineteenth century Americans, the acquisition and enjoyment of property was among the most vital of liberty interests. Moreover, constitutional thought emphasized that security of private property was a vital prerequisite for the exercise of other individual liberties, such as free speech. "It should never be forgotten," Justice Field observed in 1890, "that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain."²² The Fuller Court aggressively defended private property and contractual freedom as a means to limit the reach of government and thereby safeguard liberty. Hence, the hallmark of Fuller era jurisprudence was an embrace of economic liberty, not some dark scheme to serve corporate interests. Even a critic of Fuller's constitutional outlook conceded: "Liberty was the guiding ideal of the Fuller Court, the notion that gave unity and coherence to its many endeavors."²³

In championing economic liberty, the Fuller Court drew upon the time-honored tradition of property-conscious constitutionalism. Property ownership and political liberty had long been linked in Anglo-American legal thought.²⁴ Historians have given inadequate attention to the close connection between the Fuller years and the constitutional principles espoused by the Framers of the Constitution. As Morton J. Horowitz noted, "by seeking to stigmatize the *Lochner* era, Progressive historians lost sight of the basic continuity in American constitutional history before the New Deal."²⁵ Jennifer Nedelsky has similarly observed that "the notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth century advocates of *laissez-faire*."²⁶ Viewed in historical context, the work of the Fuller Court could best be understood as a fulfillment of the property-conscious attitudes that shaped the constitution-making process in 1787.

The Fuller Court's solicitude for the rights of property owners stemmed from utilitarian grounds as well as philosophical imperatives.

A steady flow of investment capital was vital to finance economic development. Associating security of private property with industrial growth, the Court therefore persistently labored to protect capital formation. In the railroad rate cases, for instance, the Justices stressed the importance of private capital, and expressed concern that stringent state controls would produce such an insufficient return as to discourage investment.²⁷ Excessive regulation would consequently not only destroy the value of existing property but inhibit new investment essential for development. Justice Peckham, writing for the Court in the landmark case of *Ex Parte Young*, pointedly observed:

Over eleven thousand millions of dollars. . . are invested in railroad property, owned by many hundreds of people who are scattered over the whole country from ocean to ocean, and they are entitled to equal protection from the laws and from the courts, with the owners of all other kinds of property. . . .²⁸

This concern with capital formation also played a role in the *Pollock* decisions invalidating the 1894 income tax. Critics pictured the controversial levy as an attack on wealth, a view shared by Justice Field when he declared: "The present assault on capital is but the beginning."²⁹ As historian Morton Keller has perceptively noted with respect to late nineteenth century judicial behavior: "an old concern for private rights and individual freedom coexisted with the desire to foster the development of a national economy."³⁰

Although prepared to afford heightened protection to the rights of property owners, the Fuller Court's pattern of decision-making was complex and took account of other constitutional values. Foremost among these was a strong commitment to the federal system. Consistent with its dedication to a limited federal government, Fuller and his colleagues sought to preserve a large measure of autonomy for the states. Accordingly, Court tended to defer to state governance of criminal justice, race relations, and public morals.³¹

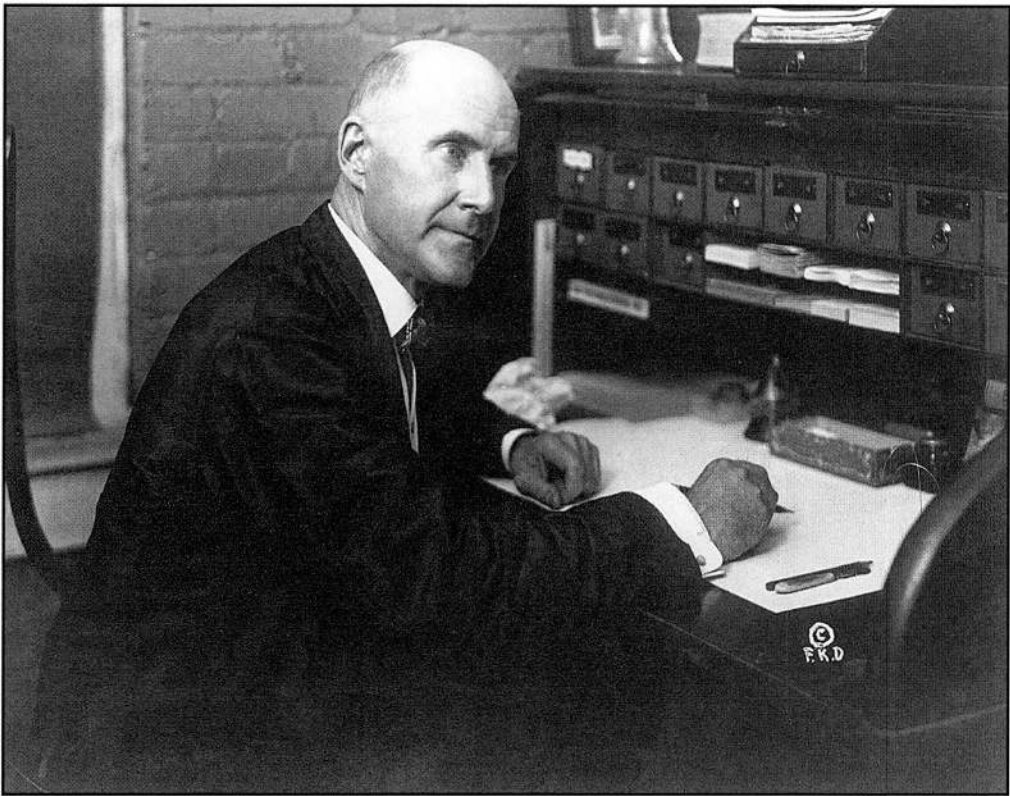
Even in the economic area, the Fuller Court saw an important role for the states. Not only

were most state business regulations sustained, but the Justices strived to maintain a balance between federal and state authority over the economy. This is perhaps best illustrated by Fuller's opinion in *E. C. Knight Co.*, which distinguished between commerce and manufacturing and restricted the reach of the Sherman Act. Fuller explained:

Slight reflection will show that if the national power extends to all contracts and combinations of manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.³²

To Fuller's mind, the prospect of plenary federal control over commerce threatened the place of the states in the constitutional system, and was more menacing than the supposed danger of business consolidations. The states' rights theme was also prominent in *Pollock*. Fuller viewed the Direct Tax Clause as one of the compromises at the Constitutional Convention designed to secure dual government.³³ If this "rule of protection could be frittered away," Fuller warned, "one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property."³⁴ In short, Fuller employed the Direct Tax Clause to protect the role of the states as well as individual property owners by curtailing federal taxing power.³⁵ He correctly perceived that the income tax would open the door for an expansion of federal power and a fundamental alteration of federal-state relations.

Of course, there was a degree of tension between the Fuller Court's defense of property rights and respect for state autonomy. State legislatures, acting under their police power to safeguard public health, safety, and morals, took the initiative in seeking to harness the new economic forces.³⁶ Inevitably, such exercise of state authority entrenched on the traditional prerogatives of property owners, stimulating a steady stream of legal challenges. The quandary inherent in protecting property owners



The author makes the case that the Fuller Court was in accord with the prevailing political ideology in its decisionmaking. Indeed, even the *In Re Debs* decision was greeted with approval by the public, which, apart from trade unionists, was hardly clamoring for a vast social welfare network. Pictured is Eugene Debs, the litigant in that suit, who, as president of the American Railway Union, instituted a policy of boycotting railroads that used Pullman cars. The intent was to get the Pullman company to increase its workers' pay.

while simultaneously upholding states' rights was strikingly evident in Fuller Court review of state-imposed railroad rates and state regulations that burdened interstate commerce. Although recognizing that railroads were subject to public control, the Fuller Court fashioned the fair value rule as a restraint on state rate-making authority.³⁷ Similarly, Fuller and his colleagues steadfastly championed the national market for goods. To this end, the Fuller Court closely scrutinized state laws that prevented the shipment of certain products across state lines. This commitment to free trade among the states led the Justices to wield forcefully the dormant Commerce Power to remove state obstacles to national economic life.³⁸ Indeed, to the annoyance of prohibition advocates, the Fuller Court maintained that freedom of interstate commerce encompassed the right to ship liquor into each state.³⁹

The conflicting pull of support for private property rights and a high regard for federalism also informed the Fuller Court's takings jurisprudence. During Fuller's tenure, the Supreme Court first had an opportunity to address in a systematic manner the Takings Clause and brought a new vitality to this provision. In a number of important rulings, the Justices strengthened the Takings Clause as a guarantee of individual rights against arbitrary governmental power.⁴⁰ Stressing that the Takings Clause was an integral part of the Bill of Rights, a unanimous Court in *Monongahela Navigation Company* declared that the just compensation requirement "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full

and just equivalent shall be returned to him."⁴¹ The determination of just compensation is of critical importance, however, because payment of an inadequate compensation undermines the protective function of the Takings Clause. Accordingly, in *Monongahela Navigation* the Fuller Court insisted that the ascertainment of the amount of compensation was a judicial, not a legislative, function. The Justices then ruled that compensation "must be a full and perfect equivalent for the property taken" and that the value of land should be determined by its productiveness.⁴²

Perhaps the most important contribution of the Fuller Court to takings jurisprudence was the extension of the just compensation requirement to the states. This step marked the initial acceptance of the view that the Due Process Clause of the Fourteenth Amendment made certain fundamental provisions of the Bill of Rights applicable to state and local government. In the seminal case of *Chicago, Burlington and Quincy Railroad Company v. Chicago*, the Justices held that compensation for private property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment.⁴³ The city contended that the amount of compensation to be awarded the railroad for the construction of a public street across land owned by the carrier was entirely a matter of local law and raised no federal question.

Writing for the Court, Justice John Marshall Harlan declared that the mere form of eminent domain proceedings did not satisfy due process unless provision was made for adequate compensation. "Due protection of the rights of property," he pointed out, "has been regarded as a vital principle of republican institutions."⁴⁴ The opinion rested on the premise that the right of compensation was a fundamental right inherent in free government. By virtue of *Chicago, Burlington*, the Due Process Clause operated as a just compensation requirement imposed on the states.

While moving to establish a vigorous takings jurisprudence, Fuller and his colleagues sought to strike a balance between national constitutional norms and state autonomy. This was particularly evident with respect to the "public use" requirement for the exercise of emi-

nent domain. The Justices generally deferred to state decisions as to what should be considered public use. Consequently, the Court did not treat the public use requirement as a meaningful restraint on the use of eminent domain. In a line of cases, for instance, the Fuller Court sustained the acquisition of private property for purposes of irrigation or mining, even if the direct benefit was limited to a handful of individuals.⁴⁵

Place in History

From the foundation of the United States, economic liberty was treated as an essential element of constitutionalism. Indeed, federal courts had long afforded protection to the property rights of individuals.⁴⁶ What, then, accounts for the unique place of the Fuller era in Supreme Court history? The answer that emerges is that Fuller and his colleagues enforced entrepreneurial freedom with heightened vigor and daring. To this end, they strengthened substantive due process, crafted the liberty of contract doctrine, animated takings jurisprudence, and aggressively reviewed state and federal economic legislation.

Not surprisingly, this burst of judicial activism aroused opposition. Populists, Progressives, and historians who reflect their attitudes, have disparaged the work of the Fuller Court and maintained that any invocation of liberty was simply a cover for favoritism to business interests.⁴⁷ Adopting a conspiratorial tone, critics alleged that the Justices were thwarting popular will. Since this dark legend has colored historical accounts of the Fuller Court, it seems appropriate to consider various factors that buttress alternative evaluations. I wish to develop three points that may facilitate a better understanding of Fuller era jurisprudence.

In the first place, one should view the work of the Fuller Court in broad perspective. It bears emphasis that the Supreme Court under Fuller upheld far more economic regulations than it struck down. The Justices in fact demonstrated a considerable tolerance for legislation protecting public welfare and safety against harmful activities, as well as for measures enhancing public morals. A review of Fuller Court decisions does not support an interpretation of a

Bench firmly resolved to frustrate all legislative initiatives.⁴⁸

To be sure, the Justices carefully scrutinized both the goals allegedly served by government action as well as the reasonableness of the means employed to achieve the announced end. They declined to accept the ostensible purpose of the legislation at face value and independently weighed the evidence as to whether a regulatory measure was a valid exercise of the police power. In particular, the Fuller Court treated liberty of contract as the constitutional norm and required states to justify laws that infringed this right. Americans of the nineteenth century attached a high value to contractual freedom.⁴⁹ It was therefore an easy step for courts to conclude that the right to enter contracts and pursue lawful occupations deserved special protection by the judiciary.

This leads us to the much maligned *Lochner* decision in which the Court invoked the liberty of contract doctrine to invalidate a statute limiting the hours of work in bakeries.⁵⁰ One of the most important cases in American constitutional history, *Lochner* remains at the center of a continuing debate about the role of the judiciary.⁵¹ My present purpose is not to enter that dialogue but rather to argue that *Lochner* was well grounded in the political economy of the day. Dismissing “the New Deal myth” about *Lochner*, Bruce Ackerman has aptly observed: “The *Lochner* Court was not making it up Peckham’s decision in *Lochner* has deep intellectual roots in our most successful movements of constitutional politics.”⁵² Indeed, revisionist scholars have persuasively argued that *Lochner* vindicated economic liberty and has been unjustly castigated.⁵³ But whether one accepts that view or not, *Lochner* was not a typical case on which to build generalizations about the Fuller Court. In fact, Fuller and his colleagues rarely applied the liberty of contract doctrine.⁵⁴

My second point is that the Fuller Court operated within the contours of dominant public opinion. Put another way, Fuller and his colleagues championed values broadly shared by turn-of-the-century Americans. As Robert Higgs has pointed out, most Americans in the 1890s were dedicated to limited government, private property, and contractual

freedom.⁵⁵ President Cleveland, Fuller’s friend, gave a classic formulation to this sentiment in 1887: “. . . the lesson should be constantly enforced that though the people support the Government, the Government should not support the people.”⁵⁶ That the Fuller Court was in accord with the prevailing political ideology was made clear by the presidential election of 1896. William Jennings Bryant assailed the Fuller Court, urged wealth redistribution through an income tax, and called for increased governmental intervention in the economy.⁵⁷ Americans decisively rejected this Populist program in 1896 and again in 1900. It is entirely fanciful to posit that the general public in Fuller’s day was yearning for big government and vast social welfare schemes.

A study of the popular reaction to leading decisions of the Fuller Court reinforces this conclusion. Aside from trade unionists, *Debs* was well received by most segments of public opinion.⁵⁸ The *Pollock* rulings surely aroused hostility in some quarters, but the Supreme Court did not lack for defenders. The *Washington Post*, for instance, proclaimed: “The income tax is dead. It is a case of Hallelujah.”⁵⁹ As discussed above, public attitudes with respect to an income tax were directly tested in the presidential election of 1896. The outcome of that canvass seemingly ratified the *Pollock* decisions and in effect closed the door on an income levy for nearly twenty years.⁶⁰ One noted historian has concluded that *Pollock* “may not have been too far from the actual desires of the public.”⁶¹ Initial reaction to the *Lochner* ruling was subdued, and only later was it taken up as a *cause celebre* by Progressives.⁶² In *Plessy v. Ferguson*, the Supreme Court placed its seal of approval on the emerging pattern of racial segregation in the South. Sadly, the outcome of *Plessy* was congruent with the racist assumptions that permeated popular and scholarly thought in the late nineteenth century. Because the decision embodied widely shared attitudes, it was not a source of contemporary controversy.⁶³

In short, the Fuller Court, despite its activist bent, generally mirrored the attitudes of American society as a whole. As one scholar has observed, “*Lochner* era jurists realized the importance of public opinion in the evolution

of constitutional law. In propounding laissez-faire constitutionalism, they believed public opinion was on their side."⁶⁴

Thirdly, historians would do well to look with a skeptical eye at the Progressive legislative program. Too often the topic of property rights at the turn of the century has been presented within the simplistic context of a conflict between the public interest and a judiciary dedicated to big business. But it unfairly loads the historical deck to presume the benign purpose and effect of so-called reform legislation. The actual picture is much less tidy. There is room to doubt the efficacy of many of the regulations introduced by the Progressives. The Progressive faith in management of the economy by experts along scientific lines seems naive and almost quaint to modern eyes. Historian Herbert Hovenkamp has aptly observed: "Government regulation proved to be one of the great embarrassments of Progressive legal thought."⁶⁵ Certainly, Progressive era legislation proved no panacea and arguably created

additional problems.⁶⁶ Although couched in terms of general benefit, much of the regulatory legislation was enacted at the behest of special interest groups. In fact, the Fuller Court's skepticism about regulatory solutions and dedication to economic liberty may well have promoted the long-term public interest.

Fuller's Legacy

This call for a reconsideration of Melville W. Fuller does not suggest uncritical celebration. Time has erased many of the achievements of the Fuller Court. We as a nation have travelled far from a constitutional order based on the principles of limited central government, states' rights, and respect for individual property ownership. On the contrary, judicial and scholarly opinion has embraced a greatly expanded role for government in American life. Property rights, the cornerstone of Fuller's libertarian jurisprudence, were seen as a barrier to establishing governmental authority over eco-



Chief Justice Fuller (bottom, center) was especially close to Justices David J. Brewer (bottom, second from right) and Rufus W. Peckham (top, second from left). Fuller also formed a personal bond with Oliver Wendell Holmes, Jr., and, indeed, Holmes (top, left) was one of the Justices most in accord with Fuller in deciding cases during their period of joint service.

conomic decisionmaking. Consequently, since the New Deal period the claims of property owners have been often ignored or belittled, in marked contrast to judicial solicitude for an expanding array of noneconomic rights. Further, an egalitarian emphasis on the plight of outsiders gradually replaced the Fuller Court's dedication to economic liberty as the principal constitutional value. One might well be tempted to dismiss the Fuller Court as a relic of another day.

Absent a sea change in attitudes toward government, we are unlikely to witness a full-scale revival of Fuller's constitutional philosophy. Nonetheless, I contend that Fuller's tenure as Chief left a lasting imprint on American law and society. Fuller and his colleagues were more receptive to the new realities of American economic life than many of their critics, whose values were often rooted in a pre-industrial world. They envisioned a future based on capitalist enterprise and sought, in the main, to encourage the new industrial order by safeguarding investment capital and national markets. In so doing, the Fuller Court was swimming with the currents of history. It is hardly news that large-scale corporate enterprise has become a permanent feature of American life. Moreover, many Americans remain skeptical about the virtues of the regulatory state. Current deregulation and tax-cutting initiatives reflect continuing interest in free-market ordering. Recently, the Supreme Court has gingerly reaffirmed the notion that the federal government does not possess plenary lawmaking authority.⁶⁷ In short, the jurisprudence of the Fuller Court was a better forecast of the future than historians have recognized.

Even more striking has been the return of property rights to the constitutional agenda. In language reminiscent of the Fuller era, jurists and scholars have recently joined in a lively and far-ranging debate over the association between property ownership and a free society.⁶⁸ Indeed, many of the issues addressed by the Fuller Court have reemerged as part of the constitutional dialogue.⁶⁹ Fuller, who, with the Framers of the Constitution, believed that property and liberty were interdependent, would be right at home.

Endnotes

¹ Much of the material for this article has been drawn from my book, *The Chief Justiceship of Melville W. Fuller, 1888-1910* (Columbia, S.C.: University of South Carolina Press, 1995). I am grateful to Jon W. Bruce, Barry Friedman, Howard A. Hood, and Nicholas Zeppos for valuable comments.

² Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (New York: Macmillan Publishing, 1993), 3.

³ *Id.*, 389-391; Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993), 45-67.

⁴ See generally Richard Hofstadter, *The Progressive Historians* (New York: Alfred A. Knopf, 1968).

⁵ E.g., Michael Les Benedict: "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293 (1985); Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," 61 *Journal of American History* 970 (1975); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993).

⁶ *Harper's Weekly*, May 12, 1888, 340.

⁷ See Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism"; Gillman, *The Constitution Besieged*, 33-60; David M. Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism* (New York: Greenwood Press, 1990), 137-141.

⁸ *Dial*, vol. I (1880), 103.

⁹ Ely, *The Chief Justiceship of Melville W. Fuller*, 6-24.

¹⁰ "Correspondence of President Cleveland to Melville W. Fuller," 3 *American Scholar* 245 (1934).

¹¹ Fuller to Cleveland, January 2, 1893, *Id.* at 248.

¹² Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence, KS: University Press of Kansas, 1997), 260.

¹³ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 315-318.

¹⁴ Charles Warren, *The Supreme Court in United States History*, rev. ed. (Boston: Little, Brown, 1926), vol. 2, 721.

¹⁵ As quoted in Willard L. King, *Melville Weston Fuller: Chief Justice of the United States, 1888-1910* (New York: Macmillan, 1950, reprint Chicago: University of Chicago Press, 1967), 334.

¹⁶ *Id.*, 339.

¹⁷ Felix Frankfurter, "Chief Justices I Have Known," 39 *Virginia Law Review* 883, 889 (1953) (observing that Fuller was "not an opinion writer whom you read for literary enjoyment").

¹⁸ Ely, *The Chief Justiceship of Melville W. Fuller*, 45-47.

¹⁹ As quoted in King, *Melville Weston Fuller*, 149.

- ²⁰Felix Frankfurter, "Chief Justices I Have Known," 39 *Virginia Law Review* 883, 890 (1953).
- ²¹*Budd v. New York*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).
- ²²Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, reprinted in 134 U.S. 729, 745.
- ²³Fiss, **Troubled Beginnings of the Modern State**, 389.
- ²⁴See generally, James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights**, 2nd ed. (New York: Oxford University Press, 1998).
- ²⁵Morton J. Horwitz, **The Transformation of American Law, 1870-1960** (New York: Oxford University Press, 1992), 7. See also Gillman, **The Constitution Besieged**, 199.
- ²⁶Jennifer Nedelsky, **Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy** (Chicago: University of Chicago Press, 1990), 228.
- ²⁷E.g., *Reagan v. Farmers' Loan and Trust Co.*, 362, 412, 410 (1894).
- ²⁸*Ex Parte Young*, 209 U.S. 123, 165 (1908).
- ²⁹*Pollock v. Farmers' Loan and Trust Company*, 157 U.S. 429, 607 (1895) (Field, J., concurring).
- ³⁰Morton Keller, **Affairs of State: Public Life in Late Nineteenth Century America** (Cambridge, Mass.: Harvard University Press, 1977), 370.
- ³¹Ely, **The Chief Justiceship of Melville W. Fuller**, 150-171.
- ³²*United States v. E.C. Knight Company*, 156 U.S. 1, 16 (1895).
- ³³Article 1, section 9 of the Constitution provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."
- ³⁴*Pollock v. Farmers' Loan and Trust Company*, 157 U.S. 429, 583 (1895).
- ³⁵Robert Stanley, **Dimensions of Law in the Service of Order: Origins of the Federal Income Tax, 1861-1913** (New York: Oxford University Press, 1993), 156-165 (discussing states' rights component of Fuller's opinions). The income tax was vulnerable on another point as well. A levy on incomes breached the widely accepted constitutional norm that taxes should be equal and uniform. Horwitz, **The Transformation of American Law**, 20-27. For Fuller's role in the *Pollock* cases, see Ely, **The Chief Justiceship of Melville W. Fuller**, 118-123.
- ³⁶Kermit L. Hall, **The Magic Mirror: Law in American History** (New York: Oxford University Press, 1989), 197-202.
- ³⁷See generally James W. Ely, Jr., "The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota* and Constitutional Limits on State Regulations," 12 *Great Plains Quarterly* 121 (1992); Richard C. Cortner, **The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment** (Westport, CT: Greenwood Press, 1993).
- ³⁸Ely, **The Chief Justiceship of Melville W. Fuller**, 140-148.
- ³⁹Richard F. Hamm, **Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920** (Chapel Hill: University of North Carolina Press, 1995), 68-70, 88-91, 176-181.
- ⁴⁰James W. Ely, Jr., "The Fuller Court and Takings Jurisprudence," 1996 *Journal of Supreme Court History*, vol. II, 120.
- ⁴¹*Monongahela Navigation Company v. United States*, 148 U.S. 312, 325 (1893).
- ⁴²*Id.*, at 326.
- ⁴³*Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897).
- ⁴⁴*Id.*, at 235-236.
- ⁴⁵Ely, "The Fuller Court and Takings Jurisprudence," 127-129.
- ⁴⁶See Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence, KS: University Press of Kansas, 1996), 72-110 (analyzing the key place of contract and property rights in Marshall's jurisprudence).
- ⁴⁷E.g., Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993), 174-202; Russell W. Galloway, **Justice for All? The Rich and Poor in Supreme Court History, 1790-1990** (Durham, NC: Carolina Academic Press, 1991), 77-89; Arnold M. Paul, **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895** (Ithaca, NY: Cornell University Press, 1960); Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921," 5 *Law and History Review* 249, 250-252 (1987).
- ⁴⁸Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," 1976 *Supreme Court Review* 135, 140-143. See also Michael J. Phillips, "How Many Times Was *Lochner*-Era Substantive Due Process Effective?," 48 *Mercer Law Review* 1049 (1997).
- ⁴⁹James Willard Hurst, **Law and the Conditions of Freedom in the Nineteenth-Century United States** (Madison: University of Wisconsin Press, 1956), 10.
- ⁵⁰*Lochner v. New York*, 198 U.S. 45 (1905). See generally Paul Kens, **Power and Reform Politics: The Anatomy of *Lochner v. New York*** (Lawrence, KS: University Press of Kansas, 1990).
- ⁵¹E.g., Cass R. Sunstein, "'Lochner's Legacy,'" 87 *Columbia Law Review* 873 (1987); Mary Cornelia Porter, "*Lochner* and Company: Revisionism Revisited," in Ellen Frankel Paul and Howard Dickman, eds., **Liberty, Property, and Government: Constitutional Interpretation Before the New Deal** (Albany: State University of New York Press, 1989), 11-38.
- ⁵²Bruce Ackerman, "Levels of Generality in Constitutional Interpretation," 59 *University of Chicago Law Review*, 317, 339-340 (1992).
- ⁵³E.g., Bernard H. Siegan, "'Rehabilitating *Lochner*,'" 22 *San Diego Law Review* 453 (1985).
- ⁵⁴See Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook 1983 Supreme Court Historical Society* 53.
- ⁵⁵Robert Higgs, **Crisis and Leviathan: Critical Epi-**

sodes in the Growth of American Government (New York: Oxford University Press, 1987), 79-105.

⁵⁶ Veto Message, "Distribution of Seeds," February 16, 1887, *Congressional Record*, 49th Cong., 2nd Session, vol. 18, pt. II, 1875.

⁵⁷ Alan Furman Westin, "The Supreme Court, the Populist Movement and the Campaign of 1896," 15 *Journal of Politics* 3, 30-39 (1953).

⁵⁸ See William G. Ross, **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937** (Princeton, N.J.: Princeton University Press, 1994), 28, (noting that the "reaction against the decision in *Debs* was primarily confined to the ranks of trade unionists").

⁵⁹ "The Last of the Income Tax," *Washington Post*, May 21, 1895. Indeed, the *Post* opined that "the American people will hold in reverent and grateful memory forever" the names of Fuller and the other members of the majority.

⁶⁰ The Sixteenth Amendment, authorizing an income tax, was not ratified until 1913. W. Elliot Brownlee, **Federal Taxation in America: A Short History** (Cambridge: Cambridge University Press, 1996), 41-44; Morton Keller, **Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933** (Cambridge, MA: Harvard University Press, 1990) 215-217.

⁶¹ Loren P. Beth, **The Development of the American Constitution, 1877-1917** (New York: Harper & Row, 1971), 42.

⁶² Kens, **Judicial Power and Reform Politics**, 128-129.

⁶³ Charles A. Lofgren, **The Plessy Case: A Legal-Historical Interpretation** (New York: Oxford University Press, 1987), 196-198 (noting that *Plessy* "embodied conventional wisdom"). See also James W. Ely, Jr., "The

South, the Supreme Court, and Race Relations, 1890-1965," in Larry J. Griffin and Don H. Doyle, eds., **The South as an American Problem** (University of Georgia Press, 1995), 126, 127-133 (discussing intellectual climate and political circumstances which fueled the segregationist tide).

⁶⁴ Stephen A. Siegel, "Lochner Era Jurisprudence and the American Constitutional Tradition," 70 *North Carolina Law Review*, 1, 108 (1991).

⁶⁵ Herbert Hovenkamp, "The Mind and Heart of Progressive Legal Thought," 81 *Iowa Law Review* 149, 157 (1995).

⁶⁶ It has been argued, for example, that Progressive era railroad legislation was ill-considered and severely hurt the rail industry. Albro Martin, **Enterprise Denied: Origins of the Decline of American Railroads, 1897-1917** (New York: Columbia University Press, 1971). Similarly, historians have become increasingly skeptical about the efficacy of Progressive measures to curb trusts, and the Progressive confidence in scientific expertise to resolve social and economic problems. Higgs, **Crisis and Leviathan**, 106-122.

⁶⁷ *United States v. Lopez*, 514 U.S.549 (1995); *Printz v. United States*, 117 S.Ct. 2365 (1997).

⁶⁸ E.g., Richard A. Epstein, **Takings: Private Property and the Power of Eminent Domain** (Cambridge, MA, Harvard University Press, 1985); Bernard H. Siegan, **Economic Liberties and the Constitution** (Chicago: University of Chicago Press, 1980); Carol M. Rose, "Property as the Keystone Right?," 71 *Notre Dame Law Review* 329-366 (1996).

⁶⁹ Fiss, **Troubled Beginnings of the Modern State**, 394-395 (arguing that the Rehnquist Court, like the Fuller Court, assigns a higher priority to liberty than equality, and views liberty in terms of limited government).

Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft

Robert Post

William Howard Taft holds the significant distinction of being the only person in the history of the nation to preside over two branches of the federal government. He was President from 1909 to 1913, and he was Chief Justice of the United States from 1921 to 1930.¹

This achievement ought to have secured Taft a prominent position within the history of the Court. Yet Taft has drifted into almost complete professional eclipse. Although familiar to specialists in legal history, Taft is no more known to the average lawyer or law student than are Chief Justices White, Fuller, or Waite.

Taft's contemporary obscurity is remarkable. When Taft died on March 8, 1930, the nation convulsed in an overpowering and spontaneous wave of mourning. He was widely characterized as "the most beloved of Americans,"² and hailed by observers like Augustus Hand, then a federal district Judge in New York, as "the greatest figure as Chief Justice since John Marshall."³ Even Felix Frankfurter, certainly no admirer of Taft's jurisprudence, was moved to

observe that "Few public men have evoked such spontaneous and warm affection from the public as has Taft. . . . He is a dear man—a true human."⁴

This was a striking tribute to a man who had only eighteen years before been crushingly repudiated. Caught between Theodore Roosevelt's New Nationalism and Woodrow Wilson's New Freedom, Taft was blasted as a reactionary, and managed to obtain only a humiliating eight electoral votes in his 1912 campaign for reelection to the presidency. Taft took defeat graciously, however, and he quickly became, in the famous phrase of journalist George Harvey, "our worst licked and best loved President."⁵ Although Taft had been known as the father of the labor injunction since his days as an Ohio state court judge, he mollified organized labor during World War I by assuming the joint chairmanship (with Frank P. Walsh) of the National War Labor Board. The Board shocked industrial leaders not only by explicitly recognizing the right of American workers



The administrative responsibilities of the chief justiceship became apparent to William H. Taft quickly after taking the oath of office on July 12. Two weeks after being sworn in, Taft learned that Deputy Clerk Henry McKenney had passed away, leaving no one authorized to issue official papers because the Clerk of Court, James D. Maher (pictured), had died on June 3. Told it was unnecessary to consult with the Associate Justices on summer recess, Taft unilaterally decided to appoint Assistant Clerk William R. Stansbury to fill the position.

to unionize, but also by pledging official support for the right of employees to receive a “living wage.”⁶ Taft also transcended partisan politics by opposing the leaders of his own party in courageously and publicly championing Woodrow Wilson’s campaign to join the League of Nations. As a result, Harding’s nomination of Taft for the Chief Justiceship in July 1921 was greeted with “almost unanimous approval.”⁷ It was, as the *The New York Times* remarked, “a ‘come-back’ unprecedented in American political annals.”⁸

We may ask, then, how this man, who, as Walter Lippmann’s *New York World* observed, retired “as Chief Justice with the enduring affection of his countrymen,” with a “career” that “has no equal in our history,”⁹ could have slipped so rapidly into such deep professional oblivion. The short answer, I think, may be found in *Time* magazine’s pithy assessment of

Taft’s resignation: “Outstanding decisions: none.”¹⁰

It is not, of course, that Taft wrote few opinions. Indeed, from October 1921 through July 1929, Taft authored 249 opinions for the Court. The prodigious nature of this accomplishment can be seen by contrasting Taft’s output with that of the four other Justices who served continuously during those eight Terms: Holmes wrote 205 opinions for the Court, Brandeis 193, McReynolds 172, and Van Devanter only 94.¹¹ It is rather that Taft’s opinions were, as Holmes put it, “rather spongy.”¹² Although Taft authored a good many opinions that were, within the context of his time, quite important, his writing was seldom crisp or eloquent.¹³ Taft’s opinions were often suffused with judicious common sense, which perversely blurred the expression of any sharpened and therefore memorable jurisprudential vision.¹⁴

Thus, at the time of Taft's death, even his supporters recognized that "His name will not be . . . connected with any outstanding decisions—as are the names, for instance, of Chief Justice Marshall and Chief Justice Taney."¹⁵ Instead, Taft's unique achievements were said to lie in "his success as an administrator of the complicated functions and activities of the [Supreme Court] . . . and his role as a supervisor of the Federal courts throughout the country."¹⁶ His "lasting monument" was that he "laid the foundation for a reorganization of the judicial administration in this country."¹⁷ Friend and foe alike acknowledged that Taft "simplified and expedited the processes of the [Supreme] court and greatly improved the administration of justice in the Federal courts."¹⁸ As Charles Evans Hughes accurately observed, Taft's career "fittingly culminated in his work as Chief Justice," because the "efficient administration of justice was, after all, the dominant interest of his public life."¹⁹

Hughes' observation suggests an important distinction between Associate Justices and a Chief Justice. The primary task of Associate Justices is to decide cases and deliver opinions, whereas the work of the Chief Justice also includes administrative responsibilities for the judicial branch of the federal government. Taft's current obscurity strongly indicates that enduring professional reputation depends upon the former task, but not the latter. Indeed, when Frankfurter praised Taft as a great "law reformer" and accorded him "a place in history . . . next to Oliver Ellsworth, who originally devised the judicial system,"²⁰ he unwittingly revealed what a very small place that is.

It is, however, a place whose corners I shall attempt to illuminate. This paper shall assess Taft's contributions as Chief Justice, rather than his general jurisprudence as expressed through his opinions. It is my hope that by so doing an important but largely overlooked aspect of our judicial history may be excavated. In particular, I shall examine both the birth of the effort to subject federal courts to a regime of efficient judicial management, and the simultaneous origin of important tensions between this regime and traditional American norms of judicial disinterest.

I

The distinct characteristics of the office of Chief Justice were forcibly impressed upon Taft almost immediately after his appointment. Harding nominated Taft on June 30, 1921, and the Senate confirmed Taft on that same day. At the time Taft was in Montreal, sitting as an arbitrator to determine the value of the Grand Trunk Railway Company, which was being nationalized by the Canadian government.²¹ Taft journeyed to Washington to take the oath of office at the Department of Justice on July 12. Returning to Canada to his summer home in Murray Bay, Quebec, he was telegraphed on July 30 by Justice Joseph McKenna, the Senior Associate Justice, that Deputy Clerk Henry McKenney had passed away.²²

This posed a serious difficulty for the Court, because its Clerk, James D. Maher, had died on June 3. At the time, federal law provided that the Clerk could only be appointed by the Court.²³ If the Clerk died, the Deputy Clerk could "perform the duties of the clerk in his name until a clerk is appointed and qualified."²⁴ With the death of Deputy Clerk McKenney, however, the Clerk's office was, as Assistant Clerk William R. Stansbury telegraphed Taft, "now without an official head and no one authorized to issue official papers."²⁵ Yet a Court could not be gathered to appoint a new Clerk.

Taft promptly returned to Washington to meet with McKenna. Telegraphic consultation with those Associate Justices who could be contacted proved unhelpful, which, as Taft wrote, "only shows what McKenna assured me that the other members of the Court expect me to attend to the executive business of the Court and not bother them." McKenna impressed the point on his new Chief: "McKenna said I must realize that the Chief Justiceship was an office distinct from that of the Associates in executive control and was intended to be and all of the Associates recognized it, that in judicial decisions all were equal but in management I must act and they would all stand by if ever question was made."²⁶ Taft boldly and promptly resolved "to do something without statutory authority"²⁷ and appoint Stansbury "de facto deputy clerk,"²⁸ exacting "a common

law bond from him to protect everybody.”²⁹ He had learned a valuable lesson about the distinction and prerogatives of the Chief Justiceship.

Chief Justices are typically evaluated as to how well they employ these prerogatives to administer the day-to-day functioning of the Court. They are scrutinized for their handling of small emergencies, like the death of Deputy Clerk McKenney, and for their ability to dispose efficiently of routinized institutional necessities like assigning opinions or moderating the Court’s Conferences. Measured by these standards, it is clear that Taft was a highly successful Chief Justice. He was ruthlessly efficient, moving heaven and earth to force the Court to diminish its embarrassingly large backlog of cases. Louis D. Brandeis remarked to Felix Frankfurter that Taft, “like the Steel Corporation, is attaining [all] time production records.”³⁰ In the popular press it was said of Taft that “The spirit of speed and efficiency lurking in the corpulent form of an ex-President of the United States has entered the Court and broken up its old lethargy.”³¹

Within the Court the dominant image of Taft was not that of a disciplinarian, but rather of a man who could dispose “of executive details . . . easily” and “get through them without friction.”³² “The new Chief Justice makes the work very pleasant,” Holmes said. “He is always good natured and carries things along with a smile or a laugh. (It makes a devil of a difference if the C.J.’s temperament diminishes friction.) He is very open to suggestions and appreciates the labors of others. I rather think the other JJ. are as pleased as I am.”³³ Brandeis concurred in this positive assessment:

On the personal side the present C.J. has admirable qualities, a great improvement on the late C.J.; he smoothes out difficulties instead of making them. It’s astonishing he should have been such a horribly bad President, for he has considerable executive ability. The fact, probably, is that he cared about law all the time and nothing else. He has an excellent memory, makes quick decisions on questions of administration that arise and if

a large output were the chief desideratum, he would be very good.³⁴

Taft’s genial and winning personality was particularly useful in managing the Court’s potentially contentious conferences. Holmes said that “The meetings are perhaps pleasanter than I ever have known them — thanks largely to the C.J.”³⁵ The Justices also appreciated how “fairly” Taft distributed case assignments.³⁶ Indeed, Harlan Fiske Stone later remarked that “there was never a Chief Justice as generous to his brethren in the assignment of cases.”³⁷ Most important, however, Taft exercised a natural leadership within the Court.³⁸ As Augustus Hand wrote to him:

You have a certain leadership in the Court that is enormously important and I don’t believe has ever existed since the times of Marshall himself. Indeed I think Brandeis, in the left wing, greatly appreciates this and knows how much it means to have a C.J. whom the Court will in certain respects follow and at any rate will “rally around.”³⁹

Supervising the ongoing institutional routines of the Court in this manner has been an essential task of every Chief Justice since Marshall. Some Chief Justices, like Taft, have fulfilled these challenges more successfully than others, but all Chief Justices have understood and accepted these obligations of their office. Taft’s unique accomplishment, however, is that he managed to expand the very concept of the Chief Justiceship, so that his successors have also in part been judged by their responses to responsibilities not even perceptible before Taft. “It is certain,” Robert Steamer writes in his study of the Chief Justiceship, “that the office was never quite the same after he left it.”⁴⁰ My concern in this paper will be with the question of how Taft transformed the role of Chief Justice, and my contention will be that he did so by endowing it with a distinctive managerial outlook, one that he had acquired as Chief Executive of the nation.

This claim may sound strange, given Taft’s notorious inadequacies as President. Taft readily admitted that as President he felt “just a

bit like a fish out of water,"⁴¹ and that he was "not fond of politics."⁴² It was said of Taft that as President he constituted "a very large body completely surrounded by politicians."⁴³ Indeed, Taft's reputation as a politician was so very bad that he could effectively mock Senator William Borah's denunciation of Taft's own nomination as Harding's effort "to take a politician . . . and put him on the Supreme Bench in the interest of party politics":⁴⁴

I seem to have heard a suggestion, by way of friendly criticism, when my name was up for the Chief Justiceship, that a politician was being put upon the bench. All I have to say is, that that was news to me (renewed and increasing laughter), and I think it was news to the people.⁴⁵

Yet while Taft may have been, as William Allen White trenchantly put it, "innocent of politics,"⁴⁶ he was always a capable administrator, determined to improve the efficient management of the executive branch.⁴⁷ And it is this perspective that Taft brought with him into the Chief Justiceship. Most specifically, Taft viewed the federal judiciary *as a coherent branch of government to be managed*, and he viewed the Chief Justiceship as the source of that management. This perspective was fundamentally new, and its implications were profound.

In the next section, I should like to unfold some of the most salient consequences of this perspective for Taft's reworking of the position of the Chief Justiceship in its relationship to the federal judiciary and to the Congress.

II

The most obvious expression of Taft's vision of the federal judiciary was the Act of September 14, 1922,⁴⁸ which, as Felix Frankfurter and James Landis have accurately noted, marked "the beginning of a new chapter in the administration of the federal courts."⁴⁹ The Act not only authorized the Chief Justice to assign district court judges temporarily to sit wherever in the country the needs of the docket were greatest,⁵⁰ but it also created a

Conference of Senior Circuit Judges to "advise as to . . . any matters in respect of which the administration of justice in the courts of the United States may be improved," and in particular to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor."⁵¹ The effect of the Act, as Taft observed, was to introduce "into our judicial system . . . an executive principle to secure effective teamwork," so that "judicial force" could be deployed "economically and at the points where most needed."⁵² In Taft's view, the primary virtue of the Act was to empower the Chief Justice and the Conference of Senior Circuit Judges "temporarily to mass the force of the judiciary where the arrears are greatest."⁵³

Taft had been advocating a reform like this for years,⁵⁴ and there was little doubt among contemporaries that the ultimate shape of the statute, as well as its enactment, were "largely the result" of his "active advocacy."⁵⁵ Taft lobbied hard for the bill, effectively mobilizing his numerous contacts within Congress, and he rightly received the lion's share of the credit for the results.⁵⁶ Four aspects of the Act of September 14, 1922, require emphasis, because each embodies an outlook on the federal judicial branch that reflects the influence of Taft's experience as President.

First, and most fundamentally, the Act implied "a functional unification of the United States judiciary."⁵⁷ Just as the executive branch has always been seen as an integrated whole, directed by the President, the Act for the first time conceptualized federal judges as also integrated into a single, coherent branch of the federal government designed to attain functional objectives. Previously, as Frankfurter has observed, "federal judges throughout the country were entirely autonomous, little independent sovereigns. Every judge had his own little principality. He was the boss within his district, and his district was his only concern."⁵⁸ The Act, in contrast, "organized" the "whole judicial force . . . as a unit, with authority to send expeditions to spots needing aid."⁵⁹

This idea may seem obvious to us today,

but in 1922 it provoked great resistance. No less a judge than Henry D. Clayton (after whom the Clayton Act was named) attacked the Act as manifesting "a dictatorial power over the courts unrecognized in our jurisprudence."⁶⁰ Clayton objected to "the war idea of mobilizing judges under a supreme commander as soldiers are massed and ordered." He argued that "judges are not soldiers but servants, and the people only are the masters whom they serve."⁶¹

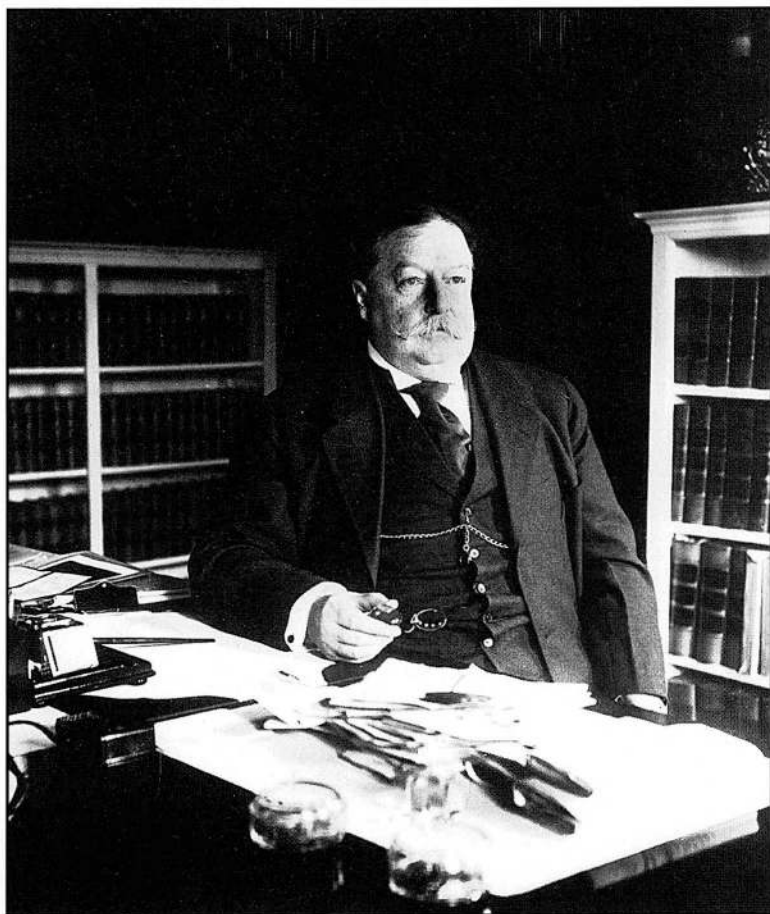
To protests like these, Taft responded with the brutal and implacable language of instrumental rationality. Although he conceded that "in the judicial work a judge does on the bench, he must be independent," Taft insisted that "in the disposition of his time and the cases he is to hear, he should be subject to a judicial council that makes him a cog in the machine and makes him work with all the others to dispose of the business which courts are organized to do."⁶² The premise that judges are "organized" to accomplish a collective function renders the

federal judiciary structurally parallel to an executive agency, which is conceptualized according to a similar logic.

Second, if judges are "cogs in a machine," there must also exist some intelligence that directs the machine. Organizations require guidance, and the functional unification of the judiciary thus implied that the judicial branch be subject to "the executive management" of "a head charged with the responsibility of the use of the judicial force at places and under conditions where judicial force is needed."⁶³ In this way the Act transformed the federal judiciary from an "entirely headless and decentralized" institution,⁶⁴ into one capable of "executive supervision."⁶⁵

Taft defended this transformation as merely a matter of "introducing into the administration of justice the ordinary business principles in successful executive work."⁶⁶ He argued that the massive increase in federal litigation required that "we must approach the problems of

In the mind of Chief Justice Taft (pictured), the Chief Justice, using the Conference of Senior Circuit Judges as a kind of cabinet, was responsible for the management of the judicial branch, just as the President was responsible for the management of the executive branch. His successor, Charles Evans Hughes, sought by contrast to decentralize federal judicial administration.



its disposition in the same way that the head of a great industrial establishment approaches the question of the manufacture of the amount that he will need, to meet the demand for the goods which he makes."⁶⁷ But in fact the necessity of executive supervision was also central to Taft's conception of the President as ultimately responsible for the "administrative control" of the executive branch.⁶⁸ In Taft's mind the Chief Justice, using the Conference of Senior Circuit Judges as a kind of cabinet, was responsible for the management of the judicial branch, just as the President was responsible for the management of the executive branch.⁶⁹

The managerial obligations that Taft imported into the office of Chief Justice were not exhausted by the operation of the Conference. Taft enthusiastically embraced a sense of generic responsibility for the over-all functioning of the federal judiciary. Exemplary are the letters Taft would write to judges who had failed to decide submitted cases for unconscionably long periods of time:

I write in the interest of the administration of justice, and for the reputation of the Federal Judiciary, that you dispose of the patent case, which you now must have had at hand and submitted to you for more than four years. . . . I write this letter with no assumption that I may exercise direct authority over you in the discharge of your duties, but as the head of the Federal Judiciary I feel that I do have the right to appeal to you, in its interest and in the interest of the public whom it is created to serve, to end this indefensible situation.⁷⁰

To accept forthrightly managerial responsibility in this way is not merely to seize the potential of executive supervision, but also to create lines of accountability. For this reason Chief Justice Hughes, when the Court in the 1930s was subject to withering political assaults, chose to diminish the exposure and vulnerability of such an aggressive managerial posture by seeking as Chief Justice to decentralize federal judicial administration.⁷¹ But Taft, in the full flush of progressive reform and personal popularity, had no such qualms.

Third, Taft knew that the management of the judicial branch would require the exercise of the deeply human virtues of leadership, inspiration, and a commitment to what Taft repeatedly called "teamwork, uniformity in action and an interest by all the judges in the work of each district."⁷² Taft viewed the Conference of Senior Circuit Judges as a means for serving these various management functions. The Conference "is a good thing," said Taft, because it "solidifies the Federal Judiciary" and "brings all the district judges within a mild disciplinary circle, and makes them feel that they are under real observation by the other judges and the country."⁷³ The Conference was also a method of gathering information about the state of the federal judiciary, of collecting both statistical and narrative data. And the Conference was a tool for "trying to come in touch with the Federal Judges of the country, so that we may feel more allegiance to a team and do more teamwork."⁷⁴ The Conference could generate the "esprit" that came from close coordination.⁷⁵

The Conference, however, was only one tool for exercising executive leadership. In fact, Taft seized the opportunity for such leadership in all his dealings with federal judges. He was always "glad to keep in touch with the District Judges," because "they are the wheel horses of our system, and I want them to know that they have the deepest sympathy in their efforts in the dispatch of business."⁷⁶ He would write to a Circuit Judge requesting "a long gossipy letter so that I may acquire intimate knowledge of the situation."⁷⁷ District Judges throughout the nation deeply appreciated this attention and care, and they wrote to Taft expressing their pleasure.⁷⁸ Learned Hand, for example, said to Taft that "It is a great comfort to know the interest that you take. To be frank, we have never felt it before your incumbency."⁷⁹ As a good executive, Taft wished "to have all the members of the Federal Judiciary realize that we are remanded to the top, and that whatever we can do here in Washington to help, we will do."⁸⁰

Fourth, the corollary of the functional unification of the federal judiciary was that the judicial branch could now articulate its ongoing and routinized requirements to the legislature, just as did the executive branch. The Con-

ference was the perfect institutional vehicle for this articulation, and Taft conceived it as enabling "the judiciary to express itself in respect of certain subjects in such a way as to be helpful to Congress."⁸¹ Taft rapidly and effectively molded the Conference into a voice for the institutional needs of the judicial branch.⁸² As he accurately reported to the Conference in 1925: "The recommendations of this Conference have a good deal of influence. I mean that they are accepted as matters for serious consideration."⁸³

Taft was unwilling, however, to regard the Conference as the exclusive voice of the judiciary.⁸⁴ He believed quite strongly that the Chief Justice was the primary national spokesman for the cause of the administration of justice, and he therefore sought to maintain an active personal presence in Congress in matters that transcended the pronouncements of the Conference.⁸⁵ In this regard Taft functioned as an independent lobbyist for a legislative agenda, much as he would have as Chief Executive.⁸⁶ It is to this aspect of Taft's conception of the chief justiceship that I would now like to turn.

III

From the very outset of his chief justiceship, Taft "thought that it was part of my duty" as the head of the federal judiciary, "to suggest needed reforms, and to become rather active in pressing them before" Congress.⁸⁷ Taft was quite aware that this was a new conception of his office. "I don't think the former Chief Justice had so much to do in the matter of legislation as I have," he wrote to his brother Horace, but "I don't object to it, because I think Chief Justices ought to take part in that."⁸⁸

Throughout his service on the Court Taft was a frequent witness before congressional committees, lobbying hard for judicial reforms. Taft's relentless determination "to keep pressing" Congress for legislation⁸⁹ began almost immediately after he assumed office. On October 5, 1921, he testified before the Senate Judiciary Committee in support of the Act of September 14, 1922. He realized that he had "violated the precedent in doing this," but he was unfazed, because "I am determined to exercise such influence as I have to help the judicial

system of the country. Precedents that keep the judges away from committees who are to help are not precedents that appeal to me."⁹⁰ By March 30, 1922, in the course of testifying before the House Judiciary Committee in favor of bills to enlarge the certiorari jurisdiction of the Supreme Court and to reform the compensation of the Court Reporter, Taft could comfortably remark that "I hate to be in the attitude of a continual beggar from Congress, but I seem to have arrived at the court just when it was necessary."⁹¹

Taft did not hesitate to draft his colleagues on the Court to assist in his lobbying efforts. In 1926, for example, he brought Justices Holmes and Brandeis with him to make the case before a Subcommittee of the House Appropriations Committee for a deficiency appropriation to enable the First Circuit to purchase an urgently needed bar library. "I wanted to bring some big guns to bear," Taft explained. "I am a constant visitor and I did not consider that I had influence enough. This is a real emergency."⁹²

The presence of Taft's political foes on congressional committees, particularly in the Senate, sometimes rendered his personal testimony counter-productive. In pressing for the legislation reforming the Supreme Court's jurisdiction, for example, Taft learned from Senator Cummins that "some of my old enemies on the [Senate Judiciary] committee rather resent my being prominent in pressing legislation. They want me to 'shinny on my own side.'"⁹³ So Taft shrewdly selected Justices Willis Van Devanter, James C. McReynolds, and George Sutherland to speak in his place.⁹⁴ Taft testified instead before the House Judiciary Committee.⁹⁵

It is clear, then, that Taft did not regard the chief justiceship as an accommodating civil servant, essentially passive although ready to provide helpful advice when requested by competent legislative authorities. Taft instead understood the position as analogous to an executive official fully authorized to conceive and "push" a legislative agenda. He realized that the responsibility of managing the judicial branch carried within it the ancillary responsibility of promoting legislative reforms that would ensure the effectiveness of such management. The logic of this position remains manifest to this day. Chief Justice William H.



When Taft received a complaint from a provincial lawyer that the government did not provide a copy of the indictment to a defendant, he took the matter up with Solicitor General William Mitchell (right). Despite Mitchell's cautions that doing so would place a financial and bureaucratic burden on the government, Taft asked Senator Albert Cummins (left), Chair of the Senate Judiciary Committee, to prepare a bill remedying the matter.

Rehnquist, for example, in a recent annual address on "the state of the judiciary" —an address whose deliberate evocation of the President's annual State of the Union address would have been inconceivable before Taft's transformation of the chief justiceship—chose to stress the proposition that the federal courts and Congress "must work together if feasible solutions are to be found to the practical problems that confront today's federal judiciary."⁹⁶

A small but telling example of the energetic and comprehensive manner in which Taft pursued this aspect of the chief justiceship may be found in the history of Public Law No. 563, which ended the practice in federal courts of charging defendants with a fee to receive copies of their own indictments.⁹⁷

In November 1925, Taft received a letter from Joseph Coursey, an unknown lawyer from South Dakota, complaining of "the failure of Federal law . . . to provide a copy of the charge to the defendant It seems to me it should be almost fundamental that a defendant be given as a matter of right a copy of the accusation against him."⁹⁸ Taft responded by asking Coursey whether the charge for the indictment was imposed "by law, or whether it rests in a local rule of practice."⁹⁹ Coursey answered that he did "not know whether the rule is one of law

or practice but I know positively that in this District we can not obtain such a copy without paying for it except in two cases: namely—if the defendant is charged with homicide or will make a pauper showing."¹⁰⁰

Taft then wrote to Solicitor General William Mitchell, asking him to find out "whether it is the practice to furnish defendants with copies of the indictment." He enclosed Coursey's letter, adding "I am rather inclined to think that he has a good case, and that the defendant should be given a copy, at the expense of the Government."¹⁰¹ Mitchell sent back a detailed, six-page letter, explaining that federal statutes currently required clerks "to charge the accused for copies of the indictments, except in cases involving capital offenses," and that courts had deemed the requirements of the Sixth Amendment satisfied "by the formality of reading the indictment to [the defendant] when he is arraigned." Mitchell went on to caution that "if clerks are directed generally to furnish copies of the indictments without charge to the accused, it would greatly increase the volume of work to be performed in the clerk's office, particularly on account of the large number of cases under the National Prohibition Act, and that the clerks' offices are now shorthanded as the result of lack of adequate appropriation."¹⁰²

Not deterred by Mitchell's warning, Taft wrote to Senator Albert Cummins, Chair of the Senate Judiciary Committee, explaining the situation and commenting that "I should think . . . that the Government ought to furnish, at its own expense, indictments to defendants."¹⁰³ Taft viewed the question as one of justice, rather than constitutional compulsion, and he dismissed the potential bureaucratic burden with the observation that clerks could easily type indictments in triplicate. Cummins agreed with Taft's assessment, and he asked Taft to "prepare a Bill relating to furnishing copies of indictments to defendants and send it to me. I will be glad to introduce it."¹⁰⁴

Taft requested that Mitchell draft a bill, which the Solicitor General did, noting that "those in charge of the appropriations for the Department of Justice have estimated that" the bill would "substantially increase the expenses of operating the offices of the clerks of the courts. . . . I have explained, however, that this Bill is not being furnished you as a Department measure, but merely as the result of a personal request for a document to supply Senator Cummins' wants."¹⁰⁵ Taft forwarded Mitchell's draft to Cummins, who agreed to "introduce the bill and have it referred to the Committee."¹⁰⁶ The result was Public Law No. 563, which became law in January 1927.

That Taft would take the time to evaluate the complaint of an unknown, unsophisticated, and provincial lawyer, that he would summon the energy and will to remedy that complaint in the face of bureaucratic opposition, that he could command the personal respect and assistance of leaders in the executive and legislative branches in this task, all reveal much about Taft's construction of the role of Chief Justice. In Taft's eyes, the chief justiceship was much closer in spirit and responsibility to the English position of Lord Chancellor, an executive official whose portfolio included the administration of justice, than to any previous American model of a federal judge.

The English model of an executive judicial official did not, however, fit easily into American circumstances. Reform in the American context often required political mobilization, which potentially conflicted with traditional American norms of judicial nonpartisanship.

Taft was keenly aware of this tension. When Taft became Chief Justice he gave up an editorial column in which he had commented regularly on current events, stating:

The degree in which a judge should separate himself from general activities as a citizen and a member of the community is not usually fixed by statutory law but by a due sense of propriety, considering the nature of his office, and by well-established custom. Certainly, in this country at least, a judge should keep out of politics and out of any diversion or avocation which may involve him in politics. It is one of those characteristic queer inconsistencies in the British judicial system, which was the forerunner of our own, that the highest judicial officer in Great Britain, the Lord Chancellor, is often very much in politics and has always been.¹⁰⁷

The passage is noteworthy because it casts a wistful glance at the office of the English Lord Chancellor at the very moment that it acknowledges distinctively American obligations of judicial disinterest.

Despite his good intentions, Taft very quickly found that he could not contain his "bursting expression."¹⁰⁸ He believed that he could reconcile his commitment to law reform with American judicial norms by speaking out only to bar associations in order to mobilize them to lobby in support of measures for the reform of the administration of justice. "One of the most important extra curriculum things that I have to do as Chief Justice," he said, is "to organize the Bench and the Bar into a united group in this country dedicated to the cause of the improvement of judicial procedure."¹⁰⁹ Elihu Root in fact commented to Taft that he was "the first Chief Justice to fully appreciate the dynamics of the Bar as an organization. If a national bar spirit can be created it will have an immense effect upon the administration of justice."¹¹⁰

Taft began his program of mobilizing the bar almost immediately upon taking office. On August 30, 1921, he spoke to the Judicial Section of the American Bar Association, seeking

support for what would later become the Act of September 14, 1922.¹¹¹ Four months later, he spoke to the Chicago Bar Association, seeking support for the Act, as well as for the simplification of federal procedure and the expansion of certiorari jurisdiction in the Supreme Court.¹¹² These speeches were criticized on the floor of the United States Senate as “different from those made by any other Chief Justice.”¹¹³ Senator William J. Harris of Georgia opined that “the judiciary is going to be injured, and the people will not have the same high respect for it if the Chief Justice and associate justices of the Supreme Court of the United States make speeches in public not in their line of duty as has been done recently.”¹¹⁴

• Taft, however, was defiant. Three days later he shot back in an address to the New York County Bar Association:

I venture to think that there are some things that a judge may speak of and may discuss in public and not use a judicial opinion for the purpose. The subject is that of law reform. From the earliest traditions of the English bench from which we get our customs, the judges of the highest courts of Great Britain have taken an interest in and a part in the formulation of legislation for bettering the administration of justice. They have written and spoken on such subjects with entire freedom and without incurring criticism. You doubtless remember that in Campbell’s Lives of the Lord Chancellors and the Chief Justices, a part of the story of each life is work done in law reform. Measures of this sort that are put through in England are



Taft prevailed on his brother, Henry W. Taft (left), to help rouse opposition to S. 3151, a bill that stripped federal district courts of both federal question jurisdiction and diversity jurisdiction. Despite being an influential member of the New York bar and a named partner at Cadwalader, Wickersham & Taft, Henry was ineffective at generating publicity in the influential New York newspapers.

usually prepared by the law officers of the government and sometimes by the Lord Chancellor himself. The judges of the Supreme Court have taken an active part in the discussion of the measures as they go through their legislative course. And why should it not be so? With their attention constantly directed toward the workings of the machinery of the administration of justice, they are at a more advantageous point of observation and if they use their opportunities, are better able to make recommendations with respect to law reform than any other class in the community.¹¹⁵

Taft never did retreat from his program of mobilizing political support for the cause of judicial reform. He understood well enough that American judges were appropriately reluctant to engage “in extra-judicial activities” because they might be cast into positions “actually or seemingly inconsistent with absolute impartiality in the discharge of . . . judicial duties.”¹¹⁶ But, explicitly invoking the precedent of the English Chancellors, Taft apparently believed that advocacy of judicial reform would not compromise his judicial impartiality because, as he said, he could “discuss” this subject “in public and not use a judicial opinion for the purpose.” As a good child of the Progressive era, Taft seemingly regarded judicial reform as purely technical and apolitical.¹¹⁷

But of course in the American context any such belief is merely naive, and so in at least two distinct ways Taft’s public advocacy sometimes threw him perilously close to violating judicial norms of disinterested neutrality. First, in America there was simply no clear line distinguishing judicial reform from partisan politics. This can perhaps best be illustrated by Taft’s opposition to S. 3151, a bill sponsored by Progressive Republican Senator George Norris of Nebraska and strongly supported by Democratic Senator Thomas Walsh of Montana, who was later selected by Franklin D. Roosevelt as Attorney General. The bill stripped federal district courts of both federal question jurisdiction and diversity jurisdiction.¹¹⁸ By a stroke of great irony, Norris, who thoroughly disliked federal courts—he had ac-

tually once proposed abolishing all federal courts except the Supreme Court¹¹⁹—was the Chair of the Senate Judiciary Committee. Remarkably, S. 3151 was reported favorably by the Senate Judiciary Committee without even a hearing.¹²⁰

Taft was appalled by what he regarded as “the remarkable effort made in the Senate by Norris and Walsh to emasculate the jurisdiction of the Federal trial courts . . . and to sneak it through without the country’s being advised about it.”¹²¹ He saw the bill as “a great attack on the administration of justice in this country,”¹²² the “most radical bill affecting the usefulness and efficacy of the Federal Judiciary that I remember ever to have heard suggested.”¹²³ Taft threw himself into the task of “trying to save the life of the Federal Judiciary.”¹²⁴

It quickly became apparent, however, that Taft’s opposition to S. 3151 could not be confined to the nonpartisan expression of expertise. Thus when Taft wrote “to sound an alarm on the subject” to his friend Casper Yost, editor of the influential *St. Louis Globe-Democrat*, he cautioned that “I am so situated that I can not take a political part, but . . . I invoke your influence in maintaining the protective power which citizens may secure from the Federal Judiciary in defense of their rights.”¹²⁵ Yost responded by publishing a lively editorial.¹²⁶

That Taft thoroughly understood and was willing to exploit the explosive politics of S. 3151 is evident from a letter he sent to his brother, Henry W. Taft, an influential member of the New York Bar,¹²⁷ urging him to begin a public campaign against the bill:

Now my own judgment about this bill is that if Norris tries to get it through, and is supported by the Democrats, it will prove to be dynamite in the next campaign. It will rouse every negro in the United States, and they cast a great many votes now in the large cities since they have moved north, and when it becomes known to them that they can not resort to the local Federal courts, they will certainly be convinced, as they ought to be, that they are suffering a practical deprivation of their Federal



Although Taft tried to keep out of the political debate over bill S. 3151, Senator Royal Copeland of New York (above) told his colleagues on the Senate floor that the Chief Justice opposed it. The bill was amended to restore federal question jurisdiction.

rights and protection. I think you ought to go to the *New York Times* and to the *Tribune* and explain the effect of the bill and have editorials printed on the subject. Reference to the negroes will find an echo, and I am quite sure that the Times will feel like warning the Democratic party against any such radical measure. I think you ought to bring it to Hilles' attention and that the opposition to it ought to be made a plank in the National Republican Platform.¹²⁸

When Henry proved inept in generating publicity, paralyzed by Charles Evans Hughes' fear that anything "coming from New York" would be dismissed as reflecting "Wall Street interests,"¹²⁹ Taft lost patience.¹³⁰ "What I was anxious to do," he explained, "was to head the movement by an announcement in the *New York Times*, for there are a great many people who

look to the Times as a kind of Bible."¹³¹ Henry accepted the "rebuke" and promptly contacted Rollo Ogden, editor of *The New York Times*.¹³² On April 22 the Sunday *Times* published an editorial strongly opposing the bill.¹³³

The fierce controversy that surrounded S. 3151 simultaneously concerned politics and the administration of justice; the two were inseparably combined. Taft knew that he could not risk overt involvement, yet his name and views figured prominently in the debate. On the floor of the Senate, for example, Senator Royal Copeland of New York, seeking to have the bill remanded to the Committee for hearings, observed that "I am advised by the attorneys who have spoken to me that the Chief Justice of the Supreme Court feels that the bill is not a good bill in some respects."¹³⁴ In its editorial, *The New York Times* specifically referred to this comment, remarking that "It is no secret, since the fact was stated in the Senate by Mr. Copeland of New York, that the Chief Justice of the Supreme Court regards some of the features of this bill as most undesirable and harmful."¹³⁵ Two weeks later, Senator Duncan Fletcher of Florida had reprinted in the *Congressional Record* an editorial in the *American Bar Association Journal* strongly opposing S. 3151, which relied heavily on arguments attributed to Taft,¹³⁶ as well as an editorial from the *Florida Times Union* that opposed the bill in part on the grounds that "the Chief Justice of the United States Supreme Court . . . is reported to have said that this bill has features that can be regarded only as most undesirable and harmful."¹³⁷

As a result of the accumulating pressure, Norris was forced to amend his bill to restore federal question jurisdiction.¹³⁸ Taft wrote Henry, "I think Norris has heard a good deal about his proposed changes, and . . . he does not find them so easy to push through as he thought he would, in view of the agitation you have all stirred up on the subject."¹³⁹ Norris' revised bill eventually stalled in the Senate. Yet Taft's intense struggle to defeat it illustrated the uneasy line between disinterested law reform and unabashedly political mobilization.

The second reason why Taft's appeal to an English model of an executive judicial official was dangerous in the American context con-

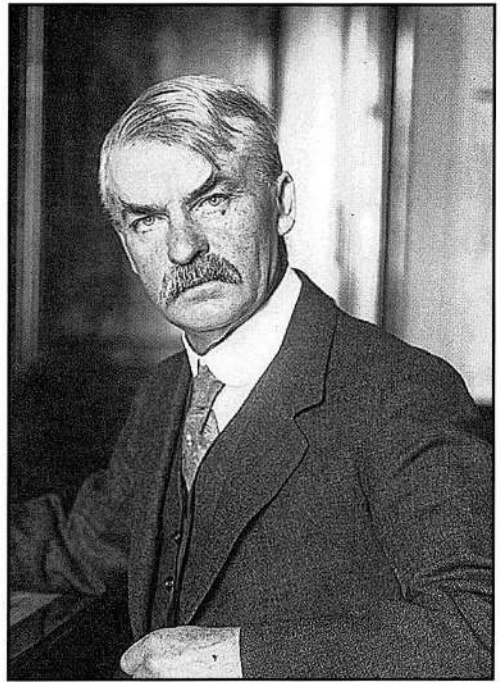
cerned the institution of judicial review. Each time Taft became involved in legislative reform, he risked prejudging the constitutionality of proposed legislation. This potential lurked even in the most technical and benign measures. The point can be illustrated by Taft's involvement in the passage of a bill that transferred jurisdiction of patent appeals from the Court of Appeals of the District of Columbia to the Court of Customs Appeals. Taft strongly supported the bill, to the extent that Acting Commissioner of Patents William A. Kinnan could in congressional hearings testify that "There has been no objection anywhere. It has been indicated that the Chief Justice of the United States has looked into it and approved it. It seems to me to be an efficiency measure."¹⁴⁰

Taft wrote to Senator Thomas Walsh on May 8, 1928, urging approval of the bill on the grounds that the District Court of Appeals was "very much burdened with business," while the Court of Customs Appeals did "not have enough to do."¹⁴¹ Despite his ongoing struggle with Walsh over S. 3151, Taft was sweetly and nonpartisanly solicitous: "I am sorry to impose on you, my dear Senator, another burden, but as I understand you are on the committee for the consideration of this bill, I venture thus to write to you. It will certainly help the administration of justice in the District."¹⁴² Most striking from a modern point of view, however, is that Taft included in his letter a long defense of the bill's constitutionality, which began:

I understand that there are two persons who think that the bill is unconstitutional. I can not for the life of me understand how any such doubt could arise. The Court of Customs Appeals is a purely statutory court, and Congress is not limited in any way in the functions which it gives to it.¹⁴³

Walsh replied to Taft that he would "make an effort to have the matter put in" shape for approval,¹⁴⁴ and the bill, seemingly uncontroversial, was enacted into law March 2, 1929.¹⁴⁵

It is remarkable that Taft would submit an advisory opinion about the constitutionality



In order to make clear his support for a bill that transferred jurisdiction of patent appeals from the Court of Appeals of the District of Columbia to the Court of Customs Appeals, Taft wrote to Senator Thomas Walsh (above), the most influential Democrat on the Senate Judiciary Committee, outlining why he thought the bill was constitutional. Apparently, the Chief Justice felt free to give constitutional advice to a political opponent.

of a statute to a Senator who was in many ways his archopponent. It indicates how unembarrassed Taft must have felt about the practice. Apparently he regarded the constitutional issues posed by the statute as uncontroversial and settled. But constitutional judgment in the United States is seldom a secure thing. Taft premised his argument on the fact that the Court of Customs Appeals was an Article I court, yet within only thirty years Congress would itself declare the (now renamed) Court of Customs and Patent Appeals an Article III court,¹⁴⁶ a conclusion sustained by the Supreme Court of the United States.¹⁴⁷

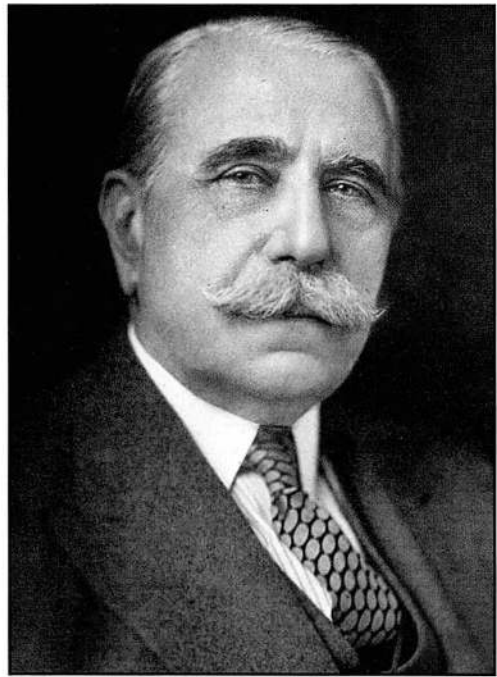
In this country, as distinct from England, the institution of judicial review renders advisory opinions dangerously uncertain, and this poses a powerful dilemma for a Chief Justice who would accept responsibility for pushing a

legislative agenda for judicial reform. For legislative change cannot be proposed without being endorsed, and how could Taft endorse legislation without rendering an advisory opinion?¹⁴⁸

The dialectic of this dilemma is vividly exposed in the story of Taft's attempt to relieve federal courts of the flood of small criminal cases that Prohibition had swept into their jurisdiction. Not only did these cases clog the docket, but federal judges found them intensely demoralizing.¹⁴⁹ Almost from the day he took office Taft believed that legislation was needed to allow United States Commissioners to try such cases.¹⁵⁰ In 1923, at the second meeting of the Conference of Senior Circuit Judges, Taft pushed through a resolution to the effect that "in prohibition and other misdemeanor cases" U.S. Commissioners be authorized "in all cases in which the defendants do not file written demands for jury trial, to take and file written pleas of guilty and to hear the evidence on pleas of not guilty and to file in court their reports of the cases and their recommendations of what judgment should be entered."¹⁵¹ Taft regarded this resolution as one of the "most important" of the Conference.¹⁵²

The recommendation went nowhere, however, and so in December 1925 Taft on his own initiative sought to revive the plan. He wrote to Representative George S. Graham, Chair of the House Judiciary Committee, and to Senator Albert Cummins, Chair of the Senate Judiciary Committee, that he was "very much troubled about the conditions that prevail in the District Courts of the United States. They are being demoralized by this police court business." Taft proposed an elaborate legislative scheme to remedy the situation.

How would this suggestion strike you? Provide that in every District there should be appointed a Judicial Commissioner to serve during good behavior, that he should have authority to hold court, try jury trials and have jurisdiction to try misdemeanors and felonies, punishment for which shall not exceed two years' imprisonment; that he should be given the power to compel the defendants to elect whether they desire



Representative George Graham (above), Chair of the House Judiciary Committee, told Representative Duncan Denison of Illinois that the Chief Justice had merely alerted members of Congress to a problem in need of solution, without proposing any particular legislative response. This was, in fact, untrue: six months earlier Taft had written to Graham to propose legislation to allow U.S. Commissioners to hear cases arising from Prohibition so as to keep the petty criminal cases from clogging federal dockets.

jury trials within ten days after the filing of the information or the indictment; that he should be required to act also as a regular United States Commissioner, and might be called upon by the District Judge to act as a Master in Chancery or a Referee. . . . I don't think he thought to be appointed by the President, but that as Judicial Commissioner his might be regarded as an inferior office, and under the Constitution he could be appointed by the District Court. . . . Can not you think this over and frame a bill? Something ought to be done. I just throw out this suggestion, with the hope that it may germinate into something.¹⁵³

Six months later, in the course of debate on a bill to authorize the appointment of additional district judges, Representative Graham observed on the floor of the House that he was "in conference with representatives of the Senate Judiciary Committee and some of the judges of the Supreme Court trying to work out some scheme by which the courts of the United States might be relieved of some of the very heavy burdens which they are now obliged to carry." Graham pledged to "strive to create some plan by which a minor judiciary may be created."¹⁵⁴ Representative Duncan Denison of Illinois rose to inquire into "the wisdom of taking into these conferences, in trying to work out legislation that will relieve the courts of a part of their work, the members of the Supreme Court. Does the gentleman think that is a wise policy?"¹⁵⁵ Thrown on the defensive, Graham quickly backpedaled:

Mr. GRAHAM. Well, without passing any opinion upon the wisdom of the policy, it came about without our solicitation and we attended simply as conferees.

Mr. DENISON. In the constitutional convention . . . that theory was abandoned as being unwise, the theory of having the Supreme Court advise the Congress as to legislation, and I think if we should return to that policy it would be a dangerous one.

Mr. GRAHAM. I may say that this conference arose and was called through the intervention of the Supreme Court judges, upon one of whom, the Chief Justice, there depended the duty of reviewing the work in the district courts all over the United States in the congested districts and trying to provide a remedy. He simply called the chairman and the ranking member of each Judiciary Committee in to ask them to take up the subject and see if there could not be some plan devised. That is all.

Mr. DENISON. What I have in mind is this. Suppose the Congress should enact legislation that is intended to create some sort of subordinate courts to relieve the other courts of some of their duties, and afterwards the constitutionality of the legislation should be raised in

the courts, if the Supreme Court had been consulted and advised in the preparation of the law, it seems to me it would be embarrassing, and I do not believe the committee of the House ought to do that.

Mr. GRAHAM. I think, perhaps, ethically the gentleman is correct, and I am not going to dispute that proposition, but I do say it was perfectly competent for those who had charge of the court business throughout the country to call our attention to it and ask us to take it up independently; and that is all that was done.

Mr. DENISON. I see no objection to that.

Mr. GRAHAM. That is all that was done. They would not be taken into consideration in framing the legislation for the legislative duty would rest upon the House and the Senate.¹⁵⁶

The dialogue crisply captures the dilemma of any American Chief Justice aspiring to advocate legislative reform. Representative Graham deftly defused Denison's challenge by asserting that Taft had merely called the attention of members of Congress to a problem in need of solution, without proposing any particular legislative response. But we know from Taft's correspondence of six months earlier that this was not true. Had the real facts been known, Taft's "embarrassment" would indeed have been acute.

Taft apparently took the point. When Frances Caffey subsequently wrote him to inquire about the status of the 1923 recommendation of the Conference of Senior Circuit Judges so as to be able more effectively to lobby for bills expanding the jurisdiction of U.S. Commissioners then pending before Congress,¹⁵⁷ Taft responded with uncharacteristic caution: "I have to be careful in taking part myself in the preparation of such a bill, because any bill is likely to come before our Court for interpretation and inquiry into its validity."¹⁵⁸ Taft's zeal to refashion judicial administration had been checked by the institutional realities of American judicial review.

Sometimes, however, that zeal pushed Taft plainly beyond what would today be regarded

as elementary norms of judicial propriety. The strong temptations generated by his urgent sense of responsibility for the federal judicial branch are well revealed by his struggle against S. 624, a bill sponsored by Senator Thaddeus Caraway of Arkansas that would make it reversible error for a federal judge to comment on the credibility of witnesses or the weight of the evidence.¹⁵⁹ Most states prohibited judges from such comments, and Taft had long regarded these prohibitions as empowering "acute and eloquent counsel for the defense" to promote "an atmosphere of fog and error and confusion," and so drastically to impede the orderly administration of justice.¹⁶⁰ For decades he had taken every opportunity passionately to oppose them.¹⁶¹ So when S. 624 was approved by the Senate Judiciary Committee and then by the Senate itself, Taft was galvanized into action.

"I am trying to prevent the passage of a bill aimed at the usefulness of the Federal courts," he wrote to his wife:

which seeks to deny to Federal Judges the power to comment on the evidence as the English Judges do. This has always been done in the Federal Courts and has contributed much to their effectiveness. Now these demagogues and damage lawyers are attempting to put the Federal Courts on the basis of the State courts in this regard. The bill has passed the Senate and the Senators yielded supinely, except Reed of Pennsylvania. It has been reported out of the House Judiciary Committee, but I am hoping to hold it over until the next session, in which case I feel fairly confident that I can induce the President to veto it, and I believe his veto would prevent its passage. There is a serious question as to whether it is constitutional, but I would prefer much to have it beaten through a veto than to throw upon the Court the question of its constitutionality.¹⁶²

Taft attempted to secure a commitment from Judiciary Committee Chair George S. Graham to

hold hearings on the bill in the House, and he sought "to have the various Bar Associations . . . apply to the committee to be heard upon this bill in opposition to it, both on the ground of its doubtful constitutionality and also because of its interference with the efficiency of the Federal courts."¹⁶³

Not content with this blatantly political maneuvering and mobilization, Taft on December 2, 1924, composed a remarkable Memorandum in opposition to the bill. The cover sheet to the Memorandum, which Taft apparently drafted for his own records, states:

I am exceedingly anxious to beat the bill . . . because it will really greatly interfere with the Federal judicial system. I was able to hold the bill off last session through Chairman Graham and Snell of the Rules Committee in the House. I have been to see the Attorney General once or twice about it and I saw the President this morning and asked him to read this memorandum. I am quite sure that he will be inclined to veto the bill, but it ought not to come to him, and I think the Attorney General suggests his sending for Graham and Nick Longworth to see whether it can not be shelved. I submitted the memorandum to Van De Vanter [sic] and he fully approved the statement, but he thought that I put a little too much admiration for the English in it. However, as this is not to be published and is only a confidential memorandum for the President and the Attorney General, and as I have only given out one copy in addition to that given to Van Devanter, there is no occasion for changing my view which is stated herein, or ameliorating it with reference to prejudices against England.¹⁶⁴

The Memorandum itself is a twelve-page document arguing that the Caraway bill would greatly "weaken the usefulness and efficiency of Federal Courts in the dispatch of business involving jury trials."¹⁶⁵ On page six the Memorandum addresses the "question . . . whether Congress may by law effect this demoralizing

assault on the trials in our Federal Courts. Fortunately the right of the Judge to exercise this power of *summing up* to a jury upon the facts is conferred upon him by the Constitution of the United States, and can not be taken away by legislation."¹⁶⁶ The remainder of the Memorandum constitutes a detailed argument for this proposition, concluding:

In view of these authorities, it can not be that Congress may take away the power of a Judge of a United States Court in carrying on a jury trial, to comment on the evidence and even express his opinion on the facts, if he leaves the question of facts clearly to the jury ultimately. It was an essential element of a jury trial in the English courts when the Declaration of Independence was signed and our Constitution was framed and adopted and when the 7th Amendment became part of it. That being true, Congress may not impair the institution by attempting to restrain Federal Judges from the discretion to exercise the power vested in them by the fundamental law.¹⁶⁷

The Memorandum is a stunning document. It is a fully developed advisory opinion, crafted by Taft for the explicit purpose of affecting the outcome of legislation. Taft knew that the Memorandum was ethically suspect, which is why he controlled so tightly its dissemination. It is revealing that at first Taft circulated the Memorandum only to the President, with whose structural position vis-a-vis Congress Taft clearly felt a strong affinity.

As Caraway continued to press his legislation, however, Taft grew bolder. In March he wrote to his brother Henry that "We stopped the Caraway bill to take away the power of the Federal Judges in charging a jury, and I am going to take time by the forelock to prime Senator David Reed of Pennsylvania on the probable unconstitutionality of such a law."¹⁶⁸ Taft enclosed a copy of his Memorandum,¹⁶⁹ and in May he suggested to Henry that "If I were you I would open a correspondence with the only man who opposed it in the Senate, and that was Senator Reed of Pennsylvania. You might

send a copy of it also to Senator Cummins and another one to Senator Gillett. Don't make me the author of it, for reasons that you will understand."¹⁷⁰

Taft's opposition to the Caraway bill never did erupt into scandal, although this seems more a matter of luck than anything else. The very intensity that Taft brought to the cause of judicial administration betrayed him into actions that could scarcely be defended in public. Of course, on the other side of the coin, it is no doubt due to Taft's vigorous interventions that federal judges enjoy to this day the traditional common law prerogative to comment on the weight of evidence and the credibility of witnesses.¹⁷¹ But this result cannot justify the means Taft used, which can only be explained by reference both to the passion of his commitment and to the inherent ambiguities of the English model of a judicial executive administrator. Taft's opposition to S. 624 demonstrates what a dangerous model this could be when transposed to the American context.

IV

It was said of Taft that the chief justiceship was his "manifest destiny."¹⁷² Certainly he freely admitted that the office was "the ambition of my life."¹⁷³ When Taft finally attained that ambition, it was after a long career of executive administration: as Governor of the Philippines, Secretary of War, and President of the United States. Taft brought this experience with him as he appropriated the role of Chief Justice and made it his own. It was natural for him to regard the administrative duties of the chief justiceship as analogous to the executive responsibilities with which he was so familiar, especially because there were powerful English precedents for this approach to judicial administration.

The most lasting effect of Taft's unique perspective was its root assumption that the federal judiciary was not a collection of independent judges, but instead a unified branch of government with functional obligations. No Chief Justice after Taft has been able to escape being evaluated on his fulfillment of these obligations. In this regard, Taft did indeed transform the office of Chief Justice.

But Taft, flush with the enthusiasm of a new idea, and filled with the contacts and assurance of an admired ex-President, pushed this perspective to its natural limits. The difficulty he encountered, but clearly did not fully conceptualize, was that executive administration in the context of a regime of separation of powers contains important elements that are essentially political, and that therefore stand in tension with American ideals of judicial nonpartisanship and with the American institution of judicial review. Taft struggled with this tension throughout his tenure as Chief Justice, acting in ways that fell on different sides of what today might be regarded as obvious ethical boundaries.

Taft truly deserves to be known as the father of federal judicial management. We can learn from his difficulties, however, how subtle and complex is the relationship between the imperatives of judicial management and American norms of proper judicial behavior. Chief Justices after Taft can no longer share his naive Progressive faith in the neutrality of disinterested administration. In our own fallen world of post-Progressive disillusion, Chief Justices must somehow negotiate between the necessities of functional rationality and the requirements of judicial neutrality. If Taft can teach us anything, it is that this negotiation will be neither clear nor easy.

Endnotes

¹ From 1913 through 1921 Taft was Kent Professor of Constitutional Law at the Yale Law School.

² Herbert Hoover, "Address Commemorating the 20th Anniversary of the Boy Scouts of America," March 10, 1930, **Public Papers of the Presidents of the United States: Herbert Hoover, January 1 to December 31, 1930** p. 87 (1976). See "William Howard Taft," *The New York Times*, March 9, 1930, Section 2, p. 1: "Of some public men, when they pass into the shadowed valley, it is said that they are the most admired of their generation . . . but about Mr. Taft there is a universal agreement that he made himself the most loved. Already the language of affection has been exhausted." See "Mr. Taft's Place in All Hearts," *Literary Digest*, March 22, 1930, p. 15; "William Howard Taft," *The World*, March 10, 1930, p. 10 ("Few men have had his opportunity to watch the attitude of the American people ripen over a period of so many years into a more universal feeling of warm affection and deep confidence.")

Affection for Taft transcended partisan and even

ideological lines. The Democratic governor of New York, Franklin Delano Roosevelt, ordered New York state flags to be hung at half staff for thirty days to honor Taft, proclaiming:

The passing of William Howard Taft. . . brings a feeling of universal sorrow to the people of New York. His many years of public service in wide fields and the simplicity and generosity of his personality will be held always in affectionate esteem.

"State Tribute to Taft," *The New York Times*, March 10, 1930, p. 5. Even Senator Hiram Johnson, a progressive follower of Theodore Roosevelt from California, one of only four Senators to vote against Taft's confirmation in 1921, could affirm to the press that

Of recent years I have become very fond of Chief Justice Taft. It was with the utmost regret that I learned of the necessity of his resignation. I feel that he has rendered a great and lasting public service and that his death is a very severe loss to the nation.

"Taft's Life Praised as Truly American," *The New York Times*, March 9, 1930, p. 26. Taft's accomplishments as Chief Justice can be measured against Johnson's assessment of nine years earlier, on July 1, 1921, when he wrote:

I felt that I would be false to the old Roosevelt fight, false to every principle in which I believed, false to myself, and false to my country, if I voted for Taft's confirmation. . . . Yesterday, we may have changed the course of our country, we may have altered the history of the world by placing in the position where he was the deciding vote in the most powerful tribunal of the universe, a man devoid of learning, judicial temperament, and of principle.

Johnson to Raymond Robins, Hiram Johnson Papers. ³"Leaders Here Laud Character of Taft," *The New York Times*, March 9, 1930, p. 26. See "Judge Morton Ranks Taft with Greatest: Puts His Service Besides that of Marshall," *Boston Globe*, February 4, 1930, p. 16.

⁴ Robert M. Mennel and Christine L. Compston, eds., **Holmes and Frankfurter: Their Correspondence, 1912-1934**, p. 249 (University Press of New England 1996).

⁵ "President Names Hughes Chief Justice as Taft Resigns Because of Ill Health When Trip to Asheville Fails to Aid Him," *The New York Times*, February 4, 1930, p. 2.

⁶ See Valerie Jean Conner, **The National War Labor Board: Stability, Social Justice, and the Voluntary State in World War I** (University of North Carolina Press 1983).

⁷"Chief Justice Taft," *Los Angeles Times*, July 2, 1921, p. 4:

Peculiarly enough, Chief Justice Taft has

enjoyed a vastly greater popularity since he retired from the presidency than during the period when he was the nation's Chief Executive. The tolerant manner in which he endured defeat, the unselfish support he gave to the man who had defeated him for the presidency, the self-effacement which he practiced during the stirring months of the war period, the logic which he brought to bear in supporting the cause of right and justice, both while the fighting was in progress and during the peace negotiations—all these things were noted by the American people and remembered. The almost unanimous approval which greeted his appointment, both by the Senate and by the country at large, goes far to disprove the theory that republics are ungrateful or that they have short memories.

The perception that national public opinion strongly favored Taft was widely shared. See, e.g., "Chief Justice Taft," *The Literary Digest*, July 16, 1921, p.13. Even *The New Republic* observed that "The press greets Mr. Taft's appointment with almost universal acclaim." "Mr. Chief Justice Taft," *The New Republic*, July 27, 1921, Volume 27, p.230.

⁸ "Taft Gained Peaks in Unusual Career," *The New York Times*, March 9, 1930, p. 27. *The New Republic* characterized the remarkable shape of Taft's career in this way:

It can be said of William Howard Taft that at the moment when he leaves the Supreme Court his reputation with the American people is undoubtedly higher than ever before. His term as President saw a steady diminution in his prestige which was reflected in the dismal failure of his candidacy in 1912, at a time when, according to the general political custom of America, he should have had an almost automatic reelection. Since then, by his modesty, geniality and unflagging energy in his work, he has rehabilitated himself to an extent which no one would have ventured to predict eighteen years ago.

"The Week," *The New Republic*, volume LXI, February 12, 1930, p. 310.

⁹ "Chief Justice Taft," *New York World*, February 4, 1930, p.10.

¹⁰ "Judiciary: Hughes for Taft," *Time Magazine*, Volume XV, No. 6, February 10, 1930, pp. 11-12.

¹¹ During the period from October 1922 through July 1929, when Sutherland was on the Court, he authored 142 opinions for the Court. Taft, in contrast, wrote 222 opinions for the Court during that same period. During the six terms between October 1923 and July 1929, when both Butler and Sanford were on the Court, they authored, respectively, 153 and 123 opinions for the Court. Taft wrote 176.

¹² Holmes to Harold J. Laski, January 15, 1922, in Mark DeWolfe Howe, editor, *1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, p. 398 (Harvard

University Press 1953).

¹³ Taft readily admitted that "I have great difficulty myself in the matter" of "judicial style." Taft to Clyde B. Aitchison, December 4, 1925, Taft Papers, Reel 278. Taft wrote plaintively to Holmes in appreciation of Holmes' opinions: "When I read them, I marvel. They read so well and so easily and I ask why can't I, but I can't." Letter to Oliver Wendell Holmes, May 6, 1927, Holmes Papers, Reel 38. And he confessed to Holmes that "I regard your power . . . to concentrate on the point in few words with admiration and awe." Holmes Papers, *Duckett & Co. v. United States*, 266 U.S. 149 (1924).

¹⁴ Sutherland's opinions, although expressing the same general conservative vision as Taft's, are by contrast baldly ideological and so remain in the canon, if only as foils.

¹⁵ "William Howard Taft," *Los Angeles Times*, March 10, 1930, p. 4. See Stephen Bonsal, "The Man Who Served Us—Taft," *World's Work*, April 1930, p. 79: "While as Chief Justice of the United States Mr. Taft delivered several notable opinions of a pioneering quality, it is certain that his words will not be studied and pondered over as, say, the decisions of Marshall, of Taney, or even of Fuller."

¹⁶ Bonsal, "The Man Who Served Us—Taft," *World's Work*, April 1930, p. 79. *The Los Angeles Times* opined that Taft's "name will . . . be . . . connected with . . . the speeding up and modernizing of the Supreme Court and its reorganization to cope fully with its work. Directly and indirectly, Taft exercised a profound influence on court procedure, and if the law's delay, of which complaint has been made from time immemorial, shall ever cease to be a subject of complaint it will be in large part due to him." "William Howard Taft," *Los Angeles Times*, March 10, 1930, p. 4.

¹⁷ Judge Harry A. Hollzer, quoted in "Jurist Here Adds Tribute," *Los Angeles Times*, March 12, 1930, p.2.

¹⁸ "Two Chief Justices," *Washington Post*, February 4, 1930, p.6. See "Chief Justice Taft," *The Baltimore Sun*, February 4, 1930, p.14.

¹⁹ Quoted in "Taft's Life Praised as Truly American," *The New York Times*, March 9, 1930, p.1. Recall that even during his campaign for the presidency in 1908, Taft averred that, "Speaking generally, I believe the greatest question now before the American public is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use." "Taft Wants Quick and Cheap Justice," *The New York Times*, August 2, 1908, p.1.

²⁰ Felix Frankfurter, "Chief Justices I have Known," in **Felix Frankfurter on the Supreme Court**, pp. 487-88 (Belknap Press of Harvard University Press 1970). Frankfurter credited Taft for adapting the federal judicial system "to the needs of a country that had grown from three million to a hundred and twenty million."

²¹ See John A. Eagle, "Monopoly or Competition: The Nationalization of the Grand Trunk Railway," *The Canadian Historical Review*, March 1981, Volume LXII, pp. 3-20; A.W. Currie, **The Grand Trunk Railway of Canada** (University of Toronto Press 1957); Leslie T. Fournier, **Railway Nationalization in**

Canada: The Problem of The Canadian National Railways (MacMillan Co. 1935). Curiously enough, Pierce Butler was at that time appearing before the arbitration panel as counsel for the Canadian government.

²² McKenna to Taft, July 30, 1921, Taft Papers, Reel 231. McKenna was sixty-nine years old and had been an employee of the Court for the past fifty-two years.

²³ 36 Stat. 1152 ch. 231 (1911).

²⁴ 36 Stat. 1153 ch. 231 (1911).

²⁵ William R. Stansbury to Taft, July 30, 1921, Taft Papers, Reel 231.

²⁶ Taft to Helen Herron Taft, August 3, 1921, Taft Papers, Reel 28.

²⁷ *Id.*

²⁸ Taft to William R. Stansbury, August 3, 1921, Taft Papers, Reel 231.

²⁹ Taft to Helen Herron Taft, August 3, 1921, Taft Papers, Reel 28.

³⁰ Brandeis to Felix Frankfurter, March 6, 1925, in Melvin I. Urofsky and David W. Levy, eds., **"Half Brother, Half Son: The Letters of Louis D. Brandeis to Felix Frankfurter"**, p.196 (University of Oklahoma Press 1991).

³¹ Herbert Little, "The Omnipotent Nine," *The American Mercury*, Volume XV, No. 57, September 1928, p. 48.

³² Holmes to Sir Frederick Pollock, October 2, 1921, in Mark DeWolfe Howe, ed., **2 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932**, p.79 (Harvard University Press 1941).

³³ Holmes to Baroness Charlotte Moncheur, June 2, 1922, Holmes Papers, Reel 26, Frame 761.

³⁴ Brandeis to Felix Frankfurter, June 28, 1923, in Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *Supreme Court Review* 299, 313.

³⁵ Holmes to Sir Frederick Pollock, February 24, 1923, in Mark DeWolfe Howe, ed., **2 Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932**, pp.113-14 (Harvard University Press 1941). Brandeis agreed: "Things go happily in the Conference room with Taft—the judges go home less tired emotionally and less weary physically, than in White's days." Brandeis to Felix Frankfurter, August 6, 1923, in Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *Supreme Court Review* 299, 322.

³⁶ Brandeis to Frankfurter, August 6, 1923, in Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 *Supreme Court Review* 299, 321.

³⁷ Stone to Thomas Reed Powell, January 30, 1940, Stone Papers.

³⁸ In May 1921, Taft characterized the office of Chief Justice in this way in the course of eulogizing the deceased Chief Justice White: "The Chief Justice is the head of the court, and while his vote counts but one in the nine, he is, if he be a man of strong and persuasive personality, abiding convictions, recognized learning, and statesmanlike foresight, expected to promote teamwork by the court, so as to give weight and solidarity to its opinions." "Chief Justice White," in James F. Vivian, **William Howard Taft: Collected Editorials 1917-1921**, p. 581 (Praeger 1990).

³⁹ Augustus Hand to Taft, September 18, 1929, Taft Papers, Reel 314. On Taft's ability to rally the Court, see Henry J. Friendly, "Review of The Unpublished Opinions of Mr. Justice Brandeis," 106 *Harvard Law Review* 766, 768 (1958). Friendly was Brandeis' law clerk during the 1927 Term. See also David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in Walter F. Murphy & C. Herman Pritchett, eds., **Courts, Judges, and Politics: An Introduction to the Judicial Process**, pp.695-703 (Random House, Inc. 1979).

⁴⁰ Robert J. Steamer, **Chief Justice: Leadership and the Supreme Court**, pp.186-87 (University of South Carolina Press 1986).

⁴¹ Taft to H.A. Morrill, December 2, 1908, quoted in Alpheus Thomas Mason, **William Howard Taft: Chief Justice**, p. 33 (Simon and Schuster 1964).

⁴² Taft to Alfred C. Meyer, January 28, 1924, Taft Papers, Reel 260.

⁴³ "The Courts and Mr. Taft on Labor," *American Federationist*, March 1921, p. 220. See Charles Willis Thompson, "The Two Tafts," *The American Mercury*, Volume I, No. 3, March 1924, pp. 315-19: "[I]n politics Taft was ever all thumbs. . . . The general dislike of Taft, which seems so queer a thing when we look back upon it . . . rested upon the fact that 'he cannot open his mouth but out there flies a blunder.'"

⁴⁴ William Borah, quoted in "Taft Chief Justice of Supreme Court; Confirmed 60 to 4," *New York Herald*, July 1, 1921, p. 1.

⁴⁵ Speech of the Chief Justice, *The Chicago Bar Association Record*, Volume 5, No. 3, December 1921, p. 9.

⁴⁶ William Allen White, **Masks in a Pageant** 333-34 (MacMillan Co. 1928).

⁴⁷ In his address accepting the 1912 Republican nomination for the presidency, for example, Taft proclaimed:

During this administration we have given special attention to the machinery of government with a view to increasing its efficiency and reducing its cost. . . . I have secured an appropriation for the appointment of an Economy and Efficiency Commission, consisting of the ablest experts in the country, and they have been working for two years on the question of how the Government departments may be reorganized and what changes can be made with a view to giving them greater effectiveness for governmental purposes on the one hand, and securing this at considerably less cost on the other.

Speech of William Howard Taft Accepting the Republican Nomination for President of the United States, Senate Document No. 902, 62nd Congress, 2d Session (1912).

⁴⁸ Public Law No. 298, 42 Stat. 837 (1922).

⁴⁹ Felix Frankfurter and James M. Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System—Part VI: The Conference of Senior Circuit Judges," 40 *Harvard Law Review* 431, 456 (1927).

⁵⁰ The Act provided, however, that the Senior Circuit

Judge of the designated judge must "consent" to the assignment, and the Senior Circuit Judge of the Circuit to which the designated judge is assigned must certify the need for judicial assistance to the Chief Justice. Although federal judges were preeminently local, there did exist two precedents for the power temporarily to transfer judges. The first was the Act of October 3, 1913, Public Law No. 18, 38 Stat. 203, which authorized the temporary transfer of judges to the Second Circuit in order to alleviate congestion in New York City, and the second was the authorization to appoint circuit judges on the Commerce Court for service on any circuit court. Public Law No. 218, 36 Stat. 539, 540. Felix Frankfurter and James M. Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System—Part VI: The Conference of Senior Circuit Judges," 40 *Harvard Law Review* 431, 447-48 (1927).

⁵¹The Act also authorized the appointment of twenty four new district court judgeships, which represented an increase of about twenty five percent in the number of authorized district court judgeships. At the time federal dockets were "particularly swamped" with litigation resulting from the cancellation of wartime contracts and with cases arising from the enforcement of prohibition. See Felix Frankfurter and James M. Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System—Part VI: The Conference of Senior Circuit Judges," 40 *Harvard Law Review* 431, 444 (1927).

⁵²William Howard Taft, "Adequate Machinery for Judicial Business," 7 *ABAJ* 453, 454 (1921).

⁵³Taft to Charles D. Hillis, February 5, 1923, Taft Papers, Reel 250.

⁵⁴See, e.g., William Howard Taft, "The Courts and the Progressive Party," *Saturday Evening Post*, Vol. 186, No. 39, March 20, 1914, p. 47; William Howard Taft, "Address of the President," 39 *American Bar Association Report* 359, 383 (1914); William Howard Taft, "The Attacks of the Courts and Legal Procedure," 5 *Kentucky Law Journal* 3, 13-15 (1916). For a good short summary of the history of the movement to improve the administration of justice in the United States, beginning with Roscoe Pound's epic-making paper, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 *Am. Bar Ass'n. Rep.* 395 (1906), and in particular of the history to establish judicial councils prior to 1922, see Felix Frankfurter and James M. Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System—Part VI: The Conference of Senior Circuit Judges," 40 *Harvard Law Review* 431, 434-43 (1927).

⁵⁵Note, "Unification of the Judiciary: A Record of Progress," 2 *Texas L. Rev.* 445, 452-53 (1924). See Felix Frankfurter and James M. Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System—Part VI: The Conference of Senior Circuit Judges," 40 *Harvard Law Review* 431, 455 (1927); "New Law Unifies Federal Judiciary: Chief Justice Made Executive Head of Judicial Council," 6 *Journal of the American Judicature Society* 69 (1922) ("were it not for the great esteem felt for the Chief Justice, and for his tact and persistence, some-

thing far inferior to the actual law would have resulted."); "Courageous Expression by Chief Justice Taft," 6 *Journal of the American Judicature Society* 67 (1922); "A New Era Opens," 6 *Journal of American Judicature Society* 67 (1922). Taft later said that "At my suggestion the bill contained a provision for a meeting of a council of judges annually, to consist of the Chief Justice and the senior circuit judge of each circuit, to take into consideration the arrears, where they are, and how they can be provided for by assignment of judges, who have free time to the burdened districts." Taft to Frank Hiscock, April 12, 1922, Taft Papers, Reel 241.

⁵⁶See, e.g., "'It Came to Pass—,'" 7 *Journal of the American Judicature Society* 83, 84 (1923).

⁵⁷"Rally Support for Daugherty Bill: Bar of Entire Country Asked to Lend Assistance in Campaign for Effective Organization of United States Judiciary," 5 *Journal of the American Judicature Society* 120 (1921).

⁵⁸Felix Frankfurter, "Chief Justices I have Known," in *Felix Frankfurter on the Supreme Court* 487-88 (Belknap Press of Harvard University Press 1970).

⁵⁹"The First Conference," 9 *ABAJ* 7 (1923).

⁶⁰Henry D. Clayton, "Popularizing Administration of Justice," 8 *ABAJ* 43, 46 (1922) (quoting Judge Sheppard).

⁶¹*Id.*

⁶²Taft to E. Cockrell, May 5, 1927, Taft Papers, Reel 291.

⁶³William Howard Taft, "The Attacks of the Courts and Legal Procedure," 5 *Kentucky Law Journal* 3, 16-17 (1916). "A judicial force of Judges ought to be under the executive direction of somebody, so that the number of Judges needed to meet the arrears of business at a particular place should be under the control of one who knows what the need is." Taft to Charles F. Ruggles, November 4, 1924, Taft Papers, Reel 268.

⁶⁴Note, "Unification of the Judiciary: A Record of Progress," 2 *Texas L. Rev.* 445, 445 (1924).

⁶⁵William Howard Taft, "The Courts and the Progressive Party," *Saturday Evening Post*, Vol. 186, No. 39, March 20, 1914, p. 47. "What is needed," wrote Taft, "is a General Director who shall be able to mass judicial force temporarily at places where the arrears are greatest and thus use what is available to do the whole judicial work. There ought to be more unity in the application of Judges at the strategic points where application is needed." Taft to Angus Wilton McLean, December 1, 1924, Taft Papers, Reel 269.

⁶⁶William Howard Taft, "The Attacks of the Courts and Legal Procedure," 5 *Kentucky Law Journal* 3, 16 (1916). "Somebody . . . ought to be made the chief of the body of Judges who cover a certain territory and have the power to assign the business, so that each Judge shall be bound to follow that assignment. There is not the slightest reason why the same strategy . . . should not be secured as you find in large business corporations." Taft to Harry A. Holzner, February 14, 1928, Taft Papers, Reel 299.

⁶⁷William Howard Taft, "Address of the President," 39 *American Bar Association Report* 359, 383 (1914).

⁶⁸*Myers v. United States*, 272 U.S. 52, 122 (1926).

⁶⁹Taft was not alone in this conception. Thus Frankfurter and Landis write:

Hundreds of judges holding court in as many or more districts scattered over a continent must be subjected to oversight and responsibility as parts of an articulated system of courts. The judiciary, like other political institutions, must be directed. An executive committee of the judges, with the Chief Justice of the United States at its head, is a fit and potent instrument for the task.

Felix Frankfurter and James M. Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System—Part VI: The Conference of Senior Circuit Judges," 40 *Harvard Law Review* 431, 456 (1927).

⁷⁰Taft to John A. Peters, October 11, 1927, Taft Papers, Reel 295. See also Joseph Buffington to Taft, November 16, 1927, Taft Papers, Reel 296; Taft to Ferdinand A. Geiger, November 17, 1927, Taft Papers, Reel 296; Taft to William N. Runyon, March 12, Taft Papers, Reel 300.

⁷¹Peter G. Fish, "William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers," 1975 *Supreme Court Review* 123.

⁷²Taft to John F. Sater, August 27, 1921, Taft Papers, Reel 233.

⁷³Taft to Robert Taft, October 2, 1927, Taft Papers, Reel 295.

⁷⁴Taft to Horace Taft, December 30, 1921, Taft Papers, Reel 237. Taft wrote: "I am trying to get more solidarity of action among the Federal Judges, so that they shall feel that we are all working toward the same end." Taft to Helen Manning, March 25, 1923, Taft Papers, Reel 252.

⁷⁵Taft to Frank S. Dietrich, January 17, 1927, Taft Papers, Reel 288. See James Morton to Taft, June 23, 1925, Taft Papers, Reel 275:

I just received and read the recommendations of the Judicial Conference. I wish you could be a District Judge for a while just to know what excellent work you and the Conference are doing. The recommendation last year about liquor cases,—that the Federal Courts should entertain only the more important ones,—was of the greatest assistance in dealing with the liquor situation. It gave the District Judges solid standing ground from which to urge that course on the United States Attorneys, who are rather inclined to prosecute everybody for everything lest they be accused of favoritism or remissness.

⁷⁶Taft to John S. Partidge, January 22, 1925, Taft Papers, Reel 271. See Taft to John M. Cotteral, May 19, 1926, Taft Papers, Reel 282:

It is too bad that we in the Court here in Washington do not have greater opportunity to meet in the flesh the Judges who are on the firing line in the Federal Judiciary, and who have so much labor thrust on them which they do not have assistance enough properly to dispose of. I am constantly afraid of hearing

of the breaking down of some of the District Judges under the burden they have to carry, and I wish you to know that we here at the Nation's Capital are fully conscious of the debt that we and the country owe to you District Judges.

⁷⁷Taft to William B. Gilbert, December 15, 1924, Taft Papers, Reel 270.

⁷⁸See, e.g., Frank S. Dietrich to Taft, January 12, 1927, Taft Papers, Reel 288; Augustus Hand to Taft, May 31, 1927, Taft Papers, Reel 292.

⁷⁹Learned Hand to Taft, March 1, 1923, Taft Papers, Reel 251. A year later, Hand wrote to Taft:

As I have had occasion to tell you before, I feel I have a vested interest in your being Chief Justice, because you are the first Chief Justice that ever recognized such things as District Courts except when they were officially brought to their attention to reverse.

Learned Hand to Taft, February 8, 1924, Taft Papers, Reel 261.

⁸⁰Taft to Frank S. Dietrich, January 17, 1927, Taft Papers, Reel 288.

⁸¹Taft to Robert Taft, October 2, 1927, Taft Papers, Reel 295.

⁸²By 1925, for example, when Congress was appropriating needed funds for "the purchase of law books . . . for United States judges, district attorneys, and other judicial officers," it subjected the distribution of the funds "to the approval of the conference of senior circuit judges." Public Law No. 631, 43 Stat. 1333. Illustrative of the way that Taft personally used the Conference may be found in his campaign to authorize the appointment of extra federal judges in New York City. In a letter to Charles Evans Hughes, Taft asked him to petition Congress for the additional judges, adding "I shall do what I can here, and I shall get the Conference of Senior Circuit Judges . . . to take action." Taft to Charles Evans Hughes, March 25, 1925, Taft Papers, Reel 272. Beginning in 1925, the Conference repeatedly recommended the creation of these judgeships. The recommendations figured prominently in Congress's eventual authorization of three additional judges for the Southern District of New York. See Public Law No. 820, 45 Stat. 1317 (1929). See 70 *Congressional Record*, 70th Cong., 2nd Sess., pp. 1742-1748 (January 15, 1929). In fact frequent references to the Conference led Representative George Graham to exclaim, "We did not surrender our legislative function when we created" the Conference. *Id.* at 1743.

⁸³Report of the Fourth Conference of Senior Circuit Judges called by the Chief Justice pursuant to the Act of Congress of September 14, 1922, p. 38, Taft Papers, Reel 618. There are many indications of the influence of the Conference's recommendations. Public Law 373, 46 Stat. 774, for example, authorized the hiring of law clerks for circuit judges. 71st Cong., 2nd Sess. (June 17, 1930). The Conference had recommended such a law in 1927, 1928, and 1929, and its recommendations figured prominently in the legislative history of the Act. See House Report No. 30, 71st

Cong., 2nd Sess. (December 12, 1929); Senate Report No. 830, 71st Cong., 2nd Sess. (May 29, 1930). In the single month of March 1927, the 69th Congress, in direct response to the recommendations of the Conference, created new judgeships in the Northern District of California (Public Law No. 739, 44 Stat. 1372), the District of Maryland (Public Law No. 700, 44 Stat. 1346), the Western District of North Carolina (Public Law No. 693, 44 Stat. 1339), the Eastern District of Pennsylvania (Public Law No. 701, 44 Stat. 1347), the Western District of New York (Public Law No. 735, 44 Stat. 1370), the Eastern District of Michigan (Public Law No. 747, 44 Stat. 1380), and the District of Connecticut (Public Law No. 703, 44 Stat. 1348).⁸⁴ Thus in March 1927 Congress also created an additional judgeship for the Northern District of New York. Public Law No. 741, 44 Stat. 1374. This judgeship had not been recommended by the Conference, but the Senate Report on the bill quotes at length from a letter by John Sargent, the Attorney General, who states:

Although the northern district of New York was not included among the districts for which the conference of senior circuit judges has recommended additional district judges, Chief Justice Taft, who presides over the conference, has, since the last meeting of the conference, specially examined the situation in the northern district of New York and concluded that an additional district judge is needed there. The Chief Justice says:

"I have been examining the statistics of the cases in the northern district of New York and in the western district, and I am bound to concede that the showing is strong for an additional judge in the northern district as well as in the western district."

Senate Report No. 1557, 69th Congress, 2nd Sess. (February 27, 1927).

⁸⁵ Thus when Congress authorized the appointment of two extra judges for the Eighth Circuit as recommended by the Conference, Pub. Law No. 555, 43 Stat. 1116, Taft personally testified in favor of the bill, Senate Report No. 705, 68th Cong., 1st Sess. (June 3, 1924), pp. 1-5. His personal support figured prominently in congressional debates. See 66 *Congressional Record*, pt. 5, 68th Congress, 2nd Sess., 5202 (March 2, 1925). The day after the passage of the bill Judge William Kenyon of the Eighth Circuit wrote Taft that "there is no doubt in my mind as to who is responsible for its enactment, and I am therefore writing you thanking and congratulating you on behalf of this Circuit. Thou art the man." William Kenyon to Taft, March 4, 1925, Taft Papers, Reel 272.

⁸⁶ So, for example, Taft was willing to recommend that the Congress authorize an additional judge for the Western District of Michigan to compensate for the incapacitated Clarence Sessions, even though the Conference had not made any such recommendation. See Public Law 423, 43 Stat. 949; H.R. Report No. 1427, 68th Cong. 2nd Sess. (February 10, 1925) ("This bill has the approval of Chief Justice Taft, who, according to the hearings, has person-

ally investigated the physical condition of Judge Sessions.") For a similar example of Taft going outside the recommendations of the Conference, see Public Law No. 663, 45 Stat. 1081 (1929), which created an additional judgeship in the Southern District of Florida. The Senate Report on the bill relies heavily on Taft's personal recommendation. Senate Report No. 631, 70th Cong. 1st Sess. (March 26, 1928). Another example is Public Law No. 528, 43 Stat. 1098, March 2, 1925, which authorized the appointment of a district judge for the District of Minnesota. The authorization was necessary because of the unexpected suicide of Judge John McGee. Although the Conference had not recommended the authorization, the House Report relied upon Taft's personal endorsement. House Report No. 1540, 68th Cong., 2nd Sess. (February 20, 1925).⁸⁷ Taft to Frank H. Hiscock, April 12, 1922, Taft Papers, Reel 241.

⁸⁸ Taft to Horace Taft, March 30, 1922, Taft Papers, Reel 240.

⁸⁹ Taft to Charles M. Hepburn, April 10, 1923, Taft Papers, Reel 252. Persistence, wrote Taft, "is the only way of getting anything through Congress."

⁹⁰ Taft to Horace Taft, October 6, 1921, Taft Papers, Reel 234.

⁹¹ Hearing Before the House Committee on the Judiciary on H.R. 10479, 67th Cong., 2nd Sess., Serial 33, March 30, 1922, p.10.

⁹² Hearing Before Subcommittee of House Committee on Appropriations in Charge of Deficiency Appropriations on the Second Deficiency Appropriations Bill, 69th Cong., 1st Sess., May 13, 1926, p. 766. The next month Taft was "delighted" to notify George W. Anderson of the First Circuit that "the Court of Appeals has ruled in our favor" and authorized the appropriation. Taft to George W. Anderson, June 4, 1926, Taft Papers, Reel 282. See Public Law No. 492, 44 Stat. 841, 859 (July 3, 1926).

⁹³ Taft to Charles P. Taft, 2nd, January 27, 1924, Taft Papers, Reel 260.

⁹⁴ "McReynolds is a Democrat and knows many of the Senators," Taft explained. "Sutherland has been a Senator, and Van Devanter is one of the most forcible of our Court and most learned on questions of jurisdiction." Taft to Thomas W. Shelton, January 31, 1924, Taft Papers, Reel 261. Taft was quite clear "that in my judgment it will help the passage of both bills if I do not make myself prominent in their advocacy."

⁹⁵ Hearing Before the Committee on the Judiciary of the House of Representatives on H.R. 8206, 68th Cong., 2nd Sess., December 18, 1924, Serial 45. As Taft said in the context of his proposed legislation that would enable federal courts to merge law and equity and promulgate rules of procedure, "I am determined to push a movement for the betterment of the procedure in the Federal courts. I suppose I weigh down such reform by my advocacy of it, in arousing the opposition of certain elements, especially in the Senate, but I don't know why that should prevent my initiating matters when nobody is likely to do so." Taft to Horace Taft, April 17, 1922, Taft Papers, Reel 241.

⁹⁶ Chief Justice William H. Rehnquist, "1996 Year-End Report on the Federal Judiciary," *The Third Branch*, Vol. 29, No. 1 (January 1997), at 1, 6.

⁹⁷ Public Law No. 563, 44 Stat. 1022 (1927).

⁹⁸Joseph Coursey to Taft, November 23, 1925, Taft Papers, Reel 278.

⁹⁹Taft to Joseph Coursey, November 28, 1925, Taft Papers, Reel 278.

¹⁰⁰Joseph Coursey to Taft, December 15, 1925, Taft Papers, Reel 278.

¹⁰¹Taft to William D. Mitchell, December 20, 1925, Taft Papers, Reel 278.

¹⁰²William Mitchell to Taft, January 8, 1926, Taft Papers, Reel 279.

¹⁰³Taft to Albert C. Cummins, January 11, 1926, Taft Papers, Reel 279.

¹⁰⁴Albert C. Cummins to Taft, January 12, 1926, Taft Papers, Reel 279.

¹⁰⁵William Mitchell to Taft, March 3, 1926, Taft Papers, Reel 280.

¹⁰⁶Albert Cummins to Taft, March 5, 1926, Taft Papers, Reel 280.

¹⁰⁷*Public Ledger*, July 14, 1921, p.1. See *Minneapolis Morning Tribune*, July 18, 1921, p.6. For a discussion of Taft's career as a columnist, see James F. Vivian, **William Howard Taft: Collected Editorials 1917-1921** (Praeger 1990).

¹⁰⁸Address to NY Country Bar Ass'n, February 18, 1922, Taft Papers, Reel 590, p.2.

¹⁰⁹Taft to Clarence Kelsey, August 17, 1923, Taft Papers, Reel 256. See Taft to Charles Evans Hughes, April 26, 1926, Taft Papers, Reel 282 ("Bar Associations are formed too often for merely social enjoyment and fraternization, with only a modicum of effort to . . . exert a controlling influence upon the legislative bodies for real reform measures in respect to courts and legal procedure.")

¹¹⁰Elihu Root to Taft, September 9, 1922, Taft Papers, Reel 245.

¹¹¹"Adequate Machinery for Judicial Business," 7 *ABAJ* 453 (1921).

¹¹²"The Chief Justice," 5 *The Chicago Bar Association Record* pp. 8-13 (December 1921).

¹¹³62 *Congressional Record*, pt. 3, 67th Cong., 2nd Sess., pp. 2582-2583 (February 15, 1922). See "Taft's Public Speeches Criticized in the Senate," *The New York Tribune*, February 16, 1922, p. 2.

¹¹⁴62 *Congressional Record*, pt. 3, 67th Cong., 2nd Sess., pp. 2582-2583 (February 15, 1922). Senator Harris also very much objected to Justice Clarke's recent speech urging cancellation of the foreign war debt. See "Justice Clarke Urges Prompt Cancellation of War Debt," *Chicago Journal of Commerce*, February 9, 1922, p.1; 62 *Congressional Record*, pt. 3, 67th Cong., 2nd Sess., pp. 2525-2526 (February 14, 1922) ("I have the greatest respect and admiration for Justice Clarke . . . However, I think that the Justices of the Supreme Court of the United States should keep out of any matters that are political. . . I do not think it is the part of wisdom for a Supreme Court Justice to publicly discuss matters to be decided by Congress.") (Remarks of Senator Harris).

¹¹⁵Address to NY County Bar Ass'n, February 18, 1922, Taft Papers, Reel 590, pp. 2-3. Taft left no doubt about the target of his remarks:

It is a source of some embarrassment for me to rise here and not to talk to you as I would like to talk to you, free from the fetters of the office which I hold. . . I am struggling to be worthy of

the bench of which I am a member. I am struggling to fall into the customs and requirements of that position. We have been warned in the Senate of the United States what our narrow function is and with due respect to that warning, I am going to confine myself to a written manuscript.

Id. at 1-2. For press coverage of the speech, see "Taft Approves Laws to Clear Court Dockets," *New York Tribune*, February 19, 1922, p.13; "Taft Backs Bills to Speed Trials," *The New York Times*, February 19, p. 18.

¹¹⁶*Minneapolis Morning Tribune*, July 18, 1921, in Taft Papers, Reel 626.

¹¹⁷Taft's commitment to this position is evident in the Canons of Judicial Ethics that were approved by the ABA in July 1924. Lisa L. Milord, **The Development of the ABA Judicial Code 131-143** (American Bar Association 1992). Taft had been appointed in February 1922 as the Chair of the small ABA Committee charged with drafting the Canons. See Cordenio Severance to Taft, February 4, 1922, Taft Papers, Reel 238; Taft to Cordenio Severance, February 9, 1922, Taft Papers, Reel 239. Canon 23 explicitly provides:

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

An early version of this Canon, drafted about June 1922, was even more explicit:

Judges have a peculiar opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the reasonable and just disposition of controversies; they should not be indifferent to shocking results; and they may well contribute to the public interest by advising both the people and their representatives of the result of their observation and experience; there is no need of diffidence in this respect, out of a false fear of being considered to be unduly interfering with another department of the Government.

Judges may well direct diligent effort toward securing from proper authority such modifications of laws or rules tending, in their experience, to impede or prevent the reasonable and just disposition of litigation, as will rectify the evils discovered by them.

Charles Boston to Taft, June 8, 1922, Taft Papers, Reel 242. For the ABA's most recent standard on this subject, see *ABA Model Code of Judicial Conduct* (1990), Canon 4(B), Comment 1.

¹¹⁸S. 3151, 70th Cong., 1st Sess. (February 13, 1928). On opposition to federal court diversity jurisdiction in the South and West, see Tony A. Freyer, "The Federal Courts, Localism, and the National Economy, 1865-1900," 53 *Business History Review* 343 (1979); Harry N. Scheiber,

“Federalism, the Southern Regional Economy, and Public Policy Since 1865,” in David J. Bodenhamer and James W. Ely, Jr., *Ambivalent Legacy: A Legal History of the South* pp.69-104 (University Press of Mississippi 1984).

¹¹⁹See 62 *Congressional Record*, 67th Cong., 2nd Sess., pt. 5, p. 5108 (April 6, 1922) (“In my judgment we ought to abolish every United States district court in America; we ought to abolish entirely the United States Court of Appeals, and leave nothing of our United States judicial system except the Supreme Court of the United States. We ought to give to State judges and State courts all the jurisdiction.”) See George Norris to G. Jay Clark, January 2, 1928, Norris Papers (“In fact, I have gone so far as to advocate the abolition of all Federal courts except the Supreme Court.”)

¹²⁰See Senate Report No. 626, 70th Cong., 1st Sess. (March 27, 1928). The Committee Report said simply, “The committee can conceive of no reason why the district court of the United States should have jurisdiction in these cases.” *Id.* at 2.

¹²¹Taft to Horace Taft, April 16, 1928, Taft Papers, Reel 301.

¹²²Taft to George Wickersham, March 29, 1928, Taft Papers, Reel 300.

¹²³Taft to Newton Baker, April 5, 1928, Taft Papers, Reel 301.

¹²⁴Taft to Newton Baker, April 19, 1928, Taft Papers, Reel 301.

¹²⁵Taft to Casper Yost, April 5, 1928, Taft Papers, Reel 301.
¹²⁶“Federal Courts in Peril,” *St. Louis Daily Globe-Democrat*, April 10, 1928, p.18. See Casper Yost to Taft, April 10, 1928, Taft Papers, Reel 301. Taft thanked Yost for the editorials: “I feel sure that they will attract attention.” Taft to Casper Yost, April 16, 1928, Taft Papers, Reel 301.

¹²⁷Henry Taft was a named partner in the firm of Cadwalader, Wickersham & Taft.

¹²⁸Taft to Henry W. Taft, April 5, 1928, Taft Papers, Reel 301. Two days later Taft wrote his brother:

What we desire is publicity. . . . You . . . might enlarge on the fact that such a bill as this would destroy the jurisdiction in those cases which McReynolds wrote from Oregon and from Nebraska on the right of the Catholics to maintain separate schools and the right of the Germans to maintain separate education in German. If we can stir up the Germans and the Irish and the negroes to an appreciation of the importance to them of maintaining the jurisdiction of the trial courts, we can make the Democrats a bit chary of burning their fingers with such a revolutionary proposal.

Taft to Henry W. Taft, April 7, 1928, Taft Papers, Reel 301. In a postscript, Taft added, “I am mistaken as to the German language cases. They came from the Supreme Courts of the States. The other came from the U.S. District Court.”

¹²⁹See Henry W. Taft to Taft, April 18, 1928, Taft Papers, Reel 301.

¹³⁰See Taft to Willis Van Devanter, April 15, 1928, Van Devanter Papers: “They seem to be slow in New York to take up the question. My brother Harry is preparing the argument for his editorial friends in New York, but he takes so long that they might pass the bill in the Senate before

he gets his articles ready.”

¹³¹Taft to Henry W. Taft, April 21, 1928, Taft Papers, Reel 301.

¹³²Henry W. Taft to Taft, April 20, 1928, Taft Papers, Reel 301. Henry W. Taft also drafted a long report on behalf of the ABA Committee on Jurisprudence and Law Reform, and managed to have the ABA Executive Committee go on record against the bill on April 24. Senator Copeland had the Executive Committee resolution, as well as the report of the Committee on Jurisprudence and Law Reform, reprinted in the *Congressional Record*. 69 *Congressional Record* 8077-8080, pt. 8, 70th Cong., 1st Sess., May 8, 1928. See also “An Unwise and Dangerous Measure,” 14 *ABAJ* 266 (May 1928).

¹³³“Senate and Courts,” *The New York Times*, April 22, 1928, Section 3, p. 4.

¹³⁴69 *Congressional Record* 6379, pt. 6, 70th Cong., 1st Sess., April 13, 1928. Norris refused to hold hearings on the bill, saying that “it is a bill on which I think no particular hearings are necessary. It is entirely a legal proposition. . . . It is purely a question of practice that the lawyers on the Judiciary Committee understand as well as do other attorneys.” *Id.* at 6378.

¹³⁵“Senate and Courts,” *The New York Times*, April 22, 1928, Section 3, p. 4.

¹³⁶69 *Congressional Record* 7421-7422, pt. 7, 70th Cong., 1st Sess., April 30, 1928. See “Whittling Away at the Federal Tribunals,” 14 *ABAJ* 200 (1928). The *ABAJ* editorial particularly objected to the Bill’s repudiation of diversity jurisdiction:

In an address at the San Francisco meeting of the American Bar Association, Chief Justice Taft, while disclaiming any discussion of legislative policy, made the following pertinent remarks by way of comment on the proposal to relieve the Federal courts of congestion by taking away this jurisdiction:

“I venture to think that there may be a strong dissent from the view that danger of local prejudice in State Courts against nonresidents is at an end. Litigants from the eastern part of the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a Western or Southern state as in a federal court.

The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in States where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element . . . in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of Federal courts there, with a jurisdiction to hear diverse citizenship cases.”

Taft had addressed the San Francisco meeting of the American Bar Association on August 10, 1922. His

speech is reproduced in full in 6 *Journal of the American Judicature Society* 36 (1922), and in 57 *The American Law Review* 1 (1923). In his address before the ABA, Taft had also been careful to observe: "But of course the taking away of fundamental jurisdiction from the Federal Courts is within the power of Congress, and it is not for me to discuss such a legislative policy." *Id.* at 11.

Brandeis did not accept Taft's point about the importance of diversity jurisdiction for facilitating the investment of eastern capital in western and southern states:

He speaks feelingly on the subject whenever it comes up. I think his point is theoretical, like much of the economists mouthing of the "rational man." Of course, the bankers & still less the investors, do not give the subject of litigation any thought when they make loans.

Brandeis to Felix Frankfurter, May 10, 1928, in Melvin I. Urofsky and David W. Levy, eds., **"Half Brother, Half Son:" The Letters of Louis D. Brandeis to Felix Frankfurter** p. 331 (University of Oklahoma Press 1991). Frankfurter later published an article thanking Norris for sponsoring S. 3151 and thereby provoking discussion about the appropriate scope of federal jurisdiction, in which he virtually reiterated (without attribution) Brandeis' comments about diversity jurisdiction. Felix Frankfurter, "Distribution of Judicial Power Between United States and State Courts," 13 *Cornell L. Q.* 499, 499 n.1, pp. 521-22 (1928).

¹³⁷69 *Congressional Record* 7422, pt. 7, 70th Cong., 1st Sess., April 30, 1928.

¹³⁸S. 3151, 70th Cong., 1st Sess., May 8, 1928. See 69 *Congressional Record* 8077, pt. 8, May 8, 1928. Somehow Taft managed to acquire a copy of a letter sent by Norris to Lewis Gannett of *The Nation* explaining the proposed change in S. 3151. In the letter Norris writes that the "principal object of this bill . . . is to take away the jurisdiction of the Federal Courts in the diversity of citizenship. It is true the bill takes away some other jurisdictions, but the other items we thought were of very little importance. However, there is no objection to amending the bill so as to confine it entirely to diverse citizenship cases." Norris to Gannett, April 28, 1928. Taft sent the letter to Willis Van Devanter, dryly commenting: "I send you herewith a copy of a letter written by Norris . . . showing how closely he scrutinized the effect of his bill before introducing it." Taft to Willis Van Devanter, May 4, 1928, Taft Papers, Reel 301.

¹³⁹Taft to Henry W. Taft, May 16, 1928, Taft Papers, Reel 302.

¹⁴⁰Hearings Before the House Committee on the Judiciary on H.R. 6687, 70th Cong., 1st Sess., February 1, 1928, p. 6.

¹⁴¹Taft to Thomas Walsh, May 8, 1928, Taft Papers, Reel 301.

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴Thomas Walsh to Taft, May 10, 1928, Taft Papers, Reel 301. The next day Taft wrote to A.C. Paul that "I sincerely hope that [Walsh] will be able to get the bill through. I fear that the Chief Justice of the Court

of Customs Appeals will try to prevent it, but I hope not." Taft to A.C. Paul, May 11, 1928, Taft Papers, Reel 301.

¹⁴⁵Public Law No. 914, 45 Stat. 1475.

¹⁴⁶28 U.S.C. Section 211 (1964 ed.).

¹⁴⁷*Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The story is well told in *Brenner v. Manson*, 383 U.S. 519, 526 (1966).

¹⁴⁸This same dilemma now occurs whenever the Supreme Court is itself called upon to promulgate rules. So, for example, Justices Douglas and Black have dissented from the Court's promulgation of Rules of Civil Procedure on the grounds, *inter alia*, that rulemaking authority should be transferred to "the Judicial Conference" in order to "relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." 374 U.S. 869-70 (1963). Taft was, of course, a great supporter of increasing the rulemaking authority of the Supreme Court.

¹⁴⁹Thus Augustus Hand wrote Taft: "Our only real relief is to get rid of petty criminal cases. If we do not do this, this court which has been one of the most important and interesting trial courts anywhere is bound, in my opinion, to sink to a very low level." Augustus Hand to Taft, December 9, 1925, Taft Papers, Reel 278. Exemplary is Henry Smith's letter to Taft explaining why he was retiring as a federal district judge:

I am not conscious of any disability, physical or mental, and would dislike to be considered "shirking," but the burden of the immense criminal business of a police character—especially the flood of liquor cases—has become very great. They involve no questions of legal importance. Just one small criminal case after another, depending wholly upon testimony as to the facts. My egotism, I suppose, persuades me that I am a little thrown away on such work, and impels me to think I had better turn it over to a younger, stronger, and less susceptible mind.

Henry A.M. Smith to Taft, May 23, 1923, Taft Papers, Reel 253.

¹⁵⁰Indeed, in appointing Taft, Harding announced that he expected Taft to move rapidly to remedy the congestion overtaking federal courts. "Additional judges will be needed," he said, and "there may be need of authorization of commissioners; something must be done to relieve the courts of cases of the less criminal type. I mean cases growing out of the Volstead act." Gus Karger to Taft, June 30, 1921, Taft Papers, Reel 227. See George F. Authler, "Taft Confirmed by Senate for Post of Chief Justice," *The Minneapolis Morning Tribune*, July 1, 1921, p. 1.

¹⁵¹"The Federal Judicial Council," 2 *Texas Law Review* 458, 461 (1924). The Conference noted that this reform "would be expedient, provided the machinery proposed is within constitutional limits." *Id.*

¹⁵²Taft to Horace Taft, September 30, 1923, Taft Papers, Reel 257.

¹⁵³Taft to Albert Cummins, December 3, 1925, Taft Papers, Reel 278; Taft to George Graham, December

3, 1925, Taft Papers, Reel 278. Ever tactful, Taft sent a similar letter to Senator Thomas Walsh, the most influential Democrat on the Senate Judiciary Committee. Taft to Thomas Walsh, December 3, 1925, Taft Papers, Reel 278. Walsh replied that "We are so near together in our ideas concerning the measure for the relief of the District Judges that there should be no difficulty in meeting each other's views." Walsh preferred, however, to lodge the appointment power in the President rather than the District courts. Thomas Walsh to Taft, December 4, 1925, Taft Papers, Reel 278. Taft responded that he did "not wish to insist on the appointment by the District Judges," and that he would be "glad to talk further with you about it, because something ought to be done." Taft to Thomas Walsh, December 5, 1925, Taft Papers, Reel 278.

Taft also asked Augustus Hand for his comments on the proposed legislation. Hand responded "Of course I am heartily in favor of such a plan though I have not looked up the law and do not know whether the appointment of magistrates for such a tribunal as you propose can be delegated to the courts." Augustus Hand to Taft, December 9, 1925, Taft Papers, Reel 278.

¹⁵⁴67 *Congressional Record* 10942, pt. 10, 69th Cong., 1st Sess., June 8, 1926. Graham continued:

One of the great difficulties has arisen by reason of the invasion of what belonged heretofore to the States alone through the adoption of the eighteenth amendment. By the adoption of that amendment a great burden of police work was cast upon the Federal Government without furnishing that Government the proper equipment and machinery for carrying on the work created by the adoption of the eighteenth amendment and the laws intended to carry it into effect. That is one reason why the business of the courts is suffering, why the courts are congested . . .

Id.

¹⁵⁵*Id.*

¹⁵⁶*Id.* at 10942-43.

¹⁵⁷Francis G. Caffey to Taft, March 17, 1927, Taft Papers, Reel 290. *See, e.g.*, Hearings before the House Committee on the Judiciary on H.R. 5608, H.R. 8230, H.R. 8555, and H.R. 8556, 70th Cong., 1st Sess., January 17, 1928, p.13 (Testimony of Francis G. Caffey referring to the 1923 recommendation of the Conference of Senior Circuit Court Judges).

¹⁵⁸Taft to Francis G. Caffey, March 21, 1927, Taft Papers, Reel 290. "[B]ut my interest in it is deep," continued Taft, "and I am glad to express the hope that united action will be taken to have the next Congress approach the subject and do the best it can." Pushed by Representative Walton Moore of Virginia, debate on expanding the powers of United States Commissioners continued sporadically throughout the decade. *See, e.g.*, Taft to Walton Moore, March 21, 1927, Taft Papers, Reel 290; Walton Moore to Taft, March 22, 1927, Taft Papers, Reel 290; Taft to Walton Moore, March 23, 1927, Taft Papers, Reel 290. The

Wickersham Commission also endorsed legislation of this kind. *See* George Cochran Doub and Lionel Kestenbaum, "Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality," 107 *University of Pennsylvania Law Review* 443, 452-53 (1959).

¹⁵⁹Caraway had been attempting to promote this reform for many years. *See, e.g.*, Ashley Cockrill, "Trial by Jury," 52 *American Law Review* 823 (1918).

¹⁶⁰William Howard Taft, "Delays and Defects in the Enforcement of Law in This Country," 187 *North American Review* 851, 857 (1908).

¹⁶¹*See, e.g.*, William Howard Taft, "The Courts and the Progressive Party," *Saturday Evening Post*, Vol. 186, No. 39, March 20, 1914, p. 47:

[S]tate legislatures have cut down the power of the judge so that now in many states he has little more power to exercise than the moderator in a religious conference. In some states he is required to deliver a written charge before argument of counsel, and in others he is permitted only to accept or reject the statements of the law as given by counsel. His opportunity for usefulness is curtailed, his impartiality made the subject of suspicion by most unwise restrictions, and the trial is turned over largely to the control of the lawyers and the little restrained discretion of the jury. The result has been the perversion of justice in jury trials, the infusion into them of much maudlin sentiment and irrelevant considerations, and a dragging out of the trial to such a length that if it be a civil case the cost of litigation is greatly increased, and if it be a criminal case the public come to treat it as a game of wits and eloquence of counsel rather than the settlement of a serious controversy in a court of justice. Neither the dignity nor the effectiveness of judicial administration under these conditions impresses itself upon the public.

¹⁶²Taft to Helen Herron Taft, April 30, 1924, Taft Papers, Reel 639. Taft continued: "Congressman Snell, who is the Chairman of the Committee on Rules in the House, promised me that he could postpone the bill. I saw the Chairman of the Judiciary Committee, Mr. Graham, and he thinks he can. I think I shall try and see Nick Longworth, the leader of the House, tomorrow, and with those agreed, I hope the plan of delay can be carried out. It will be a good deal easier to induce the President to veto the bill after the election than before."

¹⁶³Taft to Thomas W. Shelton, April 13, 1924, Taft Papers, Reel 263. Taft noted that "I am not in a position to appear before the committee myself, because were I to oppose it, it would only sharpen the eagerness of many to put it through." Taft to Gardiner Lathrop, April 27, 1924, Taft Papers, Reel 264. On Bar opposition to the measure, *see* "The Effort to Limit Power of Federal Judges," 10 *ABAJ* 303 (1924) ("The bill is part and parcel of a vicious plan to destroy the powers and independence of the Federal Judiciary, and to invade

its constitutional prerogatives.”); “An Unwise Measure,” 10 *ABAJ* 332 (1924) (“[T]he proposal is wholly indefensible. . . . The indisputably greater efficiency of the federal courts as compared with the vast majority of state courts, of English criminal courts as compared with our own, rests on the power which the presiding judge has to control the proceedings.”) *Compare* “Letters of Interest to the Profession,” 10 *ABAJ* 443 (1924) (letter of C. Floyd Huff) (“[A] jury trial is a mockery far more so under a system which permits a Judge to make the last argument to the jury.”) *See also id.* (letter of Alvah J. Rucker). *Compare* Harry Eugene Kelly, “An Impending Calamity,” 11 *ABAJ* 65 (1925) with “Curbing Federal Judges,” 28 *Law Notes* 182 (1925).

¹⁶⁴Memorandum, December 2, 1924, Taft Papers, Reel 639.

¹⁶⁵*Id.* at 1.

¹⁶⁶*Id.* at 6.

¹⁶⁷*Id.* at 12.

¹⁶⁸Taft to Henry W. Taft, March 27, 1925, Taft Papers, Reel 272.

¹⁶⁹Henry W. Taft to Taft, March 28, 1925, Taft Papers, Reel 273.

¹⁷⁰Taft to Henry W. Taft, May 28, 1925, Taft Papers, Reel 274. Henry responded by sending to Taft a “copy of the proposed report of the [ABA] Committee on Jurisprudence and Law Reform, which I prepared some weeks ago. . . . You will see from the report that I used your memorandum on the Caraway bill freely, adding something of my own.” Henry W. Taft to Taft, May 29, 1925, Taft Papers, Reel 274.

¹⁷¹*See* Wright and Miller, 9 **Federal Practice and Procedure** Civil 2d Section 2557 (1995); Jack B. Weinstein and Margaret A. Berger, 1 **Evidence** Section 107 (Matthew Bender 1994). *See Quercia v. United States*, 289 U.S. 466, 469 (1933) (“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . .”)

¹⁷²Ernest Knaebel to Taft, July 1, 1921, Taft Papers, Reel 228.

¹⁷³“Taft Awed By Gaining Goal of His Ambition,” *New York Herald*, July 1, 1921, p.2.

The Hughes Court and Constitutional Consultation

Barry Cushman*

Our conventional image of the Supreme Court under Charles Evans Hughes calls to mind the riddle of the Sphinx: What creature walks on four feet in the morning, on two at noon, and on three in the evening? The answer with which Oedipus rescued the city of Thebes from a reign of terror was, of course, "Man": he crawls on all fours in infancy, stands erect on two legs in adulthood, and leans on a staff in old age. The established story of the Hughes Court inverts the chronology somewhat, but the characters are the same. In the mid-1930s, the crotchety Nine Old Men impetuously flouted the popular will, eviscerating the New Deal. Chastened by the disciplining hand of a stern presidential father figure in 1937, a repentant Court was "reborn," then blossomed into beautiful but uncertain youth under Harlan Fiske Stone and Fred Vinson, and grew into mature adulthood under Earl Warren.

The story has its charm, and a certain simple elegance. It has for many years captured the

imagination of a great many extremely able and distinguished scholars. In my own impetuous youth I have come to conclusions that differ from theirs. But I will not belabor all of my reasons for reaching those conclusions here, for it is not my immediate objective to convert you to my view of the matter. I ask only that you suspend disbelief. Forget for a moment, if you will, that the Justices invalidated New Deal initiatives because they thought them unwise social policy; forget that they later upheld federal regulations only because the Court-packing plan put the fear of God into them; forget that they continued to do so only because they had seen the light. Forget that the Court's role under Hughes was entirely reactive: first obstructing, then surrendering to, the political branches. This will, of course, be disorienting. But if all of this forgetting has not already rendered you unconscious, it may enable us to see the Hughes Court and its role in the New Deal saga in a new light.

Franklin Delano Roosevelt was the greatest politician of his age. But he was not the greatest constitutional lawyer. For example, he had rather unorthodox views on questions of the separation of powers. Early in his first term, the President approached Chief Justice Hughes and suggested that the two of them form a sort of consultative relationship. As one contemporary account has it, Roosevelt "intimated that he would like to talk over with the Chief Justice all his important plans concerning the general welfare, to get the Court's slant on them before acting."¹ Article III, Section 2 of the Constitution provides that the judicial power of the United States shall extend only to certain specified cases and controversies; and the Supreme Court had first declined a presidential request for an advisory opinion in George Washington's second term, when the first President had sought counsel on specific questions of international law.² Hughes similarly demurred to Roosevelt's overtures, informing the Presi-

dent that "'the Supreme Court is an independent branch of government."³ As one account puts it, "he turned the President down flat."⁴ Roosevelt related this story while defending his Court-packing plan to a doubtful Senator. "You see," the President sighed, "he wouldn't co-operate."⁵

There is, I suggest, no little irony in this defense of the effort to pack the Court. For in ways that Roosevelt apparently did not fully appreciate, but which others did, the Court was in fact cooperating with the political branches in seeking to formulate constitutional solutions to the economic crisis of the 1930s. I hope to illuminate this phenomenon by sketching a series of vignettes involving the fate of several Depression-era programs. Through these I hope to show that within the channels prescribed by Article III, and occasionally outside them as well, the Hughes Court offered the Roosevelt administration a distinctive form of consultative relationship.



Senator Lynn Joseph Frazier (above) was one of the authors of the Frazier-Lemke Farm Debt Relief Act of 1934. The Act provided extraordinary relief to financially distressed farmers, allowing them to stay foreclosure proceedings for five years by paying a reasonable rental on the mortgaged land. When the Court overruled the Act, which had been widely criticized as poorly and hastily drafted, a sympathetic Louis D. Brandeis took pains in his majority opinion to suggest how it could be revised to pass constitutional muster.

Consider, for example, the Frazier-Lemke Farm Debt Relief Act of 1934. The Act provided extraordinary relief to financially distressed farmers, allowing them to stay foreclosure proceedings for five years by paying a reasonable rental on the mortgaged land. At any time during this period the debtor could take title to the land free and clear of any mortgage simply by paying its appraised value—even if that value was substantially less than the amount of the mortgage debt.

The Act “inspired a storm of controversy [over] its validity.”⁷⁶ Commentary in the law journals characterized the Act as “hastily drafted and hurriedly passed” “by a harried Congress,”⁷⁸ rushing it “through as last minute emergency legislation.”⁷⁹ It was criticized as “one of the worst recent examples of draftsmanship in Federal legislation.”¹⁰ “The failure of its ultimate passage even was feared at times,” noted one observer.¹¹ It was enacted “[d]espite. . . the doubts of many members of Congress,”¹² and “the fears of its proponents were not allayed when the President retained the bill for ten days before signing it”¹³ “with apparent hesitation and misgiving.”¹⁴ At the signing ceremony Roosevelt presciently remarked, “The bill is in some respects loosely worded and will require amendment at the next session of Congress.”¹⁵

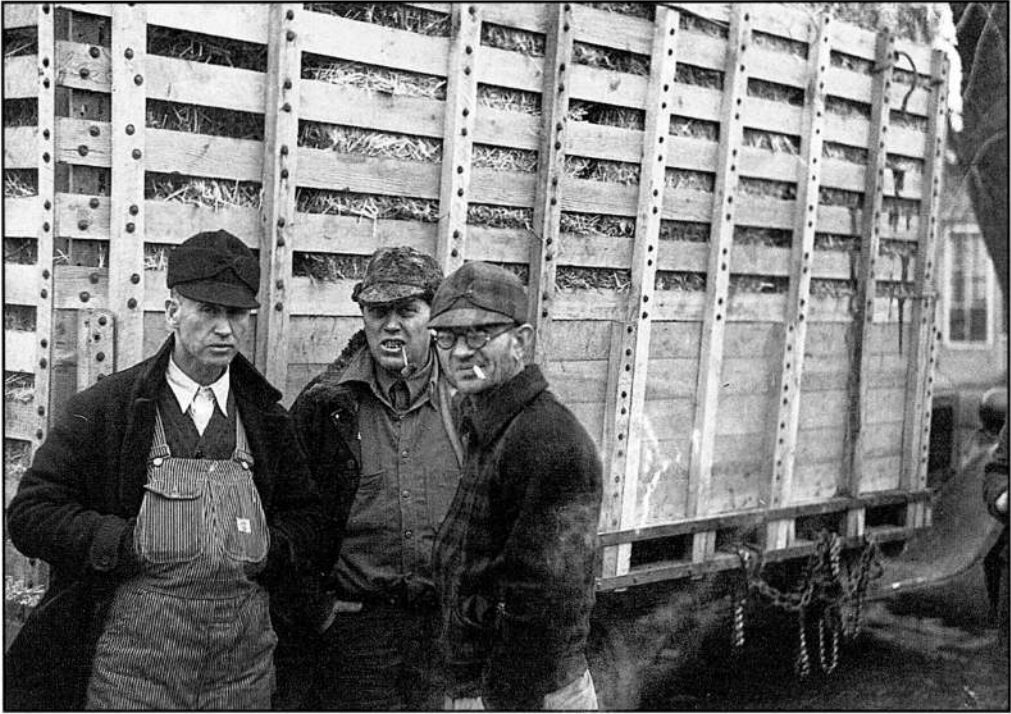
The Act’s constitutionality was challenged before the Court in the Spring of 1935 in the case of *Louisville Joint Stock Land Bank v. Radford*.¹⁶ The Justices of the Supreme Court were unanimously of the opinion that the Act transgressed limits imposed by the Due Process Clause of the Fifth Amendment. Chief Justice Hughes assigned the opinion to Justice Louis D. Brandeis, who had great sympathy for the plight of distressed small farmers and for the objectives of the Act.¹⁷ Brandeis did not squander the opportunity presented by the assignment. He offered a thirty-page examination of the history of legislative attempts to provide relief for distressed mortgagors, in which he painstakingly identified the ways in which the Frazier-Lemke Act enlarged these protections beyond anything previously sanctioned by the Court. The Justice did not confine himself to identifying one or two deficiencies of the Act and leave Congress guessing whether other features of the Act would require revision in

order to pass constitutional muster. Instead, he listed five specific substantive rights of the creditor that the Act infringed.¹⁸ As one comment in the *Cornell Law Review* noted, the Court “definitely showed that it appreciated the situation which led to this drastic measure. . . . It indicated that similar legislation might be upheld if it were found to preserve substantially the rights of mortgagees.”¹⁹

The *Radford* case was handed down on “Black Monday”—May 27, 1935. That same day the Court unanimously drew the curtain on the brief career of the National Industrial Recovery Act in the famous “sick chicken” case, *Schechter Poultry v. United States*. Immediately following delivery of the decisions, Brandeis pulled Roosevelt lieutenant Ben Cohen aside and told him “The President has been living in a fool’s paradise. . . . I should not be surprised if everything would have to be redrafted.”²⁰ Brandeis’ message was clear. The Court, despite its unanimity, was not saying that the federal government was powerless to address the economic crisis. Had this been the import of the decisions, there would have been little sense in redrafting anything. Brandeis’ point was instead that the crisis would have to be addressed with measures consistent with the Constitution. And Brandeis’ opinion in *Radford*, with its meticulous discussion of the Act’s constitutional infirmities, provided illuminating advice on how the statute ought to be redrafted.

And redrafted it was.²¹ Within ten days of the *Radford* decision Senator Frazier had introduced a revised bill, and by the first of July the Senate Judiciary Committee had issued a unanimous favorable report with amendments.²² “Their task was simplified,” noted one observer, “by the opinion pointing out the constitutional defects of the former Act. . . .”²³ The result, as another put it, was a “more carefully drawn” statute that sought “to cure the flagrant defects summarized by the Court.”²⁴

When the bill reached the floors of the House and Senate, several legislators asked whether the revised bill had rectified the constitutional deficiencies of the first Act, and its many proponents uniformly professed confidence that it had.²⁵ Senate Judiciary Committee Chairman Henry Ashurst was one among



many who assured his colleagues that "This bill is an earnest and, I believe, an able effort to meet the objection announced by the Court. . . without any attempt to defy the Court or to circumvent the Constitution. . . ." ²⁶ The old Idaho Progressive Senator William Borah testified that he had voted against the first Frazier-Lemke Act solely because he had thought it unconstitutional, but that he supported the revised bill, which he believed could run the judicial gauntlet. ²⁷ Floor amendments removed or modified any remaining provisions over which members had constitutional qualms, ²⁸ and the bill then passed both chambers without a dissenting vote. ²⁹ A comment in the *Columbia Law Review* predicted that "Since those features of the original act which the Court found chiefly objectionable have been eliminated, the revised statute will probably be held consistent with due process. . . ." ³⁰

When the constitutionality of the new Act was challenged before the Court in *Wright v. Vinton Branch Bank* ³¹ in early 1937, the debtor emphasized the efforts of Congress to remedy the faults of the first Act. The new Act, he as-

serted, was "the result of a painstaking attempt by Congress to comply with the decision of this Court holding the first Frazier-Lemke Act unconstitutional." ³² After recounting the legislative history of the statute and detailing its improvements upon the old Act, ³³ the debtor's brief concluded: "We are not here concerned with the decision of the Supreme Court holding the original Frazier-Lemke Act unconstitutional. This is not the same act, but a new act drafted carefully so as to comply with the mandate laid down by the Supreme Court in that decision." ³⁴

The Justices did vote to uphold the second Frazier-Lemke Act, and Hughes again assigned the opinion to Brandeis. "The decision in the *Radford* case did not question the power of Congress to offer to distressed farmers the aid of a means of rehabilitation under the bankruptcy clause," wrote Brandeis. It had merely held that the first Act violated the Fifth Amendment by infringing the five substantive rights there enumerated. "In drafting the new Frazier-Lemke Act," Brandeis observed, "its framers sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security. The measure received careful con-



In 1937 Dorothea Lange photographed a South Carolina sharecropper (left), and Russell Lee captured Iowa chicken farmers (opposite), for the Farm Security Administration's photo documentation program. The revised Frazier-Lemke bill was upheld by the Court and provided much-needed help to desperate farmers.

sideration before the committees of the House and the Senate. Amendments were made there with a view to ensuring the constitutionality of the legislation recommended. The Congress concluded, after full discussion, that the bill, as enacted, was free from the objectionable features which had been held fatal to the original Act.³⁵ Brandeis explained how the new Act remedied each of the defects his *Radford* opinion had identified, demonstrating at each step a thorough mastery of the Act's legislative history. His opinion noted approvingly that "Emphasis upon the deliberate intention to meet the constitutional objections raised in [*Radford*] dominated the consideration of the bill in all stages."³⁶ "Amendments to the bill subsequent to its introduction plainly demonstrate[d] careful intention to leave the [creditor's] lien wholly unimpaired."³⁷ The Court

concurred in the congressional judgment that the provisions of the revised Act made no unreasonable modification of the creditor's rights, and hence were valid.³⁸

The *Wright* opinion was announced on March 29, 1937, at the height of the controversy over the President's Court-packing proposal. That same day the Court upheld Washington state's minimum wage statute;³⁹ two weeks later the Court upheld the application of the National Labor Relations Act to three manufacturing concerns;⁴⁰ in May the Court upheld the unemployment insurance provisions of the Social Security Act as well as Alabama's complementary state unemployment compensation act.⁴¹ These decisions have often been characterized, erroneously in my view, as jurisprudential about-faces, reactions to such external pressures as Roosevelt's landslide elec-

tion in 1936 and/or the Court-packing plan. In those cases, it is contended, the Court capitulated to the New Deal in order to defuse the Court-packing threat. Could it not be contended with equal force that the Court's decision to uphold the second Frazier-Lemke Act was similarly motivated?

I don't think so. For even if we assume that the conventional explanation of the more famous decisions of the spring of 1937 is correct, the *Wright* case stands on a different footing. For all of the other cases to which I have alluded were decided by votes of 5 to 4. Notwithstanding the pressures brought to bear by the election and by the Court-packing plan, the Four Horsemen continued to cast votes against major initiatives for social reform in the most celebrated cases of the day. The vote in the *Wright* case, by contrast, was unanimous. Sutherland, Butler, Van Devanter, and McReynolds were all with the majority. Given their voting records before, during, and after the Court-packing crisis, it seems unlikely in the extreme that they voted to uphold the second Frazier-Lemke Act for any reason other than that they thought it was constitutional. A much more persuasive assessment was offered by a contemporary commentator in the *Columbia Law Review*, who remarked, "this is a dramatic illustration of the manner in which by careful draftsmanship Congress can overcome constitutional objections when they are explicitly stated, and thus in a substantial measure attain the objectives sought by previously invalidated legislation."⁴²

A second national regulatory initiative struck down by the Court in 1935 was section 9(c) of the National Industrial Recovery Act.⁴³ In an effort to stabilize petroleum prices in the face of a frenzy of wildcat drilling in the East Texas oil fields, Congress authorized the President to prohibit interstate transportation of what was called "contraband" or "hot" oil—that is, oil produced in excess of the amount permitted by the law of the state of production. The President had done so by executive order, and had in turn delegated authority to promulgate appropriate rules and regulations to the Secretary of the Interior. The President had by further executive order approved a Code of Fair Com-

petition for the Petroleum Industry. Two petroleum companies sought to restrain enforcement of various provisions of the oil regulation program.⁴⁴

The litigation of the *Hot Oil Cases* was something of a fiasco. Unbeknownst to both the oil companies and the government lawyers, a provision of the Petroleum Code at issue had been inadvertently repealed by a subsequent executive order before the suits had been initiated.⁴⁵ The Attorney General's office had been unknowingly defending the constitutionality of a provision that was not even law. Secretary of the Interior Harold Ickes wrote in his diary that it made him sick when he thought of the way the Justice Department's representative had handled the case before the Supreme Court.⁴⁶ Yet notwithstanding a poor performance by the attorneys for the government, the Chief Justice still managed to make a little lemonade.

In an opinion written by Hughes, the Court by a vote of 8 to 1 held that section 9(c) constituted an unconstitutional delegation of legislative authority to the executive. "[I]n every case in which the question has been raised," Hughes observed, "the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits."⁴⁷ Hughes patiently reviewed the development of the Court's delegation jurisprudence from the years of the early republic to the 1930s, showing how each delegation previously sustained had satisfied criteria that were unmet in the instant case.⁴⁸ "As to transportation of oil production in excess of state permission," he maintained, "the Congress has declared no policy, has established no standard, has laid down no rule."⁴⁹ "Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation. . . . It establishes no criterion to govern the President's course. . . . So far as this section is concerned, it gives to the President an unlimited authority. . . ."⁵⁰

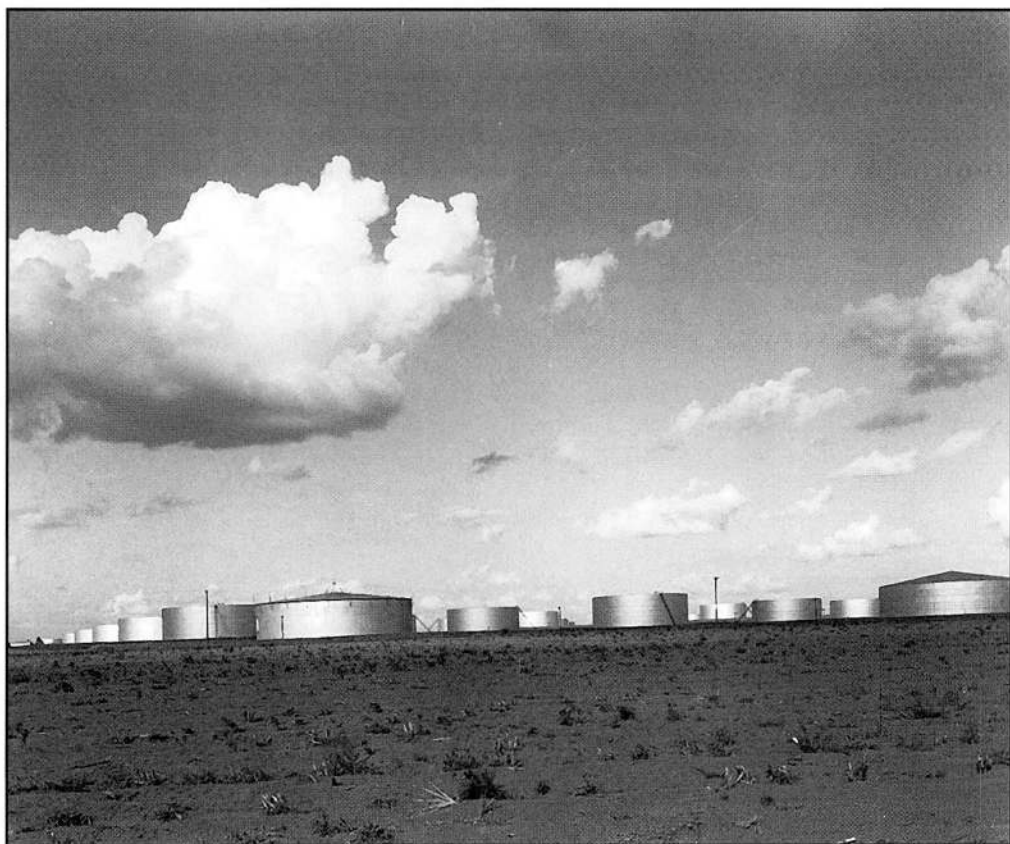
But as Hughes' opinion made clear, this problem was not irremediable. For as the cases showed, "Congress. . . may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is,

as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."⁵¹ "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform," Hughes counseled, "such legislative action is not a forbidden delegation of power."⁵²

Readers of the opinion were confident that the defects identified by Hughes could be "easily remedied." As one commentator observed, "That the decision of the Court was limited to the pronouncement that the 'primary standard' was too vague, in effect, suggests that there is a proper way to accomplish the end desired, i.e., Congress may set out definitely such a standard."⁵³ Representative Charles Wolverton maintained that a standard adequate to satisfy the Court "could have been placed in section

9(c) by the use of only a few words."⁵⁴ The requirement that the statute provide some standard to guide the President, observed another, "relates merely to the form of legislative drafting. As pointed out by one writer, 'the effect of the decision might be very like that of the Statute of Uses which has been said merely to have added six more words to every English conveyance.'"⁵⁵

At the height of the Court-packing fight, Roosevelt would contend that the series of decisions invalidating New Deal initiatives meant that the government was powerless in the face of grave economic crisis. In early 1935, however, he was much less pessimistic. At a press conference following the Court's decision in the *Hot Oil Cases*, the President told reporters, "You and I know that in the long run there may be half a dozen more court decisions



In an effort to stabilize petroleum prices in the face of a frenzy of wildcat drilling in the East Texas oil fields (above), Congress authorized the President to prohibit interstate transportation of what was called "contraband" or "hot" oil—that is, oil produced in excess of the amount permitted by the law of the state of production. Chief Justice Charles Evans Hughes' opinion in the *Hot Oil Cases* struck down the regulatory initiative as an unconstitutional delegation of legislative authority to the executive, but went out of its way to advise Congress on how to remedy the statute's defects.

before they get the correct language, before they get things straightened out according to correct constitutional methods."⁵⁶ Harold Ickes surely took encouragement from a conversation he had with Justice Roberts at a dinner party three days after the Court announced its decision. Ickes recorded in his diary that Roberts "assured me that he is entirely sympathetic with what we are trying to do in the oil matter and that he hoped we would pass a statute that would enable us to carry out our policy."⁵⁷

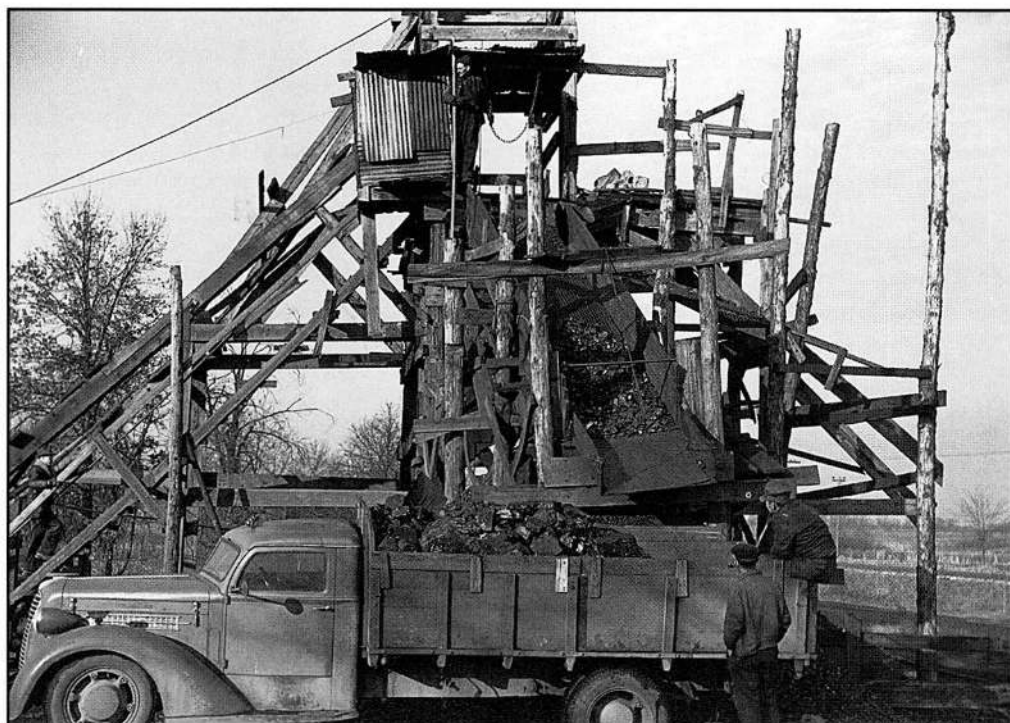
Eleven days after the Court announced its decision in the *Hot Oil Cases*, Senator Tom Connally of Texas introduced legislation to rectify the problems identified in the Chief Justice's opinion.⁵⁸ Connally, who affirmed his belief that the *Hot Oil Cases* had been correctly decided,⁵⁹ assured his colleagues that his bill "was drawn in collaboration with the legal authorities of the Department of the Interior and has been carefully scrutinized by the oil production board and their legal staff." They all joined the members of the Senate Committee on Mines and Mining in believing "that the present measure obviates the objections which were urged to the act before the Supreme Court." The new bill's solution to the delegation problem was arrestingly simple. Rather than delegating authority to prohibit interstate shipment of hot oil to the President, Congress itself prohibited such shipment by statute.⁶⁰ "While the Supreme Court did not in so many words hold that the Congress had authority to prohibit" such shipments, Connally maintained, "there is every suggestion in the opinion that in the original case if Congress itself had prohibited the interstate shipment of this oil it would have been better. . . ."⁶¹ The bill passed both houses of Congress without a record vote within six weeks of the Court's decision.⁶²

Observers were confident that the Connally bill would pass muster before the Court. "[I]t would seem," wrote one, "that Congress has effectively met the objections expressed by the Court to the former Act."⁶³ "[C]orrective legislation," wrote another, "has already been accomplished by the Connally Bill. . . ."⁶⁴ "[T]he immediate damage caused by the decision in the [*Hot Oil*] case," remarked a third, "is repaired."⁶⁵ These assessments were vindicated in due course. Attacks on the constitutionality

of the Act were uniformly rebuffed in the lower federal courts.⁶⁶ When an indictment for violation of the Act finally came before the Supreme Court in 1939, long after the Court-packing plan had been decisively repudiated, the defendants did not even challenge the Act's constitutionality. And the unanimous opinion sustaining the indictment was joined even by the two remaining Horsemen, Justices Pierce Butler and James C. McReynolds.⁶⁷

Just as overproduction had created turmoil in the petroleum industry, cutthroat competition in the bituminous coal industry exerted disastrous downward pressures on prices, wages, and working conditions. In an attempt to impose order on this chaotic situation, Congress enacted the Guffey Coal Act of 1935. One part of the Act regulated the price at which coal moved in interstate commerce.⁶⁸ Another part provided for regulation of wages, hours and labor relations at the mines.⁶⁹ Members of both houses were plagued by doubts about the constitutionality of the labor provisions, and the Roosevelt administration had to resort to extraordinary measures to secure a favorable committee report. The bill passed both houses by unusually slim margins; and the sentiments of many were summed up by Senator Millard Tydings' ominous forecast of the Act's future: "Like an autumn flower it will be blown away by the first winter blast of the Court."⁷⁰

The Court did hold the labor provisions unconstitutional in *Carter v. Carter Coal Co.*⁷¹ in 1936. The majority opinion did not, however, rule on the validity of the price regulation provisions. Instead, the majority found that those sections were inseparable from the offending labor provisions. Accordingly, the entire statute had to fall.⁷² Hughes wrote separately, agreeing that the labor provisions were invalid, but contending that the price provisions were valid, and were severable from the labor provisions.⁷³ Benjamin N. Cardozo, joined by Brandeis and Stone, agreed in dissent that the price regulation provisions were valid and severable.⁷⁴ Moreover, Cardozo noted suggestively, "Stabilizing prices would go a long way toward stabilizing labor relations by giving the producers capacity to pay a living wage."⁷⁵ If Congress could enact a law regulating the minimum price at which coal moved in interstate



Just as overproduction had created turmoil in the petroleum industry, cutthroat competition in the bituminous coal industry exerted disastrous downward pressures on prices, wages, and working conditions. In an attempt to impose order on this chaotic situation, Congress enacted the Guffey Coal Act of 1935. Above, unemployed miners in West Frankfort, Illinois, have opened primitive workings on the coal seam of an abandoned mine, known as a gopher hole.

commerce, the dissent intimated, many of the labor difficulties caused by cutthroat price competition might be ameliorated as a result.⁷⁶ And the opinions of Hughes and Cardozo, coupled with the fact that the majority opinion had refrained from declaring the price provisions themselves unconstitutional, suggested that such an act might well pass constitutional muster.⁷⁷

In the late winter and early spring of 1937, Congress framed just such a bill. The Bituminous Coal Conservation Act of 1937 essentially reenacted the Guffey Coal Act without the objectionable labor provisions.⁷⁸ Both in the committee reports and on the floor, sponsors repeatedly quoted from the Hughes and Cardozo opinions, emphasizing the limited scope of the majority opinion as they did so.⁷⁹ Everyone knew that each of the Four Horsemen held very restrictive views of governmental power to regulate prices, and it was almost certain that they would have been prepared to invalidate regulation of coal prices on the merits.⁸⁰ Supporters

of the bill therefore believed that the only reason that the *Carter* majority opinion had not squarely addressed the Guffey Act's price provisions was that Justice Owen J. Roberts did not consider them unconstitutional. After all, they pointed out, it was Roberts who had written the landmark opinion upholding broad governmental power to regulate prices in the 1934 case of *Nebbia v. New York*.⁸¹ If between 1934 and 1936 Roberts had "had any change in mind relative to the power of Congress to regulate prices," contended Representative Fred Vinson, "it would have been an easy matter to have invalidated those points" of the Guffey Act.⁸² Members of Congress thus interpreted the opinions in *Carter Coal* to mean that a majority of the Court would approve a separate price regulation measure.⁸³ Solicitor General Stanley F. Reed testified to his view that the bill was now constitutional, and its backers in Congress were optimistic about its prospects before the Court.⁸⁴ Even Senators and Representatives

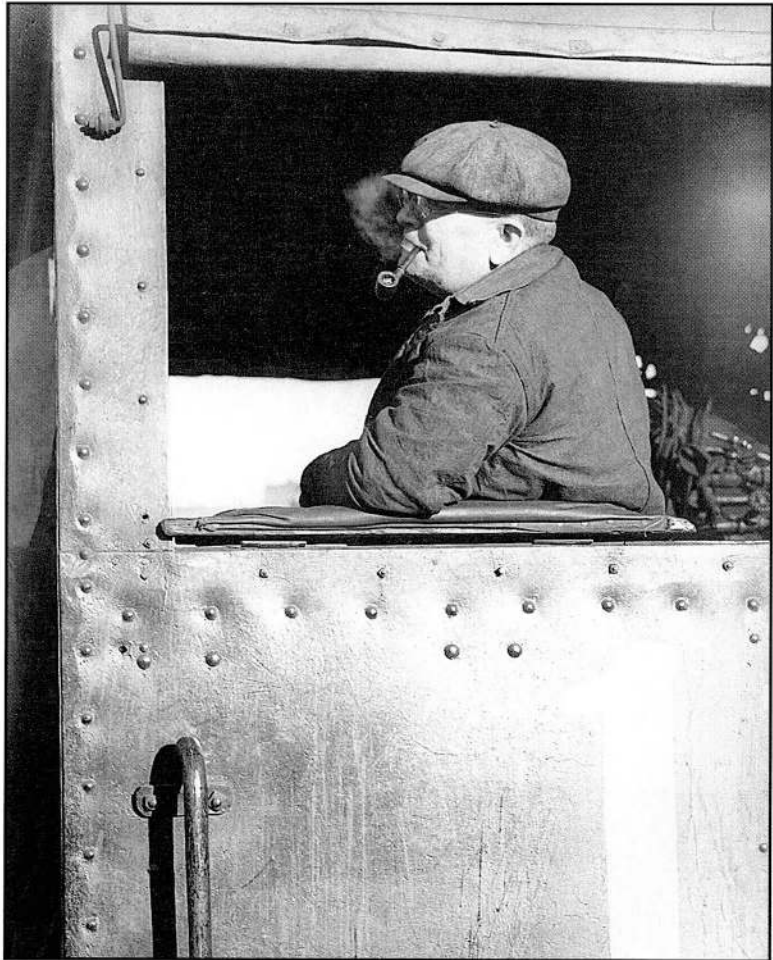
who had opposed the Guffey Act on constitutional grounds announced their support for the revised bill.⁸⁵ As Senator Guffey put it, "The bill is drawn so as to bring it clearly within the light of limitations which constitutional interpretation has imposed upon the power of Congress."⁸⁶ "As a lawyer and a Member of this body, I say to you that we have tried to square the language of this bill with the decisions of the Supreme Court," Vinson told his colleagues. "Our efforts have not been to circumvent any opinion of our highest Court, but we have worked in a bona-fide attempt to meet the law laid down by them in a proper, legal, constitutional manner."⁸⁷

When the 1937 Act was upheld by the Hughes Court in 1940, only Justice McReynolds dissented. "There is nothing in the *Carter* case which stands in the way," wrote Justice William O. Douglas, echoing arguments made in

Congress three years before. "The majority of the Court in that case did not pass on the price-fixing provisions of the earlier Act. The Chief Justice and Mr. Justice Cardozo in separate minority opinions expressed the view that the price-fixing features of the earlier act were constitutional. We rest on their conclusions for sustaining the present Act."⁸⁸

Yet another federal initiative invalidated by the Court in 1935 was the Railroad Retirement Act of 1934.⁸⁹ Enacted under the aegis of the Commerce Power, the Act set up a system of compulsory retirement for employees of interstate carriers, under which all such employees and carriers were required to contribute to a federal fund from which annuities would be paid to retirees. The majority opinion was written by Justice Roberts, who opened with the broad-minded announcement that "Our duty. . . is fairly to construe the powers of Congress, and

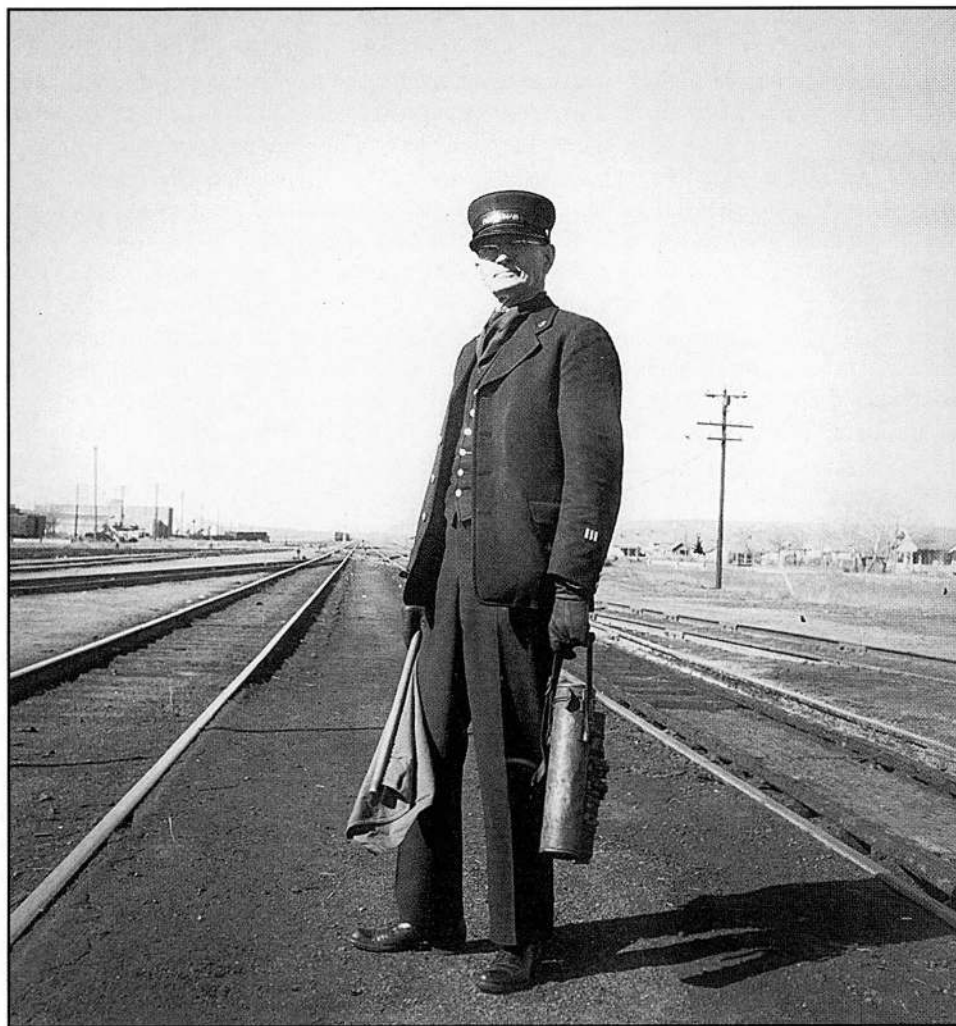
Owen J. Roberts' majority opinion invalidating the Railroad Retirement Act of 1934 identified no fewer than nine ways in which its detailed provisions violated the Due Process Clause of the Fifth Amendment. Chief Justice Hughes was distressed that the opinion did not advise Congress on how to shape future acts to comport with the Constitution. The Act set up a system of compulsory retirement for employees of interstate carriers (including the brakeman at right and the engineer opposite), under which all such employees and carriers were required to contribute to a federal fund from which annuities would be paid to retirees.



to ascertain whether or not the enactment falls within them, uninfluenced by predilection for or against the policy disclosed in the legislation."⁹⁰ Roberts then proceeded to bludgeon the Act to death, identifying no fewer than nine ways in which its detailed provisions violated the Due Process Clause of the Fifth Amendment.⁹¹ Having pummeled the Act to a bloody pulp, Roberts then administered the *coup de grace*: even were all of the due process defects of the statute rectified, it would still be unconstitutional, for it was "not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution."⁹²

Hughes was clearly distressed. The majority, in his view, was not performing its appropriate consultative function. It was not advising

Congress on how to shape future enactments so as to comport with the requirements of the Constitution. It was instead erecting an insuperable obstacle to any such ameliorative legislation. "If the opinion were limited to the particular provisions of the Act, which the majority find to be objectionable and not severable," he complained in dissent, "the Congress would be free to overcome the objections by a new statute. . . ."⁹³ "What was. . . found to be inconsistent with the requirements of due process could be excised and other provisions substituted. But after discussing these matters, the majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of congressional authority to regulate interstate commerce. In that view, no matter how suitably



limited a pension act for railroad employees might be. . . still under this decision Congress would not be at liberty to enact such a measure."⁹⁴ "The gravest aspect of the decision," Hughes remarked gravely, "is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pension act for railroad employees."⁹⁵

This lament was echoed by Cassandras in the law reviews,⁹⁶ but it proved to be unwarranted. In the April issue of the *St. Louis Law Review*, Ralph Fuchs played the contrarian. "The decision of the Court does *not* in reality exclude the power of Congress," he maintained. "No reason appears why Congress could not levy a payroll tax upon the carriers and provide also for the payment of pensions to retired employees *out of the Treasury*."⁹⁷ In other words, what Congress could not accomplish through its Commerce Power it might nevertheless be able to achieve through its powers to tax and spend. "To guard against an adverse decision upon a pension law enacted under the taxing power," Fuchs cautioned, "it might be wise to separate the taxing measure and the law authorizing the payment of the pensions."⁹⁸ Fuchs' theory was that the tax, considered separately from the pension payments, would be upheld as a legitimate revenue measure. And the appropriations to pay the pensions, separately considered, would similarly survive constitutional challenge—though for different reasons that I will explain momentarily.⁹⁹

That summer Congress followed the course mapped out by Fuchs, though it did so without much subtlety.¹⁰⁰ H.R. 8651 became the Railroad Retirement Act of 1935;¹⁰¹ H.R. 8652 became the Carrier Taxing Act of 1935.¹⁰² The Taxing Act was calibrated to generate the amount of revenue necessary to fund the pension payments authorized by the Retirement Act. This stratagem set off something of a chase scene in the Senate. Opponents of the plan, while stopping short of frankly accusing their colleagues of subterfuge, tried to get the plan's sponsors to confess that it was an attempt to circumvent the Court's decision. Proponents of the bill, assuring their interrogators that no such legerdemain was intended, struggled to keep a straight face while explaining that there were

two bills rather than one because pension legislation properly fell under the jurisdiction of one committee while taxing bills fell under the jurisdiction of another.¹⁰³

When the District Court of the United States for the District of Columbia granted the major railroads an injunction restraining collection of the tax in June of 1936,¹⁰⁴ it appeared that the Fuchs strategy had foundered. Citing extensively to the congressional debates,¹⁰⁵ the district court concluded that the Carrier Taxing Act and the Railroad Retirement Act were two parts of a single scheme that, taken as a whole, contained many of the defects from which the 1934 act had suffered.¹⁰⁶

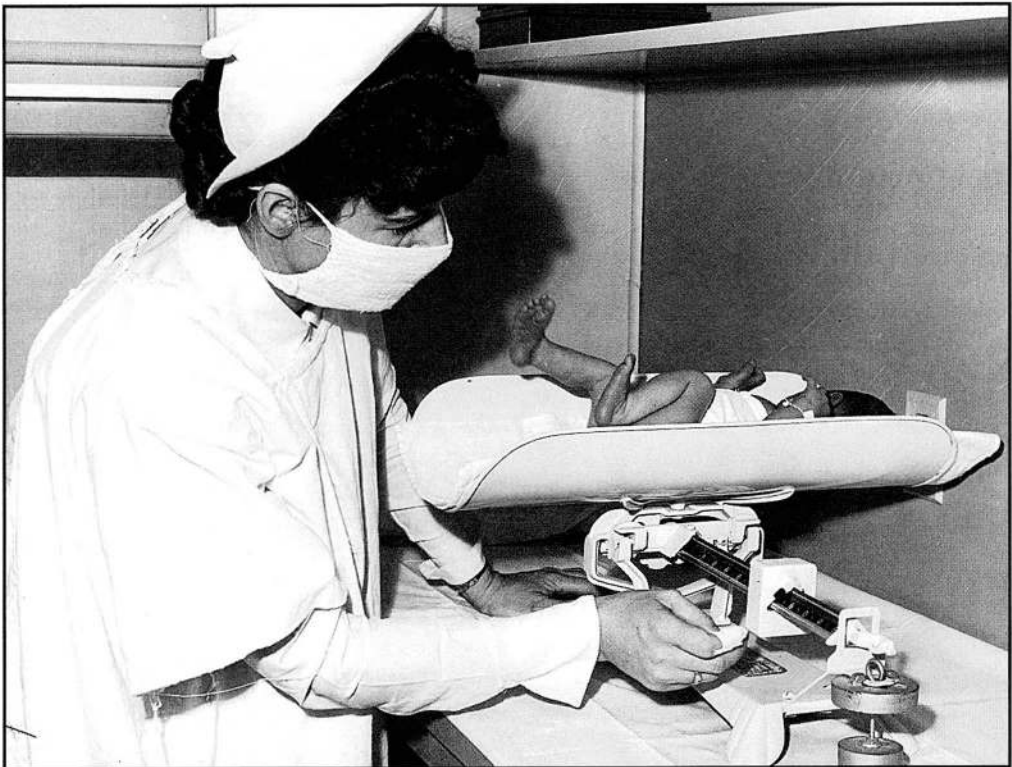
The Railroad Retirement Board immediately took an appeal.¹⁰⁷ But in December of 1936, before the Court of Appeals could hear argument in the case, President Roosevelt suggested that railway management and labor get together and negotiate the terms of a railroad retirement act. Representatives of all of the major railway labor unions sat down with agents of all of the major railroad companies, members of the Railroad Retirement Board, representatives of the Treasury Department and members of Congress. By the summer of 1937 an agreement had been reached, and its provisions had been embodied in the Carrier Taxing Act of 1937, and the Railroad Retirement Act of 1937.¹⁰⁸ Congressmen praised the process and the agreement as "a great tribute to the principle of collective bargaining."¹⁰⁹ Such collective bargaining in the railroad industry had been institutionalized by the Railway Labor Act of 1926,¹¹⁰ which the Court had unanimously sustained in a 1930 opinion written by Hughes himself.¹¹¹ Sponsors professed their faith that both the 1937 bills and the 1935 Acts were constitutional.¹¹² Representative Clarence Lea added, however, that "Friends of this legislation, in my judgment, need not particularly fear ultimate Court disposal of this problem."¹¹³ For, as Representative Carl Mapes explained, as part of the deal "It is agreed between the representatives of the railroads and the brotherhoods that they will not contest the constitutionality of this legislation. . . and that they will use their influence against having anyone else bring such action."¹¹⁴ The parties were true to their words,¹¹⁵ and the retirement system they cre-

ated remains with us in modified form to this day.¹¹⁶

The strategy of the sponsors of the Carrier Taxing Act and the Railroad Retirement Act of 1935 was informed by the opinion of the Court in *Frothingham v. Mellon*.¹¹⁷ The case was actually decided in 1923, when William Howard Taft was Chief Justice. But a majority of the Justices who joined that unanimous opinion were also members of the Hughes Court. *Mellon* involved a constitutional challenge to the Sheppard-Towner Maternity Act of 1921,¹¹⁸ which established a federal grant-in-aid program for the reduction of maternal and infant mortality. Under the statute, Congress appropriated funds to be disbursed to states that established qualifying programs for the promotion of maternal and infant health. Frothingham complained that the appropriations would in-

crease the burden of future federal taxation and thereby take her property without due process of law. Justice Sutherland's opinion, joined by Justices Holmes, Brandeis, Van Devanter, Butler, and McReynolds, held that Frothingham's status as a taxpayer was insufficient to give her standing to challenge the appropriation. Her interest in the moneys of the federal treasury, he explained, was shared with millions of others, and was too "minute and indeterminable."¹¹⁹

This "taxpayer standing doctrine" had enormous ramifications for federal spending policy in the 1930s. As Edward Corwin observed at the time, "so long as Congress has the prudence to lay and collect taxes without specifying the purposes to which the proceeds from any particular tax are to be devoted, it may continue to appropriate the national funds without judicial



The Sheppard-Towner Maternity Act of 1921, which established a federal grant-in-aid program for the reduction of maternal and infant mortality, empowered Congress to appropriate funds to be disbursed to states that established qualifying programs (such as the clinic pictured above), for the promotion of maternal and infant health. A taxpayer complained that the appropriations would increase the burden of future federal taxation and thereby take her property without due process of law. The Court held that status as a taxpayer was insufficient to give her standing to challenge the appropriation. This "taxpayer standing doctrine" had enormous ramifications for federal spending policy in the 1930s.

let or hindrance."¹²⁰ Appropriations from the general revenue, as distinguished from expenditures of designated funds collected from a particular tax, simply could not be challenged in the courts.¹²¹ Such an appropriation might exceed congressional authority to spend for the general welfare, but the federal courts would nevertheless refuse to restrain the expenditure. "Thus," wrote Benjamin Wright, "the spending of billions of dollars in civilian relief, and in the building of public works was beyond the range of constitutional litigation."¹²² As Wright put it, "the principal way in which the Court sustained. . . New Deal measures was by refusing to pass upon the validity of the spending power."¹²³

And Wright was right. Throughout Hughes' tenure, the Supreme Court and the lower federal courts repeatedly invoked the *Mellon* doctrine in rejecting constitutional attacks on loans and grants made by one of the most popular and important New Deal relief agencies, the Public Works Administration.¹²⁴ Undoubtedly because the *Mellon* doctrine posed such an insuperable obstacle to securing judicial review, a vast array of New Deal spending programs, all financed from general revenue, never underwent constitutional challenge during Hughes' tenure. Examples include the Civilian Conservation Corps,¹²⁵ the Farm Credit Act,¹²⁶ the Reconstruction Finance Corporation,¹²⁷ the Rural Electrification Administration Act,¹²⁸ and the Emergency Relief Appropriation Act of 1936.¹²⁹ Indeed, the most significant thing about the Hughes Court's much-discussed spending power jurisprudence is how little it actually mattered in light of the taxpayer standing doctrine.

One major New Deal spending initiative that the taxpayer standing doctrine did not shelter from judicial review was the Agricultural Adjustment Act of 1933.¹³⁰ In an effort to boost sagging crop prices resulting from chronic agricultural surpluses, the Act authorized the Secretary of Agriculture to enter into contracts with individual farmers. In the contract, the farmer would agree to reduce his production of certain specified agricultural commodities in exchange for a benefit payment.¹³¹ For political reasons, however, President Roosevelt opposed payment of the benefits from general rev-

enues.¹³² He did not want it to appear that the nation's farmers were feeding at the public trough. Instead, he insisted that the program be and appear to be self-financing.¹³³ The necessary funds were therefore to be derived from a special excise tax on food processing. The tax was designed to generate the amount of revenue required to meet the benefit payments contracted for, and the act appropriated the proceeds of the tax for that purpose.¹³⁴ A food processor challenging the validity of the excise therefore had standing to question the propriety of the expenditure to which the proceeds of his tax payments were specifically devoted.¹³⁵ And in *United States v. Butler*¹³⁶ the Court struck down the tax as a step in a scheme to usurp the states' authority to regulate agricultural production.¹³⁷

But while the *Butler* opinion invalidated the processing tax, the government continued to make the benefit payments for which it had contracted. With the processing tax no longer enforced, no one had standing to challenge the appropriations from general revenue by which the payments were now funded.¹³⁸ Moreover, within two months of the *Butler* decision Congress enacted a statute to replace the AAA. The Soil Conservation and Domestic Allotment Act of 1936¹³⁹ authorized the Secretary of Agriculture to pay farmers to shift acreage from soil-depleting crops to soil-conserving crops. It was not sheer coincidence that the soil-depleting crops were the very surplus commodities whose production the AAA had sought to control, while the soil-conserving crops were not overproduced. Five hundred million dollars were appropriated to fund the payments, but no companion taxing measure was enacted to provide the necessary revenue. Opponents of the measure complained that it was clearly unconstitutional in light of the *Butler* decision. But because there was no tax identified with the expenditure, no one had standing to challenge the constitutionality of the payments.¹⁴⁰ Senator Daniel Hastings challenged defenders of the bill's constitutionality "to add to it a tax provision to supply the necessary money and thus give to the American people an early opportunity to test its validity. Do not do the cowardly thing and separate the tax provision from this bill, thus making it impossible to prevent

the illegal spending of at least a half billion dollars."¹⁴¹ But proponents of the bill, chastened by the fate of the AAA, ignored this schoolyard taunt, and the law was enacted and implemented in its unchallengeable form.¹⁴²

As Robert Stern observed, however, the soil conservation strategy was "subject to the limitations of any voluntary system, even one in which cooperation was made profitable. There was no assurance that enough producers would cooperate to permit a limitation of production sufficient to raise prices."¹⁴³ Accordingly, in 1938 Congress turned to a regulatory solution, enacting a second Agricultural Adjustment Act. The 1938 Act did not regulate the *production* of staple crops—instead, it authorized the Secretary of Agriculture to prescribe and allocate *marketing quotas* for those crops.¹⁴⁴ Drawing on a long line of precedents holding that sales for subsequent shipments in interstate commerce were subject to federal regulation, Congress sought to control prices by controlling the supply of agricultural produce moving in interstate commerce.¹⁴⁵ But where could federal legislators have gotten the idea that Congress might achieve through its commerce power what it could not attain using its fiscal powers?

These are the opening lines of Roberts' discussion of the issue of federal power in *Butler*. "Article I, section 8 vests sundry powers in the Congress," he wrote. "But two of its clauses have any bearing upon the validity of the statute under review." The first was the Commerce Clause. But, as Roberts observed, "the act under review does not purport to regulate transactions in interstate or foreign commerce. Its stated purpose is the control of agricultural production, a purely local activity. . . . Indeed, the Government does not attempt to uphold the validity of the act on the basis of the commerce clause, which, for the purpose of the present case, may be put aside as irrelevant."¹⁴⁶

This was a curious passage. The act did not purport to be an exercise of the power to coin money or to establish post offices either; nor did the government defend the act as exercises of those powers. Why, if he was to so quickly lay it aside as inapposite "for the purpose of the *present* case," did Roberts even bother to mention the commerce power?

Learned students of the Court's federalism jurisprudence thought they detected a familiar signal. In 1921 Congress had sought to use its fiscal powers to regulate sales of grain futures on boards of trade. The Future Trading Act¹⁴⁷ imposed a prohibitive tax on all such sales, and then exempted from the tax all sales made on boards of trade complying with federal regulations. The Court had declared the Act unconstitutional in *Hill v. Wallace*¹⁴⁸ in 1922. Chief Justice Taft's opinion for a unanimous Court held that the Act imposed a regulatory penalty rather than a true tax, and was accordingly not a valid exercise of the taxing power.¹⁴⁹ In dicta, however, Taft had offered Congress an alternative means of achieving its goal. Noting that Congress "did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise" of that power, Taft suggested that sales of grain futures might be regulated under the commerce power if "they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon."¹⁵⁰ Taft even hinted that the revised statute be based on the current of commerce doctrine¹⁵¹ the Court had employed in upholding the Packers and Stockyards Act¹⁵² earlier in the Term.¹⁵³ Congress took the hint and enacted the Grain Futures Act,¹⁵⁴ which the Court upheld as a legitimate exercise of the commerce power the following year in *Chicago Board of Trade v. Olsen*.¹⁵⁵

Senator James Pope of Idaho, the principal sponsor of the Agricultural Adjustment Act of 1938, drew attention to this passage from Roberts' *Butler* opinion in his defense of the 1938 Act's constitutionality. "The legal theory on which the pending bill is based is entirely distinct from that which provided the basis for the Agricultural Adjustment Act," Pope explained.¹⁵⁶ Asserting the need to make the Act's constitutional foundation in the Commerce Clause explicit in the preamble, Pope observed that in *Butler* "the Court said by reason of the fact that there was no statement or claim in that bill that we were proposing to regulate interstate commerce, it was a purely local transaction."¹⁵⁷ "As stated by Mr. Justice Roberts,"



Justice Louis D. Brandeis thought that Congress could use its taxing power to encourage states to enact unemployment compensation laws by drawing on the authority of *Florida v. Mellon*. In that 1927 case, the Taft Court had unanimously upheld a federal inheritance tax that granted a credit for state inheritance taxes paid. States that had enacted inheritance taxes feared losing their wealthy residents to states like Florida that had no such taxes, and the federal provision had been designed to level the playing field.

Pope continued, “the commerce clause of the Constitution was put aside as irrelevant in the *Butler* . . . decision. Interstate and foreign commerce, however, is certainly not irrelevant to the plight of agriculture at the present time, and through the *proper* regulation by Congress of . . . interstate and foreign commerce pursuant to the provisions of this bill the economic situation of the farmer can be set aside.”¹⁵⁸

Solicitor General Robert H. Jackson, defending the Act before the Court in *Mulford v. Smith*,¹⁵⁹ drew the obvious analogy to the fate of grain futures regulation under Taft. “It is clear from *Hill v. Wallace* and *Chicago Board of Trade v. Olsen*,” he wrote in his brief, “that Congress may utilize the commerce power to regulate subjects which it may not reach under the taxing power.”¹⁶⁰ True to form, Roberts used his opinion in *Mulford* to replicate Taft’s performance in *Chicago Board of Trade v. Olsen*: he upheld the Act as a valid regulation of interstate commerce.¹⁶¹ Two years later Jackson wrote in *The Struggle for Judicial Supremacy*

that “the decision was followed by a good deal of uninformed comment to the effect that Mr. Justice Roberts had reversed his position and that the Court had reversed itself on the subject of control of agricultural production by the Federal Government.” “This,” the astute Jackson insisted, “was certainly untrue.”¹⁶²

I would be remiss if I did not relate one final instance of constitutional consultation. I refer to what is now the familiar story of Justice Brandeis’ role in framing the unemployment compensation provisions of the Social Security Act. In the summer of 1933 Brandeis was visited at his vacation cottage by his daughter, Elizabeth Brandeis Raushenbush, and her husband, Paul. Both were economists at the University of Wisconsin, and deeply interested in the subject of unemployment insurance. Paul expressed to the Justice his frustration that the states had resisted enacting statutes on the subject because they were fearful that local businesses would be placed at a competitive disadvantage vis-a-vis businesses of states not

having such laws. Brandeis replied by asking whether Paul had considered the case of *Florida v. Mellon*.¹⁶³ In that case the Taft Court had unanimously upheld a federal inheritance tax that granted a credit for state inheritance taxes paid. States that had enacted inheritance taxes feared losing their wealthy residents to states like Florida that had no such taxes, and the federal provision had been designed to level the playing field. Brandeis was suggesting that Congress could similarly use its taxing power to encourage states to enact unemployment compensation laws. Congress could simply impose a uniform national payroll tax on all employers, the proceeds to be paid into a federal unemployment insurance fund. Employers would be allowed a credit against the federal tax for any amount paid into a comparable insurance plan established by their own states. States could then enact such insurance plans free of the concerns that had previously restrained them.

That September the Justice wrote Paul and Elizabeth a letter detailing his proposal for a federal unemployment compensation statute. Throughout the fall of 1933 Brandeis personally lobbied a number of high administration officials to support his plan.¹⁶⁴ At the same time he had his friend Lincoln Filene help Paul and Elizabeth organize a meeting of the influential to discuss his proposal. Among those in attendance was Secretary of Labor Frances Perkins.¹⁶⁵ Perkins commissioned Paul Raushenbush and Thomas Eliot to draft a bill based on Brandeis' proposal. When it had been introduced in the House and the Senate, Brandeis referred to the bill as "my federal excise tax. . . to offset irregularity of employment."¹⁶⁶

As the bill ran into resistance in Congress and the White House, Elizabeth served as the Justice's eyes, ears, and chief lieutenant, lobbying the administration and recruiting opinion leaders to support the Brandeis proposal.¹⁶⁷ The Justice conscripted Felix Frankfurter to aid her in the crusade for the "one true faith," and met personally with Edwin Witte, the Executive Director of Secretary Perkins' Committee on Economic Security, in an effort to win him over. Brandeis even extended his evangelism to the Oval Office—he and Roosevelt had a personal

conference in which Brandeis made the case for his scheme of federal-state cooperation.¹⁶⁸

The bill that ultimately emerged gave Brandeis most of what he had wanted. His early initiative had framed the debate, and his position on the Court gave special weight to his counsel.¹⁶⁹ This counsel was vindicated in the spring of 1937, when the Court sustained the Act against constitutional challenge.¹⁷⁰ Figuring prominently in Justice Cardozo's majority opinion was the case of *Florida v. Mellon*.¹⁷¹

While Justices McReynolds and Butler maintained in dissent that any such program was beyond congressional power to enact,¹⁷² the author of *Florida v. Mellon* wrote separately.¹⁷³ Justice Sutherland had decided to retire from the Bench in March of 1937, and was waiting only for the Court-packing controversy to subside before taking his leave.¹⁷⁴ His colleague Justice Van Devanter had announced his retirement May 18, six days before the Social Security Act opinions were delivered.¹⁷⁵ Under these circumstances, one might have expected these Justices to quietly join the dissent of their fellow Horsemen. Instead they fashioned a dissent that provided precisely the sort of consultation that Hughes had called for in his own dissent in the railway pension case. Sutherland began by announcing that he agreed with most of what was said in the majority opinion.¹⁷⁶ In fact, the only element of the scheme to which Sutherland objected was a provision that required the states to pay the proceeds from their own payroll taxes into the *federal* treasury, and allowed withdrawals only by state agencies approved by the federal board. Such a requirement, in Sutherland's view, did not "comport with the dignity of a quasi-sovereign state,"¹⁷⁷ but the objectionable provision might also be easily revised by Congress, Sutherland explained. Indeed, he maintained that "everything which the act seeks to accomplish for the relief of unemployment might have been accomplished. . . without obliging the state to surrender, or to share with another government, any of its powers."¹⁷⁸ As Sutherland pointed out, the Social Security Act's old-age pension provisions had accomplished their goal in a manner consistent with the Constitution, and he and Van Devanter joined the opinion upholding them that very day.¹⁷⁹ Make one rela-

tively minor revision in the unemployment compensation provisions of the statute, their dissent made clear, and there would have been seven votes to uphold them as well.

That same day Justice Stone wrote the majority opinion upholding Alabama's state unemployment compensation act.¹⁸⁰ McReynolds simply dissented without opinion.¹⁸¹ But Sutherland, this time joined by both Van Devanter and Butler, again dissented separately. "The objective sought by the Alabama statute here in question, namely, the relief of unemployment, I do not doubt is one within the constitutional power of the state," Sutherland began. "But it is an objective which must be attained by legislation which does not violate the due process or the equal protection clause of the Fourteenth Amendment. This statute, in my opinion, does both, although it would have been a comparatively simple matter for the legislature to avoid both."¹⁸² After detailing the ways in which the act denied due process and equal protection,¹⁸³ Sutherland observed that "other states have not found it impossible to adjust their unemployment laws to meet the

constitutional difficulties thus presented by the Alabama act. The pioneer among these states is Wisconsin."¹⁸⁴ Of course, neither Wisconsin's nor any other state's unemployment act was before the Court. Sutherland nevertheless went on to explain the provisions of Wisconsin's statute,¹⁸⁵ and to offer an advisory opinion on its constitutionality: "I entertain no doubt that the Wisconsin plan is so fair, reasonable and just," he wrote, "as to make plain its constitutional validity."¹⁸⁶ Even in dissent at the end of their careers, Sutherland and Van Devanter were offering pointers on how to attain permissible ends through means consistent with the Constitution. Incidentally, the Wisconsin statute the dissenters praised had also been drafted by Paul Raushenbush. And that draft was based on a memorandum written in 1911 by an extraordinarily able constitutional lawyer: Louis D. Brandeis.¹⁸⁷

In March of 1937, at the height of the Court-packing struggle, Chief Justice Hughes was visited at his home by Senator Burton K. Wheeler. During that conversation Hughes wondered aloud whether the constitutional his-



Justice Brandeis enlisted his daughter, Elizabeth Brandeis Raushenbush, and her husband, Paul, both economists at the University of Wisconsin and both deeply interested in the subject of unemployment insurance, to help him shape the unemployment provisions of the Social Security Act. As the bill encountered opposition, Elizabeth served as the Justice's eyes, ears, and chief lieutenant, lobbying the administration and recruiting opinion leaders to support the bill. Here she is pictured with her father on his eightieth birthday, November 13, 1936.

tory of the New Deal would have been different had Roosevelt appointed a different Attorney General. Remarking that “the laws have been poorly drafted,” Hughes told Wheeler, “We’ve had to be not only the Court but we’ve had to do the work that should have been done by the Attorney General.”¹⁸⁸ Hughes might have been referring to any of a number of failures on the part of the Justice Department, but one was almost certainly on his mind. That very month Congress was framing the Bituminous Coal Act that Hughes and his Court would ultimately uphold. In 1935 a subcommittee of the House Ways and Means Committee had asked Attorney General Homer Cummings to appear and offer his views concerning the Guffey Coal Act’s constitutionality.¹⁸⁹ Lawyers in his Justice Department had been convinced that the labor provisions were unconstitutional,¹⁹⁰ and had reportedly told him so before his appearance.¹⁹¹ But Cummings had refused to offer Congress an opinion on the bill’s constitutionality. Instead he had advised the subcommittee “to push [the bill] through and leave the question to the courts.”¹⁹² For Hughes, this episode was no doubt emblematic of the early New Deal. In his eyes, the Attorney General’s office had not given the administration and Congress the constitutional counsel they needed, but had left that important task to the Court instead. In his State of the Union address in January of 1937, Roosevelt had said, “The judicial branch . . . also is asked by the people to do its part in making democracy successful.”¹⁹³ In Hughes’ view, the judicial branch had been doing its part and more.

Every first year law student learns that constitutional law is not only about the permissible ends of government; it is also about the means by which such ends may be attained. Yet our conventional renderings of the Hughes Court obscure this important distinction, portraying the constitutional disputes of the New Deal era as disagreements principally about ends. In suppressing this elementary distinction between the legitimate objectives of government and the manner in which those objectives may be achieved, we have lost sight of the distinctively consultative role played by the Court during Hughes’ unique tenure. If we will only remember what we have always known,

and what so many in the Congress of the 1930s clearly understood, we will see that the Supreme Court under the chief justiceship of Charles Evans Hughes faced the economic and political crises of the 1930s neither on four feet nor on three, but instead firmly on two.

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Endnotes

¹ Joseph Alsop & Turner Catledge, *The 168 Days* 16, 155 (1938); Leonard Baker, *Back to Back: The Duel Between F.D.R. and the Supreme Court* 110 (1967); Merlo J. Pusey, *Charles Evans Hughes* 733 (1951); Burton K. Wheeler, *Yankee From the West* 330 (1962).

² See William R. Casto, *The Supreme Court in the Early Republic* 77-81 (1995).

³ Wheeler, *supra* note 1, at 330.

⁴ Alsop & Catledge, *supra* note 1, at 16.

⁵ *Id.* For the suggestion of one New Dealer that the Court ought to be required to give Congress advisory opinions, see remarks of Rep. Monaghan, 79 *Cong. Rec.* 7150, 74th Cong. 1st Sess. (May 8, 1935).

⁶ F. Carlisle Roberts, “The New Frazier-Lemke Act—Its Provisions, Its Constitutionality,” 22 *A.B.A. J.* 15 (1936). See, e.g., John Hanna, “Agriculture and the Bankruptcy Act,” 19 *Minn. L. Rev.* 1, 28-32 (1934); John F. Reinhardt, “The New Frazier-Lemke Amendment,” 4 *Kan. City. L. Rev.* 19 (1935); R. O. Williams, “The Frazier-Lemke Law,” 13 *Neb. L. B.* 481, 490-91 (1935); Note, “Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act,” 21 *Corn. L. Rev.* 171, 171-72 (1935). For predictions that the first Act would be held unconstitutional, see, e.g., Note, “Relief of Distressed Farmers Under the Frazier-Lemke Act?” 3 *G.W. L. Rev.* 86, 95-96 (1934); Note, “Bankruptcy—Validity of Frazier-Lemke Act,” 29 *Ill. L. Rev.* 645, 653 (1935). John Hanna, “The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act,” 20 *A.B.A. J.* 687, 689 (1934) and Reuben G. Hunt, “Land Titles as Affected by Bankruptcy,” 20 *A.B.A. J.* 719, 722 (1934), suggested the Act’s constitutionality was open to serious question.

⁷ Roberts, *supra* note 6.

⁸ “Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act,” *supra* note 6, at 173.

⁹ “Relief of Distressed Farmers Under the Frazier-Lemke Act?,” *supra* note 6, at 87.

¹⁰ “The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act,” *supra* note 6, at 689. See also, Roberts *supra* note 6, at 15 (“an outstanding example of ill-conceived legislation”).

¹¹ “Relief of Distressed Farmers Under the Frazier-Lemke Act?,” *supra* note 6, at 87. See also “Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act,” *supra* note 6, at 174.

¹² “Relief of Distressed Farmers Under the Frazier-Lemke Act?,” *supra* note 6, at 87.

¹³ *Id.*

¹⁴ "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 173.

¹⁵ *The New York Times*, July 1, 1934, at 21, quoted in "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 173, n. 22. See Note, "The New Frazier-Lemke Act: A Study," 37 *Colum. L. Rev.* 1092, 1094 (1937).

¹⁶ 295 U.S. 555 (1935).

¹⁷ See Lewis J. Paper, *Brandeis 350* (1983); Melvin I. Urofsky, *Louis D. Brandeis and the Progressive Tradition* 162 (Oscar Handlin ed., 1981).

¹⁸ Those were:

"1. The right to retain the lien until the indebtedness thereby secured is paid.

2. The right to realize upon the security by a judicial public sale.

3. The right to determine when such sale shall be held, subject only to the discretion of the court.

4. The right to protect its [the mortgagee's] interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt." 295 U.S. at 594-95.

¹⁹ "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," *supra* note 6, at 173.

²⁰ Richard D. Friedman, *Charles Evans Hughes as Chief Justice, 1930-1941: The Complexities of Moderation* 231 (unpublished D. Phil. diss., Oxford University, 1978).

²¹ See "The New Frazier-Lemke Act: A Study," *supra* note 15, at 1095-96.

²² S. 3002, 74th Cong. 1st Sess. (1935) was introduced June 5, 1935, 79 *Cong. Rec.* 8666, 74th Cong. 1st Sess. (1935); S. Rep. No. 985, 74th Cong. 1st Sess. (1935) was submitted July 1, 1935, 79 *Cong. Rec.* 10463. A comparable bill, H. R. 8728, 74th Cong. 1st Sess. (1935) was introduced in the House June 29, 79 *Cong. Rec.* 10458, and reported with amendments August 16, 1935, H. Rep. No. 1808 74th Cong. 1st Sess., 79 *Cong. Rec.* 13494. H.R. 8728 was tabled and the Senate bill, as amended, was passed in lieu thereof. 79 *Cong. Rec.* 14334. The Senate subsequently concurred in the House amendments. *Id.* at 13233-34.

²³ "Bankruptcy: Federal Farm Mortgage Relief under the Bankruptcy Act," *supra* note 6, at 173-74.

²⁴ William A. Reppy, Comment, "Constitutional Law—Bankruptcy—Frazier-Lemke Amendment," 10 *So. Cal. L. Rev.* 474, 476 (1937). See also Roberts, *supra* note 6. "The constitutionality of this Act, because of the fate of its predecessor, was the paramount consideration during its progress through Congress," one commentator pointed out. "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 176. The new Act was passed "after extensive hearings," Roberts *supra* note 6, at 15, and "[t]he Judiciary Committee of the Senate. . . including some of the most able lawyers in the upper house on constitutional questions, was unanimously in favor of the bill." "Bank-

ruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 176, n. 39. The report of the Senate Judiciary Committee began by stating that "This bill has for its object . . . the rewriting of subsection(s), which has been held unconstitutional, so as to conform to the decision of the Supreme Court." S. Rep. No. 985, 74th Cong. 1st Sess., at 1 (1935). "We feel that all the provisions in the rewritten subsection(s) have been approved in principle in numerous decisions by the Supreme Court." *Id.* at 3. The balance of the report detailed how objectionable provisions had been either omitted entirely, *id.* at 4, or modified so as to resemble provisions that the Supreme Court had previously approved in other bankruptcy cases. *Id.* at 5-7. H. Rep. No. 1808, 74th Cong. 1st Sess. (1935), which accompanied H.R. 8728, 74th Cong. 1st Sess. (1935), the House version of the bill, was virtually identical to the Senate report.

²⁵ Asked by Senator McKellar whether the Judiciary Committee was satisfied that the bill would pass constitutional muster, Senator Pat McCarran assured him, "I can only affirm our faith in its constitutionality. . . We sought, and the author of the bill sought, to relieve the bill of those provisions which had been declared to be unconstitutional by the Supreme Court . . . if any bill can be enacted which will be constitutional it will be a bill along these particular lines . . . The committee has studied the question carefully, and has inserted in the bill a number of amendments seeking to have it conform to what we believe to be constitutional requirements. . . I believe we have obviated the features which might verge upon unconstitutionality." 79 *Cong. Rec.* 11971, 74th Cong. 1st Sess. (July 29, 1935). See also 79 *Cong. Rec.* 13411, 74th Cong. 1st Sess. (August 16, 1935) ("Mr. Robinson: The pending bill is intended to correct the features of that act which were held to be unconstitutional"); *id.* ("Mr. Borah: The pending bill is designed to, and it is believed it does, avoid the unconstitutional features which were in that law"); *id.* at 13632 ("Mr. Borah: The purpose of the bill is to avoid the objectionable features of the former act as they were denounced by the Supreme Court." Borah then explained how the new bill did so); *id.* at 13633 (Sen. Borah and Sen. Frazier explain to Sen. Hastings, to Hastings' satisfaction, why discretion vested in the court to order a sale of the property earlier than 3 years from the date of bankruptcy rescued the Act from a constitutional difficulty that plagued the earlier act; *id.* at 13640 (Sen. Robinson concurs in Borah's and Frazier's explanation to Hastings); *id.* at 13831 ("Mr. Lloyd: Mr. Speaker, this is a bill that has been rewritten by the Committee on the Judiciary as a substitute for the bill that the Supreme Court declared unconstitutional. The committee has given very careful consideration to the bill. We have in no way reduced the security of the mortgagee. We have left his security intact, but we have made it possible for the bankruptcy court to retain jurisdiction for a period not to exceed 3 years. It is the feeling of the committee that if the farmers have a breathing spell they will be able to work out their own salvation. The bill we passed last year was declared unconstitutional on the ground that it impaired the security of the mortgagee"); *id.* at 14331 ("Mr. Lemke: All this bill does is to comply with the decision of the Supreme Court, giving the farmer an opportunity to get a breathing spell after he goes into bankruptcy"); *id.* at 14332 ("Mr. Greever: Does

the gentleman feel that the constitutional feature that was decided by the Supreme Court is now fully cured? Mr. Lemke: I agree with the members of the Senate Judiciary Committee that, with the amendment that Mr. Sumners will offer, there will be no constitutional question about the bill.

Mr. Kloeb: . . . is the gentleman now satisfied in his own mind that this bill will pass the constitutional test? Mr. Lemke: Yes; I am satisfied that this bill now complies with the language of the Supreme Court decision We have complied with the decision. . . ."; *id.* at 14333 ("Mr. McCormack: It is the gentleman's opinion that this bill as now drafted comes within the constitutional powers of the Congress? Mr. Sumners: As I explained, that opinion is drawn largely from the unanimous opinion of the members of the Committee on the Judiciary, who have more carefully examined it, but from the examination which I have made, which is rather casual, I did not observe anything, if this amendment is adopted, which would make me apprehensive as to its constitutionality"); *See Note*, "Bankruptcy—The Frazier-Lemke Act," 22 *Va. L. Rev.* 218, 219 (1935).

²⁶ 79 *Cong. Rec.* 11971, 74th Cong. 1st Sess. (July 29, 1935). Ashurst added, "I emphasize the fact that the Judiciary Committee examined many authorities, and the committee carefully considered this bill. . . . I believe the learned members of the Judiciary Committee have done a good work on this bill. If it be within the power of Congress to pass a law upon the subject, I believe this bill will meet the objections of the Supreme Court. . . if Congress can constitutionally pass such a law at all it would be similar to this one." *Id.*

²⁷ Asked by Senator Copeland whether "this bill, in the form in which it is now presented to us, is likely to run the gauntlet of the courts and to be declared valid legislation?" Senator Borah responded that "that was the conclusion which was reached by the Judiciary Committee, including myself. The Judiciary Committee devoted their effort to working out the measure so as to bring it within the Constitution and obviate the objections made by the Court to the previous act. I do not think there was any disagreement in the Judiciary Committee that we had finally framed such a measure. It is my opinion that it will run the gauntlet of the courts . . . in my opinion, this bill is constitutional." Copeland then asked Borah whether he had taken "an opposite view regarding the original Frazier-Lemke Act?" Borah responded that he had "opposed that measure here on the floor, as the RECORD will show. . . For the reason that I thought it was unconstitutional." Copeland replied, "At least, though, it appealed to the Senator's heart and he would have been glad to support it if he had thought it to be constitutional?" To this Borah responded: "I would have been anxious to see the measure passed if I had thought it would have been able to escape the constitutional objection." *Id.* at 13642.

²⁸ Several Senators objected to a provision in the Senate bill that would have limited the right of the mortgagee to bid on the property at auction on the ground that it "would invalidate this measure if it were retained." *Id.* at 13634 (objection of Sen. Robinson); *see also id.* at 13413 (objection of Sen. Robinson); *id.* at

13632-33 (objections of Sen. Robinson and Sen. Logan); *id.* at 13641 (objection of Sen. Tydings). Senator Frazier was way ahead of them, and announced his intention to offer an amendment striking the objectionable provision, which had already been removed from the House version by the House Judiciary Committee. Senator Borah concurred, saying "I do not wish to urge it [the provision objected to], if it be regarded of doubtful validity," *id.* at 13633, and the objectionable provision was excised by amendment. *Id.* at 13643-44. *See also id.* (Borah and Ashurst assure Logan that the objectionable provision will be taken out of the bill); *id.* at 13641 (Borah informs Tydings of the agreement to strike the provision). Senator Robinson also objected to a proposed "provision which I think will cause the raising of another constitutional question on this bill" and would "endanger the validity of the proposed act." *Id.* at 13641. *See also id.* at 13634-36, 13640-41. Senator Ashurst agreed to its exclusion, and the amendment that would have included the objectionable provision was defeated. *Id.* at 13643. In the House Representative Sumners sought further to secure the Act's constitutional foundation, offering an amendment, promptly agreed to, securing to the mortgagee the right to have foreclosure on the property if the debt was not paid in full. *Id.* at 14332-33.

²⁹ When the bill was introduced in the House, congressman Lemke announced, "This bill was very carefully considered by a subcommittee of the Committee on the Judiciary of both the House and the Senate, and by the full Committee on the Judiciary of both the House and the Senate, and last Monday it was passed after an hour and a half discussion on the question of its constitutionality, without a dissenting vote, in the United States Senate." *Id.* at 14332. In a concluding defense of the bill's constitutionality Sumners maintained that "although there was doubt with reference to the first bill[,] I understand from my colleagues on the committee there is not now any doubt as to the constitutionality of this bill. . . .," *id.* at 14333. The bill was then passed by a voice vote. The *Cornell Law Review* observed that "the lack of opposition in both chambers seems to indicate that the legislators were satisfied with the present Act," and that "the consensus of Congressional opinion seems to be that the rights of the creditor have been fully protected. . . ." "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 174, 176.

³⁰ Comment, "Constitutional Law—Fifth Amendment—Invalidity of Frazier-Lemke Amendment to the Bankruptcy Act," 35 *Colum. L. Rev.* 1136, 1138 (1935). Reaching the same conclusion were Note, "Constitutionality of the New Frazier-Lemke Amendment to the Bankruptcy Act," 4 *G.W. L. Rev.* 105, 114 (1935); "Bankruptcy: Federal Farm Mortgage Relief Under the Bankruptcy Act," *supra* note 6, at 171, 176; Rufus K. Breihan, "The New Frazier-Lemke Amendment," 41 *Com. L. J.* 152 (1936); Note, "Constitutional Law—Due Process—Validity of Amended Frazier-Lemke Amendment to Bankruptcy Act," 84 *U. Pa. L. Rev.* 545, 546-47 (1936).

Not all commentators were so optimistic. *See, e.g.,* Roberts, *supra* note 6; Note, "Constitutional

Law—Bankruptcy—Validity of Amended Frazier-Lemke Farm Mortgage Moratorium Law,” 13 *N.Y.U. L. Q.* 465 (1936); John Hanna, “New Frazier-Lemke Act,” 1 *Mo. L. Rev.* 1 (1936); Reinhardt, *supra* note 6, at 21, 29.

The majority of the lower federal courts hearing challenges to the revised act held it unconstitutional. See Comment, “Constitutional Law—Bankruptcy—Frazier-Lemke Amendment,” 10 *So. Cal. L. Rev.* 474, 476 (1937). For comments criticizing these decisions as resting on a misunderstanding of the *Radford* opinion, see Note, “Constitutional Law—Due Process—Validity of Amended Frazier-Lemke Amendment to Bankruptcy Act,” 84 *U. Pa. L. Rev.* 545, 546 (1936); Note, “Bankruptcy—Frazier-Lemke Act—Due Process—Full Faith and Credit,” 4 *G. W. L. Rev.* 525, 526 (1936); Note, “Bankruptcy—Constitutionality of the New Frazier-Lemke Act,” 30 *Ill. L. Rev.* 794, 795 (1936); “The New Frazier-Lemke Act: A Study,” *supra* note 15, at 1096; Note, “Constitutional Law—Due Process and the Frazier-Lemke Acts,” 35 *Mich. L. Rev.* 1130, 1134-35 (1937). See also *Wright v. Vinton Branch Bank*, 300 U.S. 440, 457 (1937).

³¹ 300 U.S. 440 (1937).
³² Brief on Behalf of Robert Page Wright, p. 2. “When the Supreme Court held the original Frazier-Lemke Act unconstitutional in [*Radford*],” the brief explained,

the present act was introduced in both the Senate and the House. It was referred to the Judiciary Committees of the Senate and the House and both of these Committees referred it to Subcommittees for study and consideration with the purpose of complying with the court’s decision.

The author of the bill was called in by both of the Subcommittees. The Act was then carefully considered sentence by sentence, section by section, with the decision of the Supreme Court so as to comply with that decision. Many changes were made by the Subcommittees.

After the Subcommittees had finished their work the bill was reintroduced with the changes and amendments made by the Subcommittees and then was brought up before the Committees of the Whole of both the Senate and the House. There again the bill was gone over sentence by sentence, paragraph by paragraph and section by section, carefully considered and compared with the decision of the Supreme Court, and further amendments made.

The bill was then brought up on the floor of the Senate and the House and further debated with a view of having it comply with the decision of the Supreme Court and was finally passed . . . without a dissenting vote in either House.

Id. at 9 (emphasis in original). This theme was again emphasized at oral argument. 300 U.S. at 443. See “Constitutional Law—Due Process and the Frazier-Lemke Acts,” *supra* note 30, at 1136 n.31.

³³ Brief on Behalf of Robert Page Wright, at 3-6.

³⁴ *Id.* at 10-11. At argument Wright’s counsel main-

tained: “There is nothing novel in the new Act. It simply applies well established principles of bankruptcy law to agriculture. This may appear novel, but there is no provision of the Act which the bankruptcy courts have not already passed upon.” 300 U.S. at 443.

Compare the Brief in Response to Petition for Writ of Certiorari, at 11: “Respondent respectfully submits that a study of the present act, and of the opinion of this Honorable Court in the *Radford* case, and of the first Frazier-Lemke Act, that was by that case held unconstitutional, will disclose a studied effort by the draftsmen of the present act to give an appearance of compliance with the *Radford* decision, while at the same time it takes away from the creditor the same substantive right in specific property that was illegally to be accomplished by the first Frazier-Lemke Act.”

³⁵ 300 U.S. at 456-57.

³⁶ *Id.* at 464 n.9.

³⁷ *Id.* at 458 n.2.

³⁸ *Id.* at 470.

³⁹ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁴⁰ *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴¹ *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

⁴² Comment, “Constitutional Law—Frazier-Lemke Act—Judicial Discretion as Affecting Validity,” 37 *Colum. L. Rev.* 1005, 1006 (1937). See also “Constitutional Law—Due Process and the Frazier-Lemke Acts,” *supra* note 30, at 1135-36 (“perhaps the most significant conclusions to be drawn about the recent decisions of the Supreme Court in the *Radford* and *Wright* cases and the history of the two acts are . . . that hastily drafted, more or less ill-considered legislation (as to means) will not survive the test of due process, while carefully worked out and planned statutes on the same subject and accomplishing substantially the same objects will”).

⁴³ 48 Stat. 195, 200 (1933).

⁴⁴ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405-12 (1935).

⁴⁵ 293 U.S. at 410. The response to this embarrassment was the establishment of the *Federal Register*, in which such orders would thenceforth be officially published. Schlesinger, *The Age of Roosevelt: The Politics of Upheaval*, 254-55 (1960).

⁴⁶ Harold L. Ickes, *The Secret Diary of Harold L. Ickes*, 247 (1953).

⁴⁷ 293 U.S. at 430.

⁴⁸ *Id.* at 421-30. “The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion

would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Id.* at 421.

⁴⁹ "There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited." *Id.* at 430.

⁵⁰ *Id.* at 415. Referring to Section 1 of the Act, which set forth the Act's policy in general terms, Hughes wrote, "This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited,—nothing as to the policy of prohibiting, or not prohibiting, the transportation of production exceeding what the States allow. The general policy declared is 'to remove obstructions to the free flow of interstate and foreign commerce.' As to production, the section lays down no policy of limitation." *Id.* at 417-18. "The Congress did not undertake to say that the transportation of 'hot oil' was injurious. The Congress did not say that transportation of that oil was 'unfair competition.' The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination of any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather than those of an executive or administrative officer executing a declared legislative policy. We find nothing in section 1 which limits or controls the authority conferred by section 9(c)." *Id.* at 418-19. Nor could any of the Act's other sections "be deemed to prescribe any limitation of the grant of authority in section 9(c)." *Id.* at 419-20.

"If section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." *Id.* at 430. See Roy G. Tulane, "Constitutional Law—The Oil Control Provisions of the N.I.R.A.," 10 *Wisc. L. Rev.* 301, 304-05 (1935).

⁵¹ *Id.* at 426.

⁵² *Id.* at 430, (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 409-11 (1928)). The opinion went on to identify "another objection to the validity of the

prohibition laid down by the Executive Order under section 9(c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both section 9(c) and the Executive Order are in notable contrast with historic practice. . . by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of delegated authority. If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual. . . . To hold that [the President] is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power." 293 U.S. at 431-32. Indeed, such findings were mandated by the requirements of the Fifth Amendment: "if the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." *Id.* at 432.

⁵³ Comment, "Constitutional Law—Delegation of Legislative Powers—National Industrial Recovery Act," 8 *So. Cal. L. Rev.* 226, 229 (1935). See also Charles K. Burdick, "Constitutional Aspects of the New Deal in the United States," 13 *Can. B. Rev.* 699, 710 (1935) ("the particular situation. . . can be met easily by a more definite congressional declaration of policy and purpose to control the President's future exercise of discretion"); Carl H. Baesler, "A Suggested Classification of the Decisions on Delegation of Legislative Power," 15 *B. U. L. Rev.* 507, 529 (1935) ("If a standard—a reasonable one—had been provided it is fair to assume that a contrary result would have been reached").

⁵⁴ "Section 9(c) of the National Industrial Act could have been reenacted by the use of the same language that was in the original act with probably 10 to 20 words additional to bring it within the rule laid down by the Supreme Court." 79 *Cong. Rec.* 2135-36, 74th Cong. 1st Sess. (February 18, 1935).

⁵⁵ Joseph H. Mueller, "Constitutional Law—Delegation of Legislative Power—National Industrial Recovery Act," 23 *Ill. B. J.* 269, 270 (1935), (citing Theodore W. Cousins, "The Delegation of Federal Legislative Power to Executive Officials," 33 *Mich. L. Rev.* 512, 544 (1935) ("those who look to the Supreme Court for protection against extensive delegations to the

Executive should not take too much confidence from this decision. No substantial barrier to delegation is raised by the *Panama Refining Co.* case. A standard must be set, but previous cases teach how vague such a standard may be. . .

The Court has indeed set a limit, but it is formal rather than substantial and the slightest care in bill drafting will avoid infringing it. All in all, we may conclude that the case changes nothing and that its importance can very easily be exaggerated"). See also Note, "Delegation of Power by Congress," 48 *Harv. L. Rev.* 798, 806 (1935) ("the new requirement [of a finding] may accomplish no more than to add a formality to the issuance of an executive order").

⁵⁶ Franklin D. Roosevelt, Remarks at Press Conference (Jan. 9, 1935) quoted in Schlesinger, *supra* note 45, at 255. "[T]he mistakes involved seemed easily remediable, and the administration took the adverse decision philosophically." *Id.* William Swindler agreed: "careless draftsmanship. . . proved to be the crux of the matter, and the optimists among the Presidential advisers professed to see no serious threat to their general statutory program emerging. . . . In the 'hot oil' decision. . . the optimists took heart from the fact that the point was a procedural one which could be remedied by statute. . . ." Swindler, *Court and Constitution in the Twentieth Century: The New Legality, 1932-1968* 33 (1970).

⁵⁷ Ickes, *supra* note 46, at 273.

⁵⁸ S. 1190, 74th Cong. 1st Sess. (1935), introduced at 79 *Cong. Rec.* 632, 74th Cong. 1st Sess. (January 18, 1935). The Committee on Mines and Mining reported the bill back favorably the same day. *Id.* at 649. The two-and-one-half page report, which consisted principally of quotations from the *Panama Refining* opinion, characterized the new bill as "a substantial but somewhat elaborated reenactment of section 9(c) of the National Industrial Recovery Act. . . ." See S. Rep. No. 14, 74th Cong. 1st Sess. 1 (1935). The report of the House Committee on Interstate and Foreign Commerce, issued on Valentine's Day, explained what had been wrong with section 9(c) and how the new bill repaired the problem.

Section 9(c) did not declare anything to be illegal until the President should so declare. In making such declaration, the Congress, in the opinion of the Supreme Court, did not require the President to adhere to any legislative policy, or to follow any standard laid down by it, or in fact to be guided by any rule. No particular circumstances, or conditions were set forth as a perquisite [sic] to the President's declaration. The Supreme Court construed this action by Congress to be an invalid delegation of authority.

In S. 1190, as amended, Congress declares in no uncertain terms that such shipments, or transportation, in interstate commerce as defined therein, is prohibited, and violations of such Federal law is [sic] punishable in the manner prescribed. Immediately upon the passage of this act, therefore, shipments in interstate commerce of petroleum and petroleum products, as defined, become a violation of the law and there is no delega-

tion of authority to the President to determine anything before such law would become operative.

H. Rep. No. 148, 74th Cong. 1st Sess., at 3-4 (1935); see Comment, "Interstate Regulation of 'Hot Oil,'" 23 *Geo L. J.* 487, 492-94 (1935).

⁵⁹ In the *Hot Oil Cases*, Connally remarked on the floor, "The Supreme Court held—and I think properly so—that the Congress did not possess the power to delegate authority to the President to put the prohibition in effect or not in effect as he might determine. . . . The Court indicated, in harmony with other decisions heretofore made, that had the Congress set up a standard or a measure by which the President could determine when and when not the shipment of oil should be prohibited the act would probably have been held valid." 79 *Cong. Rec.* 693-94, 74th Cong. 1st Sess. (January 21, 1935).

⁶⁰ As Connally explained it, "In the first section of the bill there is a declaration of the policy of the Congress. One of the suggestions in the decision of the Supreme Court was that Congress had not declared any particular policy but had merely delegated its authority to the President. The declaration of policy here is that in order to remove the burden of interference with interstate commerce by contraband oil, and in order to cooperate with the various states to that end, the Congress prohibits the interstate shipment of oil and oil products when the particular oil has been produced or refined or handled in violation of some State law or some valid regulation or order of the State commission. . . . Section 2 then absolutely prohibits the shipment in interstate or foreign commerce of oil produced in violation of state law or regulations." *Id.*

⁶¹ *Id.* See also remarks of Sen. Connally, *id.* at 753; remarks of Rep. Dies, *id.* at 2124; remarks of Rep. Wolverton, *id.* at 2135-36; remarks of Rep. Dempsey, *id.* at 2150. Senators King and Borah raised delegation objections to Section 3 of the bill, which authorized the President or his duly designated agent or agency to make such rules and regulations as might be found necessary or appropriate to effectuate the purposes of the act. *Id.* at 762. Connally responded that this sort of delegation had been repeatedly upheld by the Court, citing as an example *United States v. Grimaud*, 220 U.S. 506, in which the Secretary of Agriculture had been given very broad power to make rules and regulations with respect to the forest reserve. 79 *Cong. Rec.* 763, 74th Cong. 1st Sess. (January 22, 1935). Borah responded: "Yes; I know the Supreme Court has upheld in some instances these regulations, under certain circumstances, but I invite the Senator's attention to the fact that when these cases were first presented to the Supreme Court of the United States, rules and regulations, the violation of which constituted a crime, were held invalid. The Court modified its position upon the question. I venture to say that if we continue to make these rules and regulations by the thousands and thousands, the violations of which constitute a crime, the Supreme Court will go back some of these days to the very sound and safe rule which it announced in the beginning when it first dealt with the question. There may come a time, as in the decision in the oil case,

when the Court will conclude a danger point has been reached." *Id.* at 763-64. Connally replied, saying, "In a large measure I agree with the Senator in the idea that it is rather drastic to authorize any department to make rules and regulations punishable by fine or imprisonment, but the principle has been established and followed over and over again. Under this particular measure, of course, the Department cannot prescribe any rule beyond the scope of the direct authority which the Congress grants." *Id.* at 764. See also the colloquy between Rep. Disney and Rep. Cole of Maryland, *id.* at 2146.

⁶² *Id.* at 764; *id.* at 2150. Hughes' specific advice on how to frame a constitutional delegation was not wasted. Section 4 of the Connally Act provided that "Whenever the President finds that the amount of petroleum and petroleum products moving in interstate commerce is so limited as to be the cause, in whole or in part, of a lack of parity between supply. . . and consumptive demand. . . resulting in an undue burden on or restriction of interstate commerce in petroleum or petroleum products, he shall by proclamation declare such finding, and thereupon the provisions of section 3 [prohibiting interstate shipment of "hot oil"] shall be inoperative until such time as the President shall find and by proclamation declare that the conditions which gave rise to the suspension of the operation of the provisions of such section no longer exist." c. 18, section 4, 49 Stat. 30 (1935). As Representative Charles Wolverton observed, "The House committee. . . has placed in this bill something of a safety valve, in that the President is authorized and empowered to suspend the act if it should appear that the limitation or control of production of crude oil was detrimental to the national interest. If that provision had not been placed in this bill, it would have left the entire matter to the judgment of an oil producing state as to what quantity of crude oil should go into interstate commerce. . . . [The bill as amended] has not left it entirely to the State to determine, without regard to the rights of the consuming public, how much oil shall go into interstate commerce. Provision has been made that whenever the President finds there is such a limitation of production as might be harmful to the consuming public he can act to suspend the provisions of this bill. Thus there is a safety valve provided in this bill. . . ." *id.* at 2136. The House report explained the manner in which the proviso had circumscribed the President's discretion in compliance with the *Panama Refining* decision—"The committees inserted the proviso found in the bill, which does not arbitrarily delegate to the President the power to declare the law to be inoperative in his sole discretion, but only when he finds that the circumstances exist which are set forth in the statute. Congress says to the President in effect in the language of the amendment—

You are permitted to declare the existence of the facts by which this law shall be inoperative whenever you find that the supply of petroleum and the products thereof, moving in interstate commerce, is so limited as to cause in whole or in part a lack of parity between supply, including imports, and demand, including exports, resulting in an undue bur-

den on, or restriction of, interstate commerce in petroleum and the products thereof.

Under this language the President, we assume, will require a factual basis for his finding, that factual finding being addressed to what limitation there is upon the supply moving in interstate commerce and whether there is a lack of parity between such supply and demand. This is a definite requirement, a statement of circumstances and the imposition of conditions, all of which must be determined before the President can act. This power in the President presupposes a definite finding and a statement of the facts for the President's action before any such action is taken." H. Rep. No. 148, 74th Cong. 1st Sess., at 4 (1935). See also H. Rep. 2155, 74th Cong. 1st Sess., at 5 (1935). There are no reported cases challenging the validity of section 4.

⁶³ Comment, "Constitutional Law—Delegation of Legislative Authority," 1 *Mo. L. Rev.* 68, 70 (1936). See also Isador Loeb, "Constitutional Interpretation in a Transitional Period," 21 *St. Louis L. Rev.* 95, 102 (1936).

⁶⁴ Note, "Constitutional Law—Delegation of Legislative Powers—'Hot Oil'—NIRA," 3 *G.W. L. Rev.* 391, 392-93 (1935).

⁶⁵ Note, "Delegation of Legislative Powers to the Executive—the NIRA Oil Case," 2 *U. Chi. L. Rev.* 632, 636 (1935). For other optimistic assessments of the Act's chances before the Court, see Note, "Constitutional Law—Delegation of Powers—Validity of Act of Congress Conferring Discretionary Authority Upon the President," 12 *N.Y.U. L. Q. Rev.* 520, 522 (1935); George K. Ray & Harvey Wienke, "Hot Oil on Uncharted Seas of Delegated Powers," 29 *Ill. L. Rev.* 1021, 1034-35 (1935); Comment, "Interstate Regulation of 'Hot Oil,'" 23 *Geo L. J.* 487, 494 (1935).

⁶⁶ See *Genecov v. Federal Petroleum Board*, 146 F. 2d 596 (5th Cir., 1944); *The President of the United States v. Skeen*, 118 F. 2d 58 (5th Cir., 1941); *Hurley v. Federal Tender Board No. 1*, 108 F. 2d 574 (5th Cir., 1939); *Griswold v. The President of the United States*, 82 F. 2d 922 (5th Cir., 1936); *President of the United States v. Artex Refineries Sales Corp.*, 11 F. Supp. 189 (S.D. Tex., 1935).

⁶⁷ *United States v. Powers*, 307 U.S. 214 (1939).

⁶⁸ Ch. 824, 49 Stat. 991, 995-1001, section 4, part II (1925) (repealed 1937, as noted in 15 U.S.C. sections 801-827).

⁶⁹ *Id.* at 1001-02, section 4, part III.

⁷⁰ See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 159-61 (1998).

⁷¹ 298 U.S. 238 (1936).

⁷² *Id.* at 312-16.

⁷³ *Id.* at 317-24 (separate opinion of Hughes, C.J.).

⁷⁴ *Id.* at 324 (Cardozo, J., dissenting). Cardozo maintained that "the suits are premature in so far as they seek a judicial declaration as to the validity or invalidity of the regulations in respect of labor," and accordingly did not consider the validity of those provisions. *Id.*

⁷⁵ *Id.* at 336.

⁷⁶ See Comment, "Constitutional Law—The Guffey Coal Act Decision and the Future for Federal Price

Regulation," 16 *Ore. L. Rev.* 67, 79 (1936) (noting that "by stabilizing [through price regulation] an industry in desperate economic plight and placing it in a position where it can afford to pay decent wages to labor, Congress may avert much of the damage to the public welfare from labor difficulties, and much of the need for direct regulation of wages, hours, and other labor conditions, which cannot be constitutionally imposed, in the opinion of the Supreme Court at the present time"). See also Comment, "The Bituminous Coal Act of 1937," 25 *Geo. L. J.* 986, 989 (1937); H. Rep. No. 294, 75th Cong. 1st Sess., at 2 (1937) ("It is the opinion of the committee that the stabilization of prices which the bill seeks to effect and the resulting guarantee to operators of a fair price for their coal will go a long way toward stabilization of labor conditions in the industry and toward the guarantee to the miners of satisfactory working conditions and a living wage").

⁷⁷ See "Constitutional Law—The Guffey Coal Act Decision," *supra* note 76, at 67, 71-79; Note, "The Final Phase of the Schechter Episode: *Carter v. Carter Coal Co.*," 5 *Brooklyn L. Rev.* 454, 469-70 (1936); Comment, "The Bituminous Coal Conservation Act of 1937," *supra* note 76, at 992-93.

⁷⁸ 50 Stat. 72 (1937).

⁷⁹ See S. Rep. No. 252, 75th Cong. 1st Sess., at 4-5 (1937); H. Rep. No. 294, 75th Cong. 1st Sess., at 11-14 (1937); remarks of Rep. Dirksen, 81 *Cong. Rec.* 2120, 75th Cong. 1st Sess. (1937); remarks of Sen. Guffey, *id.* at 2950-52; remarks of Sen. Borah, *id.* at 2956; remarks of Sen. Neely, *id.*; remarks of Rep. Vinson, *id.* at 2033-34, 2036-38; remarks of Rep. Jenkins, *id.* at 2041-42.

⁸⁰ See, e.g., *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (McReynolds, J., dissenting).

⁸¹ 291 U.S. 502 (1934); H. Rep. No. 294, 11 75th Cong. 1st Sess. (1937); remarks of Rep. Guffey, 81 *Cong. Rec.* 2953, 75th Cong. 1st Sess. (1937); remarks of Rep. Vinson, *id.* at 2030, 2034, 2038-39; remarks of Rep. Jenkins, *id.* at 2042.

⁸² *Id.* at 2039. See also Comment, "Constitutional Law—Bituminous Coal Conservation Act of 1935—Congressional Power Under the Commerce Clause to Regulate Labor Conditions in Local Industry and Fix the Price of Sales in Interstate Commerce," 34 *Mich. L. Rev.* 1167, 1178-79 (1936) (suggesting that *Nebbia* provided authority for federal regulation of the price of coal sold in interstate commerce); "Constitutional Law—The Guffey Coal Act Decision," *supra* note 76, at 76-79.

⁸³ See, e.g., remarks of Rep. Jenkins, 81 *Cong. Rec.* 2041, 75th Cong. 1st Sess. (March 9, 1937).

⁸⁴ Ralph Baker, **The National Bituminous Coal Commission** 66 (1941). See remarks of Rep. Jenkins, 81 *Cong. Rec.* 2044, 75th Cong. 1st Sess. (March 9, 1937); remarks of Rep. Casey, *id.* at 2047.

⁸⁵ See Cushman, *supra* note 70, at 195.

⁸⁶ 81 *Cong. Rec.* 2952, 75th Cong. 1st Sess. (1937).

⁸⁷ *Id.* at 2032.

⁸⁸ *Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381, 396-97 (1940).

⁸⁹ Act of June 27, 1934, c. 868, 48 Stat. 1283.

⁹⁰ "The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality. Even should we consider the Act unwise and prejudicial to

both public and private interest, if it be fairly within delegated power our obligation is to sustain it. On the other hand, though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare." 295 U.S. at 346.

⁹¹ *Id.* at 348-57.

⁹² *Id.* at 362.

⁹³ "Classes of persons held to be improperly brought within the range of the Act could be eliminated. Criticisms of the basis of payments, of the conditions prescribed for the receipt of benefits, and of the requirements of contributions, could be met. Even in place of a unitary retirement system another sort of plan could be worked out." *Id.* at 375.

⁹⁴ *Id.* at 375.

⁹⁵ *Id.* at 374-75.

⁹⁶ See, e.g., Comment, "Constitutional Law—Railroad Retirement Act," 4 *Fordham L. Rev.* 498, 499, 501 (1935); Comment, "Constitutional Law—Due Process—Interstate Commerce—Power of Congress to Provide for Compulsory Retirement and Pension System for Carriers," 20 *Minn. L. Rev.* 49, 55-56 (1935); Comment, "The Railroad Retirement Acts," 10 *St. John's L. Rev.* 53, 58-59 (1935); Comment, "Constitutional Law—Railroad Retirement Acts," 25 *Geo. L. J.* 161, 173 (1936); Comment, "Constitutional Law—The Railroad Retirement Act—Interstate Commerce—Due Process," 33 *Mich. L. Rev.* 1214, 1220 (1935); Bruce R. Trimble, "The Judicial Treatment of the New Deal," 4 *Kan. City L. Rev.* 104, 107 (1936). See also "Radio Address of Hon. John A. Martin, of Colorado, on March 6, 1937," reprinted in 81 *Cong. Rec. Appendix* 435-37, 75th Cong. 1st Sess. (1937); Samuel Hendel, **Charles Evans Hughes and the Supreme Court** 231-32 (1951); William E. Leuchtenburg, **The Supreme Court Reborn** 46-47 (1995).

⁹⁷ Ralph F. Fuchs, "Judicial Method and the Constitutionality of the N.I.R.A.," 20 *St. Louis L. Rev.* 199, 209 n.34 (1935) (emphasis mine). See also Comment, "Constitutional Law—Unconstitutionality of the Railroad Retirement Act—Limitation on Power of Congress Over the Instrumentalities of Interstate Commerce," 35 *Colum. L. Rev.* 932, 933 (1935) (suggesting that the powers to tax and spend were "broader in scope than the commerce power," and might therefore permit congressional legislation creating a pension system for railway employees).

⁹⁸ *Id.*

⁹⁹ See Note, "Constitutional Law—Railroad Retirement Acts," *supra* note 96, at 165-66, 170.

¹⁰⁰ Asked by Senator Duffy whether the revised Railroad Retirement Act met the objections raised by the Court in *Alton*, Senator Wagner responded that *Alton* "was based upon the ground that we had no authority, under the power to regulate interstate commerce, to retire old railway employees. . . Under this bill. . . we are proceeding on an entirely different theory, namely, the power of Congress to impose taxes." 79 *Cong. Rec.* 13646, 74th Cong. 1st Sess. (August 19, 1935). In the House, Rep. Monaghan pointed out that Roberts' *Alton* opinion had held "that the power 'to regulate

commerce' did not carry with it the power to provide pensions. He did not say we could not pay an annuity out of the Treasury of the United States. [That] is the theory of this bill." *Id.* at 13671.

¹⁰¹ 49 Stat. 967 (1935).

¹⁰² 49 Stat. 974 (1935).

¹⁰³ It all began when Senator Hastings asked why the provisions imposing the taxes and the provisions authorizing the appropriations were not all in one bill, as they were in the Social Security Act. Senator Wagner responded cryptically that it was "a matter of procedure." Senator Robinson came to Wagner's rescue, explaining that "Normally the Committee on Interstate Commerce has jurisdiction of railroad pension legislation. Always the Finance Committee has jurisdiction of tax legislation. In the case of the social-security bill, it was my personal thought that it would be better to separate the legislation, to have the administrative and other provisions in one measure, and the tax provision in a separate measure; but that course was not followed. In the case of the railroad pensions, that course is being followed, and I believe it is the best practice." 79 *Cong. Rec.* 13646, 74th Cong. 1st Sess. (1935).

Hastings was not satisfied. "May I inquire," he inquired, "whether there is any objection to adding a new title to this bill, including the tax, instead of passing a separate bill?" "Yes; there is a valid objection," Robinson responded. "[T]he Senate has no power to originate a revenue measure, and the body at the other end of the Capitol probably would take the view that we were originating a revenue measure if we put into this bill a provision for the tax to which the Senator is referring." "May I inquire. . . why it was that the House made these two separate bills?" Hastings persisted. "There was no reason why the House could not add the taxing feature to the bill. Why did they not make it in one bill?" "That is the business of the House," was Wagner's curt if somewhat juvenile response. *Id.* at 13647.

Robinson's tactic was to return to the theme of committee jurisdiction: "Mr. President," he explained, "it may or may not have been due to my own suggestion. I felt then and still feel that the committee which has jurisdiction of the legislation to provide for pensions, to work out the administrative features, is a different committee from that which has the tax-raising authority, and I think the course that has been pursued is the better course. Our committee formulated the legislation—a committee which is familiar with the subject matter of this bill. The taxing committee, the Ways and Means Committee, is composed of men of eminence and of ability; nevertheless they have not made the studies and do not possess the knowledge of this particular subject which is essential to proper formulation of the legislation. So I think the course which the House has pursued is a good one. I am perfectly willing, if the Senator thinks otherwise, to have him get them to reverse their action if he can do so." *Id.*

Wagner had by this point caught on to Robinson's strategy, and now chimed in: "Mr. President, let me say, in line with the suggestion of the Senator from Arkansas, that like the Interstate Commerce Com-

mittee of the Senate, the Interstate Commerce Committee of the House last year devoted several months to the study of this whole subject. Hearings covered a period of at least one month. Experts upon this question, those representing the railroad point of view and those representing the employees' point of view, were heard. In view of this long study, it would seem a ludicrous procedure to send the measure deliberately to another committee which would have to begin the hearings all over again and study the question *de novo*." *Id.*

Robinson then laid bare the issue Hastings had been sniffing around. "I assure the Senator from Delaware that the course which has been pursued does not involve any legerdemain, if that is what the Senator is intimating." "I am glad the Senator assures me of that," Hastings replied, "because I am very suspicious of it. . . . In this case a very clever thing has been done, by design or otherwise, which is to separate the granting of a pension from the levying of the tax. . . . I say that that in my judgment makes very much more certain the constitutionality of the two acts, but I say in doing it Senators are violating the spirit of the Constitution, and what I am trying to find out is whether or not it has been done deliberately and for the purpose of making more certain the constitutionality of these two bills." *Id.*

Wagner stuck with Robinson's game plan, insisting, "I know of no such deliberate design. I think a very clear and persuasive explanation was made as to why the two bills went to the separate committees." But Robinson, seeing a forensic opportunity where Wagner did not, had shifted ground.

"If the Senator from Delaware is in sympathy with railroad pension legislation, if he believes that it ought to be enacted, he certainly cannot object to any course the Congress might decide to take which would tend to sustain the legislation after it had been passed," he contended. "There is nothing wrong, there is nothing immoral, and there is nothing treacherous in separating the two subjects. They ought to be separated for the reasons which I gave a few moments ago." Here he rejoined Wagner. "One committee is familiar with the subject matter of one phase of the legislation; another committee is familiar with the subject matter of the tax legislation. Yet the Senator from Delaware is suspicious that there is something wrong with the policy of passing two bills—one as a tax bill. We seldom put tax legislation in the bills we enact for the expenditure of money. It was the consistent course which was pursued." *Id.* at 13647-48.

Here Senator Borah drove home Robinson's defense of separating the bills as a constitutional strategy. "I understand the question which is raised here is to what the effect constitutionally will be by reason of providing the two measures," he observed. "Suppose. . . the legislation is brought within the Constitution by reason of that fact, is it not our duty to do that very thing?" At this point Wagner again caught up to his colleagues, half admitting what he had denied a moment earlier. "That is what the Senator from Arkansas suggested," he agreed, "and I tried to suggest that if we are friends of this measure and anxious to provide a pension for the employees, if the Senator is right, that is the very course which we ought to pursue." *Id.* at 13648.

There followed a colloquy among Senators Wagner, Fletcher, and Barkley, in which it was made clear that the pensions were to be paid out of the Treasury "out of any funds not otherwise appropriated," and that while the tax "has been figured out so as to conform to the actuarial requirements" of the pension legislation, there was a "theoretical relationship between the two" bills, "but not a direct connection." *Id.* 13648-49. For a similar discussion in the House, see *id.* at 13670-71 (remarks of Mr. Hollister). This prompted Senator Tydings to launch the second offensive against the proponents' constitutional strategy. Throughout the discussion that followed, Tydings never once let on that his suggestion, if adopted, might compromise the constitutional strategy that lay behind the separation of the bills. Nevertheless, it clearly would have tended to do so.

Tydings' suggestion was to earmark the tax and pay its proceeds into a separate fund rather than mixing them in with the general revenue. "I should much rather have this fund segregated and the retirement benefits paid out of such fund than have the Treasury of the United States, without any limitation whatsoever, become the source from which these payments are to be made," said Tydings. "I believe it is extremely bad policy to have the Federal Government make the bank to pay pensions of this character. . . ." *Id.* at 13649.

Wagner sought to fend him off by vouching for the plan's actuarial integrity. "The calculations are definitely made; they are predictable as to the amount which will be required in order to secure a solvent fund for the payment of these pensions; and a sufficient tax is imposed to secure that fund. So whether it be segregated or put into the general fund of the Treasury is really a very minor matter." *Id.*

If it was such a minor matter, Tydings replied, "I take it the Senator would have no particular objection to segregating these funds under the Railroad Retirement Board?" Wagner hedged, professing solicitude for employees of the Treasury Department: "I should want to consult the Treasury authorities. I think perhaps such segregation would impose upon the Treasury Department unnecessary bookkeeping and unnecessary work. It is a matter that I do not regard as very important, so long as the calculations are definitely made, and that can be done." Tydings then expressed his wish that Wagner "at the very first opportunity. . . consult the Treasury about the advisability of having these moneys segregated into a separate fund," to which Wagner responded, "Very well." "I am certain," Tydings persisted, "if the bill were now so worded that it would attract support which otherwise might not be present. I think some Senators feel that a matter that is extraneous to the Government such as these funds, only being administered by the Government, ought not to be confused with the general revenues of the Government." *Id.*

Here Wagner became conciliatory. "I may say that the Senator raises a question really worth while," he conceded. "Under this bill a commission is to be appointed to make an investigation of all the matters that relate to this whole subject. . . . The commission may, among other things, study the very question which the Senator has raised. Furthermore, the commission is to report to the Congress on January 1 next, which will be 3 months prior to the effective

date of this particular act; so that ample time will be afforded to study that very question." *Id.*

Not quite satisfied, Tydings replied: "Even so, if I may so ask the Senator, I request that he ascertain if the Treasury would look with favor upon it; and if the Treasury should look with favor upon it and the author of the bill should do so, I should like to see such a provision incorporated into the law. If subsequently after the examination shall have been made, he should find that the money should be covered into the general fund for one reason or another, that would be a different thing. I do not like to start the bill out in that form if it can be avoided." At this point Wagner asked to be let off the hook. "At this late date," he replied to Tydings, "I hope the Senator will not press the suggestion, because the commission will be in a position to study the question and to report to us before any tax is imposed in accordance with the design of this bill." *Id.*

Tydings did not press the suggestion, but Hastings rejoined the colloquy to suggest that segregation of the funds rather than payment of the pensions out of the Treasury would be fatal to the scheme's constitutionality. Wagner attempted to cut Hastings short. "There is no need of going into that; I know the Senator's point of view from the standpoint of the law upon this subject; but there is no need of our pursuing it any further. The courts will finally have to speak upon that question." *Id.* at 13649-50.

But Hastings had to have the last words, and they dripped with barely concealed sarcasm and disdain. "Mr. President, I think this method of legislating is establishing an exceedingly bad precedent. I was delighted to hear the Senator from New York [Mr. WAGNER] suggest that it was not designedly done. I had the distinct impression that the Social Security Act, as to the constitutionality of which many of us had serious doubt, was divided into separate titles because the fear was existent that if the fund were segregated, as the Senator from Maryland [Mr. TYDINGS] suggested he would like to see done, there would be very grave danger of the act being declared to be unconstitutional. . . . when I found in these two bills that the two proposals are separated entirely, I reached the conclusion that some smart person had probably thought he would be able to circumvent the Constitution in that way. I was not certain and I am not now certain whether the Supreme Court may take the two acts together in order to determine whether both or either may be constitutional.

"As an illustration, when we pass the second bill providing for a tax upon railroads, there is no doubt that nothing in that measure will show the purpose for which the tax is levied. The Federal Government may take it, may pay the pensions due the World War veterans, may use it for relief, may use it to assist the farmers, may use it as the Federal Government may use any other part of the general fund which comes into the Federal Treasury. That is undoubtedly true. There is no earmark to the taxation. . . . But the query I have in mind is whether or not the Supreme Court may look at the two acts and determine that the tax was levied for a purpose.

"I do not raise the objection here for any other reason than to caution the Senate against this kind of legislation which separates a tax bill from the purpose of the tax itself. I think unless we can combine the

two, and safely combine the two, we ought not to enact it at all. I am not in favor of circumventing the spirit of the Constitution in any way. We have developed new and important minds recently. They have new ideas. It seems to me that this is one idea which they might be able to 'put over.' I am glad, in view of that thought, to hear the Senator from New York [Mr. WAGNER] say it was not done designedly, that it was not for any such purpose as that.

"With that statement in the record I assume the Supreme Court, when they come to consider one of these acts, will feel justified in considering both of them and reading the record in order to ascertain whether or not we have done a lawful thing." *Id.* at 13652.

In the House, Rep. Merritt echoed Hastings' objections. "Mr. Speaker, I do not propose to make any general speech or argument against this bill, but I think the Members of the House, if they do not appreciate already what it is proposed to do, should have it called to their attention. What we are doing today is to reenact a part of a bill which has already been declared unconstitutional. The way it is proposed to avoid the decision of the Supreme Court is to divide the bill into two bills, and pass this bill, which gives the people who are affected by it, a general claim on the United States Treasury; and then this afternoon to pass an appropriation bill to cover the supposed expense which will be incurred by this pension bill." *Id.* at 13673. *See also* remarks of Rep. Hollister, *id.* at 13671.

¹⁰⁴ *Alton R. Co. v. Railroad Retirement Board*, 16 F. Supp. 955 (Dist. D.C., 1936).

¹⁰⁵ *Id.* at 956-57.

¹⁰⁶ "The two taken together so dovetail into one another as to create a complete system, substantially the same as that created by the Railroad Retirement Act of 1934. . . . The provisions of the two acts in question are so interrelated and interdependent that each is a necessary part of one entire scheme. This is not only apparent from the terms of the acts themselves, but is shown by their legislative history. It was clearly the intention of Congress that the pension system created by the Retirement Act should be supported by the taxes levied upon the carriers and their employees." *Id.* at 956. "In the case at bar. . . the interlocking and interdependent provisions of the two acts and their legislative history do show an attempt to accomplish under certain of its powers an end which has been held to be unconstitutional." *Id.* at 957. "[F]rom what has been said it necessarily follows that the two acts are inseparable parts of a whole, that Congress would not have enacted one without the other, that the taxes levied under the tax act are the contributions required under the act of 1934. . . . This being true, it is clear that under the views of the Supreme Court in the *Alton* case the taxing act transcends the powers of Congress. The pension system so created is substantially the same as that created by the act of 1934, and, apart from its unconstitutionality as a whole, subject to the same objections in certain particulars as those pointed out by the Supreme Court in that case." *Id.* at 958. The court identified some of those particulars *id.* at 959.

The court rejected the claim that the two acts had to be considered entirely separately because "the funds arising from the taxing act are not 'ear marked,' not kept as a separate fund for the payment of pensions provided for in

the Retirement Act. . . . [T]he purpose of Congress in passing [the Taxing Act] is clearly as shown . . . to provide funds for pensions . . . and not to provide for the expenses of the government." That being so, "it would seem to be immaterial whether the funds raised by the tax act are to be segregated in the Treasury; that would be a mere matter of bookkeeping, and would not affect the right of the taxpayer." *Id.* at 957.

Several commentators had predicted this fate for the 1935 pension legislation. *See, e.g.*, "Constitutional Law—Railroad Retirement Act," *supra* note 96, at 499, 501; "Constitutional Law Due Process—Interstate Commerce—Power of Congress to Provide for Compulsory Retirement and Pension System for Carriers," *supra* note 96, at 55-56; "The Railroad Retirement Acts," *supra* note 96, at 58-59; "Constitutional Law—Railroad Retirement Acts," *supra* note 96, at 173.

¹⁰⁷ This is reported in *B. & O. R. Co. v. Magruder*, 77 F. Supp. 156, 156-57 (D. Md., 1948).

¹⁰⁸ As Rep. Lea, Chairman of the House Committee on Interstate and Foreign Commerce explained in introducing the Railroad Retirement Act, "Representatives of the 21 standard railway employees' organizations representing substantially all railway employees on class I railroads participated in the negotiations. Railway management representing 98 1/2 percent of the total mileage of class 1 railways of the United States participated in the negotiations. Class 1 railroads, as the membership of the House is aware, embrace every railroad whose annual income is over \$1,000,000.

"Members of the Federal Railroad Retirement Board participated with representatives of the management and men in these conferences. Finally an agreement was reached, the substance of which was embodied in a bill brought before the Interstate and Foreign Commerce Committee of the House. As a result of the hearings and further consideration of that measure by our committee a number of changes were made which were approved by these two groups and embodied in the bill now presented to the House." 81 *Cong. Rec.* 6080-81, 75th Cong. 1st Sess. (June 21, 1937). The Committee Reports similarly noted that "The pending bill has received the endorsement of both the labor organizations and the carriers, expressed in hearings before the committee." H. Rep. No. 1071, 75th Cong. 1st Sess., at 2 (1937). *See also* S. Rep. No. 818, 75th Cong. 1st Sess., at 2 (1937), which adopted the House report as its own.

As Representative Doughton explained, "The matter was given long and painstaking consideration, and was thoroughly discussed with the employers, the employees, and representatives of the Treasury Department. After long and deliberate consideration the measure now has unanimous support. It is agreed to by those who will pay the tax, it is acceptable to the Treasury of the United States, and it has the unanimous support of the Committee on Ways and Means." 81 *Cong. Rec.* 6302, 75th Cong. 1st Sess. (June 24, 1937). "Representatives of the railroad men, represented by Mr. George Harrison, president of the 21 brotherhoods, came before our committee," noted Representative Jenkins, "and indicated that they favored this legislation. The railroad executives, represented by Mr. Fletcher, a capable and able representative, stated that

they, too, were in favor of this legislation." *Id.* at 6303. Representative Wolverton reported that the District Court's injunction "prompted the President to suggest to representatives of railroad labor organizations and railroad management that an effort be made to work out between them a retirement plan which would be mutually satisfactory.

"In accordance with the suggestion of the President, a committee was appointed by the Association of American Railroads to confer with a committee appointed by the Railway Labor Executives Association, representing the employees. As a result of the conferences held by these two representative groups the plan of retirement was agreed upon and is embodied in amendments to the existing law. The bill now before the House. . . represents that plan as agreed upon by the carriers and their employees and approved by the Committee on Interstate and Foreign Commerce after careful study and extensive hearings. The enactment of this bill in its present form has been agreed upon by all the interested parties." The bill "represents absolute and complete unanimity of thought and desire between management and men. There is no feature of this bill that presents any controversy or disagreement as between these two parties. Every provision has the support of both without any reservation on the part of either. It represents a unified effort to produce legislation that will be satisfactory and mutually beneficial, and comes before the House with the united support of railroad management and all the standard brotherhoods." *Id.* at 6084-85. *See also id.* at 6302 (remarks of Rep. Snell); *id.* at 6085-86 (remarks of Rep. Martin of Colorado); *id.* at 6087 (remarks of Rep. Mapes); *id.* at 6087-88 (remarks of Rep. Cole of Maryland); *id.* at 6089 (remarks of Rep. Mead); *id.* at 6092 (remarks of Rep. Rayburn); *id.* at 6222 (remarks of Sen. Wagner); *id.* at 6224 (remarks of Sen. Wheeler); *id.* at 6227 (remarks of Sen. Barkley).

Sponsors also explained the constitutional theory of the plan, and the reasons why it was being enacted as two bills rather than one. Representative Jenkins explained that "It was thought advisable to divide these bills and permit the bill providing the amount the railroads should pay and the manner of payment and all incidents thereto to be considered by the Ways and Means Committee, which of right should consider it. And it was also thought advisable that another bill should be introduced providing who should be entitled to draw this pension and how much each class should draw, and also to provide what age men should be required or be eligible to draw the pension." *Id.* at 6091.

In the Senate, Senator Davis explained that "The measure now before us is not predicated upon the power to regulate commerce, but upon two separate and distinct powers vested by the Constitution in Congress, neither of which was involved in the case holding the Retirement Act of 1934 to be void.

"The measure now before us is predicated upon the right of Congress to appropriate money. Section 12 authorizes an appropriation for the purposes of the bill out of the Treasury of the United States. This appropriation is not payable out of any particular fund, nor out of any money earmarked for that purpose." *Id.* at 6227. *See also id.* at 6303 (remarks of Rep. Jenkins).

In the House there was a mild reprise of the colloquy Senators Wagner, Robinson, Hastings, and Tydings had held in the Senate two years earlier. Representa-

tive Fish asked: "Is any of this money earmarked for this purpose when it goes into the Treasury?"

Representative Fred Vinson replied that it was not. "This is a taxing bill that produces revenue collected by the Bureau of Internal Revenue. The revenues go directly into the Federal Treasury, the general fund of the Treasury." Fish responded, "I simply want to ask the gentleman if there is any reason why this money should not be earmarked for this specific purpose."

Vinson replied that "So far as this act is concerned, the act covers the money into the Treasury of the United States. Congress has the power to appropriate this money just as they appropriate all other money that goes into the general fund of the Treasury."

This was unresponsive, and Fish told Vinson so. "But the gentleman has not answered my question. Why should it not be earmarked?"

The future Chief Justice answered: "Because, from the beginning of our Government, until now, as I am informed, the policy of the Treasury has never been to earmark money coming into the general fund of the Treasury. . . ." But "What about the Congress?" retorted Fish. "Cannot Congress do that?" Here Vinson was finally forthcoming: "I recall one instance when the Congress attempted to collect taxes for a special purpose, which may be characterized as earmarking—it was the Agricultural Adjustment Act. The processing taxes were held by the Supreme Court to be an exaction which, under the act, did not go into the general fund of the Treasury, but were used for a specific purpose which the Supreme Court held to be beyond congressional power. I am certain that my friend from New York will recognize that a recurrence of that sort of thing is not desirable. So I repeat that this act is what it says it is—the Carriers Taxing Act of 1937—a revenue bill in which the revenue will be collected by the Bureau of Internal Revenue, as other taxes are collected, and they will become part and parcel of the general fund of the Treasury of the United States." *Id.* at 6303-4.

If Mr. Fish thought that such a recurrence would have been desirable, he did not say so. Debate concluded and the bill was passed without a record vote. *Id.* at 6304. The bill passed the Senate without debate and without a record vote. *Id.* at 6345.

¹⁰⁹ Remarks of Sen. Davis, *id.* at 6227. This echoed the encomiums of the Committee Reports, which stated: "we wish to commend both the carriers and the employees upon the great ability they have shown to adjust matters of this sort through normal process of collective bargaining. The agreement as to this measure constitutes a landmark in the history of industrial relations in this country." H. Rep. No. 1071, 75th Cong. 1st Sess., at 2 (1937); *see also* S. Rep. No. 818, 75th Cong. 1st Sess., at 2 (1937). Chairman Lea echoed these views on the floor of the House: "This is the most far-reaching agreement ever entered into between capital and labor in this or any other country." 81 Cong. Rec. 6081, 75th Cong. 1st Sess. (June 21, 1937); *see also* remarks of Sen. Wagner, *id.* at 6222. For further praise of the agreement, *see* remarks of Rep. Wolverton, *id.* at 6085; remarks of Rep. Martin of Colorado, *id.* at 6086; remarks of Rep. Mapes, *id.* at 6087; remarks of Rep. Cole of Maryland, *id.* at 6088; remarks of Rep. Mead, *id.* at 6089-90; remarks of Rep. Rayburn, *id.*

at 6092; remarks of Sen. Clark, *id.* at 6222-23.

¹¹⁰ Ch. 347, 44 Stat. 577 (1926).

¹¹¹ *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930) (Justice McReynolds did not participate). See also *Virginian Railway Co. v. System Federation*, No. 40, 300 U.S. 515 (1937) (unanimously upholding 1934 amendments to the Act); *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937) (unanimously upholding application of National Labor Relations Act to interstate bus company); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding application of NLRA to steel manufacturer); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937) (upholding application of NLRA to trailer manufacturer); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937) (upholding application of NLRA to clothing manufacturer); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (upholding application of NLRA to wire service company).

¹¹² Chairman Lea stated that "It is the belief of the committee that this act, and particularly its substantial features, will be held constitutional should the Supreme Court be called upon for its decision." 81 *Cong. Rec.* 6081, 75th Cong. 1st Sess. (June 21, 1937). See also *id.* at 6302 (Rep. Doughton professes faith in constitutionality of Carrier Taxing Act and Railroad Retirement Act of 1937); *id.* at 6090-91 (Rep. Jenkins professes belief in constitutionality of Railroad Retirement Act of 1937); *id.* at 6093 (Rep. Crosser professes faith in constitutionality of Railroad Retirement Act of 1937); *id.* at 6222 (Sen. Wagner expresses confidence in the constitutionality of the 1935 Acts and of the Railroad Retirement Act of 1937); *id.* at 6087 (Rep. Cole of Maryland professes faith in the constitutionality of the 1935 Acts); *id.* at 6092 (Rep. Rayburn does the same); *id.* at 6093 (Rep. Crosser does the same).

¹¹³ *Id.* at 6081.

¹¹⁴ *Id.* at 6087. This was repeated several times on the floor. Chairman Lea reported that "The two great groups entering into agreement resulting in this legislation have agreed not to contest it." *Id.* at 6081. Rep. Wolverton reported that "it has been agreed by each of the parties that they will upon its enactment support and defend its provisions." *Id.* at 6085. In the Senate Wagner reported that "the railroads agreed with the representatives of the workers that if this measure were enacted they would not test its constitutionality, but accept it as law of the land." *Id.* at 6222. See also remarks of Sen. Wheeler, *id.* 6224-25 (suggesting that a stockholder or small railroad might nevertheless bring a contest); remarks of Rep. Lea, *id.* at 6081 (hinting at the same). For fear that floor amendments would unravel the deal between the railroads and the unions, the Senate decisively rejected two amendments offered by Wheeler. See *id.* at 6224-27.

Rep. Mapes added: "It is further understood that any suit or suits now pending in court to test the constitutionality of the existing railroad retirement law will be withdrawn." *Id.* at 6087; see also remarks of Rep. Wolverton, *id.* at 6085. Because the 1937 Act expressly repealed the 1935 Act, the Court of Appeals directed the District Court to dismiss the *Alton* suit on the grounds that it had become moot. Thus the 1935 Act was never challenged before the Supreme Court. See *B. & O. R. Co. v. Magruder*, 77 F. Supp. 156, 157 (D. Md., 1948).

¹¹⁵ In *California v. Latimer*, 305 U.S. 255 (1938), the state

sought an injunction against collection of the tax from its own State Belt Railroad. The Court appears to have been unsure exactly what the bill claimed. As Justice Brandeis put it, "The bill asserts, apparently, that as a matter of statutory construction, the federal [retirement] system is not applicable to the employees of the State Belt Railroad; and apparently that if construed as applicable to them, the legislation is unconstitutional." *Id.* at 257. The state's theory was that application of the Carrier Taxing Act to the State Belt Railroad would constitute taxation of a state instrumentality in violation of the principle of intergovernmental tax immunity. See Brief on Motion for Leave to File Bill of Complaint, 6, 20-21; Motion for Leave to File and Brief of Complainant State of California in Support of Motion for Leave to File Bill of Complaint, 5-20, 28-29, 44-45; Supplemental Brief of Complainant State of California on Defendants' Motion to Dismiss Bill of Complaint, 10-18. In this last document, filed after doubt was cast on the intergovernmental immunity claim by the Court's decision in *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the state also contended that the 1937 acts were generally unconstitutional. *Id.* at 18-21. The relief prayed for, however, was not that the federal railroad retirement act legislation be declared unconstitutional. It was instead more modestly that it "be declared inapplicable to the State Belt Railroad." 305 U.S. at 258. Because the Court dismissed the bill as without equity, the opinion reached neither the statutory nor the constitutional issue. The state again sought exemption from the Carrier Taxing Act under the principle of intergovernmental immunity, again without success, in *State of California v. Anglim*, 37 F. Supp. 663 (N.D. Cal., 1941), *affd.*, *State of California v. Anglim*, 129 F. 2d 455, 459 (9th Cir., 1942), *cert. den.*, 317 U.S. 669 (1942). In two cases lower courts held parties exempt from the Carrier Taxing Act as a matter of statutory construction. See *Ocean S.S. Co. of Savannah v. Allen*, 36 F. Supp. 851 (M.D. Ga., 1941), *affd.*, 123 F. 2d 469 (5th Cir., 1941); *New England Freight Handling Co. v. Hassett*, 33 F. Supp. 610 (D. Mass., 1940). See Robert Stern, "The Commerce Clause and The National Economy, 1933-1946," 59 *Harv. L. Rev.* 645, 693 (1946) (reporting that the "validity" of the revised retirement program "has never been challenged").

¹¹⁶ See 45 U.S.C. 231 et seq.; 26 U.S.C. 3221-3232.

¹¹⁷ 262 U.S. 447 (1923).

¹¹⁸ Act of Nov. 23, 1921, c. 135, 42 Stat. 224.

¹¹⁹ 262 U.S. at 487. For other Taft Court era cases rebuffing challenges to federal spending on the basis of *Mellon's* taxpayer standing doctrine, see, e.g., *Elliott v. White*, 23 F. 2d 997 (1928) (rejecting petition for injunction to prohibit appropriations for salaries for federal chaplains); *Wheless v. Mellon*, 10 F. 2d 893 (1926) (rejecting suit to enjoin enforcement of act providing for adjusted compensation for war veterans).

¹²⁰ Edward S. Corwin, *Twilight of the Supreme Court* 176 (1934).

¹²¹ See Samuel J. Konefsky, *Chief Justice Stone and the Supreme Court* 102 n.11 (1945); Carl Swisher, *American Constitutional Development* 838 (2d ed. 1954); Dean Alfange, *The Supreme Court and the National Will* 178-80, 205 (1937).

¹²² Benjamin F. Wright, *The Growth of American Constitutional Law* 184 (1942).

¹²³ *Id.* at 183.

¹²⁴ See *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-79

(1938); *Duke Power v. Greenwood County*, 302 U.S. 485 (1938); *California Water Serv. v. Redding*, 304 U.S. 252 (1938); *City of Allegen v. Consumers' Power Co.*, 71 F. 2d 477, 480 (6th Cir., 1934), *cert. denied*, 293 U.S. 586 (1934); *Central Illinois Pub. Serv. Co. v. City of Bushnell*, 109 F. 2d 26, 29 (7th Cir., 1940); *Duke Power Co. v. Greenwood County*, 91 F. 2d 665, 676 (4th Cir., 1937); *Greenwood County v. Duke Power*, 81 F. 2d 986, 997 (4th Cir., 1936); *Arkansas-Mo. Power Co. v. City of Kennett*, 78 F. 2d 911, 914 (8th Cir., 1935); *Iowa S. Util. Co. v. Town of Lamon*, 11 F. Supp. 581, 585 (S.D. Iowa, 1935); *Missouri Power & Light Co. v. City of La Plata*, 10 F. Supp. 653 (E.D. Mo., 1935); *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454, 464 (W.D. Mo., 1934). See also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (relying on *Mellon* in denying standing to challenge determination made under Public Contracts Act); *Graff v. Town of Seward*, 9 Alaska 205 (1937) (denying plaintiff standing to challenge Public Works Administration).

Mellon's broader justiciability doctrine was also invoked by the lower courts in repulsing attacks on the National Labor Relations Act, see *Bethlehem Shipbuilding Corp. v. Nylander*, 14 F. Supp. 201, 207 (S.D. Cal., 1936); *Ohio Custom Garment Co. v. Lind*, 13 F. Supp. 533, 536 (S.D. Ohio, 1936); the second Frazier-Lemke Act, see *In re Chilton*, 16 F. Supp. 14, 16 (D. Col., 1936); *In re Paul*, 13 F. Supp. 645, 647 (S.D. Iowa, 1936); the Emergency Relief Appropriation Act of 1935, see *Barnidge v. United States*, 101 F. 2d 295, 298 (8th Cir., 1939); the Securities and Exchange Commission, see *Detroit Edison Co. v. Securities & Exchange Commission*, 119 F. 2d 730, 740 (6th Cir., 1941); certain provisions of the amended Agricultural Adjustment Act, see *Wallace v. Ganley*, 95 F. 2d 364, 366 (D.C. Cir., 1938); and the Tennessee Valley Authority, see *Frahn v. Tennessee Valley Authority*, 41 F. Supp. 83, 84, 86 (N.D. Ala., 1941); *Tennessee Valley Authority v. Ashwander*, 78 F. 2d 578, 583 (5th Cir., 1935); see also *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137 (1939); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

¹²⁵ 48 Stat. 22, 23 (1933).

¹²⁶ 48 Stat. 257, 258 (1933).

¹²⁷ 49 Stat. 1, 4 (1935).

¹²⁸ 49 Stat. 1363, 1364 (1936).

¹²⁹ 49 Stat. 1597, 1608 (1936). As Carl Swisher put it, "Congress . . . continued to make appropriations of this kind, largely immune from judicial scrutiny." Swisher, *supra* note 121 at 838-39. The Supreme Court and the lower federal courts also rejected challenges to the Home Owners' Loan Corporation on standing grounds. See *Kay v. United States*, 303 U.S. 1 (1938). See also *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939) (assuming constitutionality of *Home Owners' Loan Corp.*); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 492 (1939) (assuming constitutionality of *Home Owners' Loan Corp.*); *United States v. Hill*, 90 F.2d 573 (3d Cir., 1937), *cert. den.*, 302 U.S. 736 (1937), *reh'g den.* 302 U.S. 779 (1937) (upholding constitutionality of *Home Owner's Loan Corporation*). The Federal Emergency Relief Act, 48 Stat. 55, 56 (1933), was subjected to an unsuccessful "collateral attack" in *Langer v. United States*, 76 F. 2d 817, 824-25 (8th Cir., 1935), where the court upheld the Act as a legitimate exercise of Congress's power to appropriate money for the general

welfare. In any event, the court held, citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923), *Frothingham's* companion case, "no personal right of any appellant is infringed," and even if the Act constituted an invasion of state power "still only an abstract question of political constitutional law would be presented, with which the courts are not concerned." *Id.* at 825.

¹³⁰ Act of May 12, 1933, ch. 25, 48 Stat. 31.

¹³¹ *Id.*, section 8(11).

¹³² Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Coming of the New Deal* 97 (1959).

¹³³ In a 1932 campaign speech Roosevelt argued that any farm plan "must finance itself. Agriculture has at no time sought and does not now seek any such access to the public treasury as was provided by the futile and costly attempts at price stabilization by the Federal Farm Board. It seeks only equality of opportunity with tariff-protected industry." Raymond Moley, *The First New Deal* 250 (1966).

¹³⁴ Act of May 12, 1933, ch. 25, Sections 9, 12, 48 Stat. 31

¹³⁵ *United States v. Butler*, 297 U.S. 1, 57-61 (1936). The dissent did not take issue with the majority on the question of standing. See 297 U.S. at 78 (Stone, J., dissenting). See also Alfange, *supra* note 121, at 184, 187-88.

¹³⁶ 297 U.S. 1 (1936).

¹³⁷ *Id.* at 68. Kelly and Harbison reported "a rumor given wide credence in Washington" that "asserted that Chief Justice Hughes had at first believed the statute constitutional, but that he had ultimately voted with the majority only because he thought another 5-to-4 decision would seriously damage the Court's prestige." Alfred H. Kelly, et al., *The American Constitution: Its Origins and Development* 750 (4th ed. 1970). Harold Ickes' diary reveals that Homer Cummings repeated this gossip at a Cabinet meeting in early 1936. Ickes, *supra* note 46, at 535-36.

¹³⁸ Alfange, *supra* note 121, at 180-81. See *F. G. Vogt & Sons, Inc. v. Rothensies*, 11 F. Supp. 225, 226 (E.D. Pa., 1935).

¹³⁹ 49 Stat. 1148 (1936).

¹⁴⁰ See Swisher, *supra* note 121, at 902; Frank B. Freidel, *Franklin D. Roosevelt: A Rendezvous With Destiny* 234 (1990); Stern, *supra* note 115, at 689-90; Richard Kirkendall, "The New Deal and Agriculture," in Braeman, Bremmer & Brody, eds., *The New Deal: The National Level* 94 (1975).

¹⁴¹ 80 *Cong. Rec.* 1778, 74th Cong. 2nd Sess. (February 11, 1936).

¹⁴² See Note, "Soil Conservation and Domestic Allotment Act," 24 *Geo. L. J.* 962, 965-67 (1936).

¹⁴³ Stern, *supra* note 115, at 689-90. Arthur Schlesinger reports that Secretary of Agriculture Henry Wallace "was aware in 1935 that AAA, in its original form, was beginning to play out. Acreage reduction was breaking down in certain areas, partly because too many of the farmers (as in wheat) were staying outside the system, partly because increases in productivity nullified the effect of reducing acreage. . . . Wallace, as he told Henry Morgenthau on a walk to work on a fall morning in 1935, would be glad enough to have the processing tax declared unconstitutional, so that AAA would thereafter get its money from the general tax funds. It was clear to him, and even clearer to Howard R. Tolley, head of the Program Planning Division, that AAA would have to evolve in new directions." Schlesinger,

supra note 132, at 82.

¹⁴⁴ 52 Stat. 31 (1938).

¹⁴⁵ See Cushman, *supra* note 70, at 191-92, 196-97.

¹⁴⁶ 297 U.S. at 63-64.

¹⁴⁷ See ch. 86, 42 Stat. 187 (1921) (amended by the Grain Futures Act, ch. 369, 42 Stat. 998 (1922)) (codified as amended at 7 U.S.C. section 1-26 (1992)).

¹⁴⁸ 259 U.S. 44 (1922).

¹⁴⁹ *Id.* at 66-68.

¹⁵⁰ *Id.* at 68-69.

¹⁵¹ *Id.* at 69.

¹⁵² See Act of Aug. 15, 1921, ch. 64, 42 Stat. 159 (1921) (current version at 7 U.S.C. section 181-229 (1992)).

¹⁵³ See *Stafford v. Wallace*, 258 U.S. 495 (1922).

¹⁵⁴ See ch. 369, 42 Stat. 998 (1922) (amended by the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936)) (codified as amended at 7 U.S.C. section 1-26 (1992)).

¹⁵⁵ 262 U.S. 1 (1923).

¹⁵⁶ 82 *Cong. Rec.* 341, 75th Cong. 2nd Sess. (1937).

¹⁵⁷ *Id.* at 340-41. Pope agreed with Senator McKellar that Congress ought to "make perfectly clear to the Court. . . what Congress had in mind by stating the purpose of the bill on its face," predicting that every member would see the importance of the bill's legislative findings concerning the effect of unregulated agricultural marketing on interstate commerce "when the Court comes to pass upon the constitutionality of the pending measure." *Id.* at 341.

¹⁵⁸ *Id.* at 341.

¹⁵⁹ 307 U.S. 38 (1939).

¹⁶⁰ Brief for the United States at 110 (citations omitted).

¹⁶¹ 307 U.S. at 47.

¹⁶² Robert Jackson, **The Struggle for Judicial Supremacy** 238 (1941). See also Swisher, *supra* note 121, at 957; Comment, "Interstate Commerce—Federal Regulation of Tobacco Marketing Held Constitutional," 52 *Harv. L. Rev.* 1364 (1939).

¹⁶³ 273 U.S. 12 (1927).

¹⁶⁴ Among them were NRA head General Hugh Johnson, NRA counsel Donald Richberg, and Commissioner of Statistics Isador Lubin. Bruce A. Murphy, **The Brandeis/Frankfurter Connection** 167 (1982).

¹⁶⁵ Also in attendance were presidential aide Tommy Corcoran, Senator Robert Wagner, and Charles Wyzanski, the talented young Labor Department Solicitor who would ultimately defend the Social Security Act before the Court. *Id.* at 168.

¹⁶⁶ See Murphy, *supra* note 164, at 165-69; see also Elizabeth Brandeis Raushenbush to LDB, Sept. 30, 1933; EBR to LDB, Sept. 24, 1933; Lincoln Filene to LDB, Dec. 26, 1933; W. L. Stoddard to LDB, Dec. 27, 1933; W. L. Stoddard to Lincoln Filene, Dec. 27, 1933; Tom Corcoran to Paul Raushenbush, Jan. 26, 1934; Paul Raushenbush to Tom Corcoran, Jan. 26, 1934 (Brandeis Papers, University of Louisville, microform).

¹⁶⁷ Murphy, *supra* note 164, at 169; EBR to LDB, Feb. 5, 1934; Beulah Amidon to EBR, Feb. 6, 1934; A.J. Altmeyer to EBR, Feb. 9, 1934; EBR to LDB, Feb. 10, 1934; EBR to LDB, Feb. 12, 1934; EBR to LDB, Feb. 15, 1934 (Brandeis papers, University of Louisville, microform).

¹⁶⁸ Murphy, *supra* note 164, at 169-75; FDR to FF, June 11, 1934, in **Roosevelt and Frankfurter: Their Correspondence, 1928-1945** 122-23 (Max Freedman, annot. 1968); Tom Corcoran and Ben Cohen to FF, June 18, 1934, *id.* at 123-26. See also Schlesinger, *supra* note 132, at 301-03, 305-06; Joseph P. Lash, **Dealers and Dreamers** 244-45 (1988); William E. Leuchtenburg, **Franklin D. Roosevelt and the New Deal** 130 (1963).

¹⁶⁹ Murphy, *supra* note 164, at 176-77.

¹⁷⁰ *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

¹⁷¹ *Id.* at 591-92.

¹⁷² 301 U.S. at 598 (McReynolds, J., dissenting); 301 U.S. at 616 (Butler, J., dissenting).

¹⁷³ *Id.* at 609 (Sutherland, J., dissenting).

¹⁷⁴ See George Sutherland to Richard R. Lyman, Jan. 21, 1938; George Sutherland to Mr. Preston (initials unknown), Jan. 18, 1938; George Sutherland to Nicholas Murray Butler, Jan. 12, 1938, Box 6, Sutherland MSS, LC.

¹⁷⁵ Alsop & Catledge, *supra* note 1, at 206; Pusey, *supra* note 1, at 760.

¹⁷⁶ "I agree that the payroll tax levied is an excise within the power of Congress; that the devotion of not more than 90% of it to the credit of employers in states which require the payment of a similar tax under so-called unemployment-tax laws is not an unconstitutional use of the proceeds of the federal tax; that the provision making the adoption by the state of an unemployment law of a specified character a condition precedent to the credit of the tax does not render the law invalid." 301 U.S. at 609-10 (Sutherland, J., dissenting).

¹⁷⁷ *Id.* at 613-14.

¹⁷⁸ 301 U.S. at 615-16 (Sutherland, J., dissenting).

¹⁷⁹ *Id.*; *Helvering v. Davis*, 301 U.S. 619 (1937).

¹⁸⁰ *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

¹⁸¹ *Id.* at 527 (McReynolds, J., dissenting).

¹⁸² *Id.*

¹⁸³ *Id.* at 527-30.

¹⁸⁴ *Id.* at 530.

¹⁸⁵ *Id.* at 530-31.

¹⁸⁶ *Id.* at 531.

¹⁸⁷ Murphy, *supra* note 164, at 93-96.

¹⁸⁸ Wheeler, *supra* note 1, at 329.

¹⁸⁹ Baker, *supra* note 84, at 49-50.

¹⁹⁰ Peter H. Irons, **The New Deal Lawyers** 248 (1982).

¹⁹¹ Baker, *supra* note 84, at 50 (citing *The New York Times*, July 6, 1935, at 2).

¹⁹² *Id.*

¹⁹³ *The New York Times*, Jan. 7, 1937, p. 1.

Chief Justice Earl Warren: Super Chief in Action

Bernard Schwartz

Years after his Presidency, John Adams said, "My gift of John Marshall to the people of the United States was the proudest act of my life. . . . I have given to my country a Judge, equal to a Hale, a Holt, or a Mansfield."¹

Contrariwise, when former President Dwight D. Eisenhower was asked by his biographer, Stephen E. Ambrose, what was his biggest mistake, he replied heatedly, "The appointment of that S.O.B. Earl Warren."²

History, however, disagreed with the Eisenhower estimate. Instead, the consensus is plainly with Vice President Hubert H. Humphrey's assertion that, if President Eisenhower "had done nothing else other than appoint Warren Chief Justice, he would have earned a very important place in the history of the United States."³

During the 1953 Labor Day weekend when Chief Justice Fred M. Vinson died of a massive heart attack, Earl Warren stayed up late reading Beveridge's classic **Life of John Marshall**.⁴ When, a month later, President Eisenhower appointed Warren to succeed

Vinson, no one expected the new Chief Justice to rank near Marshall himself in the judicial pantheon. Yet that is exactly what has happened. In his autobiography, Justice William O. Douglas concluded, "Warren clearly ranked with John Marshall and Charles Evans Hughes as our three greatest Chief Justices."⁵ Since Douglas wrote, Warren's stature has, if anything, grown. In a 1997 book, I stated, "Warren's leadership abilities and skill as a statesman enabled him to rank as second only to Marshall among our Chief Justices."⁶

This reality was encapsulated by Justice William J. Brennan, who, after Warren retired, began to call him the "Super Chief" a title soon adopted by those growing increasingly nostalgic about the Warren years. "To those who served with him," Brennan wrote after Warren's death, "Earl Warren will always be the Super Chief."⁷

Warren himself was proud of his reputation in this respect. After he retired, he delivered a talk to hundreds of students in the basement lounge of Notre Dame Law School

and responded to questions. A witness remembers: "One of our classmates prefaced his question with the observation that 'Some say that you'll go down in history with Marshall as one of the two greatest Chief Justices. . . .' The Chief Justice smiled broadly and interrupted. 'Could you say that again—a little louder, please? I'm having a little trouble hearing!'"⁸

Leadership Not Scholarship

Irving Stone, the novelist, who had become then-Governor Warren's friend, tells how he tried to introduce Warren to modern art. "What does this mean? Why hasn't this got a head?" the Governor asked when shown examples. Finally, Warren said, "Irving, I don't understand what this is all about. It is outside my training." Asked whether Warren got to know more about art as their friendship ripened, Stone laughed and said, "I think he left the subject alone."⁹

David Halberstam has written a tribute to Justice Brennan titled, "The Common Man as Uncommon Man."¹⁰ The title can be applied equally to Earl Warren who was, in Anthony Lewis's phrase, "an ordinary man, a rather simple man."¹¹ In most respects, Warren could have been a character out of a Sinclair Lewis novel. Justice Potter Stewart once told me, "Warren's great strength was his simple belief in the things we now laugh at: motherhood, marriage, family, flag, and the like." These, according to Stewart, were the "eternal, rather bromidic, platitudes in which he sincerely believed." They were the foundation of Warren's jurisprudence, as they were of his way of life. When we add to this Warren's gruff masculine bonhomie, his love of sports and the outdoors, and his lack of intellectual interests or pretensions, we end up with a typical representative of the Middle America of his day. Indeed, the most striking impression Warren gave "was what an old fashioned American figure he [was]."¹² It is revealing that the Chief Justice's favorite poem was W.E. Henley's *Invictus*¹³—a poem that we now consider a prime example of trite Victorian sentimentalism.

After Warren refused to head the commis-

sion investigating the Kennedy assassination, even though President Lyndon B. Johnson said that he had "begged" him,¹⁴ the President persuaded Warren to change his mind by appealing to Warren's patriotism: "Mr. Chief Justice, you were once in the army, weren't you? Well, as your Commander-in-Chief, I'm ordering you back into service." According to the just-published Johnson tapes, Warren then started crying and he said, "I won't turn you down. I'll just do whatever you say."¹⁵ "You know," Warren later told his law clerk, "When someone appeals to my patriotism that way, I don't know how I can say no."¹⁶

Certainly, Warren was anything but a learned legal scholar. "I wish that I could speak to you in the words of a scholar," the Chief Justice once told an audience, "but it has not fallen to my lot to be a scholar."¹⁷

The work of a Chief Justice, however, differs greatly from that of other members of the Court as far as legal scholarship is concerned. While considering the appointment of a successor to Chief Justice Vinson, President Eisenhower asked a member of Governor Warren's staff whether Warren would really want to be on the Court after his years in high political office: "Wouldn't it be pretty rarified for him?" "Yes," came back the answer, "I frankly think he'd be very likely to be bored to death [as an Associate Justice]." But, the response went on: "My answer would be emphatically different if we were talking about the Chief Justiceship. He could run the place."¹⁸

The staff member's answer gets to the heart of the matter. The essential attribute of a Chief Justice is not scholarship, but leadership. One who can "run the place" and induce the Justices to follow, will effectively head the Court.

"Warren had learned as an executive in California to lead, to manage, to set a tone, and to get results."¹⁹ As such, he brought more authority to the Chief Justiceship than had been seen for years. The most important work of the Supreme Court, of course, occurs behind the scenes, particularly at the Conferences, where the Justices discuss and vote on cases. In an interview with me, Justice Abe Fortas

summarized the Warren Conference forte: "It was Warren's great gift that, in presenting the case and discussing the case, he proceeded immediately and very calmly and graciously to the ultimate values involved—the ultimate constitutional values, the ultimate human values." In the face of such an approach, traditional legal arguments seemed inappropriate, almost pettifoggery. To quote Fortas again, "opposition based on the hemstitching and embroidery of the law appeared petty in terms of Warren's basic value approach."

All the Justices who served with him stressed Warren's ability to lead the Conference. Justice Stewart well summarized the Warren role: "He was an instinctive leader whom you respected and as the presiding member of our conference, he was just ideal." When I asked Stewart about claims that Justice Hugo L. Black was the intellectual leader of the Court, he replied, "If Black was the intellectual leader. Warren was the *leader* leader."

Justice Black, it should be noted, always considered himself the catalyst for the Warren Court jurisprudence. In 1968 he delivered a lecture that the media interpreted as criticism of the Chief Justice. When Black told Warren that the press had distorted his statement, the Chief laughed and retorted, "Look, Hugo, you can't unring a bell."²⁰

A reading of the available Conference notes of Justices on the Warren Court reveals that, after an initial period of feeling his way, the Chief Justice was as strong a leader as the Court has ever had. In almost all the important cases, Warren himself led the discussion toward the decision he favored. If any Court can properly be identified by the name of one of its members, his Court was emphatically the Warren Court and, without arrogance, he, as well as the country, knew it. In journalist Anthony Lewis's words, the Warren Court's "legal revolution could not have taken place . . . without Chief Justice Warren."²¹

A word should also be said on a widespread canard about Warren—that Warren had had no practical experience as a lawyer. "We made a mistake," Senator Joseph R. McCarthy once complained at a Senate hearing, "in confirming as Chief Justice a man

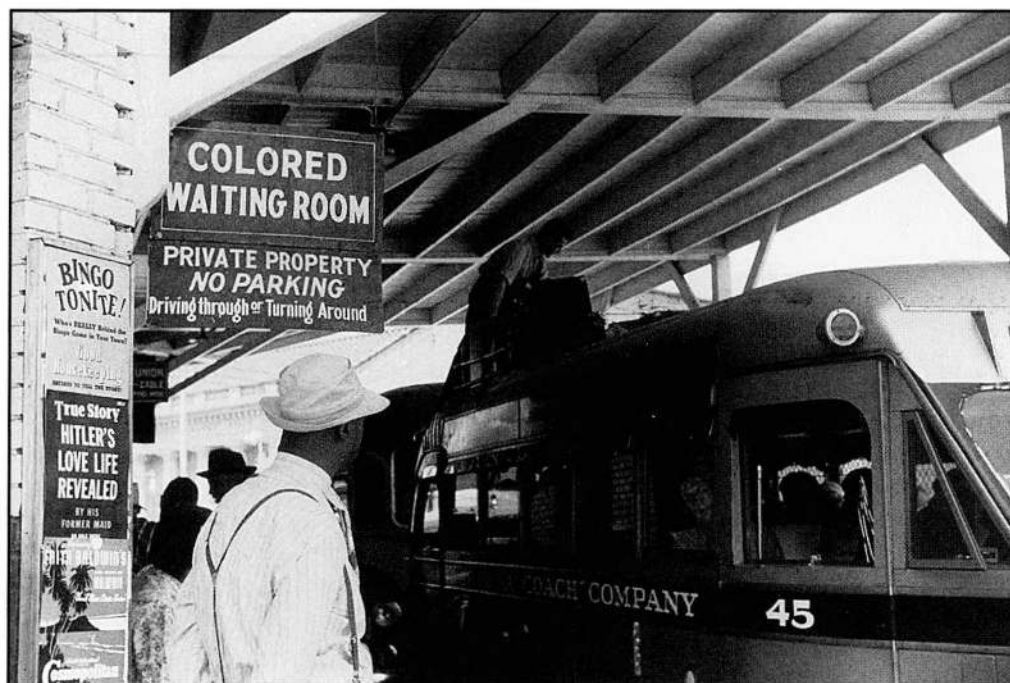
who had no judicial experience and very little legal experience."²² Alabama Governor George Wallace asserted that Warren did not know enough law "to try a chicken thief in my home county!"²³ Such criticism, however, was misplaced. As his most recent biography puts it, Warren "was better prepared as a practicing attorney than many gave him credit for."²⁴ In terms of legal practice, Warren had more experience than any member of his Court. As District Attorney of Alameda County, he had headed one of the largest law offices in California for thirteen years and then served as his state's highest legal officer for four more.

Warren was the chief of the D.A.'s office in fact as well as name. According to the office's chief investigator, in "every major case in Alameda County Earl Warren associated himself in the trial."²⁵ Warren personally appeared in court in many cases. In fact, he probably had more trial experience than most Justices. As Warren put it in his memoirs, "As district attorney, I had engaged in much litigation, both civil and criminal, and had argued a case in the United States Supreme Court."²⁶

The Chief Justice used to recall the time, on January 7, 1932, when District Attorney Warren argued before the highest Court in defense of Alameda County in a case brought against it by the Central Pacific Railway.²⁷ The argument happened to be the last heard by Justice Oliver Wendell Holmes, Jr. After the sitting that day, Holmes casually announced, "I won't be down tomorrow," and he resigned a few days later.²⁸ Warren said his friends accused him of driving Holmes from the Bench. They used to tease him, "one look at you and he said, 'I quit.'"²⁹

Warren and *Brown I*

Chief Justice Warren's leadership of the Conference and the Court is shown most spectacularly in the *Brown* segregation case.³⁰ I have already quoted Vice President Humphrey's assertion that, if President Eisenhower had done nothing else other than appoint Warren, he would have earned an important place in our history. If Earl Warren had done nothing else other than lead the



Brown first came before the Court when Fred Vinson was occupying the center chair, but Chief Justice Vinson was not ready to overturn *Plessy v. Ferguson*, the 1896 ruling allowing segregation in public transportation (such as this bus station), public accommodations, and in schools. If *Brown* had not been reheard the next Term when Earl Warren was Chief Justice, Felix Frankfurter believed that four of his Brethren (Tom C. Clark, Stanley F. Reed, and Robert H. Jackson, in addition to Vinson) would have voted to uphold segregation.

Court to its unanimous *Brown* decision, he too would have earned an important place in our history.

We need not subscribe to Carlyle's hero theory to recognize that outstanding judges do make a great difference in the law.³¹ It made a great difference that Earl Warren, rather than Fred M. Vinson, presided over the Court that handed down the *Brown* decision. *Brown* itself was the watershed constitutional case of this century. Justice Stanley F. Reed, who participated in *Brown*, told his law clerk that "if it was not the most important decision in the history of the Court, it was very close."³² When *Brown* struck down school segregation, it signaled the beginning of effective enforcement of civil rights in American law.

In *Brown*, black plaintiffs challenged the constitutionality of segregated schools in four states and the District of Columbia. Before *Brown*, the Court had followed the rule laid down in *Plessy v. Ferguson* (1896),³³ that segregation was not unconstitutional, pro-

vided that there were "equal but separate accommodations for the white and colored races." The subsequent structure of racial discrimination was built on this "separate-but-equal" doctrine.

Brown first came before the Court when Chief Justice Vinson sat in its center chair. When the Justices discussed the case on December 13, 1952, Vinson stated that he was not ready to overrule *Plessy v. Ferguson*.³⁴ A May 17, 1954, Memorandum for the File *In re Segregation Cases* by Justice Douglas states, "Vinson was of the opinion that the *Plessy* case was right and that segregation was constitutional." With the Chief Justice in favor of upholding segregation,³⁵ the Vinson Court was far from ready to issue a ringing pronouncement of racial equality. Indeed, had Vinson presided over the Court that decided *Brown*, the result would have been a sharply divided decision. According to the Douglas Memorandum for the File, "In the original conference there were only four who voted

that segregation in the public schools was unconstitutional. Those four were Black, Burton, Minton and myself. . . . So as a result of the informal vote at the 1952 conference, . . . if the cases were to be then decided the vote would be five to four in favor of the constitutionality of segregation in the public schools."

Justice Frankfurter's count was a bare majority the other way. In a May 20, 1954, letter to Justice Reed, three days after the unanimous *Brown* decision was announced, Frankfurter wrote, "I have no doubt that if the *Segregation* cases had reached decision last Term there would have been four dissenters—Vinson, Reed, Jackson and Clark—and certainly several opinions for the majority view. That would have been catastrophic."

The "catastrophe" was avoided when *Brown* was set for reargument in the next Court Term and, in the interim, Chief Justice Vinson suddenly died. "This is the first indication that I have ever had that there is a God," Frankfurter caustically remarked to two former law clerks when he heard of Vinson's death.³⁶ The Justice was confirmed in his comment when Warren was appointed as Vinson's successor. Under the new Chief Justice, the Court was able to issue its landmark ruling striking down segregation and to do so unanimously, without a single concurring or dissenting voice to detract from the decision.

Both the decision and the unanimity were attributable directly to Chief Justice Warren's leadership. A few days before the *Brown* decision was announced, Justice Harold H. Burton wrote in his diary, "it looks like a unanimous opinion—a major accomplishment for his [Warren's] leadership." And, just after the *Brown* opinion was read, Burton wrote to Warren, "To you goes the credit for the character of the opinions which produced the all important unanimity."³⁷ Even a critic of my *Brown* interpretation—what he calls "the standard version"³⁸—agrees that that version "does capture most of Warren's contribution to *Brown*" and that "in the end what mattered . . . was indeed Warren's ability to accommodate the conflicting views of his colleagues."³⁹

The new Chief Justice led the Court to its

unanimous decision by first setting a completely different Conference tone than his predecessor. According to a law clerk, Warren had come to believe that "*Plessy* was a disastrous opinion for the blacks."⁴⁰ With that belief, he began his first *Brown* Conference on December 12, 1953, with a strong statement on the unconstitutionality of segregation: "I don't see how in this day and age we can set any group apart from the rest and say that they are not entitled to exactly the same treatment as all others. To do so would be contrary to the Thirteenth, Fourteenth, and Fifteenth Amendments. They were intended to make the slaves equal with all others. Personally, I can't see how today we can justify segregation based solely on race."

As far as *Plessy v. Ferguson* was concerned, said Warren, "the more I've read and heard and thought, the more I've come to conclude that the basis of segregation and 'separate but equal' rests upon a concept of the inherent inferiority of the colored race. I don't see how *Plessy* and the cases following it can be sustained on any other theory. If we are to sustain segregation, we also must do it upon that basis." Warren then asserted that, "if the argument proved anything, it proved that that basis was not justified."

The Chief Justice's Conference presentation was a masterly illustration of the Warren method of leading the Conference. It put the proponents of *Plessy* in the awkward position of appearing to subscribe to racist doctrine. Justice Reed, who spoke most strongly in favor of *Plessy*, felt compelled to assert that he was not making "the argument that the Negro is an inferior race. Of course there is no inferior race, though they may be handicapped by lack of opportunity." Reed did not, however, suggest any other ground on which the Court might rely to justify segregation now.

When the Conference was finished, it appeared that Chief Justice Warren had six firm votes for his view that segregation should be ruled invalid.⁴¹ Two Justices, Robert H. Jackson and Tom C. Clark, indicated that they would vote the same way if an opinion could be written to satisfy them. Only Justice Reed still supported the *Plessy* doctrine.

The Chief Justice now devoted all his



Linda Brown, now Mrs. Charles D. Smith, was photographed in 1975 with her two children, Charles and Kimberly. Twenty-four years earlier, Linda's father, Oliver Brown, had sued the city of Topeka, Kansas, because his daughter had to cross railroad yards to catch the bus for a black school twenty-one blocks away when there was a white school only five blocks from home.

efforts to eliminate the danger of dissenting and concurring opinions. During the months that followed, he met constantly with his colleagues on the case, most often talking to them informally in their Chambers. That was the way he had been able to accomplish things back in California. The result in *Brown* showed that he had not lost any of his persuasive powers in the Marble Palace. In particular, as Justice Reed's biographer puts it, Warren "engage[d] in a number of low-key but effective conversations regarding the cases

with Reed."⁴²

Despite the Chief Justice's efforts, there are indications that Justice Reed persisted in voting to uphold segregation for months. He actually started to prepare a draft dissent.⁴³ By then, however, the Justice stood alone and Warren continued to work on him to change his vote, both at luncheon meetings and in private sessions. Then, the Chief Justice put it to Reed directly: "Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the country." As

described by Reed's law clerk, who was present at the meeting, "Throughout the Chief Justice was quite low-key and very sensitive to the problems that the decision would present to the South. He empathized with Justice Reed's concern. But he was quite firm on the Court's need for unanimity on a matter of this sensitivity."

Ultimately, Justice Reed agreed to the unanimous decision. He still thought, as he wrote to Justice Frankfurter, that "there were many considerations that pointed to a dissent." But, he went on, "they did not add up to a balance against the Court's opinion. . . factors looking toward a fair treatment for Negroes are more important than the weight of history."

At the Conference that took the vote to strike down segregation, it was agreed that the opinion should be written by the Chief Justice. Toward the end of April, after he had secured Justice Reed's vote, Warren was ready to begin the drafting process. On April 20, Justice Burton wrote in his diary, "After lunch the Chief Justice and [I] took a walk around the Capitol then went to his chambers where he uttered his preliminary thoughts as to author segregation cases." Soon thereafter Warren went to work on the *Brown* draft opinion.

Chief Justice Warren's normal practice was to leave the actual drafting of opinions to his law clerks. He would only outline the way he wanted the opinion drafted and would rarely go into particulars on the details involved in the case. That was for the clerk drafting the opinion, who was left with a great deal of discretion, particularly on the reasoning and research supporting the decision. It has been assumed that this procedure was also followed in the *Brown* drafting process. However, there is a draft opinion in Warren's papers in the Library of Congress that shows that it was the Chief Justice himself who wrote the *Brown* draft. Headed simply "Memorandum" and undated, it is in Warren's handwriting, in pencil, on nine yellow legal-size pages.

Chief Justice Warren's *Brown* draft⁴⁴ was written in the typical Warren style: short, nontechnical, well within the grasp of the average reader; the language is direct and

straightforward. The draft was based on the two things he later stressed to the clerk primarily responsible for helping on the *Brown* opinion: the opinion should be as brief as possible, and it was to be written in understandable English, avoiding legalisms. The Chief Justice told the clerk he wanted an opinion that could be understood by the layman.

The Warren draft contains the most famous passages in the *Brown* opinion. First, after referring to the decision facing the Court, the draft states, "In approaching it, we cannot turn the clock of education back to 1868, when the Amendment was adopted, or even to 1895 [sic] when *Plessy v. Ferguson* was decided."

The Warren draft also contains *Brown*'s striking passage on the baneful effect of segregation on black children: "To separate them from others of their age in school solely because of their color puts the mark of inferiority not only upon their status in the community but also upon their little hearts and minds in a form that is unlikely ever to be erased."

Concern with the impact of segregation on the "hearts and minds" of black children was typical of the Warren approach. In the case of segregation, this view had roots in Warren's contact with Edgar Patterson, his black driver while he was Governor of California. Patterson later recalled how he used to talk to the Governor about his early years. Warren would ask, "Tell me about how you felt when you were a little kid, going to school. And then I used to tell him about some of the things that happened in New Orleans, the way black kids felt." Patterson thought that the *Brown* opinion "almost quoted the ideas that he and I used to talk about on feelings . . . things that he picked up as he was asking questions about how the black man felt, how the black kid felt." Just before Warren's death, Patterson visited him in Georgetown University Hospital and told him his *Brown* decision "seemed to be based on our discussion of my early school life in New Orleans." Warren laughed and indicated that many other factors had entered into the decision.

In addition, the Warren draft stressed the changed role of education in modern society,

as contrasted with the situation when the Fourteenth Amendment was adopted: "No child can reasonably be expected to succeed in life today if he is deprived of the opportunity of an education. It also posed the crucial question presented to the Court: "Does segregation of school children solely on the basis of color, even though the physical facilities may be equal, deprive the minority group of equal opportunities in the educational system?"—as well as its answer: "We believe that it does."

The Warren memorandum transmitting the *Brown* draft to the Justices declared, "On the question of segregation in education, this should be the end of the line." If that was true, it was mainly the Chief Justice's doing—more even than commentators on *Brown* have realized. The *Brown* draft shows that the Chief Justice was primarily responsible not only for the unanimous decision, but also for the opinion in the case. This was one case where the drafting was not delegated. The opinion delivered was essentially the opinion produced when Warren himself sat down and put pencil to paper.

The final *Brown* draft was circulated on May 13, 1954, in printed form. The next day, Saturday, May 15, was a Conference day. At lunch, the Justices were entertained by Justice Burton, with a large salmon provided by Secretary of the Interior Douglas McKay. Just before, Burton wrote in his diary, the "conference finally approved Segregation opinions and instructions for delivery Monday—no previous notice being given to office staffs etc so as to avoid leaks. Most of us—including me—handed back the circulated print to C.J. to avoid possible leaks."

When the *Brown* opinion was delivered, the Justices were well aware that they had participated in what Justice Frankfurter termed "a day that will live in glory." A few days earlier, in a note to Warren joining the opinion, Frankfurter wrote: "When—I no longer say 'if'—you bring this cargo of unanimity safely to port it will be a memorable day no less in the history of the Nation than in that of the Court. You have, if I may say so, been wisely at the helm throughout this year's journey of this litigation. *Finis coronat omnia.*"

Brown Enforcement

There is an undated note, written on a Supreme Court memo pad in Justice Frankfurter's handwriting, that reads, "It is not fair to say that the South has always denied Negroes 'this constitutional right.' It was NOT a constitutional right till May 17/54."

The change in Justice Frankfurter's posture on segregation was explained by him during a 1960 Conference. "During the Conference," states a January 25, 1960, handwritten note by Justice Douglas in his papers in the Library of Congress, "Frankfurter . . . said if the cases had been brought up [before *Brown*] he would have voted that segregation in the schools was constitutional because 'public opinion had not then crystallized against it.' He said the arrival of the Eisenhower Court heralded a change in public opinion on this subject and therefore enabled him to vote against segregation. Bill Brennan's response was 'God Almighty.'

The May 17, 1954, *Brown* opinion declared the right to ban segregation, but it made no provision for enforcement of the new right. Instead, Chief Justice Warren's opinion concluded by announcing that the Court was scheduling further argument on the question of appropriate relief. The situation was summarized in *The New York Times* account of the *Brown* decision: "when it returns in October for the 1954—1955 term [the Court] will hear rearguments then on the question of how and when the practice it outlawed today may finally be ended."⁴⁵

The theme for the second *Brown* decision and opinion was set by Chief Justice Warren himself at the Conference that met on Saturday, April 16, 1955, following the oral reargument on the terms of the decree earlier in the week. Warren's presentation opening the Conference stated the main lines of what became the Court's enforcement decision. First, the Chief Justice rejected various proposals that had been discussed in the Court: appointment of a master to work out the terms of an enforcement decree, fixing of a date for completion of desegregation, requiring specific desegregation plans from defendant school districts, and imposing of procedural

requirements—all of which were also rejected by the Court's decision. Then he emphasized that the Court should furnish guidance to the lower courts: "the opinion ought to give them some guidance. It would make it much easier and would be rather cruel to shift it back to them and let them flounder." The guidance should be in an opinion listing the factors to be taken into account, rather than a formal decree: "I think there should be an opinion with factors for the courts below to take into account rather than a formal decree." The opinion-not-decree approach had the advantage of greater flexibility. Flexibility in enforcement was also the keynote of the "ground rules" Chief Justice Warren suggested to guide the enforcement process.

Once again, the Warren presentation set the theme both for the Conference and the decision. And once again the Conference

agreed that the unanimous opinion should be written by the Chief Justice. Warren stressed to his clerks that the opinion should be as short as possible and cover the main points he had made at the Conference: that enforcement be flexible, under accepted equity principles, and that it take into account various factors to be briefly listed to serve as "ground rules" for the lower courts.

As was true in *Brown I*, the drafting of the *Brown II* opinion was by the Chief Justice himself. In May 1955, Warren once more put pencil to paper and produced a draft opinion. The original is again in pencil in the Chief Justice's handwriting on six yellow legal-size pages and headed "Memo."⁴⁶ As was true of Warren's *Brown I* draft, this *Brown II* draft is essentially similar to the final *Brown II* opinion and contains most of the latter's language.

The most noted change in Warren's



Although President Eisenhower and Chief Justice Warren were all smiles at this White House meeting in 1957, Eisenhower would later describe his appointment of Warren as "the biggest damn fool thing I ever did." From left to right, flanking the President and the Chief Justice, are Associate Justices William O. Douglas, Felix Frankfurter, William J. Brennan, Tom C. Clark, John Marshall Harlan, Charles Whittaker, Harold H. Burton, and Stanley F. Reed.

Brown II opinion was made at Justice Frankfurter's urging. The Chief Justice had closed his original draft: "The judgments of the Courts of Appeal are accordingly reversed (except Delaware) and the causes are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit plaintiffs and those similarly situated in their respective school districts to the public school system on a non-discriminatory basis at the *earliest practicable date*."

In the final *Brown II* opinion, this was changed to: "The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."

When the *Brown II* opinion declared that the lower courts were to ensure that blacks were admitted to schools on a nondiscriminatory basis "with all deliberate speed," it led to learned controversy on the origins of the oxymoronic phrase—itself so untypical of the normal Warren mode of expression. The phrase itself comes from Justice Holmes.⁴⁷ However, we remain uncertain where Holmes obtained the phrase. What is certain, nevertheless, is that Justice Frankfurter got it from Holmes and the *Brown II* opinion got it from Frankfurter. Commentators on *Brown II* have all assumed that this was the case; but they have had to support the assumption only by circumstantial evidence. However, two letters by Justice Frankfurter to the Chief Justice enable us to confirm definitely that the Justice was responsible for the "all deliberate speed" language.

These letters show that Chief Justice Warren had discussed the opinion with Justice Frankfurter even before his draft opinion was circulated and the Justice had then suggested the Holmes phrase. On May 24, 1955, Frankfurter wrote to Warren that he had read the draft "and I am ready to sign on the Undotted line." But Frankfurter went on, "I still

think that 'with all deliberate speed' . . . is preferable to 'at the earliest practicable date.'"

Chief Justice Warren did not make the change in his circulated draft. So Justice Frankfurter sent him a May 27 letter repeating the suggestion: "I still strongly believe that 'with all deliberate speed' conveys more effectively the process of time for the effectuation of our decision. . . . I think it is highly desirable to educate public opinion—the parties themselves and the general public—to an understanding that we are at the beginning of a process of enforcement and not concluding it. In short, I think it is far better to habituate the public's mind to the realization of this, as . . . the phrase 'with all deliberate speed' . . . [is] calculated to do."

Chief Justice Warren did, of course, finally accept the Frankfurter suggestion and the "all deliberate speed" phrase remains the most striking one in the *Brown II* opinion. More important, was the two-edged nature of the phrase. It ensured flexibility by providing time for enforcement; but it also countenanced delay in vindicating constitutional rights. "All deliberate speed" may never have been intended to mean indefinite delay. Yet that is just what it did mean in much of the South.

Some of the Justices, including the Chief Justice, later indicated that it had been a mistake to qualify desegregation enforcement by the "all deliberate speed" language. Justice Black's son quotes him as saying, "It tells the enemies of the decision that for the present the status quo will do and gives them time to contrive devices to stall off desegregation."⁴⁸ This Black statement is inconsistent with what he said at the *Brown* enforcement Conference. The Alabama Justice then had indicated that the Court should not try to settle the segregation issue too rapidly. If it attempted to do so, Black told the conference, its decree "would be like Prohibition." Black, in fact, was the one Justice who predicted at the Conference that the movement toward desegregation in the South would at best be only "glacial."

The Chief Justice, too, came to believe, that it had been a mistake to accept the "all deliberate speed" language. In his later years Warren concluded that he had been sold a bill

of goods when Justice Frankfurter induced him to use the phrase. It would have been better, he later said, to have ordered desegregation forthwith. By then, however, Justice Black's prediction of the "glacial" pace of desegregation had proved, if anything, overoptimistic. The Justices had, to be sure, not expected enthusiastic compliance by the South. But the extent of opposition was something that had not been foreseen. Looking back, Warren, at least, felt that much of the defiance of *Brown* could have been avoided if the South had not been led to believe that "deliberate speed" would countenance indefinite delay. When a comparable problem arose in 1964 in connection with enforcement of the "one person-one vote" principle in legislative apportionments,⁴⁹ the Chief Justice did not hesitate to urge immediate enforcement, regardless of the problems in individual states in adapting to the new rules.

Except in the *Brown* case, in fact, Chief Justice Warren never let the question of enforcement affect his decisions. He always felt that the Justices' duty was only to decide the cases before them as they thought the Constitution required. Warren's Court career was the living example of the old maxim: *Fiat justitia et ruant coeli* (Let justice be done though the heavens should fall).

But he did not expect the heavens to fall. Once, after the Court had ordered the release of an Army prisoner, one of his law clerks asked him how they were going to make the Army do that. The Chief Justice just laughed and said, "Don't worry about it. They will do it." The clerk persisted and referred to the Andrew Jackson statement about John Marshall having to enforce his own decision.

"Look," Warren said in reply, "you don't have to worry. If they don't do this, they've destroyed the whole republic, and they aren't going to do that. So you don't even have to worry about whether they are going to do it or not—they're going to do it!"⁵⁰

Leadership and Reapportionment

The 1964 case in which the one-person-one-vote principle was laid down was *Reynolds v. Sims*.⁵¹ It arose out of challenges

to the apportionment of the Alabama legislature. The apportionment issue had arisen two years earlier in *Baker v. Carr*,⁵² which had decided that the Court had jurisdiction over cases challenging legislative apportionments, though they had until then been held to involve only "political questions" beyond judicial competence. Several of the Justices, including Chief Justice Warren, had also wanted to decide the merits in *Baker v. Carr* and apply a standard of equality of population to legislative apportionments. They were not, however, willing to apply it to more than one House.

The Chief Justice, in particular, was influenced by his experience in California, when only the Assembly was apportioned by population. Each California county was represented by one state senator, regardless of population. In his memoirs, Warren called this the "Federal System of Representation" because of its resemblance to that in the United States Constitution.⁵³ Warren had believed that the system worked fairly and he thought that the equal-population requirement should not extend to similar state senates.

The same belief was expressed during the conference discussions that followed the argument in November 1963 of *Reynolds v. Sims*. Led by the Chief Justice, most of the Justices quickly decided that the lower House apportionments, which were not based on equality of population, were invalid. But neither Warren nor the others were willing to apply the population standard to both Houses of the state legislature.

That a majority of Justices changed their minds was a direct result of Chief Justice Warren's lead. The Chief Justice had assigned the *Reynolds* opinion to himself at the November 22, 1963, Conference—the Conference at which the Justices received word of President John F. Kennedy's assassination. As Warren started to work out his reasoning, he came to realize that his California experience should not be determinative. Instead, he concluded that the equal-population standard must apply to both Houses of a state legislature.

After the Chief Justice had concluded that *Reynolds v. Sims* had to be decided by an

equal-population standard applicable to both Houses, he was talking to the law clerk working on the case. He began to laugh and remarked, "You know I gave a speech some years ago in California supporting our reapportionment system there." He said it was based on the federal principle that the Court was rejecting. "You know," he went on, "I never really thought very much about it then. As a political matter it seemed to me to be a sensible arrangement. But now, as a constitutional matter, with the point of view of the responsibilities of a Justice, I kind of got to look at it differently." The Chief Justice was not at all troubled by the fact that he had taken an entirely different position as Governor. "I was just wrong as Governor," Warren later told another law clerk.⁵⁴

Even though Warren's *Reynolds v. Sims* opinion was more far-reaching than the Conference discussion, it was quickly accepted by a majority. That result was due entirely to Warren's leadership. It was Warren alone who decided that the Conference consensus was wrong, and that the equal-population standard had to govern all state legislative apportionments. The Chief Justice also personally persuaded the Justices who joined his opinion that the federal analogy should not be followed. Had Warren not changed his mind and convinced the others that his new position was correct, the law on the subject would be entirely different.

Chief Justice Warren never had doubts about the reapportionment decision. He maintained that, if the "one person, one vote" principle had been laid down years earlier, many of the nation's legal sores would never have festered. "If [the principle] had been in existence fifty years ago," he later insisted, "we would have saved ourselves acute racial troubles. Many of our problems would have been solved a long time ago if everyone had the right to vote, and his vote counted the same as everybody else's. Most of these problems could have been solved through the political process rather than through the courts. But as it was, the Court had to decide."⁵⁵ Indeed, John Hart Ely, a former Warren law clerk who is now a leading constitutional scholar, wrote in a book in 1996,

"The Chief used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary."⁵⁶

The Chief Justice was well aware that *Reynolds v. Sims* was the political death warrant for undetermined numbers of rural legislators, whose seats would now be reapportioned out of existence. Soon after the decision, Warren flew to his home state of California to hunt with some old friends. One of them was asked to invite the Chief Justice to go with some state senators on a trip to hunt quail. When Warren was asked if he wanted to drive down and join them, he looked incredulous. "All those senators?" he inquired in mock horror. "With guns?"⁵⁷

Criminal Law Cases

Justice Douglas tells us in his autobiography⁵⁸ that when Warren E. Burger succeeded Warren as Chief Justice, he told the Conference that the Court should overrule a number of Warren Court decisions—particularly those in the *Gideon* and *Miranda* cases.⁵⁹ These were the two most famous criminal-law cases decided by the Warren Court. They will be dealt with in reverse order in our discussion of the leadership role of Chief Justice Warren in those decisions.

Writing in *The New York Times* in 1965, Anthony Lewis pointed out that the difficulty of the Court's work was insufficiently appreciated by either the Court's critics or its admirers. When the Court reversed a conviction, the decision was judged only in terms of the "poor downtrodden defendant" or the "vicious criminal threatening our peace."

Yet the criminal cases that come to the Court can rarely be dealt with in light of the individual attitude toward the particular defendant. Lewis illustrated the point by referring to "a typical criminal case that comes before the Court these days. A suspect has been arrested and brought to a local police station; he asks to see a lawyer, and the police say no; after questioning by a relay of officers he confesses. Should the confession be admissible as evidence—or excluded because it resulted from the denial of counsel?" The

Sixth Amendment guarantees the right to counsel in "all criminal prosecutions." But, as Lewis noted, "the Constitution does not answer the critical question: When does the right to counsel begin?"⁶⁰

Though Lewis published his article almost a year before *Miranda v. Arizona*,⁶¹ his illustrative case presented the very question posed in *Miranda*. The answer given made that case one of the most controversial in the Warren Court.

Miranda itself came to the Court as a result of the Chief Justice's initiative. He instructed his law clerks that year to be on the lookout for a case raising the *Miranda* issue, saying, "I think we are going to end up taking [such a] case this year."⁶² *Miranda* had been convicted of kidnapping and rape in Arizona. He had

been arrested and taken to an interrogation room, where he was questioned without being advised that he had a right to have an attorney present. After two hours, the police secured a confession that was admitted into evidence over *Miranda's* objection. The state supreme court affirmed the conviction.

The Chief Justice's questions and comments during the *Miranda* argument foreshadowed the decision. One of the points for the Court to decide was when the proceeding "focused" on the defendant for purposes of his Fifth and Sixth Amendment rights—whether at the stage of police interrogation or only when an accusation was made. To Warren, the accusatory stage was reached with *Miranda's* arrest. "I didn't know," he commented during the argument, "that we



Chief Justice Warren was keenly interested in methods of arrest, questioning of suspects, and police conduct, because he had been intimately familiar with them when he was doing the prosecuting years earlier as district attorney in Alameda County, California. His excellent public record as a prosecutor helped propel him into politics. Above, Governor Warren is celebrating the election returns with his family in his successful bid to become attorney general of California in 1938. From left to right are Mrs. Warren, Dorothy, Virginia, Governor Warren, Earl, Jr., Nina, Elizabeth, and Bobby.

could arrest people in this country for investigation. Wouldn't you say it was accusatory when a man was locked in jail?" The Chief Justice also indicated that Miranda's right to consult counsel was not affected by whether or not he could pay for a lawyer. "When does the right to counsel attach?" Warren asked, "Does inability to hire mean less generous treatment by the law?"

Last of all, the Chief Justice stressed the failure to advise Miranda of his rights—a focal point of the *Miranda* opinion. When counsel argued that the test was one of voluntariness of the confession, Warren came back, "Wouldn't the best test be simply that the authorities must warn him?" Then the defendant could intelligently decide if he wanted to talk without counsel. "Do you agree," Warren asked, "that if a man says I would like to talk to a lawyer, the police should not interrogate?"⁶³

Justice Fortas, who had been on the *Miranda* Court, told me that the *Miranda* decision "was entirely his"—i.e., Warren's. The Chief Justice's leadership led the Justices both to their decision in the case and to the setting out of what the opinion called "concrete constitutional guidelines" for police interrogation.

At the *Miranda* Conference, Chief Justice Warren left no doubt where he stood. As at the argument, the Chief Justice stressed that no warning had been given by the police. In such a case, the police must warn someone like Miranda of his right to silence, that anything he said could be used against him, that he could have a lawyer, and that he could have counsel appointed if he could not afford one.

The Chief Justice told the Conference that such warnings had been given by his staff when he had been a district attorney. He placed a particular emphasis upon the practice followed by the Federal Bureau of Investigation and explained how it worked. The "standard" F.B.I. warning covered the essential requirements Warren had posited. The Chief Justice told the Conference that the F.B.I.'s record of law enforcement showed that requiring similar warnings in all police interrogations would not impose too great a burden. Justice Brennan, who was present,

said to me, "the statement that the F.B.I. did it . . . was a swing factor. I believe that was a tremendously important factor, perhaps the critical factor in the *Miranda* vote."

The *Miranda* majority agreed on the Warren approach to the case after the Chief Justice explained his reasoning in his draft opinion. Above all, he persuaded others to accept what amounted to a code of police procedure governing interrogation of suspects. Even *The New York Times* thought that the Warren opinion went too far in this respect, saying that the listing of procedures was an "over-hasty trespass into the legislative area."⁶⁴ Chief Justice Warren himself had no doubts in the matter and, relying on his years as a criminal prosecutor as well as the F.B.I. experience, persuaded a majority to agree to his far-reaching opinion. The opinion of the Court that the Chief Justice delivered in *Miranda* was essentially the same as the draft that he had originally circulated.

In a memorandum at the time, Justice Brennan declared that the *Miranda* opinion "will be one of the most important opinions of our time." *Miranda* also turned out to be the most controversial of the Warren Court's criminal-law decisions, and gave rise to anguished complaints from law-enforcement officers throughout the country. They denounced *Miranda* for putting, as Mayor Sam W. Yorty of Los Angeles said, "another set of handcuffs on the police department."⁶⁵ *Miranda* was condemned on Capitol Hill and became a major issue in Richard M. Nixon's presidential campaign.

On the other hand, *Miranda*, as much as anything, exemplified Chief Justice Warren's basic approach. Every so often in criminal cases, when counsel defending convictions would cite legal precedents, Warren would bend his bulk over the Bench to ask, "Yes, yes—but were you fair?"⁶⁶ The fairness to which the Chief Justice referred was no jurisprudential abstraction. It related to such things as methods of arrest, questioning of suspects, police conduct, and the like—matters that Warren still understood as intimately as when he himself was doing the prosecuting years earlier as district attorney in Alameda County, California. The *Miranda* decision was the

ultimate embodiment of the Warren fairness approach. *Miranda* also illustrates another aspect of the Warren leadership. The strong dissents there led Justice Brennan to draft a short concurrence emphasizing that the Court had not been as extreme "as the dissents suggest." Brennan showed his draft to the Chief Justice before circulating it. Warren expressed concern at the prospect of a separate opinion by a member of the majority. Though Brennan explained that the concurrence was being issued solely to emphasize the Court's decision, the Chief Justice was not mollified. If he had a lodestar principle for important cases, it was that the opinion of the Court should speak with one voice. In the end,

Warren persuaded Brennan neither to circulate nor issue the concurrence and only the Chief Justice's opinion of the Court was issued for the *Miranda* majority.

During the *Miranda* arguments Chief Justice Warren stated that "this [case] is not much different from *Gideon*." He was referring to *Gideon v. Wainwright*,⁶⁷ the Warren Court's landmark 1963 case on the right to counsel. The book published the next year by Anthony Lewis, *Gideon's Trumpet*, and the movie based on it have made Clarence Gideon and his case a part of American folklore. But few people realize that the *Gideon* decision resulted directly from Warren's leadership. For years, Warren had felt, as he said in a 1954

DIVISION OF CORRECTIONS CORRESPONDENCE REGULATIONS	
MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES	
<p>No. 1 -- Only 3 letters each week, not to exceed 3 sheets letter-size 8 1/2 x 11" and written on one side only, and if ruled paper, do not write between lines. Your complete name must be signed at the close of your letter. Clippings, stamps, letters from other people, stationery or cash must not be enclosed in your letters.</p> <p>No. 2 -- All letters must be addressed in the complete prison name of the inmate. Cell number, where applicable, and prison number must be placed in lower left corner of envelope, with your complete name and address in the upper left corner.</p> <p>No. 3 -- Do not send any package without a Package Permit. Unauthorized packages will be destroyed.</p> <p>No. 4 -- Letters must be written in English only.</p> <p>No. 5 -- Books, magazines, pamphlets, and newspapers of reputable character will be delivered only if mailed direct from the publisher.</p> <p>No. 6 -- Money must be sent in the form of Postal Money Orders only, in the inmate's complete prison name and prison number.</p>	
INSTITUTION _____	CELL NUMBER _____
NAME _____	NUMBER _____
<p>In The Supreme Court of The United States Washington D.C.</p> <p>Clarence Earl Gideon Petitioner</p> <p>vs.</p> <p>H.G. Cochran, Jr., as Director, Division of Corrections State of Florida</p> <p>Petition for a writ of Certiorari directed to The Supreme Court State of Florida.</p> <p>No. 890 Misc. COT. TERM 1961 U. S. Supreme Court</p>	
<p>To: The Honorable Earl Warren, Chief Justice of the United States</p> <p>Comes now the petitioner, Clarence Earl Gideon, a citizen of the United States of America, in proper person and appearing as his own counsel, who petitions this Honorable Court for a Writ of Certiorari directed to The Supreme Court of the State of Florida, to review the order and Judge- ment of the court below denying the petitioner a writ of Habeas Corpus.</p> <p>Petitioner submits that the Supreme Court of the United States has the authority and jurisdiction to review the final Judge- ment of the Supreme Court of the State of Florida, the highest court of the State under sec. 344(B) Title 28 U.S.C. and because the "Due process clause" of the</p>	

The 1963 right-to-counsel case of Clarence Gideon is now part of American folklore thanks to Anthony Lewis's book, *Gideon's Trumpet*, and the movie that followed. At left is the handwritten petition Gideon filed with the Supreme Court for certiorari. In it he claimed not to have been given due process when he was denied counsel to defend himself on a charge of breaking and entering a poolroom with intent to commit a crime—a felony under Florida law. What many who know the story of Gideon's personal crusade do not realize, however, is that not long before the petition was filed, Chief Justice Warren's law clerks were given these instructions by one of the previous Term's clerks: "Keep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer."

speech to the American Bar Association, “that no man accused of a serious offense is capable of representing himself.”⁶⁸ Not long before Gideon’s petition was filed, the Chief Justice’s law clerks had been instructed by one of the prior Term’s clerks, “Keep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer.”⁶⁹

Gideon had been convicted in a Florida court of breaking and entering a poolroom with intent to commit a crime—a felony under Florida law. The trial judge refused Gideon’s request for counsel, and he had to conduct his own defense. The highest Florida court affirmed. Gideon then sent a petition to the Supreme Court for certiorari. The petition was laboriously scrawled in pencil in schoolboy-type printing. Gideon’s papers arrived at the Court January 8, 1962—one of nine *in forma pauperis* petitions in that morning’s mail.

Gideon’s petition claimed that he had been denied due process: “When at the time of the petitioners trial he ask the lower court for the aid of counsel, the court refused this aid. Petitioner told the court that this Court made decision to the effect that all citizens tried for a felony crime should have aid of counsel. The lower court ignored this plea.” At the trial, when the court had denied his request for appointed counsel, Gideon had asserted, “The United States Supreme Court says I am entitled to be represented by counsel.”⁷⁰

Gideon was, to be sure, wrong in his assertion. The leading case then was *Betts v. Brady*,⁷¹ where the Court had held in 1942 that an indigent defendant did not have a due process right to appointed counsel in a noncapital case unless he could show that, under the special circumstances of his case, he could not obtain a “fair trial” without a lawyer. Gideon’s petition did not claim any such “special circumstances” and, as Lewis characterized it in his book, the petition was not the type that evoked that rare comment in the Clerk’s office, where the petitions were sorted, “Here’s one that I’ll bet will be granted.” On the contrary, wrote Lewis, “In the Clerk’s Office it had no ring of history to it.”⁷²

But Lewis and other Court watchers were unaware of two crucial facts. One was that, as

noted, the Warren law clerks had been instructed to find in the mass of petitions just such a right-to-counsel case. The second was that, in their discussions on *Carnley v. Cochran*,⁷³ a case then pending, the Justices had come close to overruling *Betts v. Brady*. However, before *Carnley* was decided, Justice Whittaker resigned and Justice Frankfurter became incapacitated by a stroke. This gave the Chief Justice, who was in favor of discarding the *Betts v. Brady* rule, the votes for a four-to-three decision overruling *Betts*. Warren decided, nevertheless, that it would be unwise to overrule an important precedent by a bare majority of only a seven-Justice Court. The case was assigned to Justice Brennan, who drafted an opinion of the Court reversing *Carnley*’s conviction within the *Betts v. Brady* rule. It was after this that Chief Justice Warren told his clerks to look for a right-to-counsel case that would give the Court an opportunity to overrule *Betts v. Brady*.

Carnley and the Warren instructions made the *Gideon* case the proverbial needle in the *in forma pauperis* haystack. The Chief Justice’s law clerks had the special duty of scrutinizing the I.F.P. applications and preparing a memorandum (then called a “flimsy,” from the thin carbon copy sent to each Justice). When the Warren clerk who prepared the flimsy considered the case worthy of consideration, he attached the red envelope containing the original petition to his memo. This was done in Gideon’s case and served as a red flag that this was a right-to-counsel case that might serve as a vehicle for overruling *Betts v. Brady*.

At Chief Justice Warren’s urging, the *Gideon* certiorari Conference voted to grant the writ, with only Justice Tom Clark for denial. Even the normally conservative Justice John Marshall Harlan had written at the end of his clerk’s certiorari memo, “YES, I think the time has come we should meet the *Betts* question head-on.” The order granting certiorari stated that counsel were requested to discuss the question, “Should this Court’s holding in *Betts v. Brady* . . . be reconsidered?”

Gideon then sent another penciled petition: “I do desire the Court to appoint a competent attorney to represent me in this Court.” At the last Conference of the 1961

Term, Chief Justice Warren suggested that Abe Fortas, soon to be appointed to the Court himself, should be assigned to represent Gideon. The Justices all concurred. The Court Clerk put in a call to Fortas, locating him in Dallas, and Fortas said he would be happy to serve.

"If an obscure convict named Clarence Earl Gideon," declared Attorney General Robert F. Kennedy in a speech after the Supreme Court decision, "had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court the vast machinery of American law would have gone on functioning undisturbed. But Gideon did write that letter . . . and the whole course of American legal history has been changed."⁷⁴

Yet it was Chief Justice Warren more than anyone who was responsible for the *Gideon* decision. It was the Chief Justice who wanted his clerks to find a case like *Gideon*, led the Justices in granting certiorari in the case, and suggested that Fortas be assigned to argue it. Those were the crucial steps that made the *Gideon* decision inevitable. The rest was anticlimax—though none but the Justices were privy to that reality.⁷⁵

Gideon was argued on January 15, 1963. In his autobiography, Douglas called the Fortas argument the best he had heard.⁷⁶ But Fortas's eloquence was only the battering on an open door. The Justices, including Clark and Harlan, who had not been willing to go that far the previous year in *Carnley*, had reached a consensus on overruling *Betts v. Brady*. Led by Chief Justice Warren, the January 18 Conference quickly agreed that *Betts v. Brady*'s time had come.

The Conference voted unanimously to reverse *Gideon*'s conviction and to overrule *Betts v. Brady*. They followed Warren's suggestion to limit the opinion to the case at hand, without addressing the question of how far the new right to assigned counsel extended. The Chief Justice assigned the opinion to Justice Black—a gesture particularly appreciated by the others because Black had delivered the dissent in *Betts v. Brady*. When Justice Black wrote the opinion, he simply based it on his previous dissent, and he was able to circulate a draft within two weeks. The

decision was announced for a unanimous Court on March 18.

To one interested in how an effective Chief Justice operates, the *Gideon* case is a good illustration of the Warren fairness in assigning opinions. He did not take the "big" cases for himself, except where, as in the *Brown* segregation case, he thought it was important that the Court speak through the Chief Justice, or, as in *Reynolds v. Sims* or *Miranda v. Arizona*, he wanted to bear the brunt of the expected criticism. The Justices all received their share of the important opinions, though he naturally gave more of them to those who were his supporters and would express themselves in the manner closest to his own views.

Warren and Court TV

Even an acute observer such as John Gunther could list Earl Warren's outstanding characteristics as "decency, stability, sincerity, and lack of genuine intellectual distinction; he will never set the world on fire or even make it smoke."⁷⁷ Warren may have projected a kindly, smiling, public picture, whose outstanding characteristic was its blandness. The outer image was, however, deceiving. The Justices who served with him all reject the blandness notion. "He was rock-hard . . .," Justice Byron R. White said to me, "He was very firm, very firm. . . . When he made up his mind, it was like the sun went down."

One subject on which Warren had firm convictions was television in the courtroom. Because of the attention focused on that subject by the O.J. Simpson trial, the Chief Justice's privately expressed view on court TV should be of great interest today.

There is no doubt about how Warren felt about television in the courtroom. It was Warren himself who led his Court to its 1965 decision in *Estes v. Texas*,⁷⁸ reversing a conviction because the trial had been televised. To Warren, TV had no legitimate place in a criminal trial. To allow televising of criminal proceedings, he declared in an unissued *Estes* draft, means "allowing the courtroom to become a public spectacle and source of entertainment."⁷⁹

There is in the Warren papers a copy of the remarks the Chief Justice made to his law clerk about the *Estes* case, as taken down by the clerk.⁸⁰ If televised trials are permitted, Warren told his clerk, “we turn back the clock and make everyone in the courtroom an actor before untold millions of people. We are asked again to make the determination of guilt or innocence a public spectacle and a source of entertainment for the idle and curious.”

The Chief Justice recalled for his clerk how “[t]he American people were shocked and horrified when Premier Castro tried certain defendants in a stadium.” The same thing could happen here, Warren warned his clerk: “[I]f our courts must be opened to the pervasive influence of the television camera in order to accommodate the wishes of the news media, it is but a short step to holding court in a municipal auditorium, to accommodate them even more. As public interest increases in a particular trial, perhaps it will be moved from the courtroom to the municipal auditorium and from the auditorium to the baseball stadium.

The presence of the television camera, the Chief Justice asserted in his remarks to his clerk, meant that all in the courtroom would act differently: “To the extent that television has such an inevitable impact, it deprives the courtroom of the dignity and objectivity that is so essential for determining the guilt or innocence of persons whose life and liberty hinge on the outcome of the trial.”

Feeling the way he did about court TV, the comment Warren made to Fred W. Friendly about the matter is scarcely surprising. After Friendly had been appointed President of CBS News, he met the Chief Justice at a 1964 cocktail party. Warren wished Friendly well in his new job. In thanking the Chief Justice, Friendly said he hoped he would still head CBS News when they had television cameras on the moon and on the floor of the Supreme Court. Warren responded with a smile, “Good luck! You will have more luck with the former than the latter.”⁸¹

Mirror of the Man

In a commemorative article written at the time of Chief Justice Warren’s death in 1974,

Justice Douglas wrote that, while Warren would be remembered most for the major cases, such as the *Brown* school segregation case, “in many ways the lesser cases mirrored the man.”⁸² Warren the man, as well as the leader of the Court, was well shown in the 1967 case of *Brooks v. Florida*. Tyrone Brown, the law clerk who worked on the case said to me that the case “will never be significant . . . but I think, for me at least, it revealed volumes about the character of the man.”

The *Brooks* case arose out of a food riot by blacks in a Florida prison. Brooks and the others involved were stripped naked and placed in bare punishment cells which the Supreme Court described as “the windowless sweatbox . . . a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate.”⁸³ For two weeks, they were kept in these cells on a daily diet of twelve ounces of thin soup and eight ounces of water. Within minutes after Brooks was brought from the cell, he signed a confession. The confession was used to convict him of participating in the riot. The highest state court affirmed. Brooks filed an *in forma pauperis* petition for certiorari.

At the certiorari Conference, the Justices voted eight-to-one, with Chief Justice Warren dissenting, not to take the case. The consensus was that it involved a matter of internal prison discipline in which the Court should not become involved. Warren was indignant at the decision to deny certiorari. He told Brown to work up a draft dissent. Brown prepared a number of drafts, but the Chief Justice kept saying that they were not strong enough.

At the 1994 University of Tulsa Conference on the Warren Court, Brown described what happened next: “So he called me to his office a third time. Rising from his chair, he said, ‘Let’s tell them what really happened. Tell them that the authorities placed these men in threes in tiny sweat boxes for two weeks, naked and on a starvation diet with just a hole in the floor to defecate in! Tell them that they brought these men out, still naked, and forced written confessions from them! Tell them that these confessions were used to convict these men of new crimes, that many years were

added to the terms they already were serving. Tell them what really happened,' said the Chief, 'in plain language. Put it in those books, said he, pointing to the bound volumes of **United States Reports** on the shelves in his office, 'and let posterity decide who was right!' So, that was what we did."⁸⁴ Warren circulated an extremely sharp draft dissent on November 9, 1967, and, as Brown described it to me, "just kind of sat in his office and waited."

Soon thereafter, the Justices came in one by one and joined the dissent. By the next Conference on the case, the Chief Justice had the votes of all, not only for the granting of certiorari, but for summary reversal. Warren had Brown draft a short *per curiam* to that effect, which was issued December 18, 1967.

Cases like *Brooks* and those discussed above demonstrate the Warren leadership in both the landmark and lesser cases. Well could Warren reply when, on his retirement, a reporter asked him to describe the major frustration of his Court years, that he could not think of any. Breaking into a wide smile, the retired Chief Justice declared, "It has not been a frustrating experience."⁸⁵

In the Pantheon

To the end of his life, nevertheless, Warren regretted not having been able to make his mark in the White House. He always believed that his Presidential attempt had been frustrated by Richard M. Nixon's defection at the 1952 Republican Convention. Just after swearing in Nixon as President in 1968, Warren told a close Nixon adviser that he could not help feeling that, but for Nixon, he himself might have taken the Presidential oath in 1953.⁸⁶

It can, however, be said that Warren was actually able to accomplish more as Chief Justice than any occupant of the Oval Office since midcentury. Indeed, as Anthony Lewis tells us, the Warren Court "brought about more social change than . . . most Presidents."⁸⁷ Another Warren biographer concludes: "The only other figure in recent American history with whom Warren can be equated is Franklin Delano Roosevelt."⁸⁸ John Hart Ely summed it up last year: "while we should weep for the

absence in public life of men like Earl Warren, we need not weep for him. He lived the American Dream. Quite a number of men have done that, however. The Chief did something that few will ever do: he did what he set out to do. And that was to make the American Dream more broadly accessible than it had ever been before."⁸⁹

Earlier this year, James J. Kilpatrick, the syndicated columnist, criticized my inclusion of Warren among the Supreme Court greats. "Is Earl Warren properly ranked among the 10 greatest"? Kilpatrick asked. "Warren wouldn't make my own list of the greatest 25. The gentleman was a . . . politician from start to finish. He had the constitutional depth of a dishpan; he wrote tedious opinions."⁹⁰

Perhaps Warren cannot be deemed a great juristic technician, noted for his mastery of the common law. But he never pretended to be a legal scholar. To him, the outcome of the case mattered more than the reasoning behind the decision. He took full responsibility for the former and delegated the latter, in large part, to his law clerks.

The result may have been a deficiency in judicial craftsmanship that subjected Warren to academic criticism, both during and after his tenure. Without a doubt, Warren does not rank with Holmes or Cardozo as a master of the opinion, but his opinions have a mark of their own. Warren would go over the drafts prepared by his clerks and make changes, usually adding or substituting straightforward language typical of his manner of presentation. As one of his law clerks told me, "He had a penchant for Anglo-Saxon words over Latin words and he didn't like foreign phrases thrown in if there was a good American word that would do."

As a consequence, the important Warren opinions have a simple power all their own; if they do not resound with the cathedral tones of a Marshall, they speak with the moral decency of a modern Micah. Perhaps the *Brown* opinion did not articulate the juristic basis of its decision in as erudite manner as it could have, but as the Chief Justice wrote in his memorandum transmitting the *Brown* draft, the opinion was "prepared on the theory that [it] should be short, readable by the lay public,

non-rhetorical, unemotional and, above all, non-accusatory.⁹¹ The decision in *Brown* emerged from a typical Warren moral judgment, with which few today would disagree. The Warren opinion was so *right* that one wonders whether additional learned labor in spelling out the obvious was really necessary.

When all is said and done, Warren's place in the pantheon rests, not upon his opinions, but upon his Court's decisions. If impact on the law is the hallmark of the outstanding judge, few occupants of the bench have been more outstanding than Chief Justice Warren. As Professor James W. Ely has written, "this was unmistakably, a great man."⁹²

In the end, however, can we say that anyone truly knew the real Earl Warren? Outwardly he was, as Ely describes him, a "sunny, even jolly man, a sort of lovable uncle,"⁹³ or, as a biographer put it, "with the enveloping friendliness of Smokey the Bear."⁹⁴ From the time he took his seat, Warren tried to meet everyone in the Supreme Court building. "I'm Earl Warren," he would say, as he shook hands all around, including with the guards and plumbers. "When he says 'good morning,' he does it as if he hadn't seen you for a year," said one Justice.⁹⁵

Yet, his most recent biography concludes, "For all his affability, Earl Warren remained a private man."⁹⁶ The outward camaraderie masked a different inner person. "No one," a friend of Warren once said, "really knows this man." "All day long," a member of Warren's gubernatorial staff recalled,

we used to hear that booming voice, that belly laugh, that loud, 'How are you?' but sometimes in the evening when I worked late, I'd see him sitting in his office alone, his back to the door, his head bowed, and on that wall above him a sad, brooding picture of Lincoln. That's the Earl Warren few of us ever saw and none of us ever knew.⁹⁷

Endnotes

¹ Warren, *The Supreme Court in United States History* 178 (1922).

² Ambrose, "The Ike Age," *The New Republic*, May 9, 1981, pp. 26, 30. See similarly 2 Ambrose, *Eisenhower: The President* 190 (1984): "in the sixties, Eisenhower frequently remarked that his biggest mistake was the appointment of that dumb son of a bitch Earl Warren"; Cray, *Chief Justice: A Biography of Earl Warren* 10 (1997): "the biggest damn fool thing I ever did."

³ Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 627 (1983), hereafter cited as *Super Chief*.

⁴ Weaver, *Warren: The Man, The Court, The Era* 190 (1967).

⁵ Douglas, *The Court Years 1939-1975*, 240 (1980).

⁶ Schwartz, *A Book of Legal Lists* 8 (1997).

⁷ *Super Chief* vii.

⁸ Owens, "Book Review," 15 *The Appellate Practice Journal* 46, 47 (1997).

⁹ *Super Chief* at 204.

¹⁰ *Reason and Passion: Justice Brennan's Enduring Influence* 22 (Rosenkranz and Schwartz, eds. 1997).

¹¹ *Id.* at 164.

¹² *The Supreme Court Under Earl Warren* 152 (Levy, ed. 1972).

¹³ The poem that ends, "I am the, master of my fate; I am the captain of my soul." Anyone who has seen Rodin's famous bust of Henley, see Butler, *Rodin: The Shape of Genius* 166 (1993), realizes at once how out-of-date the character captured there seems today.

¹⁴ *Taking Charge: The Johnson White House Tapes, 1963-1964*, 68 (Beschloss, ed., 1997).

¹⁵ *Id.* at 72. There is no tape of the Johnson-Warren conversation in the Johnson Library. Apparently, even Lyndon Johnson realized that this was one conversation that should remain private.

¹⁶ *Super Chief* 496.

¹⁷ *Id.* at 287.

¹⁸ *Id.* at 4.

¹⁹ White, *Earl Warren: A Public Life* 152 (1982).

²⁰ Cray, *supra* note 2, at 473; *Super Chief* 629.

²¹ *Supra* note 11, at 152.

²² *Super Chief* 183.

²³ Cray, *supra* note 2, at 11.

²⁴ *Id.* at 262.

²⁵ *Super Chief* 10.

²⁶ Warren, *The Memoirs of Earl Warren* 176 (1977).

²⁷ *Central Pacific Ry. Co. v. Alameda County*, 284 U.S. 463 (1932).

²⁸ Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* 629 (1991).

²⁹ *Super Chief* 335.

³⁰ *Brown v. Board of Education*, 347 U.S. 483 (1954).

³¹ Compare, Frankfurter, *Of Law and Men* 9 (1956).

³² Schwartz, *A History of the Supreme Court* 286 (1993).

³³ 163 U.S. 537 (1896).

³⁴ The Conference statements in *Brown* and other cases are taken from notes taken by Justices who were present.

³⁵ This conclusion is disputed in Tushnet, "What Happened in *Brown v. Board of Education*," 91 *Col.*

L. Rev. 1867, 1903-1904 (1991).

³⁶ This statement was confirmed for me by one of the former clerks on a nonidentification basis.

³⁷ The sources of the Burton quotes and others not attributed in the *Brown* discussion in **Super Chief**, Chapter 3.

³⁸ Tushnet, *supra* note 35, at 1875.

³⁹ *Id.* at 1878.

⁴⁰ Cray, *supra* note 2, at 279.

⁴¹ According to Justice Douglas, Warren had only five votes. Tushnet, *supra* note 35, at 1912.

⁴² Fassett, **New Deal Justice: The Life of Stanley Reed of Kentucky** 571 (1994).

⁴³ *See id.* at 570 for a portion of the Reed draft.

⁴⁴ For the draft's text, *see* Schwartz, **The Unpublished Opinions of the Warren Court** 451 (1985). Cray, *supra* note 2, at 284, is mistaken in saying that the draft only "outlined the general approach that Warren wanted the opinion to take." The text shows that it was a first draft of the *Brown* opinion, containing most of its passages.

⁴⁵ *The New York Times*, May 18, 1954, p. 18.

⁴⁶ For its text, *see* Schwartz, *supra* note 44, at 463.

⁴⁷ *Virginia v. West Virginia*, 222 U.S. 17, 20 (1911).

⁴⁸ Schwartz, *supra* note 44, at 469.

⁴⁹ *Reynolds v. Sims*, 377 U.S. 533

Super Chief 759.

⁵¹ 377 U.S. 533 (1964).

⁵² 369 U.S. 186 (1962).

⁵³ Warren, *supra* note 26, at 309.

⁵⁴ **Super Chief** 504.

⁵⁵ Pollack, **Earl Warren: The Judge Who Changed America**, 209 (1979).

⁵⁶ Ely, **On Constitutional Ground** 44 (1996).

⁵⁷ **Super Chief** 508.

⁵⁸ Douglas, *supra* note 5, at 231.

⁵⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁰ *The New York Times*, January 17, 1965, Section VI, p. 18.

⁶¹ 384 U.S. 436 (1966).

⁶² Cray, *supra* note 2, at 455.

⁶³ **Super Chief** 588-89.

⁶⁴ Schwartz, **Decision: How the Supreme Court Decides Cases** 109 (1996).

⁶⁵ **Super Chief** 593.

⁶⁶ Cray, *supra* note 2, at 317,531; Pollack, *supra* note 56, at 358; Weaver, *supra* note 4, at 9.

⁶⁷ 372 U.S. 335 (1963).

⁶⁸ Warren, "The New Home of the Profession: The American Bar Center Dedication Address," 40 *A.B.A.J.* 955, 956 (1954).

⁶⁹ **Super Chief** 458.

⁷⁰ Lewis, **Gideon's Trumpet** 7-8, 10 (1964).

⁷¹ 316 U.S. 455 (1942).

⁷² Lewis, *supra* note 70, at 7.

⁷³ 369 U.S. 506 (1962).

⁷⁴ **Super Chief** 459.

⁷⁵ *Id.*

⁷⁶ Douglas, *supra* note 5, at 187.

⁷⁷ Gunther, **Inside U.S.A.** 18, 20-21 (1947).

⁷⁸ 381 U.S. 532 (1965).

⁷⁹ **Super Chief** 543.

⁸⁰ For its text, *see* Schwartz, **Constitutional Issues: Freedom of the Press** 163 (1992).

⁸¹ **Super Chief** 543.

⁸² Douglas, "As Chief Justice," 60 *A.B.A.J.* 1232 (1974).

⁸³ *Brooks v. Florida*, 389 U.S. 413, 414 (1967).

⁸⁴ **The Warren Court: A Retrospective** 280 (Schwartz, ed. 1996).

⁸⁵ **Super Chief** 766.

⁸⁶ *Id.* at 723.

⁸⁷ *Supra* note 11, at 15 1.

⁸⁸ Katcher, **Earl Warren: A Political Biography** 473 (1967).

⁸⁹ Ely, *supra* note 56, at 4.

⁹⁰ Kilpatrick, "10 Best, 10 Worst," *Tulsa World*, April 14, 1997, p. A-8.

⁹¹ **Super Chief** 97.

⁹² Ely, *supra* note 56 at 3.

⁹³ *Id.*

⁹⁴ Weaver, *supra* note 4, at 7.

⁹⁵ **Super Chief** 131.

⁹⁶ Cray, *supra* note 2, at 317,

⁹⁷ **Super Chief** 132.

Hail to the Chief: A Bibliographical Essay on Six Chief Justices of the United States

John B. Taylor

Although Chief Justices of the United States tend to downplay the notion that their role is significantly more important than that of Associate Justices, and although their tenures do not necessarily coincide with periods that are, on the basis of other criteria, discrete eras in political or judicial history, observers of the Supreme Court nevertheless commonly focus on Chief Justices and define judicial eras in terms of them. In many cases, that is fully justified. The Marshall and Warren Courts surely exemplify distinctive approaches to the use of judicial power and the substance of judicial policymaking. Both John Marshall and Earl Warren had a major impact on those developments, and both left the Court as times were changing. William Howard Taft joined the Court at a time of political transition and heftily embodied reascendant conservatism. He was succeeded by Charles Evans Hughes, whose performance—whether viewed as statesmanlike, vacillating, or obfuscatory—reflected the doctrinal shifts of his time. Melville

Weston Fuller was not the prime mover on his Court, but a focus on his tenure encapsulates the rise of substantive due process at the hands of colleagues such as Justice Stephen J. Field. In many respects, Roger Brooke Taney adapted the work of John Marshall, but his Court became a focal point for the overriding mid-nineteenth century constitutional issues of slavery and the integrity of the Union. Each of these men was, moreover, personally noteworthy in his own way, and it would be remarkable if that were not so. The preceding essays in this volume thus appropriately focus on these six Chief Justices and paint skillful portraits of their lives and work. What remains is to survey some of the rest of the vast literature on them that other scholars have produced.

General Works

Broad works of constitutional history provide an overview of our subjects in context. Alfred H. Kelly, Winfred A. Harbison, and

Herman Belz, **The American Constitution: Its Origins and Development**, 7th ed., (New York: W. W. Norton, 1991) provides a richly descriptive and analytical narrative that seeks to balance the conflicting impulses of the liberal nationalist and decentralized individualist themes in American constitutional development. Melvin I. Urofsky, **A March of Liberty: A Constitutional History of the United States** (New York: Alfred A. Knopf, 1988; McGraw-Hill, 1994) is a clearly written and succinct discussion of the events, issues, and trends of American constitutional history. Leonard W. Levy, Kenneth L. Karst, and Dennis J. Mahoney, eds., **Encyclopedia of the American Constitution**, 4 vols. plus Supplement (New York: Macmillan, 1986, 1991) contains articles on Justices, judicial decisions, doctrinal concepts, and historical perspectives. A useful selection from these articles, focusing on short periods of constitutional history and the Court under each of its Chief Justices, is the same editors' **American Constitutional History** (New York: Macmillan, 1989). Among general works with more specialized themes, Kermit L. Hall, **The Magic Mirror: Law in American History** (New York: Oxford University Press, 1989) traces the evolution of American legal culture in relation to social, economic, and political developments. James W. Ely, Jr., **The Guardian of Every Other Right: A Constitutional History of Property Rights** (New York: Oxford University Press, 1992; 2d ed., 1998) is a fine brief history of issues concerning the constitutional protection of property rights, which were central to the periods of every Chief Justice under consideration here except Earl Warren. See also Max Lerner, "The Supreme Court and American Capitalism," 42 *Yale Law Journal* 668 (1933), and Jennifer Nedelsky, **Private Property and the Limits of American Constitutionalism** (Chicago: University of Chicago Press, 1990), who argues that from 1787 to 1937 there was a consensus that a focus on property rights as a limit on governmental power was the defining principle of American constitutionalism, and that the problem since 1937 has been to develop an alternative principle for the era of the regulatory welfare state.

Many valuable works focus on the Supreme Court from its inception. Charles Warren, **The**

Supreme Court in United States History (Boston: Little, Brown, 1922, 1926) is a classic history of the Court up to 1918 that pays considerable attention to public reaction to its decisions. Robert G. McCloskey, **The American Supreme Court**, (Chicago: University of Chicago Press, 1960; 2d ed., revised by Sanford Levinson, 1994) is still the best brief history of the Court and characterization of its role. David P. Currie's two volumes, **The Constitution in the Supreme Court: The First Hundred Years, 1789-1888** and **The Constitution in the Supreme Court: The Second Century, 1888-1986** (Chicago: University of Chicago Press, 1985, 1990) are written from the perspective of a lawyer interested in methods of constitutional analysis and the quality of the performance of its judicial practitioners. Bernard Schwartz, **A History of the Supreme Court** (New York: Oxford University Press, 1993) is a fine recent study, and Fred Rodell, **Nine Men: A Political History of the Supreme Court from 1790 to 1955** (New York: Random House, 1955) is an older standard work. John A. Garraty employs the case-study approach in his edited volume **Quarrels That Have Shaped the Constitution** (New York: Harper and Row, 1964; rev. ed. 1987), which contains deftly written accounts of the personalities and politics of major decisions of the Court under every Chief Justice considered here except Taft.

Other useful studies concentrate on the Court in particular eras. Loren P. Beth, **The Development of the American Constitution, 1877-1917** (New York: Harper & Row, 1971) surveys American constitutional development from the end of Reconstruction to World War I, with major attention to the Court's work in the areas of governmental regulation of business and civil liberties and civil rights. Beth does not see a monolithic defense of business in the Court's decisions, but rather a pragmatic and inconsistent course of decision-making as it dealt with novel socioeconomic developments. William F. Swindler, **Court and Constitution in the Twentieth Century**: vol. 1 **The Old Legality 1889-1932**, vol. 2 **The New Legality 1932-1968**, supplementary volume **A Modern Interpretation** (Indianapolis, IN: Bobbs-Merrill, 1969, 1970, 1974) is a narrative constitutional history set against the context of social and political de-

velopments and attentive to the influence of Congress as well as the Court on constitutional interpretation. John E. Semonche, **Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920** (Westport, CT: Greenwood Press, 1978) maintains that the Court during these years was not simply a bastion of laissez-faire dogma but rather functioned pragmatically to adapt the law to the requirements of an industrializing society; it set up some notorious obstacles to governmental power, but they were relatively few. Paul Murphy, **The Constitution in Crisis Times, 1918-1969** (New York: Harper & Row, 1972) provides a historian's perspective on the Court's evolution from protector of property rights to protector of a very different set of personal rights. In **The Supreme Court from Taft to Burger**, 3d ed. (Baton Rouge: Louisiana State University Press, 1979), Alpheus Thomas Mason finds Taft legislating on behalf of conservatism and undermined by a fear of progressivism, while Hughes (in a view less flattering than many others) is seen as leading a camouflaged retreat from conservatism, starting in 1937. The revolutionary Warren Court is favorably evaluated against a broad background of judicial history.

The Chief Justiceship

Among works on the office of Chief Justice, Peter G. Fish, **The Office of Chief Justice** (Charlottesville: White Burkett Miller Center of Public Affairs of the University of Virginia, 1984) analyzes the office in its modern form and includes material on the administrative philosophies and programs of William Howard Taft, Charles Evans Hughes, and Earl Warren. David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in **Courts, Judges, and Politics: An Introduction to the Judicial Process**, 3d ed., Walter F. Murphy and C. Herman Pritchett, eds. (New York: Random House, 1979) assesses Chief Justices Taft and Hughes (as well as Harlan Fiske Stone) in terms of task and social leadership, opinion assignment, and ability to unite the Court. Robert J. Steamer, **Chief Justice: Leadership and the Supreme Court** (Columbia: University of South Carolina Press, 1986) is a comparative study of

social and task leadership by Chief Justices from John Marshall to Warren Burger. Steamer finds that only Marshall and to a lesser extent Taft were successful in normally uniting the Court in major cases, and that only Marshall and Hughes achieved both personal and intellectual leadership. Roger B. Taney displayed elements of both but lost his authority with *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Melville W. Fuller, Taft, and Warren were personal leaders who deferred to others intellectually. Steamer's best—perhaps great—Chief Justices—Marshall, Hughes, and Warren—were "first and foremost very skillful politicians" (296). Current Chief Justice William H. Rehnquist concurs. In "Chief Justices I Never Knew," 3 *Hastings Constitutional Law Quarterly* 637 (1976), he surveys the chief justiceships of Marshall, Taney, Taft, Hughes, and Stone and concludes that the skills required to be an effective Chief may be more readily developed in a political than a legal career. Rehnquist's title gently mocks Justice Felix Frankfurter's pretentious "Chief Justices I Have Known," 39 *Virginia Law Review* 883 (1953). Writing before Earl Warren joined the Court, Frankfurter characterized Fuller as an excellent presiding officer and moderator, Taft as a great judicial reformer, and Hughes as a masterful presiding officer and assigner of opinions. As of 1953, Frankfurter considered Marshall, Taney, and Hughes as the three greatest Chiefs.

If he had written after Warren's time, Frankfurter's judgment might well have been the same. Bernard Schwartz, "The Judicial Lives of Earl Warren," 15 *Suffolk University Law Review* 1 (1981) recounts the story of how Warren, a neophyte on the Court, was recruited by both Justice Hugo L. Black and Justice Felix Frankfurter. Warren initially sided with the Frankfurter wing but had moved to Black's camp by the end of the 1955 Term. The catalyst, according to Schwartz, was a vote Warren regretted in *Irvine v. California*, 347 U.S. 128 (1954), a search and seizure case. In "Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship," 1980 *Supreme Court Review* 115, Schwartz draws on the Frankfurter papers to document the subsequent deterioration of his personal relationship with Warren.

Biographical Collections

General collections of judicial biography are another good starting place for consideration of the Chief Justices under consideration. Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789-1995: Their Lives and Major Opinions**, 5 vols. (New York: Chelsea House, 1995) contains essays on all the Justices, with focus on their Court tenure, and texts of representative opinions they wrote in Supreme Court cases. Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789-1995**, 2d ed. (Washington, D.C.: Congressional Quarterly, 1995) provides succinct portraits of the lives of the Justices, with attention to their activities prior to joining the Court. Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (New York: Garland Publishing, 1994) presents biographical essays focusing on Court service. All of these works list other biographical references. Both Allison Dunham and Philip B. Kurland, eds., **Mr. Justice** (Chicago: University of Chicago Press, 1956) and G. Edward White, **The American Judicial Tradition: Profiles of Leading American Judges** (New York: Oxford University Press, 1976) contain profiles of Marshall, Taney, and Hughes; White also paints a group portrait of the Warren Court. Informative accounts of the appointments of the Justices may be found in Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court**, 3d ed. (New York: Oxford University Press, 1992).

John Marshall

In 1827, at the request of Justice Joseph Story, Marshall wrote **An Autobiographical Sketch** that concludes with his appointment as Chief Justice in 1801. This brief account was edited and published more than a century later by John Stokes Adams (Ann Arbor: University of Michigan Press, 1937). We can learn more of his personal life from "Letters from John Marshall to His Wife," 3 *William and Mary Quarterly*, 3d series 73 (1923) and from letters collected by Frances Norton Mason in **My Dearest Polly: Letters of Chief Justice John**

Marshall (Richmond, VA: Garrett & Massie, 1961). Selections from the autobiography and other writings are reprinted in Stanley I. Kutler, ed., **John Marshall** (Englewood Cliffs, NJ: Prentice-Hall, 1972), which also includes excerpts from the positive and negative opinions of contemporaries and evaluations of modern scholars. Marshall's political views are reflected in his **The Life of George Washington**, 5 vol. (Philadelphia: C. P. Wayne, 1805-1807; reprint, Fredericksburg, VA: The Citizens' Guild of Washington's Boyhood Home, 1926). Jack L. Cross, "John Marshall on the French Revolution and on American Politics," 12 *William and Mary Quarterly*, 3d series 631 (1955) presents nine of Marshall's letters to Timothy Pickering, four from the period when the latter was Secretary of State and Marshall was on the diplomatic mission that led to the XYZ Affair, and five from the period 1800-1808 showing Marshall's ardent Federalism. Charles C. Smith, ed., "Letters of Chief Justice Marshall," 14 *Proceedings of the Massachusetts Historical Society*, 2d series 320 (1900) reprints letters on public issues, mostly to Justice Joseph Story, while Charles Warren, "The Story-Marshall Correspondence," 21 *William and Mary Quarterly*, 2d series 1 (1941) presents some of Story's letters to Marshall. James A. Servies, **A Bibliography of John Marshall** (Washington: United States Commission for the Celebration of the Two Hundredth Anniversary of the Birth of John Marshall, 1956) is an annotated bibliography of Marshall's writings and selected writings about him, including pamphlets and speeches, oriented more toward historical understanding than legal analysis. Irwin S. Rhodes, **The Papers of John Marshall: A Descriptive Calendar** (Norman: University of Oklahoma Press, 1969) provides a chronological listing of Marshall's papers—court decisions, documents, letters, etc.—which are widely scattered. Eight of a projected twelve comprehensive volumes of **The Papers of John Marshall** (Chapel Hill: University of North Carolina Press, 1974—), under various editors, have appeared so far. They contain all constitutional and representative other Supreme Court opinions, circuit court opinions, and some correspondence (but most of that appears not to have been preserved).

Since most of what we do have from Marshall's own hand has been made available only fairly recently, it is not surprising that his first great biographer, Albert J. Beveridge, lamented our clear lack of personal information about his subject. Beveridge's **The Life of John Marshall**, 4 vols. (Boston: Houghton Mifflin, 1916, 1919) is the classic biography of the "frontiersman, soldier, legislator, lawyer, politician, diplomat, . . . statesman, and . . . constructive jurist" (1:vi), a highly favorable life-and-times account which takes great care to set Marshall's acts in the context of contemporary history. Landon C. Bell, "John Marshall: Albert J. Beveridge as a Biographer," 12NS *Virginia Law Register* 641 (1927) maintains that Beveridge "is not a dependable historian and is a biased biographer" (641), exalting Marshall and denigrating Jefferson. Robert Eugene Cushman,

on the other hand, in his review article "Marshall and the Constitution," 5 *Minnesota Law Review* 1 (1920) affirms that Beveridge's work is based on "astonishingly accurate and exhaustive historical research" (2). Cushman also has high praise for Edward S. Corwin's **John Marshall and the Constitution: A Chronicle of the Supreme Court** (New Haven, CT: Yale University Press, 1919), which is also admiring but somewhat more critical of Marshall and sympathetic to Thomas Jefferson. Cushman finds consensus on Marshall's contributions in enhancing the authority of the Court, establishing judicial review, furthering nationalism, protecting commerce, and guaranteeing the sanctity of contracts.

Among more recent biographical works, David Loth's **Chief Justice: John Marshall and the Growth of the Republic** (New York: W.W.

Jefferson's political ally, Spencer Roane, was the most prominent member of Virginia's highest court and the state's most powerful politician. The conventional view has long been that Roane, rather than Marshall, would have been Chief Justice if Jefferson, rather than John Adams, had appointed Oliver Ellsworth's successor. Recent scholarship now casts doubt on that assumption.



Norton, 1949) is an admiring narrative of events, without close analysis of cases, while Leonard Baker's **John Marshall: A Life in Law** (New York: Macmillan, 1974) is a comprehensive descriptive history of Marshall's life and career, with major attention to the period before he joined the Court. Francis N. Stites, **John Marshall: Defender of the Constitution** (Boston: Little, Brown, 1981) is a good brief account of Marshall's life and major accomplishments, with brisk and incisive interpretations. In **John Marshall: Definer of a Nation** (New York: Henry Holt, 1996), Jean Edward Smith's goal is not to break new legal ground—he deftly summarizes existing scholarship on Marshall's constitutional decisions—but rather to address the problem Beveridge first noted: our lack of knowledge of Marshall the man. His focus is thus Marshall's character and the influences that shaped it, and in telling Marshall's story he makes insightful comments as well about the other great personalities of the time, and about the nature of their relationships. A brief earlier attempt to fill the void of personal information about Marshall is Justice Harold H. Burton's "John Marshall—The Man," 104 *University of Pennsylvania Law Review* 3 (1955).

The well-known story of the appointment of Chief Justice Marshall and many other Federalist judges by the lame-duck President John Adams is ably told in two articles by Kathryn Turner, "The Appointment of Chief Justice Marshall," 17 *William and Mary Quarterly*, 3d series 143 (1960) and "The Midnight Judges," 109 *University of Pennsylvania Law Review* 494 (1961). The history of the Marshall Court is recounted most comprehensively in two volumes of **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States**. George Lee Haskins and Herbert A. Johnson, **Foundations of Power: John Marshall, 1801-1815** (New York: Macmillan, 1981) provides detailed coverage of roughly the first half of Marshall's tenure as Chief Justice, focusing on the Court's successful effort to avoid the alternative fates of survival through irrelevance or defeat by hostility. The Court's strategy, the authors argue, was to assert its power but to respect its proper bounds, and to build a record of solid performance in noncontroversial areas of the law. G. Edward White,

with the aid of Gerald Gunther, **The Marshall Court and Cultural Change, 1815-1835** (New York: Macmillan, 1988; abridged edition, New York: Oxford University Press, 1991) provides a new perspective by enlarging upon legal and historical analysis to view the Marshall Court as a mechanism of adaptation of American republicanism to cultural change as the Revolutionary era receded. Its technique, White argues, was simultaneously to adapt and universalize first principles while legitimating, but also masking, the discretionary nature of that judicial enterprise. An earlier and far more critical work is Charles Grove Haines, **The Role of the Supreme Court in American Government and Politics 1789-1835** (Berkeley: University of California Press, 1944; reprint, New York: Da Capo Press, 1973), an in-depth political history of the Court, written from a Jeffersonian perspective to counter the prevailing, laudatory view. Haines considers Marshall to have functioned on the Bench as a conservative political partisan, hostile to democracy, whose jurisprudence helped pave the way to civil war. Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801-1835** (Columbia: University of South Carolina Press, 1997) considers the Marshall Court in light of recent controversy about judicial review and the jurisprudence of original intent. Johnson examines the politics of the times, the personnel of the Court, and Marshall's leadership, and he reviews the Court's work in the areas of constitutional, international, and private law.

John Marshall is, of course, most famous for his decision in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), and the establishment of the power of judicial review. That topic is explored in W. Melville Jones, ed. **Chief Justice John Marshall: A Reappraisal** (Ithaca, NY: Cornell University Press for the College of William and Mary, 1956), an important collection of essays that also examines the political and ideological context within which the Marshall Court functioned and Marshall's contributions to the law and to the institution of the Court. William W. Van Alstyne provides an indispensable guide to the *Marbury* opinion in "A Critical Guide to *Marbury v. Madison*," 1969 *Duke Law Journal* 1, a careful, point-by-point critique of Marshall's holdings and their justification, with discus-

sion of the plausible alternatives. A collection of views on judicial review from prominent commentators of the founding generation is also included. In **John Marshall** (Boston: Houghton Mifflin, 1901; reprint New York: DaCapo Press, 1974). James Bradley Thayer, an esteemed skeptic of an expansive concept of judicial review, finds many important questions about that power unanswered in *Marbury* and regrets that Marshall did not give this case the same full treatment evident in his later great opinions. He wishes, too, that Marshall had been obliged to answer the questions raised by Judge John B. Gibson in *Eakin v. Raub*, 12 Sergeant and Rawle 330, 344 (Pa. 1825). Donald O. Dewey argues in **Marshall versus Jefferson: The Political Background of *Marbury v. Madison*** (New York: Alfred A. Knopf, 1970) that Marshall wanted to establish judicial review but that he was far more concerned with contemporary political needs than with the elaboration of a full rationale for that doctrine. The decision was based on an extremely narrow reading of the Constitution, which was certainly not Marshall's style thereafter. The opinion was legally flawed and left major questions about judicial review unanswered, Dewey concludes; its significance flows from what later judges did with it. In "John Marshall's Selective Use of History in *Marbury v. Madison*," 1987 *Yearbook of the Supreme Court Historical Society* 82, also in 1986 *Wisconsin Law Review* 301, Susan Low Bloch and Maeva Marcus note that Marshall read the Constitution narrowly in ignoring the fact that Section 13 of the Judiciary Act of 1789 had been invoked without question in the 1790s. By ignoring those contrary precedents in *Marbury*, Marshall was able to trade larger original jurisdiction for the power of judicial review—which seems like a pretty good bargain. One might ask why he did not overrule those precedents; we may surmise that that would have undermined a defense of judicial review buttressed by examples confined to the need to correct obvious deviations from the Constitution, and would have highlighted the exercise of judicial discretion.

J. A. C. Grant's "*Marbury v. Madison* Today," 23 *American Political Science Review* 673 (1929), is a withering critique that argues that Marshall was wrong at every turn in this

great case: he should have recused himself, *Marbury's* right to the commission should not have been decided, the question of his right to the commission was wrongly decided, the constitutionality of Section 13 of the Judiciary Act of 1789 should not have been decided, and the question of constitutionality was wrongly decided. Marshall forced the issue in this fashion because support for judicial review was slipping away; the Court was fortunate that attention focused upon the immediate political issue, although it suffered from being perceived as "the champion of a defeated faction" (680). Grant's richly ironic final judgment is that "nothing remains of *Marbury v. Madison* except its influence upon the development of our system of constitutional law" (681). Not surprisingly, Justice Harold H. Burton's "The Cornerstone of Constitutional Law: The Extraordinary Case of *Marbury v. Madison*," 36 *American Bar Association Journal* 805 (1950), defends a decision that met the "need . . . for a convincing lecture on constitutional law upholding the essential power of the Court while saving the face of the Chief Executive" by not formally ruling against him (881). Burton agrees with Grant that the Court could have avoided the constitutional question, or decided it the other way, but he applauds it for not doing so in order to establish the critical power of judicial review, which Marshall understood in terms of an authoritative and binding judicial power of constitutional interpretation, intended to avoid the chaos of the Jeffersonian conception of concurrent review. David E. Engdahl, "John Marshall's 'Jeffersonian' Concept of Judicial Review," 42 *Duke Law Journal* 279 (1992), takes issue with that interpretation, arguing that Marshall in *Marbury* did not hold the Federalist "judicial supremacy" theory of judicial review—that the Supreme Court's interpretations of the Constitution are authoritative and binding on all other organs of government—but rather the Jeffersonian view—that each organ of government is bound to interpret the Constitution independently as the need arises in the course of its work, and that such interpretations are not binding on other organs. Engdahl suggests the wisdom of not having a final constitutional interpreter after all, and he revives the arguments of the 1930s against

judicial supremacy.

Engdahl's is by no means the only revisionist interpretation. Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (New Haven, CT: Yale University Press, 1990), argues that prior to Marshall, the understanding of judicial review was as "an extraordinary political act, a judicial substitute for revolution," (3) enforcing the fundamental values of a social contract. Marshall—not in *Marbury* but in cases over the following three decades—converted judicial review from this political act to a legal one, from the interpretation of fundamental law (incidentally written down) to the interpretation of supreme written law, to be judicially construed and applied by the same processes as statutes are. Marshall adroitly camouflaged this basic transformation, Snowiss argues, so it has gone unrealized (although Alexander Bickel began to sense it in **The Least Dangerous Branch: The Supreme Court at the Bar of Politics** (Indianapolis, IN: Bobbs-Merrill, 1962)). Elizabeth McCaughey's "*Marbury v. Madison*: Have We Missed the Real Meaning?" 19 *Presidential Studies Quarterly* 491 (1989), suggests that Marshall was propounding a circumscribed and defensive concept of judicial review, designed to allay contemporary hostility to the judiciary by restraining judicial discretion. Judges had been enforcing common law principles, McCaughey argues; now they were to be limited to enforcement of a written Constitution, ordained by the people. James M. O'Fallon, "*Marbury*," 44 *Stanford Law Review* 219 (1992), argues just the opposite: that Marshall's main focus was the immediate political situation and that his primary purpose was a conservative desire to keep the people at arm's length. In this view, bills of attainder and *ex post facto* laws are not just examples of obvious occasions for judicial review, but real fears. Marshall need not be seen as a visionary and may be seen as fighting a lost battle against majoritarian democracy. Judicial review did not need an elaborate justification because its validity was widely acknowledged. Marshall's concern for judicial review, O'Fallon concludes, "has been exaggerated by the desire of legal scholars for a strong foundation for this doctrine" (219). In ***Marbury v. Madison and Judicial Review*** (Lawrence: University Press of

Kansas, 1989) and "Substantive Due Process, Selective Incorporation, and the Late-Nineteenth Century Overthrow of John Marshall's Constitutional Jurisprudence," 5 *Journal of Law and Politics* 499 (1989), Robert Lowry Clinton offers yet another revisionist perspective: that in *Marbury* Marshall did not assert the Court's final authority to interpret the Constitution in ways that bind other branches beyond cases where the statute concerns the Court's performance of its own functions. He goes on to argue that the Supremacy Clause gives the Court much clearer authority to make binding decisions about state laws, which may be why the Marshall Court invalidated several of them but only one Act of Congress. Cases like *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), on the other hand, display no great nationalism but are rather exemplars of great deference to Congress. The modern, expansive, activist conception of judicial review derives not from Marshall, Clinton concludes, but from substantive due process and the incorporation of the Bill of Rights. All of this is too much for Dean Alfange, Jr. In "*Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom," 1993 *Supreme Court Review* 329, Alfange upholds the traditional view of *Marbury* against Snowiss, O'Fallon, and Clinton, whom he shows to be inconsistent with each other as well as with the canon. In a lengthy critique, Alfange finds the first two wrongheaded and dismisses Clinton's interpretation of *Marbury* as "malarkey" (333). Although Judge Gibson's dissent in *Eakin v. Raub* demolishes Marshall's attempt to deduce the Court's power of judicial review from the fact of a written Constitution, Alfange maintains, a pantheon of distinguished commentators (who appreciated Gibson) are not wrong about what Marshall set out to accomplish in *Marbury*, or why he did so.

Marshall handed down many other great constitutional decisions besides *Marbury*. All of them are collected in Joseph P. Cotton, Jr., ed., **The Constitutional Decisions of John Marshall**, 2 vol. (New York: G. P. Putnam's Sons, 1905; reprint, New York: Da Capo Press, 1969), with introductory notes to set the political and

legal context. *McCulloch v. Maryland* was so important to Marshall that when it provoked criticism in the form of pseudonymous newspaper essays actually written by his arch-rival Spencer Roane and another Virginia judge, he replied in kind. Gerald Gunther, ed., **John Marshall's Defense of *McCulloch v. Maryland*** (Stanford, CA: Stanford University Press, 1969), reproduces this remarkable exchange, along with Marshall's opinion in the case. Marshall is often praised for his ability to turn the immediate circumstances of cases to his larger purposes, but Howard J. Plous and Gordon E. Baker find him overreaching in "*McCulloch v. Maryland*: Right Principle, Wrong Case," 9 *Stanford Law Review* 710 (1957). The principle of implied powers was crucial, the authors assert, although Marshall had asserted it fourteen years earlier in *United States v. Fisher*, 6 U.S. (2 Cr.) 358 (1805). The highly unpopular bank, however—more a private, profit-making entity than an arm of the government—was not a good candidate for tax immunity. The case was thus not a propitious vehicle for the assertion of vital and correct principles, the authors maintain, and Maryland could have prevailed without sacrifice of those principles. Justice Felix Frankfurter expresses the traditional view in "John Marshall and the Judicial Function," 69 *Harvard Law Review* 217 (1955), where he calls *McCulloch* Marshall's greatest case and his admonition that "it is a Constitution we are expounding" the "single most important utterance in the literature of constitutional law" (218). In "It Is a Constitution We Are Expounding: Chief Justice Marshall and the 'Necessary and Proper' Clause," 12 *Journal of Legal History* 190 (1991), however, A. I. L. Campbell tentatively suggests a revisionist interpretation of the doctrine of the case, namely that Marshall did not intend his famous phrase to justify broad interpretation of the Constitution in general. It may have signified only a warrant for legislative adaptation, founded ultimately on the authority of the people. If so, Campbell argues, then "a case founded on judicial restraint may have become a by-word for judicial activism" (219). Wallace Mendelson asks, "Was Chief Justice Marshall an Activist?" in Stephen C. Halpern and Charles M. Lamb, eds., **Supreme Court Activ-**

ism and Restraint (Lexington, MA: Lexington Books/D.C. Heath, 1982). Mendelson's short answer is no. Neither the Hughes nor Warren Court activists can claim Marshall as their intellectual father, he maintains; that honor goes to Justice Stephen J. Field.

The great commerce power case *Gibbons v. Ogden* is analyzed in Maurice G. Baxter, **The Steamboat Monopoly: *Gibbons v. Ogden*, 1824** (New York: Alfred A. Knopf, 1972) and in George L. Haskins, "John Marshall and the Commerce Clause of the Constitution," 104 *University of Pennsylvania Law Review* 23 (1955), which also discusses the immediate significance of other cases and traces their continuing influence on the law. Nathan Isaacs, "John Marshall on Contracts: A Study in Early American Juristic Theory," 7 *Virginia Law Review* 413 (1921), analyzes Marshall's view of the law of contracts in light of the common law understanding of the late eighteenth century, and Steven R. Boyd adds more background in "The Contract Clause and the Evolution of American Federalism, 1789-1815," 44 *William and Mary Quarterly* 3d series 529 (1987). C. Peter Magrath studies a seminal case in **Yazoo: Law and Politics in the New Republic: The Case of *Fletcher v. Peck*** (Providence, RI: Brown University Press, 1966), delving into the Yazoo land frauds that led to *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810), in which Marshall fashioned the law of obligation of contracts—and which may have been the first Supreme Court case in which an organized interest group engaged in lobbying through litigation. A second key Contract Clause case was *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); it is fully considered in Francis N. Stites, **Private Interest & Public Gain: The Dartmouth College Case, 1819** (Amherst: University of Massachusetts Press, 1972). Taking for granted that the case was ultimately about the rights of business corporations, Bruce A. Campbell, "John Marshall, the Virginia Political Economy, and the *Dartmouth College* Decision," 19 *American Journal of Legal History* 40 (1975), explores the development of Marshall's views in relation to his business and commercial dealings in the context of the Virginia political economy. Taking this line of argument a good deal further, Max Lerner, "John Marshall and the Campaign of History,"

39 *Columbia Law Review* 396 (1939), places more emphasis on Marshall's economic goals than on his constitutional theory, finding him "the strategic link between capitalism and constitutionalism" (403). He faults the reasoning of *Marbury* and *Fletcher*, viewing them along with *Dartmouth College* as part of a counter-revolution by the propertied classes. Marshall's great contribution was his nationalism—again in aid of the propertied classes, but with the tide of history. The irony, Lerner notes, is that Marshall's concepts of vested rights and judicial supremacy were combined by subsequent Courts to undermine his conceptions of the national commerce power and the Necessary and Proper Clause. An opposing irony is suggested by Edward S. Corwin in "John Marshall, Revolutionist *Malgre Lui*," 104 *University of Pennsylvania Law Review* 9 (1955). Marshall, a revolutionary towards the British, was characterized by Beveridge as a supreme conservative by the end of his career. Though Marshall—who was for individual liberty, not social equality—would not have approved, Corwin declares, his opinions in *Gibbons* and *McCulloch* became the basis for the culmination of a modern liberal revolution in Justice Stone's opinion in *United States v. Darby*, 312 U.S. 100 (1941).

Marshall's ideological and jurisprudential beliefs and objectives have been the subject of much scholarly debate, which can only be sampled here. Morton J. Frisch, "John Marshall's Philosophy of Constitutional Republicanism," 20 *Review of Politics* 34 (1958), is an early attempt to provide a systematic exposition of Marshall's political ideas. Samuel J. Konefsky, **John Marshall and Alexander Hamilton: Architects of the American Constitution** (New York: Macmillan, 1964), examines the parallels between Hamilton and Marshall in the furtherance of the social philosophy they largely shared, and Francis Newton Thorpe, "Hamilton's Ideas in Marshall's Decisions," 1 *Boston University Law Review* 60 (corrected) (1921), employs extensive quotation to illustrate Marshall's agreement with Hamilton rather than Jefferson. Robert K. Faulkner's **The Jurisprudence of John Marshall** (Princeton, NJ: Princeton University Press, 1968), is a seminal study that presents a synthesis of Marshall's understanding and pursuit of the great pur-

poses of American constitutionalism: protection of the rights of life, liberty, and property, maintenance of a powerful but republican government, and furtherance of the rule of fundamental law through judicial statesmanship. The volume also includes an extended analysis of Oliver Wendell Holmes' critical essay "John Marshall," which may be found in his **Collected Legal Papers** (New York: Peter Smith, 1952). William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," 76 *Michigan Law Review* 893 (1978), rejects the views that Marshall basically sought to write Federalist political precepts into constitutional law, or to serve the interests of a privileged class, or simply to apply the revealed law. Somewhat tentatively, he asserts that Marshall sought to mediate between a style of resolving issues by majoritarian political conflict—in place by 1800—and an older, mid-eighteenth century style of resolving issues by resort to nonpolitical consensus on basic values. Mediation meant the courts should employ the latter method whenever possible and defer to political resolution by the other branches when consensus was lacking. As Nelson realizes, his interpretation and the three he rejects are not necessarily mutually exclusive. In a comprehensive reassessment, "John Marshall: The Nature of Law in the Early Republic," 98 *Virginia Magazine of History and Biography* 57 (1990), Richard A. Brisbin, Jr. examines Marshall's conception of law from the vantage point of political thought, which in his time was undergoing a transition from republicanism to liberalism. Brisbin faults the interpretations of Faulkner; Haskins and Johnson; Nelson; Snowiss; and White (whose focus on cultural change comes closest to getting it right), arguing that Marshall was neither a republican nor a liberal but a jurist drawing on opposing sets of ideas, with consequent tensions and inconsistencies in his opinions. Thomas C. Shevory, ed., **John Marshall's Achievement: Law, Politics, and Constitutional Interpretations** (New York: Greenwood Press, 1989), is a philosophically oriented collection of essays that also examine Marshall's thought from the perspective of late eighteenth and early nineteenth century conceptions of republicanism and liberalism,

as well as modern approaches to legal studies. Shevory's **John Marshall's Law: Interpretation, Ideology, and Interest** (Westport, CT: Greenwood Press, 1994), written from a concern for contemporary liberalism as the legitimizing of American political life, views Marshall as less legal than Faulkner would have him, and more concerned to reach results in accord with his interests and ideology. The author, however, never fully pulls all his ideas together. John Choon Yoo holds out for an older, contrary view. In "Marshall's Plan: The Early Supreme Court and Statutory Interpretation," 101 *Yale Law Journal* 1607 (1992), he argues that in construing statutes, Marshall sought to discover congressional intent rather than to further Federalist political principles, in order to develop the perception of the Court as a non-partisan finder of the law. Charles F. Hobson is a historian seeking to place Marshall in the context of American political thought. In **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence: University Press of Kansas, 1996), Hobson examines the principal foci of his jurisprudence to illustrate his distinctive role in applying the seminal ideas of the founding era to concrete problems of governance in the era of growth and development. Concluding with an interpretation of Marshall's conception of the judicial function, Hobson finds Marshall the great expounder of the Constitution to be fundamentally in harmony with James Madison, father of the Constitution.

We have already noted that Charles Grove Haines and James M. O'Fallon view Marshall as inimical to democracy. Saul K. Padover, "The Political Ideas of John Marshall," 26 *Social Research* 47 (1959), argues that Marshall was "conservative on questions relating to property but a democrat in his fundamental political views" (55), fearing only excessive democracy and rejecting aristocratic rule. Christopher L. Eisgruber discerns a complex relationship among Marshall's constitutional philosophy, his attitude toward democracy, and the disparity between the statesmanlike quality of Marshall's opinions and their technical deficiencies (such as failure to cite precedent). In "John Marshall's Judicial Rhetoric," 1996 *Supreme Court Review* 439, he finds the explanation for the latter problem in a conscious rhe-

torical strategy. Marshall was concerned that not just the judiciary, but the national government in general, be perceived as legitimate. Rather than trying to prove debatable premises, Marshall assumed them and argued that the favorable consequences that would ensue were in accord with the sovereign will of the people as ordained in the Constitution. But the legitimacy of the Constitution itself was not yet firmly established, Eisgruber argues; Marshall could establish the legitimacy of both the Constitution and actions taken under it if he could resolve constitutional ambiguities as meaning what the sovereign people were persuaded was in their best interests.

Debates about Marshall's attitude toward democracy inevitably raise the issue of his relationship to Thomas Jefferson. Donald G. Morgan's biography of Jefferson's most important appointee to the Supreme Court, **Justice William Johnson: The First Dissenter** (Columbia: University of South Carolina Press, 1954), presents a moderately critical view of Marshall from a Jeffersonian perspective. Julian P. Boyd's view in "The Chasm that Separated Thomas Jefferson and John Marshall," in **Essays on the American Constitution**, ed. Gottfried Dietze (Englewood Cliffs, NJ: Prentice-Hall, 1964), is evident from his title. Boyd, sympathetic to Jefferson, sees Marshall—the representative of law—and Jefferson—the representative of democracy—as harboring not only irreconcilable personal differences but also irreconcilable views of man and society and theories of democratic government as well. Neither understood the other, and neither was fit for the other's role. In the great debate over the role of the judiciary, Boyd observes, Jefferson forbore but Marshall could not see that. In an important revisionist study, Richard E. Ellis, **The Jeffersonian Crisis: Court and Politics in the Young Republic** (New York: Oxford University Press, 1971), downplays the conflict between Jefferson and Marshall, maintaining that they had more in common than either they or subsequent historians have been willing to admit. The real battles were between the radical and moderate factions of their respective parties, Ellis asserts; Marshall and Jefferson led the moderates on each side (some of Jefferson's rhetoric to the contrary notwith-

standing) and shared a belief in an independent judiciary. Robert Lowry Clinton adopts a similar stance in "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury v. Madison*," 38 *American Journal of Political Science* 285 (1994). Applying game theory to the circumstances of the *Marbury* case, Clinton argues that they did not constitute a game that Marshall won and Jefferson lost, but reveal instead a "tacit political compromise" (300). The charge that Marshall's conduct of the Burr trial was marred by his hostility toward Jefferson, put forward most prominently by Edward S. Corwin in his book on Marshall cited above, is convincingly refuted by Robert K. Faulkner, "John Marshall and the Burr Trial," 53 *Journal of American History* 247 (1966).

There is less doubt about Marshall's relationship with Jefferson's political ally Spencer Roane, the most prominent member of Virginia's highest court and the state's most powerful politician (whose attack on *McCulloch v. Maryland* is discussed above). The Note "Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall," 66 *Harvard Law Review* 1242 (1953), reviews Roane's political and judicial career, reporting that almost every important judicial decision he made contradicted a Supreme Court ruling. The conventional view has long been that Roane rather than Marshall would have been Chief Justice if Jefferson rather than John Adams had appointed Oliver Ellsworth's successor. Accepting that view, Charles Kerr, "If Spencer Roane Had Been Appointed Chief Justice Instead of John Marshall," 20 *American Bar Association Journal* 167 (1934), argues that Roane's positions on judicial power and state sovereignty would have made our constitutional development profoundly different. The assumption here, of course, is that the other Justices would have been compliant. Samuel R. Olken, "John Marshall and Spencer Roane: An Historical Analysis of their Conflict over U.S. Supreme Court Appellate Jurisdiction," 1990 *Journal of Supreme Court History* 125, argues that Jefferson would not have appointed Roane. Focusing on the role Roane did play, Olken examines the personal, political, economic, and legal components of his continuing battle with

Marshall over the power of the Supreme Court to review decisions of state supreme courts. The account begins with Marshall's arguments in the Virginia ratifying convention of 1788 and culminates in his opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Mark A. Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power," 12 *Constitutional Commentary* 67 (1995), argues that *Cohens* is not the culmination of the firm establishment of judicial review because, like *Marbury*, it asserts a firm principle but avoids a decision that could have been flouted. A further problem is that Marshall engages in a questionable manipulation of a technical exercise in statutory construction to conceal the basic inconsistency of *Cohens* with *McCulloch v. Maryland*. In both *Marbury* and *Cohens*, Graber points out, the Court lacks power in the sense of being able to make someone do something he would not otherwise do; hence Marshall's resort to passive-aggressive techniques to further political goals. William E. Dodd, "Chief Justice Marshall and Virginia, 1813-1821," 12 *American Historical Review* 776 (1907), recounts the Marshall feud with the Virginia power structure, focusing on *Cohens* and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Marshall recused himself in *Martin* because he was a very interested party. F. Thornton Miller, "John Marshall versus Spencer Roane: A Reevaluation of *Martin v. Hunter's Lessee*," 96 *Virginia Magazine of History and Biography* 297 (1988), focuses more on the issue of title to the land in question than that of the power of appellate review, noting that the Supreme Court could not enforce Justice Story's decision on the merits (which he finds unpersuasive) and that the Marshall family's legal troubles continued. Miller agrees that there is no evidence that Jefferson would have appointed Roane.

Saul K. Padover, in "The Political Ideas of John Marshall" reflects a common view when he remarks that Marshall "dominated the Court by the sheer force of personality" (59), and the Jeffersonians certainly resented the sway he seemed to exert over his colleagues, and in particular his abolition of *seriatim* opinions. Robert G. Seddig looks closely at this issue in "John Marshall and the Origins of Supreme Court

Leadership," 1991 *Journal of Supreme Court History* 63. Seddig affirms that Marshall had a great impact not only on the content of constitutional law but on the institutional development of the Court, and he explores Marshall's achievement in bringing unity to that body, chiefly through the initiation of the opinion of the Court (which he most often wrote himself). Marshall did not bully his Court but rather provided effective task and social leadership through most of his tenure, Seddig argues, and his article relates that leadership to the stature of the Court and to the substance of the law it created. A longer version of this article, with more discussion of social psychology and more tabular and graphical data, appears in 36 *University of Pittsburgh Law Review* 785 (1975). In a lighter vein in "Imagining the Marshall Court," 1986 *Yearbook of the Supreme Court Historical Society* 77, G. Edward White uses the facts of actual issues and cases to construct imaginative vignettes of what the personal relationships and collective decisionmaking style of the Marshall Court Justices might have been. In "The Working Life of the Marshall Court, 1815-1835," 70 *University of Virginia Law Review* 1 (1984), a preliminary version of a chapter from his book on the Marshall Court, White describes and illustrates the setting of its work and its operating procedures—by today's standards informal, nonaccountable, and in some respects ethically unacceptable (in light of the modern view of law as judge-made). Since the orthodox view was that the law contained immutable political principles, and that the Court found the law, White reminds us, only an opinion of the Court was required. From this perspective, Marshall's institution of that custom was not necessarily a sign of his domination. Donald G. Morgan emphasizes in "The Origin of Supreme Court Dissent," 10 *William and Mary Quarterly* 2d series 353 (1953), however, that such arguments could hardly appease Jefferson and his followers. Morgan argues that Marshall had masked divisions on the Court, and thus responsibility for its actions, a fact bitterly resented by opponents. Upon the prodding of Thomas Jefferson, Justice William Johnson, who had succumbed to Marshall earlier, began to speak out independently in concurring and dissenting opin-

ions, a practice adopted by new appointees if not the continuing members of the Court. Donald M. Roper contends that Marshall paid a price for unanimity. Marshall did not impose his views on the Court, Roper argues in "Judicial Unanimity and the Marshall Court—A Road to Reappraisal," 9 *American Journal of Legal History* 118 (1965); he thought unanimity essential for the preservation of judicial power from congressional attacks and was willing to compromise his Federalist principles in order to achieve it. William Winslow Crosskey is far more iconoclastic in "John Marshall and the Constitution," 23 *University of Chicago Law Review* 377 (1956). Crosskey challenges the Holmes-Beveridge view that Marshall dominated his Court and imposed Federalist doctrine on its jurisprudence. Federalists were for strict construction and it was the Jeffersonians who were for loose construction; various Marshall decisions depart from the substance of Federalist doctrine as well. Jeffersonians dominated the Court for most of Marshall's tenure and the opinions were of the Court, not just the Chief Justice, who so wanted the Court to speak with one voice that he sometimes wrote opinions with which he disagreed. Marshall was actually fighting a rearguard, ultimately losing battle, against Jeffersonian principles, Crosskey argues; he was disillusioned and pessimistic in his final years but did much to minimize the damage to his principles and still deserves to be considered the Great Chief Justice.

Roger Brooke Taney

It has been the fate of Roger Brooke Taney to be viewed not simply in his own right, but in relation to the great Chief Justice who preceded him and the great President who served contemporaneously at the end of his term on the Court. Even more remarkable is the fact that the reputation of a man who served as Chief Justice for twenty-eight years hinges to an extraordinary degree on his opinion in just one case, *Dred Scott v. Sandford*. It is small wonder that Taney's stature has been especially susceptible to successive changes in the standards of historical interpretation, and his ups and downs are carefully charted in Marvin

Laurence Winitsky, "Roger B. Taney: A Historiographical Inquiry," 69 *Maryland Historical Magazine* 1 (1974).

Samuel Tyler, a friend asked by Taney to write his life, produced a **Memoir of Roger Brooke Taney, LLD** (Baltimore, MD: John Murphy & Co., 1872), an overwrought defense of the Chief Justice without analysis of his judicial work. The volume does contain Taney's autobiographical sketch of his early years and his supplement to—and defense of—his *Dred Scott* opinion. The latter document, written in 1858 but apparently never used, dismisses all criticism of the opinion as "perversions and misrepresentations" (607). Bernard C. Steiner's **Life of Roger Brooke Taney** (Baltimore, MD: Williams & Wilkins, 1922; reprint, Westport, CT: Greenwood Press, 1970), is a more balanced work. Taney was profoundly wrong in *Dred Scott*, Steiner concludes, but was "a great judge and a good man" (542). Walker Lewis, **Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney** (Boston: Houghton Mifflin, 1965), is a narrative account of Taney's life, admiring of his personal qualities, which takes the view that the *Dred Scott* opinion was a sincere but misguided aberration that should not undermine our appreciation of his greatness. The standard biography is still Carl Brent Swisher, **Roger B. Taney** (New York: Macmillan, 1935), sympathetic to the man, which sees Taney in *Dred Scott* as seeking to preserve southern culture and independence, and not slavery—although that might well be the byproduct—from northern encroachment.

Swisher is also the author of the most comprehensive history of the Court under Taney. **The Taney Period: 1836-64** (New York: Macmillan, 1964), a volume in the **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States**, is an exhaustive account in which Swisher finds the Taney Court to be much the same as the Marshall Court—but far less philosophical and lower in prestige, primarily because it was caught up in sectional conflict. An earlier history is Charles Grove Haines and Foster H. Sherwood, **The Role of the Supreme Court in American Government and Politics, 1835-1864** (Berkeley: University of California Press, 1957; reprint, New York: Da Capo Press, 1973).

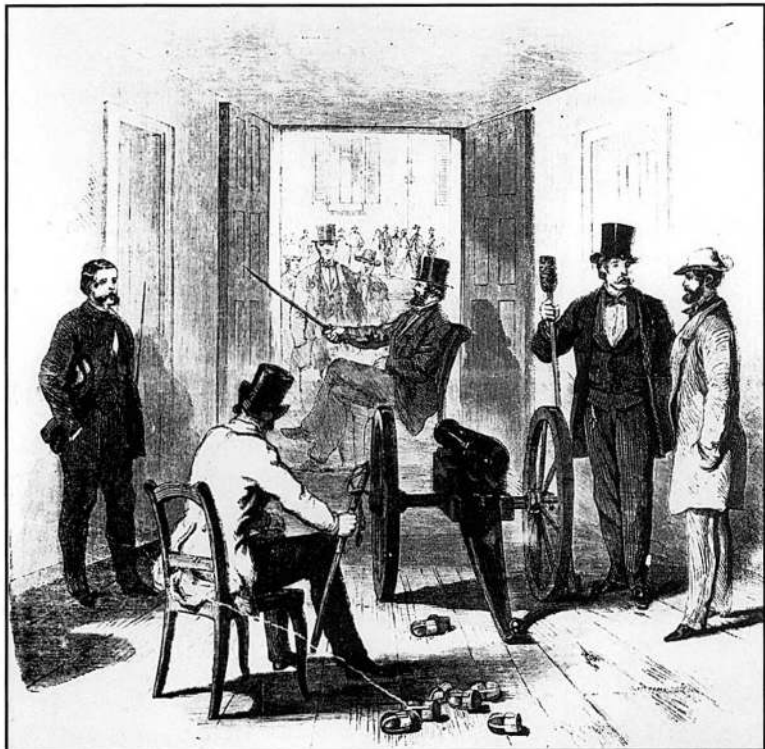
This second volume, more temperate and less judgmental than the first Haines volume cited earlier, is largely the work of Sherwood, who completed it after Haines's death. He finds that, with some modifications, the Taney Court essentially extended the Marshallian themes of growth of national as against state power, expansion of federal judicial power, and protection of property rights, especially corporate. Taney, however, lacked the political sagacity of Marshall. Other writers emphasize continuity as well. Benjamin F. Wright, **The Contract Clause of the Constitution** (Cambridge, MA: Harvard University Press, 1938), finds that although Marshall imbued the Contract Clause with far more of Hamilton's desire to protect property than the Framers anticipated, Taney's principles were close to Marshall's. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), is the only case which comes close to being an exception, and its influence was not felt until after Taney's death. Taney's decisions are properly viewed as a "consolidation and application" of his predecessor's doctrine in this area (63). A closer focus on the *Charles River Bridge* case is available in Stanley I. Kutler, **Privilege and Creative Destruction: The Charles River Bridge Case** (Philadelphia: J.B. Lippincott, 1971). Writing on **The Commerce Clause Under Marshall, Taney, and Waite** (Chapel Hill: University of North Carolina Press, 1937), Justice Felix Frankfurter notes that, through the period of Chief Justice Waite, the Commerce Clause was important as a limitation on state incursions on national policy, rather than as an instrument for furthering commerce on a national scale. In the task of adjusting the federal balance, Taney did not simply oppose states' rights views to Marshall's nationalism, Frankfurter finds, and he is "second only to Marshall in the constitutional history of our country" (73). This appearance of continuity may be deceptive, argues Gerald Garvey in "The Constitutional Revolution of 1837 and the Myth of Marshall's Monolith," 18 *Western Political Quarterly* 27 (1965). Garvey addresses the disagreement over whether Taney significantly departed from the jurisprudence of Marshall in three important cases in 1837: *Charles River Bridge*, *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.)

257, and *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102). It is not simply a question of whether *stare decisis* or the force of new socioeconomic conditions prevailed in these decisions, for Taney found inconsistencies in Marshall's pronouncements on the key issues. Taney was thus able to have it both ways, Garvey argues, adhering to the letter of Marshall's law but giving it new meaning.

On the whole, however, commentators see more similarities than differences. Ben W. Palmer, **Marshall and Taney: Statesmen of the Law** (Minneapolis: University of Minnesota Press, 1939), sees the two as not so far apart on the great issues of federalism and property, and each as in accord with the needs of his own time—though it is hard to say that about *Dred Scott*. Louis B. Boudin's "John Marshall and Roger B. Taney," 24 *Georgetown Law Journal* 864 (1936), draws creative and at times unconventional parallels and contrasts between the two Chief Justices. Marshall was great to the extent that his support of nationalism offset his protection of vested rights; Taney was not so different, though somewhat inconsistent in his nationalism. Taney favored the new over the

old, Boudin argues, and interpretations that would enable rather than cripple government. In "Roger Brooke Taney: Chief Justice of the Supreme Court of the United States (1836-1864)," 24 *Georgetown Law Journal* 809 (1936), William L. Ransom argues that Taney saw a need for states to control corporate power in order to prevent the reverse; he was not opposed to the national commerce power but more concerned with upholding state power touching commerce in an era when national power was not aggressively exercised. On the other great issue of his time, Taney upheld both national and state power to protect the institution of slavery. The *Dred Scott* decision was historically and legally sound, but overreaching, Ransom concludes; Taney was a man of his time, not a molder of the future. R. Kent Newmyer's **The Supreme Court Under Marshall and Taney** (New York: Thomas Y. Crowell, 1968), explores the impact of judicial statesmanship on the American experience. The Marshall Court was more in tune with the values that have endured—nationalism and capitalism—and was instrumental in securing them, Newmyer concludes, whereas the Taney Court bucked the tide

Loyal Unionists in Baltimore guarded the office of the city's provost marshal against the mob. The military arrested citizens suspected of treason, including prominent Baltimorean John Merryman. In a letter to the President that Chief Justice Taney wrote concerning Merryman, he challenged Lincoln's right to take legislative and judicial power and called on him to uphold the law and the courts.



of history with its position on slavery. It did not challenge but adapted the Marshall Court's doctrines, however, and the two courts were more alike than different. Together, Newmyer argues, they established the procedures and traditions of a flexible and pragmatic constitutionalism.

Those who view Taney as a man of his own time invoke the era of Jacksonian democracy. Wallace Mendelson, "Chief Justice Taney—Jacksonian Judge," 12 *University of Pittsburgh Law Review* 381 (1951), characterizes Jacksonian values as popular self-government, negation of governmentally created privilege for the economic elite and substitution of laissez-faire as egalitarian individualism, and preservation of the Union and national sovereignty (with stress on local self-government). The Taney Court furthered these interests but not radical agrarianism, protecting the business climate and upholding national power. It was for legislatures' rights rather than states' rights, Mendelson argues, and even *Dred Scott* was really an attempt to legitimate popular sovereignty. Charles W. Smith, Jr., **Roger B. Taney: Jacksonian Jurist** (Chapel Hill: University of North Carolina Press, 1936), is a useful study of Taney's jurisprudence, which Smith finds is based on the key principles of democracy, the sovereign power of the state, and individual liberty. *Dred Scott*, Smith maintains, was correct in its determination of "sovereign will as written into the Constitution" but nevertheless "a blunder in statecraft" (155). Taney apparently chose the greater of two evils.

Even so, many commentators emphasize his pragmatism. Writing at the height of the conflict between the Hughes Court and the Roosevelt Administration, Dean G. Atcheson in "Roger Brooke Taney: Notes upon Judicial Self Restraint," 31 *Illinois Law Review* 705 (1937), praised Taney's pragmatic approach to applying grand principles in practice as just what the country needed. The one glaring exception to Taney's self-restraint, he noted, was *Dred Scott*. Edwin Borchard, "Taney's Influence on Constitutional Law," 24 *Georgetown Law Journal* 848 (1936), also views Taney as a pragmatist. Borchard agrees with Ransom that the *Dred Scott* decision was historically and legally sound, but overreaching (and he con-

siders Taney to have been personally opposed to slavery). In "Chief Justice Taney: Prophet of Reform and Reaction," 10 *Vanderbilt Law Review* 227 (1957), Robert J. Harris reviews Taney's jurisprudence and major rulings and finds that he was, paradoxically, a spokesman for reform in fostering active use of state police power (which laid the foundations of the welfare state), and for reaction in facilitating dual sovereignty, reading the foundations of substantive due process into the Due Process Clause, and protecting slavery. He would not, however, have approved of all the subsequent uses of his ideas. Constitutional law since 1937, Harris asserts, may be viewed as a blend of Marshall's views on national power and Taney's views on social legislation. A different view of Taney as an intermediary between Marshall and the modern era is offered by Robert Meister in "The Logic and Legacy of *Dred Scott*: Marshall, Taney, and the Sublimation of Republican Thought," 3 *Studies in American Political Development* 199 (1989). While abhorring the *Dred Scott* decision itself, Meister, in a sophisticated argument, maintains that Taney's jurisprudence is a crucial link between that of Marshall and that of the Fourteenth Amendment, with respect to the intersection of private and public law and the issue of minority political identities in a context of federalism.

In his own time, Taney's stands on those issues collided with those of Abraham Lincoln, who thought the Court should overrule its decision in *Dred Scott*. Joseph C. Long, "Ex Parte Merryman: The Showdown Between Two Great Antagonists: Lincoln and Taney," 14 *South Dakota Law Review* 207 (1969), argues that Taney valued protection of constitutional guarantees more than preservation of the union, whereas Lincoln did just the opposite. Lincoln would preserve the union at all costs, but for Taney some costs—such as coercive government—were too high. Long shows how this value conflict played out in *Ex Parte Merryman*, 17 Fed. Cas. 144, No. 9,487 (CC Md. 1861), and other Civil War cases. Sitting in Circuit Court, Taney in *Merryman* denied the President's power to suspend the writ of *habeas corpus*, an opinion Lincoln ignored. Long praises Taney's *Merryman* decision as the only instance in our history where the judiciary has

taken such a stand in wartime. In "Lincoln and Taney: A Study in Constitutional Polarization," 15 *American Journal of Legal History* 199 (1971), Robert M. Spector notes that Lincoln is remembered as the champion of human rights, and Taney as the bigot, because of *Dred Scott*. But the *Merryman* case is another matter, Spector argues; Taney saw not the deified Lincoln of modern understanding but a dangerous threat, employing military power unilaterally to trample civil liberties. Lincoln would ultimately appoint Salmon P. Chase to succeed Taney as Chief Justice, but before that he appointed four other Justices to the Taney Court. David M. Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1956), assesses the changing Court under Lincoln; see also Brian McGinty, "War in the Court," 19(5) *Civil War Times Illustrated* 22 (1980).

Taney's confrontation with Lincoln was the culmination of a long course of legal and political developments, which are recounted in David M. Potter, *The Impending Crisis, 1848-1861* (New York: Harper & Row, 1976), completed and edited by Don E. Fehrenbacher. The *Dred Scott* decision was a catalytic and polarizing event, but William M. Wiecek, "Slavery and Abolition Before the United States Supreme Court, 1820-1860," 65 *Journal of American History* 34 (1978), argues that the decision, though disastrous, was neither sudden nor aberrational, but rather the culmination of two decades of decisionmaking by the Taney Court. We have already noted three other scholars who take that view, which owes much to an early article by the eminent Edward S. Corwin, who in "The *Dred Scott* Decision, in the Light of Contemporary Legal Doctrines," 17 *American Historical Review* 52 (1911), argued that much of Taney's decision was legally defensible but nevertheless "a gross abuse of trust" (68). Taney's premise of the inferiority of blacks was, moreover, unexceptional at the time, concedes A. Leon Higginbotham, Jr., in "The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority," 17 *Cardozo Law Review* 1695 (1996). Higginbotham, a distinguished jurist and commentator on race, law, and politics, analyzes the *Dred Scott* opinion in terms

of ten precepts of slavery jurisprudence culled from antebellum statutes and appellate opinions. These views were, he concludes, no doubt those of the vast majority of whites in 1857.

A good concise source on the *Dred Scott* case is Stanley I. Kutler, ed., *The Dred Scott Decision: Law or Politics?* (Boston: Houghton Mifflin, 1967). Kutler sets the case in historical and political context and provides selections from the opinions in the case, from contemporary editorial, political, and legal commentary, and from evolving historical interpretations. The exhaustive and definitive work on the case is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), which delves deeply into its historical context and consequences, and into the complexity of the proceedings and judicial opinions. "Taney's opinion, carefully read," Fehrenbacher concludes, "proves to be a work of unmitigated partisanship, polemical in spirit though judicial in its language, and more like an ultimatum than a formula for sectional accommodation" (3). In his article "Roger B. Taney and the Sectional Crisis," 43 *Journal of Southern History* 555 (1977), Fehrenbacher evokes Taney's passionate, visceral attachment to the Southern way of life to explain the *Dred Scott* opinion, "a discreditable intellectual performance by an upright man" (565). Carl Brent Swisher, as we have seen earlier, also attributes Taney's opinion to his devotion to the South, but John R. Schmidhauser qualifies that interpretation in "Judicial Behavior and the Sectional Crisis of 1837-1860," 23 *Journal of Politics* 615 (1961). Schmidhauser's scalogram analysis of Supreme Court voting behavior in sectionally divisive cases, 1837-1860, reveals that while four other Southern Democratic Justices had strongly pro-Southern voting records, Taney and John McKinley did not, falling into Schmidhauser's neutral category. Schmidhauser believes that Taney was personally consistently pro-Southern, but that his sense of institutional responsibility led him to moderate his judicial behavior (as seen also in his assignment of opinions in divisive cases).

The *Dred Scott* decision remains at the center of a continuing controversy over whether or not Roger Brooke Taney deserves to be con-

sidered a great Chief Justice, and we have already noted the views of several commentators. Charles Evans Hughes gave considerable impetus to a campaign to rehabilitate Taney's reputation in an address at the unveiling of a bust of Taney in Frederick, Maryland, published as "Roger Brooke Taney," 17 *American Bar Association Journal* 785 (1931). In his address, the Chief Justice praised Taney's positions in many areas—state and national power, economic development, political questions, and civil liberties in wartime. *Dred Scott* was a sincere but foolhardy attempt to do what only war could accomplish; it damaged the Court but not the law. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859), which upheld federal judicial power to enforce national supremacy (by enforcing the Fugitive Slave Law) was Taney's greatest opinion. All in all, Hughes concluded, "he was a great Chief Justice" (790). Hughes' effort was seconded a year later by Monroe Johnson's "Roger B. Taney: A Reappraisal," 66 *United States Law Review* 487 (1932). Taney's words in *Dred Scott* were distorted so as to ascribe to him an attitude toward blacks that he did not personally hold, Johnson maintains, and his stand against nullification in *Ableman v. Booth* only earned him further obloquy, but he persevered, as in the *Merryman* case. More recently, the attack on Taney has resumed. In "'Hooted Down the Page[s] of History: Reconsidering the Greatness of Chief Justice Taney,'" 1994 *Journal of Supreme Court History* 83, Paul Finkelman charts the continuing rise and fall of Taney's reputation among historians and concedes the considerable merit of his positions on state and federal regulation of economic activity. The notion that *Dred Scott* was an aberration, however, is simply wrong; it is merely the most unrestrained example of Taney's efforts, in cases both before and after, to protect slavery and support the Confederacy. Taney's support of racism and slavery, Finkelman argues, must weigh more heavily in the balance of historical judgment than his creativity in the field of economic regulation. Robert L. Stern refuses to concede even that much. In "Chief Justice Taney and the Shadow of *Dred Scott*," 1992 *Journal of Supreme Court History* 39, he finds the Taney Court "essentially pragmatic and unphilosophical," and its deci-

sions outside of the sectional issue generally "sensible." (51). But *Dred Scott* is rightly regarded as a great blot on the record of the Court and its Chief, Stern concludes, and even outside the issue of sectional conflict, Taney was "an able but not a great Chief Justice" (52). Harold M. Hyman and William M. Wiecek do not merely weigh Taney's views on slavery against his positions in other areas, but see the former as undermining the latter. In **Equal Justice Under Law: Constitutional Development 1835-1875** (New York: Harper and Row, 1982), they find that the Taney Court carefully modified Marshall Court doctrines to balance state police power against corporate power and property rights, but that its commerce power decisions were muddled because of the issue of slavery. Taney's *Dred Scott* opinion exemplifies an "error-ridden dogmatism" (190) that was his tragic flaw. "[T]he intensity of his devotion to the welfare of slavery forced lapses in his judgment, aberrations of an otherwise sure instinct for constitutional statesmanship. Roger Taney, not his abolitionist contemnors, was his own worst enemy" (85).

Melville Weston Fuller

Melville Weston Fuller has his admirers and detractors as well, but the disagreements are not about greatness. In reviewing Fuller's significant judicial opinions, Robert P. Reeder, "Chief Justice Fuller," 59 *University of Pennsylvania Law Review* 1 (1910), notes that he seldom wrote for the Court in constitutional cases. Scholarship tends to focus on the Fuller Court rather than on its Chief, and sometimes even then without much enthusiasm. In "The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910," 52 *University of Chicago Law Review* 867 (1985), David P. Currie dutifully reviews Fuller Court cases involving the Full Faith and Credit Clause and the Bill of Rights but reserves his most pungent writing for profiles of the Justices, most of whom he finds unimpressive. "[I]n terms of personnel," Currie laments, "the Fuller period was a drab time in the history of the Court" (897). We should note, however, (and Currie does) that Justices Samuel F. Miller, Stephen J. Field, Joseph P. Bradley, John Marshall Harlan

I, Horace Gray, Edward Douglass White, and Oliver Wendell Holmes, Jr., served at least some time on the Fuller Court; Currie's disdain is reserved for the other twelve.

For a long period, the only serious book on Fuller was Willard L. King, **Melville Weston Fuller: Chief Justice of the United States, 1888-1910** (New York: Macmillan, 1950; reissue, Chicago: University of Chicago Press, 1967). This first biography of Fuller is admiring; it acknowledges that his strength was character rather than intellect and praises his personal qualities and administrative ability. King provides a careful narrative of events, especially those of *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 and 158 U.S. 601 (1895), but does not analyze Fuller's jurisprudence. Fuller's talent as an administrator is his most generally recognized attribute. Arthur W. Spencer, ed., "Judge Putnam's Recollections of Chief Justice Fuller," 22 *Green Bag* 526 (1910), recounts the testimony of Judge William L. Putnam, Fuller's lifelong, intimate friend. Putnam provides a sketch of his early life and character and quotes from a letter from Justice Holmes, who pronounced Fuller's performance as leader of the Court to have been extraordinary.

Two important studies of the Fuller Court have recently appeared. Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910** (New York: Macmillan, 1993), a volume in **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States**, is an interpretive study that rejects the older view of the Fuller Court as simply a protector of the interests of the propertied class. It was not defending class interests but defending liberty—defined almost entirely in terms of limited government—against the social movements of its day. The Court was not, however, solicitous of liberty for Chinese, blacks, or women, Fiss notes. It was not solicitous of equality, either, as indicated by its opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Charles A. Lofgren, **The Plessy Case: A Legal-Historical Interpretation** (New York: Oxford University Press, 1987), is a masterful account of this major civil rights case of the Fuller Court. The second major recent work is James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller, 1888-1910** (Columbia: University of South

Carolina Press, 1995). Ely's revisionism goes further than that of Fiss. Writing in the vein of recent scholarship, which rejects the older view of the turn-of-the-century Court as a mere proponent of Social Darwinism and laissez-faire, Ely sees Fuller as skillfully guiding it through a period of profound transition. Although political and economic conservatives devoted to property rights, limited government, and state autonomy—the dominant values of their time—Fuller and his like-minded colleagues upheld most of the regulatory legislation brought before them. The Fuller Court, Ely argues, accommodated the needs of both the emerging industrial society and the emerging administrative state, propelling the Court into its modern role in the process. In "The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910," 52 *University of Chicago Law Review* 324 (1985), David P. Currie sees not balancing but inconsistency. Currie gives the Fuller Court a mixed review, finding that it was not generally hostile to governmental authority, construing it both broadly and narrowly to protect economic interests. Most state regulations of business were in fact upheld, and the protection of the Contract Clause was significantly curtailed. "The economic decisions of the Fuller years," Currie observes, "were not characterized by great respect for precedent . . . [or by] a meticulous concern for persuasive reasoning" (387-88). Like Ely, Jeffrey B. Morris sees the Court as adapting, but he notes only interim success. In "The Era of Melville Weston Fuller," 1981 *Yearbook of the Supreme Court Historical Society* 37, Morris characterizes the Fuller era, provides brief profiles of the members of the Court, and praises the Chief Justice as a presiding officer and judicial administrator. In fields such as governmental regulation of the economy and race relations, Morris concludes, the Court responded to new forces, adapted to a new role focusing on public law, and was not out of line with the political branches—but made decisions that would need to be reversed.

The Fuller Court is best known for the development of economic substantive due process, and the case that has long been the pivot of interpretation is *Lochner v. New York*, 198 U.S. 45 (1905). The traditional view of the rise

of substantive due process is presented in works such as Benjamin R. Twiss, **Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court** (Princeton, NJ: Princeton University Press, 1942), and Arnold M. Paul, **Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895** (Ithaca, NY: Cornell University Press for the American Historical Association, 1960). Twiss examines the role of leading lawyers, representing business clients, in metamorphosing the ideology of laissez-faire into legal terms and constitutional doctrines which receptive judges turned into the law of the land; Paul argues that in the 1890s the judiciary revolutionized American constitutionalism with a massive intervention in policy making on behalf of property rights and social order. Richard C. Cortner, **The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment** (Westport, CT: Greenwood Press, 1993), provides further background on substantive due process, and James W. Ely, Jr., "The Fuller Court and Takings Jurisprudence," 1996 *Journal of Supreme Court History*, vol. 2, 120, argues that the Fuller Court's support of economic liberty rested not only on its interpretation of the Due Process Clause but also on its more enduring application of the Takings Clause. Paul Kens, in **Judicial Power and Reform Politics: The Anatomy of *Lochner v. New York*** (Lawrence: University Press of Kansas, 1990), has produced a detailed study of the famous case, including an assessment of conditions in the baking industry—which the Court presumed to understand—the labor reform movement, the ideology and politics of the era, the constitutional doctrines of the decision, and their repudiation and contemporary reappearance.

There is now a considerable body of revisionist scholarship on the *Lochner* era. An early example is Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," 61 *Journal of American History* 970 (1975). The jurisprudence of substantive due process was not merely orthodox Social Darwinism invoked on behalf of the rich, McCurdy argues, but a coherent attempt to balance the internally con-

tradictory positions of many interests that favored governmental promotion of business but opposed governmental regulation; it ultimately failed not because it was one-sided in its own time, but because it was not adaptable to rapidly changing socioeconomic conditions. McCurdy's "The Roots of 'Liberty of Contract' Reconsidered: Major Premises in the Law of Employment, 1867-1937," 1984 *Yearbook of the Supreme Court Historical Society* 20, finds a distinction between the status of legislation designed to protect public health and safety and that designed to enhance the bargaining position of workers. Howard Gillman makes a similar point in **The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence** (Durham, NC: Duke University Press, 1993), arguing that from the founding there was a constitutional tradition that permitted general welfare legislation but prohibited class or special interest legislation. *Lochner*-era judges were not simply writing reactionary policy preferences into the law, Gillman maintains, but still operating in that tradition at a time when changing socioeconomic conditions made it no longer neutral but in fact biased towards the affluent class. Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," 1976 *Supreme Court Review* 135, is an early argument that decisions in the late nineteenth and early twentieth centuries were far from uniformly pro-business and anti-regulatory; where the Court used substantive due process against the states it was to achieve uniform national commercial rules indispensable for investment and economic growth. Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," 1983 *Yearbook of the Supreme Court Historical Society* 53, provides further evidence that *Lochner* and a relatively small number of like cases were not typical of Supreme Court decisionmaking in the Progressive Era, and that the Court generally upheld exercises of the police power to protect the interests of workers. Michael Les Benedict's "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law and History Review* 293 (1985), has also been influential, and Mary Cornelia Porter takes stock



Although there was widespread militancy in the labor movement, such as this 1913 demonstration of the I.W.W. in Seattle, that militancy was muted with respect to conservative judicial decisions, probably because of wide respect for the judicial role as guardian of liberty and property, as well as judicial responsiveness to the needs of Progressive groups.

in "Lochner and Company: Revisionism Revisited," in **Liberty, Property, and Government: Constitutional Interpretation Before the New Deal**, Ellen Frankel Paul and Howard Dickman, eds. (Albany: State University of New York Press, 1989). Paul Kens has challenged the revisionist interpretation in two articles, "Lochner v. New York: Rehabilitated and Revised, but Still Reviled," 1995 *Journal of Supreme Court History* 31, and "The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937," 35 *American Journal of Legal History* 70 (1991). Many regulations may have been upheld, Kens argues, but the Court held to the principle that the state's power to intervene in economic and social affairs was narrowly limited, and the legislation that passed muster had to be on its terms.

Alan Furman Westin writes in the progres-

sive tradition in "The Supreme Court, the Populist Movement, and the Campaign of 1896," 15 *Journal of Politics* 3 (1953), where he recounts populist opposition to conservative decisions as a campaign issue in 1896. Taking a much longer view from a much later vantage point, however, William G. Ross in **A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937** (Princeton, NJ: Princeton University Press, 1994), sees several factors muting the militancy of these groups in opposition to the judiciary, including wide respect for the judicial role as guardian of liberty and property, but also judicial responsiveness to their needs.

In a contemporary assessment, William E. Walz, "Chief Justice Fuller, the Individualist on the Bench," 10 *Maine Law Review* 77 (1917), found Fuller's defining characteristic to be his

belief in individualism. The popular sovereignty of free individuals, Walz concludes, was of higher value to Fuller than national sovereignty. Without pausing to consider the logical problems inherent in such a formulation, we may note that it was in the economic field that the free play of individualism was most highly touted, on the basis of a firm belief in the sanctity of the free market. Stephen A. Siegel thus provides a key to understanding the fate of the Fuller Court in "Understanding the *Lochner* Era: Lessons from the Controversy over Railroad and Utility Rate Regulation," 70 *Virginia Law Review* 187 (1984), where he shows how the legal doctrines devised with reference to a free market became less and less workable as the nature of that market changed.

William Howard Taft

Whatever their prospects in the longer run, Fuller's principles were alive and well in the social philosophy of William Howard Taft. In **Liberty Under Law: An Interpretation of the Principles of Our Constitutional Government** (New Haven, CT: Yale University Press, 1922), Taft expressed his faith in individualism, skepticism of too much democracy, and belief in a limited venue for governmental action on behalf of the community. Much earlier, in "The Right of Private Property," 3 *Michigan Law Journal* 215 (1894), Taft had even more forcefully extolled the heritage of liberty and property, sacred and coequal values that must be protected against "the gusty and unthinking passions of temporary majorities" (218). The profit motive is what spurs the development of civilization, and the regulatory attack on corporate capital is a threat to the social fabric. The resort of the wealthy to the courts for protection of these constitutional rights against the depredations of the sovereign majority is "an appeal by the weak against the unjust aggression of the strong" (232). The spectre for Taft was that of socialism, and he expressed misgivings about labor unions as well. He detected a slackening of resolve to protect the rights of liberty and property against the claims of those who do manual labor, and he argued that shortsighted union leaders fail to understand that protection of property rights is ulti-

mately in the interest of the working class. In "The Labor Decisions of Chief Justice Taft," 78 *University of Pennsylvania Law Review* 585 (1930), Alpheus T. Mason in a sympathetic account credits Taft—as state and lower federal judge, President, private citizen, and Chief Justice—with having more influence on the shaping of labor law than anyone else. While acknowledging that Taft's decisions almost always went against labor, Mason sees his approach as evenhanded, recognizing labor rights but guarding against legitimate labor evils. Stanley I. Kutler adopts a similar view in two articles. In "Labor, the Clayton Act, and the Supreme Court," 3 *Labor History* 19 (1962), he acknowledges that the Taft Court would not construe the Clayton Act to favor the interests of labor, but notes that the statute was surely ambiguous. Kutler also shows in "Chief Justice Taft, Judicial Unanimity, and Labor: The *Coronado Case*," 24 *Historian* 68 (1961), that not only Brandeis but Taft induced a majority of the Court to give organized labor some relief from application of the Sherman Antitrust Act to strikes, in *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), and *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925).

The standard biography of Taft is still Henry F. Pringle, **The Life and Times of William Howard Taft**, 2 vol. (New York: Farrar & Rinehart, 1939). Based on unrestricted access to Taft's voluminous papers, this "authorized but not official" (I, vii) account focuses on Taft's character and personality—outwardly jolly but often tortured. His opinions in a few major cases are described but not subjected to close legal analysis. Taft's troubled psyche is probed more deeply by Judith Icke Anderson in **William Howard Taft: An Intimate History** (New York: W.W. Norton, 1981). Anderson covers Taft's life only through his presidency but builds on Pringle's insights by focusing on his "complex psychological make-up and intimate personal history" (14) to shed new light on his personality and behavior. Paolo E. Coletta has written **The Presidency of William Howard Taft** (Lawrence: University Press of Kansas, 1973) and also compiled **William Howard Taft: A Bibliography** (Westport, CT: Meckler, 1989), a compilation of works by and about Taft that em-

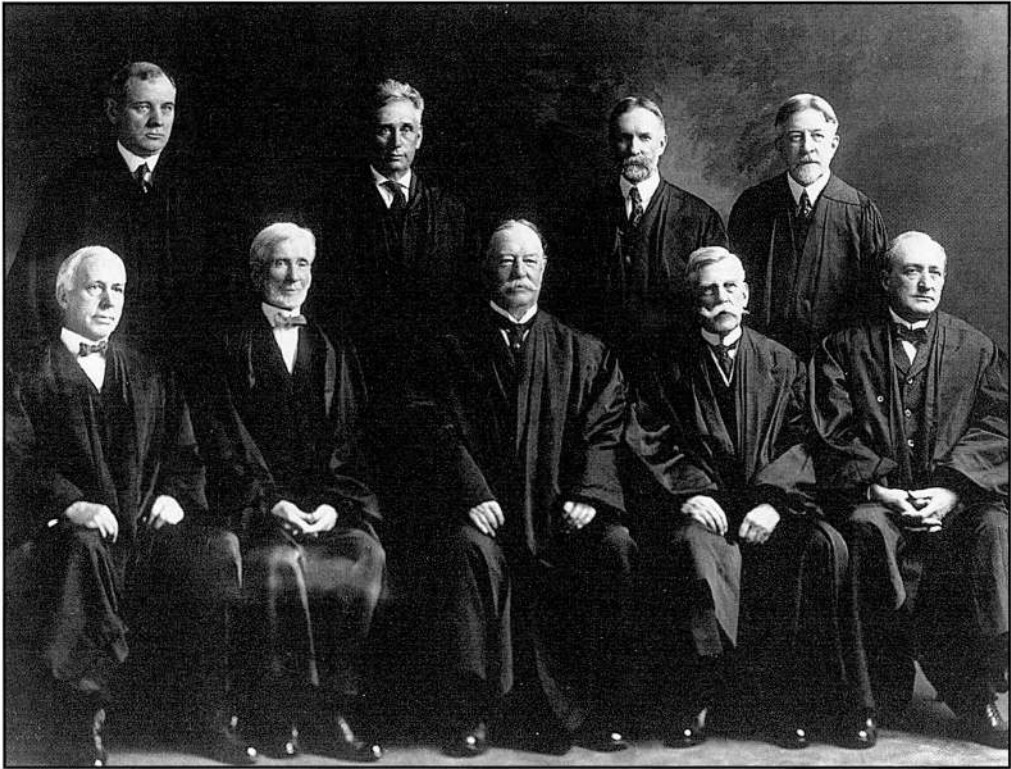
phasizes his presidency but also has material on his chief justiceship and personal characteristics.

Taft is widely praised as an able administrator and effective proponent of judicial reform, and he was in his element playing those roles as Chief Justice. Jeffrey B. Morris's, "What Heaven Must Be Like: William Howard Taft as Chief Justice, 1921-30," 1983 *Yearbook of the Supreme Court Historical Society* 80, focuses on Taft as judicial administrator, including his attempts to mass the Court in favor of conservative outcomes. In "Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration," 24 *Journal of Politics* 453 (1962), Walter F. Murphy discusses Taft's efforts to promote teamwork in the federal judiciary—perhaps best described as lower court support of Supreme Court rulings—by working for judicial reform, especially the creation of the Judicial Conference in the Judiciary Act of 1922, and by attempting to influence judicial appointments. See also Murphy's "Marshaling the Court: Leadership, Bargaining, and the Judicial Process," 29 *University of Chicago Law Review* 640 (1962). Before turning to more controversial pursuits, Kenneth W. Starr wrote "William Howard Taft: The Chief Justice as Judicial Architect," 60 *University of Cincinnati Law Review* 963 (1992), in which he praises Taft for providing executive direction to an inefficient and backlogged federal judiciary (in the process breaking the tradition that the Chief Justice did not lobby Congress). Taft secured passage of the Judges' Bill of 1925, allowing the Supreme Court effective discretion over its docket, whereupon its backlog was eliminated. The Supreme Court could focus exclusively on larger questions, and the Courts of Appeal gained stature as the final authority in a greater number of cases. Taft also secured approval for a new Supreme Court building (which he never saw) and lobbied for simpler rules of civil procedure. Taft explained the reform statute in "The Jurisdiction of the Supreme Court under the Act of February 13, 1925," 35 *Yale Law Journal* 1 (1925), and Felix Frankfurter and James M. Landis provide a contemporary evaluation of his judicial reforms in **The Business of the Supreme Court** (New York: Macmillan, 1927). Taft well understood that efficient—and cor-

rect—judicial decisionmaking depended on having the right judges on the bench. Alexander M. Bickel, "Mr. Taft Rehabilitates the Court," 79 *Yale Law Journal* 1 (1969) discusses President Taft's Supreme Court appointments, and Walter F. Murphy's "In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments," 1961 *Supreme Court Review* 159, recounts Chief Justice Taft's active role in influencing nominations to his Court as vacancies occurred.

In his survey of the constitutional decisions of the Taft years, "The Constitution in the Supreme Court: 1921-1930," 1986 *Duke Law Journal* 65, David P. Currie finds that the views of the Court were the views of Taft. The Chief Justice was in the minority in only a very few constitutional cases, he notes, and dissented only once, in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). Issues of national power and the federal balance, as well as issues of liberty and property rights, were central in that era. In "Chief Justice Taft, National Regulation, and the Commerce Power," 51 *Journal of American History* 651 (1965), Stanley I. Kutler argues that Taft's broad interpretation of the national commerce power is the one aspect of his jurisprudence that has endured, and that it provided an important line of precedent for the constitutional revolution that began in 1937. Robert C. Post's "Chief Justice William Howard Taft and the Concept of Federalism," 9 *Constitutional Commentary* 199 (1992), rejects the simplistic notion of federalism as the issue of national versus state power. Post elaborates four strands of the concept of federalism and draws a subtle and complex portrait of Taft and his values in the process. Taft's positions in relation to those of the Four Horsemen on the one hand and Holmes and Brandeis on the other are richly nuanced, Post argues, and his overall stance of individualistic nationalism is reminiscent of—surprise—Justice William J. Brennan.

Stanley I. Kutler wrote another, slightly earlier article on Taft that was less charitable than the one already noted. In "Chief Justice Taft and the Delusion of Judicial Exactness—A Study in Jurisprudence," 48 *Virginia Law Review* 1407 (1962), he argues that in addition to his political and economic conservatism, Taft exhibited a jurisprudential posture of belief in



Constitutional scholar David P. Currie has found that the views of the Taft Court (pictured) were the views of William H. Taft. The Chief Justice was in the minority in only a very few constitutional cases, Currie notes, and dissented only once, in *Adkins v. Children's Hospital*. Standing from left to right are Pierce Butler, Louis D. Brandeis, George Sutherland, and Edward Sanford. Sitting from left to right are Pierce Butler, Joseph McKenna, Chief Justice Taft, Oliver Wendell Holmes, Jr., and James C. McReynolds.

the received law and a search for logical consistency and certitude as a barrier against chaos. Thus he eschewed novelty in the law and sought to eliminate vagueness with precise and enduring formulations. The static approach was doomed, Kutler concludes; Taft created little that has survived and, ironically, his most notable influence on the law may be his dissent in *Adkins v. Children's Hospital*.

Alpheus Thomas Mason provides much useful information about Taft, and about his successor, Hughes, in his masterful biography **Harlan Fiske Stone: Pillar of the Law** (New York: Viking Press, 1956; reprint, Hamden, CT: Archon Books, 1968). Mason next planned a synthesizing work on the office and powers of the Chief Justice, comparable to the volume on the presidential office by his predecessor as McCormick Professor of Jurisprudence at Princeton, Edward S. Corwin. He became so intrigued with the material he had gathered on

Taft, however, that he wrote instead the most important study of his tenure on the Court: **William Howard Taft: Chief Justice** (New York: Simon and Schuster, 1965; reprint, Lanham, MD: University Press of America, 1983), followed a year later by "Chief Justice Taft at the Helm," 18 *Vanderbilt Law Review* 367 (1965). In the book, a topical rather than narrative examination of the Taft chief justiceship, Mason pursues the connection between Taft the Social Darwinist opponent of social democracy and Taft the zealous proponent of judicial reform, finding it in the proposition that an efficient and fair system of justice could make social reform both less justified and less likely. Taft was thus highly effective but fatally short-sighted. Expanding on this theme in "President by Chance, Chief Justice by Choice," 55 *American Bar Association Journal* 35 (1969), Mason asserts that Taft, with Fuller and Hughes, was one of the three best administra-

tors among Chief Justices, was a masterful architect and reformer of the judicial system, wrote important early civil liberties decisions, and wrote commerce power decisions that laid the foundation for the constitutional revolution of 1937. Only John Marshall rivals him in his expansive conception and effective use of the office—yet Taft does not rank among the great Chief Justices. Justices must have “the ability to weigh realistically the strength of the popular will and its claims to prevail.” Because of his devotion to *laissez-faire* and fear of social democracy, Mason concludes, Taft (and many contemporaries) “did not fully meet this test” (39).

Charles Evans Hughes

By the time Charles Evans Hughes became Chief Justice in 1930, he had already been governor of New York, served as an Associate Justice on the Supreme Court (1910-1916), run for President of the United States, been president of the American Bar Association, served as Secretary of State, served on the Permanent Court of International Justice, and written a book about the Supreme Court. The book is **The Supreme Court of the United States: Its Foundation, Methods, and Achievements: An Interpretation** (New York: Columbia University Press, 1928; reprint 1966), an explanation of the Supreme Court and its accomplishments, intended for the layman. Discussions of Hughes’ service as Associate Justice are available in Arthur M. Allen, “The Opinions of Mr. Justice Hughes,” 16 *Columbia Law Review* 565 (1916), a laudatory account, and in a Note: “Governor Hughes on the Bench: Charles Evans Hughes as Associate Justice,” 89 *Harvard Law Review* 961 (1976), which argues that the great changes in the Court that occurred during Hughes’ chief justiceship were foreshadowed by the earlier associate justiceship of the man who had been a reform governor of New York.

The standard biography of Hughes is still Merlo J. Pusey, **Charles Evans Hughes**, 2 vol. (New York: Macmillan, 1951; reprint, New York: Garland Publishing, 1979). In preparing this authorized biography, most of which deals with Hughes’ life and career prior to the chief justiceship, Pusey had access to the Hughes pa-

pers and in fact based his account primarily on numerous interviews with Hughes and on extensive autobiographical notes that he prepared. Pusey discusses his relationship with Hughes and the process of composition in “The Hughes Biography: Some Personal Reflections,” 1984 *Yearbook of the Supreme Court Historical Society* 45. The biography is unabashedly flattering, characterizing Hughes as consistently brilliant, scrupulous, principled, flexible, and statesmanlike. Pusey sees Hughes and his opinions in major New Deal cases as the sensible center between judges who would petrify the Constitution and politicians who would flout it. Hughes’ opinions in commerce power cases were consistent throughout, Pusey maintains, only changing in emphasis as Congress learned to draft legislation that met constitutional requirements. Thomas Reed Powell is highly favorable to the Hughes-Pusey collaboration, to the book, and to Hughes in “Charles Evans Hughes,” 67 *Political Science Quarterly* 161 (1952); for a different perspective see Alpheus Thomas Mason, “Charles Evans Hughes: An Appeal to the Bar of History,” 6 *Vanderbilt Law Review* 1 (1952). David J. Danelski and Joseph S. Tulchin have edited the Hughes manuscript in **The Autobiographical Notes of Charles Evans Hughes** (Cambridge, MA: Harvard University Press, 1973). The understated premise of this volume is that Hughes provided a more balanced portrait of himself than did Pusey in his gloss on the notes, and the editors also contribute their own introduction of more objective praise. Hughes’ personal qualities are the focus of an admiring Paul A. Freund in “Chief Justice Charles Evans Hughes,” a section of Richard B. Morris, Paul A. Freund, and Herbert Wechsler, “Columbians as Chief Justices: John Jay, Charles Evans Hughes, and Harlan Fiske Stone,” 1988 *Yearbook of the Supreme Court Historical Society* 66, 70.

The defining issue for the Hughes Court was its relationship to President Franklin D. Roosevelt’s New Deal—before, during, and after the Court-packing crisis of 1937. In **The Supreme Court Reborn** (New York: Oxford University Press, 1995), William E. Leuchtenburg draws on extensive archival research in the papers and diaries of participants to provide an

especially rich chronicle of the development of the Court-packing plan in preference to many alternative strategies, and he also analyzes the defeat of the plan in Congress and the revolution in Court decisionmaking that began in 1937. Leuchtenburg writes in a tradition flowing from such works as Edward S. Corwin's **Constitutional Revolution, Ltd.** (Claremont, CA: Claremont Colleges, 1941; reprint, Westport, CT: Greenwood Press, 1977), which see the Hughes Court as making major doctrinal shifts starting in 1937 and frequently cite political pressure from President Roosevelt as the explanation. Much discussion centers on the consistency of Hughes' position through this shift. His biographer, as we have seen, finds him true to his principles, upholding later statutes only in response to improved legislative performance; Alpheus Thomas Mason, on the other hand, in **The Supreme Court: Palladium of Freedom** (Ann Arbor: University of Michigan Press, 1962), argues that Hughes was motivated by expediency in shifting his ground but camouflaging the shift to preserve the appearance of judicial stability. See also Mason's account of the Court-packing episode and unflattering portrait of Hughes in **The Supreme Court: Vehicle of Revealed Truth or Power Group, 1930-1937** (Boston: Boston University Press, 1953). Samuel Hendel finds middle ground in **Charles Evans Hughes and the Supreme Court** (New York: King's Crown Press, Columbia University, 1951), and "The 'Liberalism' of Chief Justice Hughes," 10 *Vanderbilt Law Review* 259 (1957). Mason overstates the case in suggesting that Hughes was basically an extreme conservative opposed to democratic pressures for governmental action; on the other hand, Pusey is disingenuous in claiming that Hughes did not change course in 1937 but simply acknowledged better legislative draftsmanship. Hendel finds Hughes liberal on civil rights and liberties, and moderately conservative on economic and social issues before 1937 but essentially liberal thereafter. He concedes Hughes' penchant for distinguishing cases where logic called for overruling, finding that Hughes' great concern for the prestige of the Court and the continuity of its pronouncements was challenged by his recognition of the forces of political, economic, and social change. Because

Hughes was not ideologically doctrinaire, Hendel concludes, he could respond to that need. F. D. G. Ribble, "The Constitutional Doctrines of Chief Justice Hughes," 41 *Columbia Law Review* 1190 (1941), suggests that Hughes' disinclination to overrule was an aspect of his concern for consistency, and that in 1937 he may have treated earlier cases gently in order to facilitate Justice Owen J. Roberts' switch—the crucial fifth vote. Ribble also praises Hughes' support for such civil liberties as speech and press, which he finds no less strong than his support for property rights. Robert L. Stern, "The Court-Packing Plan and the Commerce Clause," 1988 *Yearbook of the Supreme Court Historical Society* 91, finds that Hughes' claim that his position in commerce power cases before and after 1937 was consistent, and thus perhaps not influenced by pressure from FDR, may be credible; Richard D. Friedman, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *University of Pennsylvania Law Review* 1891 (1994), is convinced that it is.

The principal challenge to the traditional view that the Hughes Court was at first recalcitrant but then shifted ground radically in response to political pressure comes from Barry Cushman, whose most recent work appears in this volume. In "Rethinking the New Deal Court," 80 *Virginia Law Review* 201 (1994), Cushman makes the case that the Court's shift in the areas of substantive due process and the commerce and tax powers was not simply the result of the Court-packing plan or the election of 1936 but was rather the product of factors internal to the judicial process. The first round of the New Deal battle was characterized by sloppy draftsmanship of statutes and flawed selection and argumentation of test cases, whereas the statutes of the second round were competently drafted and the cases carefully selected and argued. Further, Cushman asserts here and elsewhere that the Justices should be given credit for deciding cases on the basis of an intellectual environment of constitutional doctrines, premises, and principles that they consciously and conscientiously create, evolve, and modify as required to perform their judicial function. As an example, Cushman cites Hughes' treatment of the

commerce power in "A Stream of Legal Consciousness: The Current of Commerce Doctrine from *Swift* to *Jones & Laughlin*," 61 *Fordham Law Review* 105 (1992). For further information on the Hughes Court and the New Deal, and on *Lochner*-era jurisprudence as well, see the sources cited in John B. Taylor, "Politics, the Court, and the Constitution: A Bibliographical Essay on the Pre- and Post-New Deal Supreme Court," 1997 *Journal of Supreme Court History* vol. 1, 99.

Professor Ribble is not alone in his praise for Hughes' support for civil liberties; R. Perry Sentell, Jr., "The Opinions of Hughes and Sutherland and the Rights of the Individual," 15 *Vanderbilt Law Review* 559 (1962), finds Hughes very sensitive to infringements of civil liberties most of the time, and the economic conservative Justice George Sutherland not far behind. Daniel Hildebrand discerns important connections between civil liberties and central issues of economic regulation and national power. In "Free Speech and Constitutional Transformation," 10 *Constitutional Commentary* 133 (1993), Hildebrand argues that Chief Justice Hughes and Justice Roberts were the authors of a focus on free speech that became central to democratic government. Two 1931 cases—*Near v. Minnesota*, 283 U.S. 697 and *Stromberg v. California*, 283 U.S. 359—blazed an early trail for civil liberties and, in mandating national judicial control of local repression, anticipated the comparable nationalism of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) and, with *Powell v. Alabama*, 287 U.S. 45 (1932), the incorporation of the Bill of Rights, which began in systematic fashion in *Palko v. Connecticut*, 302 U.S. 319 (1937). Justice Stone's famous Footnote Four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), to which Hughes contributed, cites all six of the Hughes Court's free speech decisions and, Hildebrand argues, "is best read as a belated acknowledgement of continuity between the recent Commerce Clause cases, the First Amendment decisions and the protection of fundamental liberties provided by *Palko*" (136). In the area of civil rights, A. Leon Higginbotham, Jr., and William C. Smith, "The Hughes Court and the Beginning of the End of

the 'Separate But Equal' Doctrine," 76 *Minnesota Law Review* 1099 (1992), credit Hughes with having "relatively progressive racial views" (1106) and recount the first steps toward racial justice taken by the Court during his tenure. In "The Court of Chief Justice Hughes: Contributions to Civil Liberties," 12 *Wayne Law Review* 535 (1966), Merle William Loper focuses on the First Amendment, equal protection, and criminal procedure and credits the Hughes Court with considerable achievement, within the bounds of the contemporaneous movement away from judicial activism. The Chief Justice imposed coherence on this process even as the Court was rife with dissension, Loper finds, carefully guiding conference discussion, assigning opinions judiciously, and exerting great influence in the promulgation of *per curiam* opinions, where his discretion was apparently virtually unfettered.

Hughes' administrative ability is often praised. In "The Business of the Supreme Court as Conducted by Chief Justice Hughes," 63 *Harvard Law Review* 5 (1949), Edwin McElwain, Hughes' law clerk for three years, provides a descriptive account of his style as a leader in conference and oral argument and recounts his care in handling *in forma pauperis* cases. Justice Felix Frankfurter, who served with him for two Terms, assesses "'The Administrative Side' of Chief Justice Hughes," at 63 *Harvard Law Review* 1 (1949). Frankfurter praises Hughes for bringing matters to resolution efficiently and gracefully, comparing him to the conductor of an orchestra in guiding Conference discussion and to a general deploying an army in the assignment of opinions. Frankfurter equates Hughes' performance with Holmes' assessment of Fuller, noted earlier. Stacia L. Haynie offers a dissenting view in "Leadership and Consensus on the U.S. Supreme Court," 54 *Journal of Politics* 1158 (1992). Although Hughes is routinely praised for the quality of his task and social leadership, Haynie argues that the lack of cohesion so prominent on the Stone Court really began with the Hughes Court, as reflected in the rise of dissenting and, especially, concurring opinions, and that Hughes' leadership style was a contributing factor. Peter G. Fish relates Hughes to his predecessor rather than to his successor in

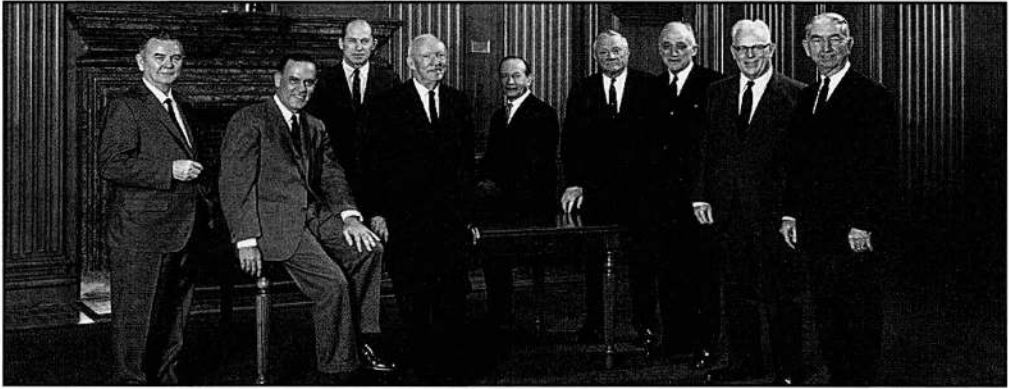
“William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers,” 1975 *Supreme Court Review* 123. Fish sees both men working to improve administrative efficiency within the judicial system to ward off majoritarian influences—Taft to protect property rights from state governmental regulation and Hughes to preserve judicial independence, especially against national executive encroachments. The two types of conservative reform were quite different, Fish concludes, but both had implications for public policy and hence were political.

Just as John Marshall confronted Thomas Jefferson and Roger Brooke Taney confronted Abraham Lincoln, so Charles Evans Hughes confronted Franklin D. Roosevelt. The need in 1937 was to accommodate the policy needs of the country without undermining the integrity of the Court. In his broad survey of the impact of the New Deal on the American legal order, “The Great Depression, the New Deal, and the American Legal Order,” 59 *Washington Law Review* 723 (1984), Michael E. Parrish credits Hughes with rescuing the power of judicial review and emerging as a progressive leader with his reputation and integrity intact (even though he had been an opponent of this course as late as 1936). In his brief biography **Charles Evans Hughes and American Democratic Statesmanship** (Boston: Little, Brown, 1956), Dexter Perkins finds Hughes’ statesmanship—throughout his career—in his balancing of liberal and conservative sentiments and in his flexible approaches to changing circumstances. With the notable exception of Alpheus Thomas Mason, scholars tend to agree with the assessment of Paul A. Freund in “Charles Evans Hughes as Chief Justice,” 81 *Harvard Law Review* 4 (1967). In this highly favorable account, Freund evaluates Hughes as a strong proponent of civil liberties, no enemy of welfare legislation, and an excellent administrator, who did a superb job of presiding over a fractious Court. Hughes defended the Court in his famous letter to the Senate Judiciary Committee during the Court-packing crisis while at the same time employing “nice distinctions” to achieve “creative continuity” (35) as he changed policy direction. The crisis Hughes faced is matched only by the challenges of the Marshall era, Freund concludes,

and whereas Marshall saw his Court gradually slip away, Hughes remained at the helm as he charted a new course for his.

Earl Warren

John Marshall took office in search of cases that would allow him to put his mark upon the Court and that would allow the Court to put its mark upon the nation; Earl Warren took office with such a case *in medias res*: *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955). The result, of course, was one of the most influential Supreme Court decisions ever rendered, and although President Eisenhower is commonly portrayed as less than enthusiastic about that result, Michael A. Kahn argues in “Shattering the Myth About President Eisenhower’s Supreme Court Appointments,” 22 *Presidential Studies Quarterly* 47 (1992), that in appointing Earl Warren (and in making his four other nominations), Eisenhower intended to steer the Court toward liberal decisions in the area of civil rights. Richard Kluger tells the story of the great case in **Simple Justice: The History of *Brown v. Board of Education* and Black America’s Struggle for Equality** (New York: Alfred A. Knopf, 1976), and gives Warren much credit for achieving the unanimity that was so important for the moral authority of the decision. Drawing on the papers of Justice Harold H. Burton, S. Sidney Ulmer also emphasizes Warren’s role in securing unanimity in “Earl Warren and the *Brown* Decision,” 33 *Journal of Politics* 689 (1971). Taking a longer view, Dennis J. Hutchinson charts the rise and fall of unanimity in the segregation cases over the period immediately before and after *Brown* in “Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,” 68 *Georgetown Law Journal* 1 (1979). An examination of the influence of ideas and doctrines as well as personality shows that Chief Justice Warren played a significant role, Hutchinson argues, but momentum for unanimity had begun by the time of the three important cases of 1950 (*Sweatt v. Painter*, 339 U.S. 629, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, and *Henderson v. United States*, 339 U.S. 816). Mark Tushnet, with Katya Lezin, refocuses on the *Brown* case itself in “What



Racial equality was the most prominent of many areas of legal innovation by the Warren Court; others included legislative apportionment (which Warren ranked as most important), freedom of speech and press, separation of church and state, privacy, and the treatment of criminal offenders. Members of the Warren Court posed informally in the East Conference room: (left to right) William J. Brennan, Potter Stewart, Byron R. White, Hugo L. Black, Abe Fortas, William O. Douglas, John Marshall Harlan, Chief Justice Earl Warren, and Tom C. Clark.

Really Happened in *Brown v. Board of Education*,” 91 *Columbia Law Review* 1867 (1991). On the basis of an exhaustive review of the inner workings of the Court in the drawn-out process of deciding *Brown*, Tushnet revises previous accounts but agrees that Earl Warren played a crucial role in reconciling the conflicting views of the Justices. The one thing Warren did not have to do to accomplish this result was make major changes in his proposed opinion for the Court, as Bernard Schwartz shows in **The Unpublished Opinions of the Warren Court** (New York: Oxford University Press, 1985). The draft *Brown* opinion thus stands in marked contrast to those in ten other major cases Schwartz presents, which the Warren Court went on to decide differently, including *Bell v. Maryland*, 378 U.S. 226 (1964), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Racial equality was the most prominent of many areas of legal innovation by the Warren Court; others included legislative apportionment (which Warren ranked as most important), freedom of speech and press, separation of church and state, privacy, and the treatment of criminal offenders. In **The Warren Court: A Retrospective** (New York: Oxford University Press, 1996), Bernard Schwartz has edited a balanced and thoughtful collection of essays that is essential for a full understanding of Earl Warren and his Court. This comprehensive re-

view and evaluation of the Warren Court and its work by a distinguished group of legal scholars and professionals includes essays on jurisprudence in major fields, profiles of leading members of the Court, and a series of evaluative essays that set the Warren Court in historical and legal perspective. Schwartz’s **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (New York: New York University Press, 1983), is a comprehensive reconstruction of the Court’s handling of the important cases and events of the Warren years, based on a thorough review of the notes and papers of the Justices and extensive interviews with Justices and law clerks. Two major collections of essays appeared in 1968, at the time Warren originally intended to retire. One is a lengthy symposium on the Warren Court in 67 *Michigan Law Review* 219 (1968), which provides assessments of the Court’s work in seven areas of the law and also analyses of the Court’s role in the political process and its coverage by the press. **The Warren Court: A Critical Analysis** (New York: Chelsea House, 1969), edited by Richard H. Saylor, Barry B. Boyer, and Robert E. Gooding, Jr., includes essays by prominent scholars on Warren Court decisionmaking in nine areas of the law, plus Anthony Lewis’s essay on Warren and Philip Kurland’s piece of designated devil’s advocacy, in which he finds the attribution of greatness to Warren “extravagant and premature” (167).

Kurland's is by no means the only negative view, and Clifford M. Lytle, **The Warren Court & Its Critics** (Tucson: University of Arizona Press, 1968), classifies and analyzes criticism of the early Warren Court emanating from a variety of sources. G. Theodore Mitau's **Decade of Decision: The Supreme Court and the Constitutional Revolution 1954-1964** (New York: Charles Scribner's Sons, 1967), discusses path-breaking decisions of the Warren Court in six areas of law and policy and the issues of compliance that ensued. Richard Y. Funston takes up at the point where Mitau leaves off and is highly critical in **Constitutional Counter-revolution? The Warren and the Burger Court: Judicial Policymaking in Modern America** (Cambridge, MA: Schenkman; New York: distributed by Halsted Press, 1977). A reformist Warren Court, he maintains, became radical in 1964, pursuing nationalization of political processes and issues and an egalitarianism not found in the Framers' Constitution. Other vices, according to Funston, include aggrandizing power, showing contempt for legislatures, enforcing unenumerated constitutional rights, lacking a sense of political reality, and writing poor opinions. John Denton Carter, **The Warren Court and the Constitution** (Gretna, LA: Pelican Publ. Co., 1973), is a diatribe against the tyranny of judicial activism in the service of a liberal intellectual elite. Philip B. Kurland weighs in with further (and more elevated) criticism in **Politics, the Constitution, and the Warren Court** (Chicago: University of Chicago Press, 1970). Kurland's purpose in these published lectures "is to dissipate some of the promulgated romance about the Warren Court" (xi). He sees that Court acting much like a legislature and identifies three basic shortcomings of that approach: a penchant for announcing broad rules rather than simply deciding concrete cases, a failure to recognize the Court's lack of capacity for gathering the information on which such rules should be based and its lack of machinery for enforcing them, and, most serious, the Court's tendency to coerce where it could not persuade. The price of these failures was great popular mistrust of the Court and, Kurland concludes with some hyperbole, a general disrespect for law which led three Presidents and five Congresses to pursue an

unconstitutional war in Vietnam. Archibald Cox disagrees in **The Warren Court: Constitutional Decision as an Instrument of Reform** (Cambridge, MA: Harvard University Press, 1968). Cox, who believes that the task of constitutional adjudication inevitably forces the Court at times to choose between desirable policy-making and the logic of the law, examines the Warren Court's handling of that dilemma. Though acknowledging that it risked undermining the continuity and force of law on which its own authority depends, Cox concludes that the Warren Court's contributions to political and social justice in many fields were worth the risk. In his edited volume **The Supreme Court Under Earl Warren** (New York: Quadrangle Books, 1972), Leonard W. Levy praises the crusade for liberty and justice of the Warren Court, "the first *liberal* activist court in our history" (16), but also questions its methods. Other contributors examine the evolution of the Court under Warren, paint portraits of Warren, Hugo L. Black, and Frankfurter, and evaluate the Warren Court, bestowing both high praise and trenchant criticism. Mark Tushnet enlarges upon the ideological theme in his edited volume, **The Warren Court in Historical and Political Perspective** (Charlottesville: University Press of Virginia, 1993). The editor's essay sets the Warren Court in historical context as the Court of the political liberalism that began with the New Deal and culminated in the Great Society (while noting as well that some of its rulings contributed to the unraveling of the dominant liberal coalition). Essays by other contributors examine the Court's work from the perspective of several of its major and two of its lesser members.

Readers seeking to learn about Warren the man will not find much revelation in his own writings. **The Public Papers of Chief Justice Earl Warren**, edited by Henry M. Christman (New York: Simon and Schuster, 1959), contain selected addresses by Warren while governor of California and Chief Justice, and selected Supreme Court opinions, through 1958. They are characteristically unrevealing, and the same may be said of **The Memoirs of Earl Warren** (Garden City, NY: Doubleday, 1977). This posthumous volume, for which Warren had almost finished a rough first draft when he died, con-

tains uneven comments on some events and cases, including *Brown*. Warren's **A Republic, If You Can Keep It** (New York: Quadrangle Books, 1972), is a collection of his thoughts on responsible citizenship and liberty. Insight from some who knew him well may be found in brief reminiscences collected in "Earl Warren: A Tribute," 58 *California Law Review* 3 (1970), and in remembrances by Justice William J. Brennan, Jr., Charles L. Black, Jr., Louis H. Pollak, and John Hart Ely, collected at 88 *Harvard Law Review* 1, 6, 8, 11 (1974). Written upon Warren's death, the latter pieces emphasize his personal decency and his stature as a force for public morality. Four biographies describe Warren's career but do not analyze his jurisprudence: John D. Weaver, **Warren: The Man, The Court, The Era** (Boston: Little, Brown, 1967); Leo Katcher, **Earl Warren: A Political Biography** (New York: McGraw Hill, 1967); Jack Harrison Pollack, **Earl Warren: The Judge Who Changed America** (Englewood Cliffs, NJ: Prentice-Hall, 1979); Ed Cray, **Chief Justice: A Biography of Earl Warren** (New York: Simon and Schuster, 1997). The one major, scholarly biography is G. Edward White's **Earl Warren: A Public Life** (New York: Oxford University Press, 1982). White, who clerked for the Chief Justice, sets out to replace what he perceives as conventional misunderstandings of the man with his own interpretations: he was not a conservative California politician but a progressive who evolved into a liberal, he did not undergo a metamorphosis of opinion on the Court under the sway of Justices Black and Douglas, he was a legal craftsman of a distinctive sort whose approach combined ethical principles and judicial activism, and he was not a bland and ordinary fellow. His greatness, White acknowledges, rests on the correctness of his principles, not the quality of his jurisprudence. Warren, who "embodied attitudes rather than contributing to their intellectual development," was in White's eyes "nonetheless a great man, not only for what he embodied but also for what he accomplished" (369).

As we have seen in our discussion of the other Chief Justices, the assessment of greatness is a theme to which scholars often repair. The consensus seems to be that John Marshall and Charles Evans Hughes were great and that

Melville Weston Fuller and William Howard Taft fell short; the cases of Roger Brooke Taney and Earl Warren are more contentious. James A. Gazell discusses "Chief Justice Warren's Neglected Accomplishments in Federal Judicial Administration" at 5 *Pepperdine Law Review* 437 (1978) and ranks Warren with Taft, Hughes, and Warren Burger as a judicial administrator, but the real debate concerns judicial activism and judicial craftsmanship, and evaluation of Warren blends inevitably with evaluation of the Warren Court. Attacking from the right, L. Brent Bozell in **The Warren Revolution** (New Rochelle, NY: Arlington House, 1966) decries the Warren Court's decrees moving the solution of various problems out of the open political process and reserving them for the judiciary alone (as if that were possible). Bozell finds the Court asserting a revolutionary degree of final authority to interpret the Constitution and rejects its imposition of its views on the country. Alexander M. Bickel expresses similar concerns in much more reasoned form. In **Politics and the Warren Court** (New York: Harper and Row, 1965), a series of revised versions of previously published articles on civil rights, reapportionment, and religion in the schools, Bickel's theme is the danger of relying too much on the legal process for social ordering, and not enough on the processes of political accommodation. In **The Supreme Court and the Idea of Progress** (New Haven, CT: Yale University Press, 1978), Bickel emphasizes the importance for the judicial function of rationality, principle, and analytical rigor, and he is disturbed by the degree of subjectivity he finds in the rulings of the Warren Court. For further analysis of this problem, sensitive to Bickel's concerns but sympathetic to Warren, see John Hart Ely, **Democracy and Distrust: A Theory of Judicial Review** (Cambridge, MA: Harvard University Press, 1980), especially chapter three, "Discovering Fundamental Values," but see also Martin Shapiro, **Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence** (New York: Free Press of Glencoe, 1964). In "Policy in Search of Law: the Warren Court from *Brown* to *Miranda*," 9 *Journal of American Studies* 301 (1975), Richard A. Maidment admires the Warren Court's policies on segregation, reapportionment, and the rights

of criminal suspects, but he finds its opinions in major cases to be insubstantial, deficient in the elements of traditional legal argument. Unlike earlier activist Courts, the Warren Court did not reason from history, precedent, and constitutional intent; it made policy. The Court thus became an unelected legislature, Mardment concludes, inimical to the democratic political process. Critics of those earlier Courts, of course, find them guilty of the same offenses. In a skeptical evaluation, "Earl Warren, the 'Warren Court,' and the Warren Myths," 67 *Michigan Law Review* 353 (1968), Philip B. Kurland asserts that Warren was "deserving neither of the simpering adulation of his admirers nor of the vitriolic abuse of his detractors" (353). He was certainly not the intellectual leader of the Court; it formed him more than he formed it. It was too early to tell whether the modest results of the Warren Court's work (as in desegregation and the abolition of school prayer) were on the side of history, Kurland concludes, but if they were, Warren may be deemed great because of the place he held. Nine years later in "Self Portrait of a Jurist—Without Warts," 87 *Yale Law Journal* 225 (1977), an acid review of Warren's memoirs, Kurland suggests he should be ranked with Chief Justices Fred M. Vinson and Warren Burger, not Marshall and Hughes. In a "Book Review Essay," 29 *American Journal of Legal History* 349 (1985), Barry Sullivan finds that Bernard Schwartz (**Super Chief**) apparently agrees with his subject that the processes of legal reasoning employed to reach good results are relatively unimportant, while G. Edward White (**A Public Life**) is properly troubled by that approach. "The problem," says Sullivan, "is that Warren's personal notions of fairness and decency have no greater claim to constitutional authority than 'Mr. Herbert Spencer's Social Statics.'" (353; the reference is to Justice Oliver Wendell Holmes' rejection of ideology as a basis for constitutional interpretation in his dissent in *Lochner v. New York*. White, however, is ultimately positive about Warren. Reviewing the same two books, Dennis J. Hutchinson, "Hail to the Chief: Earl Warren and the Supreme Court," 81 *Michigan Law Review* 922 (1983), is no great admirer of either work or of their subject. He downplays Warren's role in achieving unanimity in *Brown*

and faults the tactic of postponing a remedy. The Chief Justice's constitutional theories were "empty"; in terms of intellectual leadership, "it was 'The Brennan Court'" (926, 923). Warren was, Hutchinson opines, "a dull man and a dull judge" (930).

Other commentators view Warren very differently. In "The World of Earl Warren," 60 *American Bar Association Journal* 1228 (1974), a brief collection of tributes at the time of his death, Eugene Gressman praises Warren's "innate commitment to decency, fairness, equality, integrity, and honesty . . . , qualities . . . which were exasperatingly maudlin to Warren's more sophisticated critics" (1229). Gressman finds Warren reflecting "current national needs and aspirations" (1230) but acknowledges Justice John Marshall Harlan's complaint that the role of the Court is not to provide a remedy for every social ill. Judge William S. Thompson recounts Warren's efforts on behalf of the movement for world peace through law, and Justice William O. Douglas ranks Warren with Marshall and Hughes as a great Chief Justice. In "Earl Warren as Jurist," 67 *Virginia Law Review* 461 (1981), G. Edward White sees in Warren a result-oriented approach to judging based on ethical conviction, a natural-law approach pursued—for a change—on behalf of the non-elite (albeit in a posture of skepticism about the ability of representative institutions to do the right thing). This flies in the face of the norms of judicial restraint, whose disciples believe that, in the long run, the integrity of the process of decision is even more important than the result. Warren's approach produced no consistent, well-crafted body of constitutional doctrine, White concedes, so it produced admirable results but left hanging the question of how we would view him if he had not correctly identified the values Americans consider to be right. The short answer, I think, is that we would view him the way we view Taft. The more important point, insist other observers, is that Warren did identify and pursue the correct values. His colleague, Justice Abe Fortas, in "Chief Justice Warren: The Enigma of Leadership," 84 *Yale Law Journal* 405 (1975), credits Warren with leadership of the "profound moral, ethical and constitutional revolution" (411) wrought by his Court, which was the product

of his personality, courage, sense of fairness, and dignity, and of the tone which he set for the work of the Court. Warren ranks with Marshall and Hughes in leadership, Fortas concludes. In "Understanding the Warren Court: Judicial Self-Restraint and Judicial Duty," 81 *Political Science Quarterly* 523 (1966), Alpheus Thomas Mason sets the work of the Warren Court in the context of a wide-ranging survey of American constitutional history. The two basic issues that divided the Court were the choice of reliance on the Bill of Rights or on federalism and separation of powers as the primary safeguards of freedom, and the question of whether economic dogma has any greater claim to judicial support than political ideology. While some of its members lamented a want of self-restraint, the Warren Court did its duty, Mason contends, enhancing the quality of American democracy and employing judicial review for its intended purpose of eliminating the occasion for revolution. As we have seen,

Sylvia Snowiss argues that that is precisely how the Framers conceived of judicial review: as an uncommon political act, enforcing the fundamental values of a social contract. Great constitutional decisions command consensus by accurately perceiving the common will, Archibald Cox argues in "Chief Justice Earl Warren," 83 *Harvard Law Review* 1 (1969), and, popular and professional criticism to the contrary notwithstanding, Warren's greatness lay in leading a Court that achieved that. "[T]he decisions of the Warren Court brought the law more nearly into accord with the best and truest aspirations of the American people" (3). That is a judgment Earl Warren would be proud to accept.

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