

# Introduction

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This issue of the **Journal of Supreme Court History** is the last in the old format. Starting in 1999, the **Journal** will publish three times a year, providing our readers with a greater wealth of material on the history of the Supreme Court, and scholars a larger venue in which to publish their work. For this expansion we happily acknowledge the response of our readers to the efforts we have made over the past few years to upgrade the quality of the **Journal**, and to secure a broader variety of materials. Our goal is to become the premier publication dealing with the history of the Supreme Court, and to make this publication part of the larger educational mission which is the primary purpose of the Supreme Court Historical Society.

This issue showcases the large variety of materials which we now get on a regular basis. Two articles in an earlier issue on the landmark case of *Euclid v. Ambler Realty* (1926) elicited a letter from Milton Handler recalling his experience with that case as a clerk to Mr. Justice Stone. We have another reminiscence, by Alan Kohn, of his year as a clerk, albeit a generation later.

Lectures, which often provide the basis for our articles, contributed two important pieces, one by the Solicitor General, Seth P. Waxman,

on the historic functions and role of his office, and the other by Lord Irvine, the Lord High Chancellor of England, on how constitutional change in Great Britain operates.

Justices and cases are the meat and potatoes of Supreme Court history (without indicating which is the meat), and here we have both. William Bader and Roy Mersky take a stab at rehabilitating the reputation of Levi Woodbury, and the reader will draw his or her own conclusion as to how successful they are. In my piece, I suggest that judicial biography is a more important element of judicial history than some scholars are willing to credit.

In terms of cases, we have both real decisions as well as ones that might have been. After the exciting 1998 baseball season (yes, scholars, lawyers and judges also follow the national pastime), we should recall that baseball is no stranger to the Court, and that one of the great exemptions to antitrust law was forged, not in Congress, but by the judiciary. We can also see how the Justices handled one of the most delicate and explosive issues of the time, miscegenation, in Peter Wallenstein's exploration of the Court's decisions from 1883 to its landmark ruling in *Loving v. Virginia* (1967). And in a bit of whimsey based on history,

Stephen McAllister looks at the politics involving the old institution of Court Reporter.

Finally, to remind us that both the quantity and quality of writing on the Court's history has expanded, Grier Stephenson, after recuperating from marrying off his daughter, wrote his usual insightful study of recent works on the

Court.

Thank you all, contributors and readers, for helping us to grow. We believe the **Journal of Supreme Court History** serves a useful and unique function, and all of us here are dedicated to making that work a success.

# Letter to the Editor

**Editor's Note:** In the 1997 volume, second issue, we carried two articles on the landmark case of *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926), one by Garrett Power on the advocacy in the case, and the other by Michael A. Wolf on the holding and its importance. One of our longtime members and loyal readers, Professor Emeritus Milton Handler, remembered the case well, and he wrote the following to the two authors. It is reprinted here with Professor Handler's kind permission. Sadly, he did not live to see his letter in print. Professor Handler passed away in November 1998.

April 8, 1998

Gentlemen:

I read with the greatest interest the articles which each of you wrote about *The Village of Euclid v. Ambler Realty Co.*, decided by the Supreme Court in 1926.

In the 1926 Term, I served as law clerk to Justice Stone. The *Euclid* case was one of the most interesting appeals that the Court handled that Term. I started work in September 1926, and Sutherland's opinion in the *Euclid* case came down in the fall of that year. This was a period when the *Lochner* case dominated the thinking of the Four Horsemen as well as of Chief Justice Taft. I anticipated that the Four Horsemen plus Taft would hold municipal zoning unconstitutional. It came as a surprise when Sutherland joined Holmes, Brandeis and Stone,

with Van Devanter, McReynolds and Butler dissenting, and Taft in the unusual role of associating himself with the three liberal Justices. Sutherland was a facile writer and his opinion was quite impressive.

Somehow or other, I met James Metzenbaum. I can't recall the precise circumstances, but what I do recall was that he was a "Nervous Nellie" and that I served as a "Father Confessor." What disturbed him was that early in the week in which his case was scheduled for hearing, a western lawyer, dressed in cowboy clothes, argued before the Court. Taft chastised him for his costume and said the Court rules required that counsel wear a vest. Apparently, the rest of his costume did not call for censure.

Metzenbaum was wearing a five-button jacket with a military cut. Not even an x-ray machine could discover that he was not wearing a vest. He took Taft's admonition quite seriously and debated whether or not he should return to Cleveland to pick up a vest or whether he should buy one in one of Washington's department stores. I reassured him that his black suit with a jacket that covered his shirt would fully satisfy the Court's sartorial requirements. He kept after me, day and night, to be sure that my advice was correct. I told him that I could not poll the Justices or initiate a conversation with Chief Justice Taft, but I was satisfied and I sought to satisfy him that my advice was sound. In the course of these discussions, he told me all about the loss of his wife and his visit to the cemetery three to four times a week.

Having lost a very beloved wife recently, and not having visited the cemetery since her burial, I think now and thought then that this fussiness about visiting a grave was not the normal reaction to the loss of a spouse.

I now come to the oral argument. To me, it was quite a disaster. Metzenbaum spent a substantial part of his limited time in denouncing the trial judge who had been a partner of Newton D. Baker and was appointed to the court through Baker's assistance, Baker then being Secretary of War in the Wilson Cabinet. It was a total waste of time to attack the trial judge in an important case before the Supreme Court. I could never understand what he sought to accomplish by this personal attack, the issue in the case being the constitutionality of zoning. Whether or not the trial judge was influenced by his relationship to Baker was really of no moment. The Court was not going to reverse on that ground alone and the importance of the appeal was to get a determination on the legality of zoning. Having argued in my lifetime many appeals before the Supreme Court, state appellate courts and in virtually all of the Courts of Appeal of the various circuits, I know that this was poor advocacy and a waste of the lim-

ited time allotted to counsel for the presentation of his case. Baker was magnificent and, in my opinion, ranked with such extraordinary appellate counsel as John W. Davis, Charles Evans Hughes when at the bar, Wild Bill Donovan, and others enjoying the fame that a skillful appellate advocate obtains through experience.

I rooted for the ultimate decision, which came as a welcome surprise. It was very rare that Sutherland abandoned the others in the Four Horseman group, and it was even rarer for Taft to abandon his cohorts. Then and now it seemed to me that if zoning were not permissible, virtually no legislation designed to advance the collective good could be sustained. This is one of the rare occasions where the Court split as it did, with Taft and Sutherland joining my boss, Brandeis, and Holmes.

I thought that this anecdotal epistle might be of interest to both of you and I send you my warmest regard for the enjoyment I derived from your articles.

Sincerely,

Milton Handler



# **“Presenting the Case of the United States As It Should Be”: The Solicitor General in Historical Context**

**Seth P. Waxman\***

Some sixty years ago, a letter found its way into the United States mail addressed simply, “The Celestial General, Washington, D.C.” The Postmaster apparently had no trouble discerning to whom it should be delivered. It went to Robert H. Jackson, then Solicitor General of the United States.<sup>1</sup>

Now neither Justice Jackson nor any of my other predecessors, I am sure, had pretensions of other-worldliness. But we have all been fortunate indeed to have been able to serve in what Thurgood Marshall called “the best job I’ve ever had.”<sup>2</sup> For the office of Solicitor General of the United States is a wonderful and unique creation.

The Solicitor General is the only officer of the United States required by statute to be “learned in the law.”<sup>3</sup> He is one of only two people (the other being the Vice President) with formal offices in two branches of government.<sup>4</sup> And perhaps more than any other position in government, the Solicitor General has impor-

tant traditions of deference to all three branches.

The Solicitor General is of course an Executive Branch officer, reporting to the Attorney General, and ultimately to the President, in whom our Constitution vests all of the Executive power of the United States. Yet as the officer charged with, among other things, representing the interests of the United States in the Supreme Court, the Solicitor General has important responsibilities to the other branches of government as well. As a result, by long tradition the Solicitor General has been accorded a large degree of independence.

To the Congress, Solicitors General have long assumed the responsibility, except in rare instances, of defending the constitutionality of enactments, so long as a defense can reasonably be made.<sup>5</sup> With respect to the Supreme Court, the Solicitor General has often been called “the Tenth Justice.”<sup>6</sup> But alas, although the Solicitor General gets to participate in a great many Supreme Court cases, he does not get a

vote (although in some important cases he may feel that he could really use one). No, the Solicitor General's special relationship to the Court is not one of privilege, but of duty—to respect and honor the principle of *stare decisis*, to exercise restraint in invoking the Court's jurisdiction, and to be absolutely scrupulous in every representation he makes. As one of my predecessors, Simon Sobeloff, once described the mission of the office:

The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice.<sup>7</sup>

So what does the Solicitor General do, and how did the office come to be? As for the "what," for the past fifty years or so, the Solicitor General has had two principal functions: to represent the United States in the Supreme Court and, with respect to the lower federal

courts and state courts, to decide when the United States should appeal a case it has lost, when it should file a brief *amicus curiae*, and when the United States should intervene to defend the constitutionality of an Act of Congress. Ultimately, it is the responsibility of the Solicitor General to ensure that the United States speaks in court with a single voice—a voice that speaks on behalf of the rule of law.

How this position—this marvelous creation—came to be, and how it developed, is the subject of this lecture. But at best I will be only partially successful, for the Office has a long, rich history that, in many respects, is not well documented. Much of the collected history consists of anecdotal accounts of discrete events and individuals<sup>8</sup>—and almost none of it covers the origins and early development of the Office. I propose to focus on three early developments that shaped the Solicitor General's authority over litigation on behalf of the United States. First, I will briefly discuss the problems and historical forces that led to the creation of the Office of Solicitor General



Simon E. Sobeloff was named Solicitor General in 1954 and served until 1956. He once described his function with these words: "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory, but to establish justice."

and the Department of Justice in 1870. Second, I will summarize the formative experiences of the early Solicitors General in consolidating control over government litigation. And third, I will point out the important part played by the Supreme Court in securing this consolidation of authority.

### Early Experiences of the Attorneys General

The First Congress established four Cabinet positions to assist the President. With respect to one of those four, the position of Attorney General, the Judiciary Act of 1789 provided:

[T]here shall . . . be appointed a . . . person, learned in the law, to act as attorney-general for the United States, . . . whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.<sup>9</sup>

Although given broad authority over the legal affairs of the country, the Attorney General—unlike his fellow Cabinet officers—did not preside over an executive department. Rather, the Judiciary Act of 1789 created only the Office of the Attorney General. There was no provision for a Department of Justice or even for subsidiary officers or clerical staff to assist the Attorney General in his duties.<sup>10</sup> Although the Act also created United States district attorneys to conduct the government's legal business in the lower courts, it did not authorize the Attorney General to supervise those legal officers.<sup>11</sup>

Not only was the Attorney General given

no assistance, but his salary was set at \$1,500, one-half the rate of the other Cabinet officers, with the clear expectation that his would be a part-time job only and that he could more than make up the pay differential from his private clients.<sup>12</sup> As President Washington advised Edmund Randolph, seeking to persuade him to accept the position as the first Attorney General, while the salary was low, “the Station would confer pre-eminence on its possessor, and procure for him a decided preference of Professional employment.”<sup>13</sup> In other words, being Attorney General would be highly advantageous to what we now know as “business development.”

Experience soon provided Randolph with a more colorful description of his part-time status. In 1790 he described himself as “a sort of mongrel between the State and U.S.; called an officer of some rank under the latter, and yet thrust out to get a livelihood in the former.”<sup>14</sup> That description proved apt; indeed, in the celebrated *Hayburn's Case*, Randolph appeared in the Supreme Court acting on behalf of the United States in his official capacity as Attorney General.<sup>15</sup> When the Court declined to recognize his participation *ex officio*, Randolph simply switched hats and was allowed to proceed as private counsel for William Hayburn.<sup>16</sup>

It did not take Randolph long to recognize several deficiencies in the original structure of his office. In December 1791 he wrote a long letter to President Washington protesting that the current conditions made it impossible for him properly to discharge his duties. He recommended that the Attorney General be authorized to represent the United States in the lower courts, that he be given control and supervision of the district attorneys, and that he be provided with at least one clerk to assist him in transcribing his opinions.<sup>17</sup>

Of particular significance given the current duties of the Solicitor General, Randolph described the need to supervise and coordinate the litigation of the government. From “the want of a fixed relation between the attorneys of the districts and the Attorney General,”



**In 1854 Attorney General Caleb Cushing (below) wrote to President Franklin Pierce (above) assuring him that as President he had the authority to consolidate control of the government's litigation in the hands of the Attorney General. Pierce forwarded the letter to Congress, which took no action on the matter. Finally, Pierce was forced to issue an executive order. It was little heeded.**

Randolph explained:

the United States may be deeply affected by various proceedings in the inferior courts, which no appeal can rectify. The peculiar duty of the Attorney General calls upon him to watch over these cases; . . . [but] his best exertions can not be too often repeated, to oppose the danger of a schism.<sup>18</sup>

Randolph therefore requested authority to supervise the work of the district attorneys and to harmonize conflicting interpretations of law among them.

President Washington immediately forwarded Randolph's letter to Congress, where

a bill was drafted to enact his suggestions. But in what would become a distressing pattern for efforts to reform the government's legal work, Congress did not pass the bill despite favorable committee action.<sup>19</sup> Over the ensuing eight decades, incremental changes were enacted, but Congress consistently refused to resolve the larger structural concerns raised by Randolph and his successors.<sup>20</sup>

The failure of Congress to reform and coordinate the government's legal business is rather puzzling, and apparently did not reflect any lack of interest or effort by the Executive. In 1814, for example, President Madison echoed Attorney General Randolph's reform recommendations by urging Congress to extend the powers and duties of the Attorney General, to increase his salary to that of other Cabinet officers, to provide fitting office space, supplies, and support, and to give him control over the district attorneys; but to no avail.<sup>21</sup>

In 1829 President Jackson made similar recommendations, adding that the Attorney General should also have authority to super-



wise and manage all suits involving revenue and other Treasury matters.<sup>22</sup> Congress responded to President Jackson's message with a bill "to re-organize the establishment of the Attorney General, and erect it into an Executive Department." The bill proposed to make the Attorney General the head of the Law Department and authorized him to superintend all suits in which the United States was a party.<sup>23</sup>

Senator Daniel Webster, however, led the opposition to the bill. According to Webster, the measure would "turn [the Attorney General] into a half accountant, a half lawyer, a half clerk—in fine, a half of every thing, and not much of any thing."<sup>24</sup> Rather, Webster argued, the Attorney General "should be engaged in studying his books of law," without distraction from such minor matters as tax collection.<sup>25</sup> Webster, therefore, proposed a bill to create a Solicitor of the Treasury with authority over all Treasury suits and authority to provide rules for the district attorneys to follow in regard to all civil litigation in which the United States was a party. Webster's bill was enacted.<sup>26</sup>

As an experienced advocate before the Supreme Court, Webster should have known better than to promote the further balkanization of the federal government's control over its litigation. But the issue arose in the context of a struggle by the National Republicans to find a suitable leader to succeed John Quincy Adams, who had been swamped by Jackson in the 1828 election, and Webster sought that mantle. The need to consolidate control over the government's litigation may thus have fallen hostage to presidential ambitions.<sup>27</sup> Other Presidents revived Jackson's requests, but Congress continued to show little interest.<sup>28</sup>

Why, then, didn't the President simply issue an executive order directing the Attorney General to assume primacy over government litigation? The President, after all, has plenary authority under Article II to ensure that the laws be "faithfully executed." In 1854 Attorney General Caleb Cushing told President Pierce that

the President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States [in courts other than the Supreme Court] when the interests of the Government seem to the President to require this.<sup>29</sup>

If the Attorney General could be directed personally to take over litigation, why would the President lack authority to instruct him to supervise litigation conducted by other officers subordinate to the President? But instead of issuing such an instruction, President Pierce forwarded Cushing's letter to Congress with a request for legislation.<sup>30</sup> Only when Congress failed to act did he issue an executive order attempting to consolidate a modicum of control in the Attorney General. But Pierce's order met with substantial resistance within the Executive Branch itself and had little practical effect.<sup>31</sup>

It may be that Presidents other than Pierce did not feel themselves free to order their Attorneys General to supervise the legal work of officers in other Departments because by statute Congress had frequently, and perhaps haphazardly, conferred authority to control litigation in other federal officers. In 1820, for example, Congress had authorized an agent of the Comptroller of the Treasury to oversee the government's legal efforts to enforce tax and revenue laws—including the power to direct the district attorneys in those cases.<sup>32</sup> Neither the Comptroller nor his agent were required to have had any legal training, and the agent was considered a relatively low-level accounting officer.<sup>33</sup> Thus, Congress created the anomalous situation of subjecting the district attorneys, at least in part, to the direction and control of a non-legal officer, while the chief legal officer of the government—the Attorney General—had little or no authority over them at all.<sup>34</sup>

As discussed, Congress superseded that arrangement in 1830 by creating the position of Solicitor of the Treasury, with authority "to instruct the district attorneys . . . in all matters and proceedings, appertaining to suits [in the district and circuit courts] in which the United States is a party, or interested."<sup>35</sup> With that precedent, other department heads began clamoring for their own legal staffs and control over their own litigation.<sup>36</sup> In 1836 Congress passed a law requiring district attorneys to follow instructions of the auditor of the Post Office Department.<sup>37</sup> By the eve of the Civil War, every major department had its own legal officer.<sup>38</sup>

The exigencies of the Civil War laid bare the deficiencies of this uncoordinated legal structure. In August 1861 Congress finally enacted a law giving the Attorney General control over the United States district attorneys and marshals.<sup>39</sup> Yet much of the significance of that reform was undermined when, four days later, Congress passed another Act providing that the authority of the Solicitor of the Treasury was not to be affected.<sup>40</sup> To complicate matters even further, Congress passed a law in 1867 requiring the Commissioner of Internal Revenue to establish regulations for the guidance of United States district attorneys.<sup>41</sup>

The law giving the Attorney General control over the district attorneys also authorized the Attorney General to retain outside counsel to assist the district attorneys. Due to the immense increase in Civil War-related government litigation, almost immediately the number of outside counsel retained to represent the United States exceeded the number of all commissioned law officers in the federal government.<sup>42</sup> In the six-year period beginning in 1861, when Congress authorized the hiring of outside attorneys, the Attorney General paid nearly \$50,000 for outside counsel to assist in the preparation and argument of government cases in the Supreme Court alone.<sup>43</sup> In addition, the solicitors of the various departments and the district attorneys were spending ever-increasing amounts on outside

legal services. Indeed, it was not uncommon for a single non-governmental attorney during this period to receive a higher average annual income from the government than the Attorney General himself.<sup>44</sup> All told, between 1864 and 1869 the United States spent well over \$700,000 procuring outside legal services.<sup>45</sup>

### **The Birth of the Department of Justice and the Office of Solicitor General**

By 1867 the size of these expenditures focused Congress's attention once again on proposals for reforming how the government conducted litigation on its own behalf. In December of that year the Senate passed a resolution requesting the Attorney General to provide information and his views on the need for reform.<sup>46</sup>

Attorney General Henry Stanbery's reply is an important key to understanding the origins and development of the Solicitor General's Office. "As to the mere administrative business of the office [of the Attorney General] the present force is sufficient," Stanbery declared, "but as to the proper duties of the Attorney General, especially in the preparation and argument of cases before the Supreme Court. . . and the preparation of opinions on questions of law referred to him, some provision is absolutely necessary to enable him properly to discharge his duties. After much reflection," Stanbery proposed, "it seems to me that this want may best be supplied by the appointment of a solicitor general. With such an assistant, the necessity of employing special counsel in the argument of cases in the Supreme Court of the United States would be in a great measure, if not altogether, dispensed with."<sup>47</sup> Stanbery further added that he believed the various law officers of the other Departments and the Court of Claims should be transferred to the Attorney General's Office "so that it may be made the law department of the government, and thereby secure uniformity of

**Attorney General Henry Stanbery wrote a letter to the Senate in 1867 containing one of the first references in an American legislative document to the term "Solicitor General." He was replying to questions about whether his office was sufficiently staffed, how much money had been spent on nongovernment attorneys to argue the government's cases before the Supreme Court, and whether all of the government's lawyers should be brought under the direction of the Attorney General.**



decision, of superintendence, and of official responsibility."<sup>48</sup>

Stanbery's letter appears to contain one of the first references in an American legislative document to the term "Solicitor General."<sup>49</sup> And his vision of the duties of that position—to assist in the preparation and argument of Supreme Court cases and the preparation of legal opinions for the Attorney General—tracks very closely with the actual work of the early Solicitors General.<sup>50</sup> Interestingly, it also mirrors the very responsibilities given to the Attorney General himself in the 1789 Judiciary Act.<sup>51</sup>

While the Senate Judiciary Committee kept the subject under advisement without further action, the House of Representatives was also considering legal reform. Even before the Senate had requested information, Representative William Lawrence of Ohio, Chairman of the House Judiciary Committee, had directed a similar inquiry into the creation of a "law department" headed by the Attorney General and composed of the various department solicitors and district attorneys.<sup>52</sup> Shortly thereafter, Representative Thomas Jenckes of Rhode Island

introduced a measure to establish a "department of justice." Jenckes' proposal was referred not to the Judiciary Committee but to the Committee on Retrenchment, a joint body of the two Houses charged with finding ways of reducing government expenditures.<sup>53</sup> Thus, by 1868 three separate congressional committees were examining proposals to consolidate and place under the direction of the Attorney General the legal business of the government.<sup>54</sup>

The House Judiciary Committee acted first. On February 19, 1868, Representative Lawrence reported out his bill to establish a "law department" that contained features ultimately enacted in 1870, including: the creation of a department to handle legal affairs with the Attorney General at its head; a position of Solicitor General to assist the Attorney General; the transfer to the new department of solicitors and assistant solicitors then in the other departments; a requirement that the Attorney General approve all government legal opinions; and a prohibition on the hiring of outside counsel to represent the United States.<sup>55</sup> Before Congress could act, however, the im-





peachment trial of President Johnson derailed Chairman Lawrence's bill.<sup>56</sup>

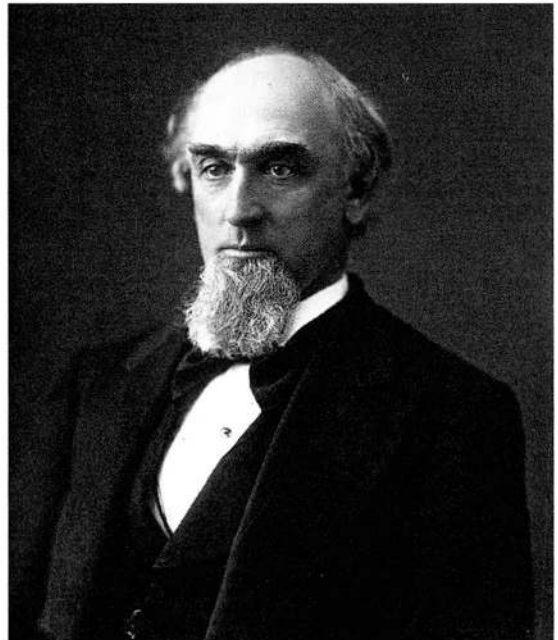
Congress did enact some piece-meal reforms. In June 1868 it authorized the Attorney General to control all government litigation in the Court of Claims and provided two Assistant Attorneys General, together with additional clerical staff, to assist him.<sup>57</sup> In March 1869, as a retrenchment measure, Congress repealed the authority of the Attorney General to employ outside counsel to aid the district attorneys.<sup>58</sup> But the volume of litigation

immediately overwhelmed the district attorneys, and Congress quickly restored that authority.<sup>59</sup>

Finally, on February 25, 1870, Representative Jenckes reported from the Committee on Retrenchment a bill "to establish a Department of Justice," which embodied the ideas of both Lawrence and Jenckes.<sup>60</sup> Proponents of the bill emphasized the multiplicity of conflicting legal opinions given by the law officers in the several departments and the ever-increasing expenditures for outside counsel—what one Senator contemptuously referred to as "the sporadic system of paying fees to persons . . . who may be called departmental favorites."<sup>61</sup> Representative Jenckes explained the overriding aim of this legislation as creating "a unity of decision, a unity of jurisprudence . . . in the executive law of the United States," and it was for this purpose that the bill "propose[d] that all the law officers therein provided for shall be subordinate to one head."<sup>62</sup> Of the new office of Solicitor General, Representative Jenckes had this to say:

We propose to create . . . a new officer, to be called the solicitor gen-

**Representative William Lawrence of Ohio (right), chairman of the House Judiciary Committee, made inquiries in 1867 into creating a "law department" headed by the Attorney General and composed of district attorneys and solicitors from the various departments of government. Shortly thereafter, Representative Thomas Jenckes of Rhode Island (above), introduced a similar measure to the Committee of Retrenchment, a joint body of the House and Senate charged with reducing government spending. Jenckes' bill was signed into law in 1870, and created the Office of the Solicitor General.**





eral of the United States, part of whose duty it shall be to try these cases in whatever courts they may arise. We propose to have a man of sufficient learning, ability, and experience that he can be sent to New Orleans or to New York, or into any court wherever the Government has any interest in litigation, and there present the case of the United States as it should be presented.<sup>63</sup>

The bill was passed by both houses and signed into law by President Grant on June 22, 1870.<sup>64</sup> Section 2 provided:

That there shall be in said Department an officer learned in the law, to assist the Attorney-General in the performance of his duties, to be called the solicitor-general, and who, in case of a vacancy in the office of Attorney-General, or in his absence or disability, shall have power to exercise all the duties of that office.<sup>65</sup>

Curiously, with the creation of the Office of Solicitor General, the requirement originally set out in the 1789 Judiciary Act—that the Attorney General be “learned in the law”—was dispensed with, and no longer appears in the statutes.<sup>66</sup>

### **The Early Solicitors General: Defining the Office**

President Grant was serious about reforming the conduct of the government’s legal business—particularly in the Reconstruction South—and his first appointment as Solicitor General reflected that seriousness. In October 1870 he nominated Benjamin Helm Bristow of Kentucky to be the first Solicitor General of the United States. Bristow was a renowned lawyer, a loyal Republican, and an ardent proponent of civil rights for blacks, who had served

for the previous four years as United States district attorney for the district of Kentucky. During his tenure as district attorney, Bristow had made a name for himself as one of the most aggressive and successful prosecutors of Ku Klux Klan cases, obtaining twenty-nine convictions for various crimes under the civil rights acts, including a capital sentence for murder.<sup>67</sup>

The 1870 Act created extravagant expectations for the Office of Solicitor General. Was the Solicitor General to write the legal opinions, to handle the Supreme Court litigation, and to ride circuit, supervising the government’s most sensitive litigation? Was he to be the Attorney General’s surrogate, substituting for him during his many absences? No one person could perform all those tasks. And so it fell to Bristow and the new Attorney General, Amos T. Ackerman of Georgia, to determine which duties would actually be performed by the Solicitor General and which would not.

One of the early imperatives was to consolidate: the Act of 1870, after all, was a retrenchment measure. Which legal officers and their clerks from other Departments should be absorbed into the new Department of Justice and which could be dispensed with? Apparently, one particular clerk stood out. Congress had eliminated a position for a third-class clerk, and the Treasury Solicitor recommended that “Mr. Walt Whitman is the clerk of this class who can be discharged with least detriment to the public service.”<sup>68</sup> Thus was one of this country’s great creative spirits unbound from the demands of government service.<sup>69</sup>

The new Solicitor General took little time in establishing primacy over the government’s Supreme Court docket. As Bristow prepared for his first oral argument in *United States v. Hodson*,<sup>70</sup> his former law partner John Marshall Harlan, still practicing in Kentucky, wrote that this appointment would give him an opportunity for “brilliant distinction.”<sup>71</sup> Another colleague advised: “Look upward and onward trusting to your God—to Justice and Right—



**Benjamin Bristow, a Republican from Kentucky, became the first Solicitor General in 1870. He had served for four years as United States district attorney from his state and had championed the civil rights of blacks by successfully prosecuting twenty-nine Ku Klux Klan cases.**

in your conflicts before finite judges and all will be well."<sup>72</sup>

Bristow was indeed a success in the Supreme Court, and his presence quickly obviated the need to hire private attorneys to represent the United States in that Court. During the December 1869 Term, the last one without a Solicitor General, private counsel argued 15 cases on behalf of the United States.<sup>73</sup> During Bristow's first Term, they appeared in only two cases, and in his second Term, one. By the third Term, the December 1872 Term, the government's Supreme Court litigation was being handled exclusively by its own attorneys.<sup>74</sup>

Bristow did not take over completely, by any means. Both the Attorney General and the Assistant Attorneys General handled cases before the Court, and continued to do so for some time.<sup>75</sup> During the December 1870 Term, Solicitor General Bristow presented arguments in thirteen cases—three alone, five together with Attorney General Ackerman, and five others with Assistant Attorneys General. Approxi-

mately seven cases were argued that Term by the Attorney General and/or the Assistant Attorneys General without Bristow's participation. The following year, Solicitor General Bristow argued twenty-seven Supreme Court cases—seven alone, five with the Attorney General, and fifteen with the Assistant Attorneys General.

Bristow's successor, Samuel Field Phillips of North Carolina, another accomplished federal civil rights prosecutor,<sup>76</sup> continued in that vein. During the 1873 Term, Phillips' first full Term as Solicitor General, he argued eighteen cases before the Supreme Court—eleven solo and seven in conjunction with the Attorney General. During Phillips' remarkable twelve-year tenure as Solicitor General—under four different Republican Presidents and six Attorneys General—the number of cases argued by Attorneys General declined.<sup>77</sup> And Phillips' skill as an oral advocate inspires us to this day. As a distinguished contemporary recalled:

His habit was to discard the minor points of a case, and address himself to the great questions upon which [the Court's] decision ought to rest; and then he was so candid in stating the position of his opponents and the facts appearing in the record, and so lucid and strong in his argument, that he commanded the entire confidence, as well as the respect, of the Court.<sup>78</sup>

In so doing, Phillips was again carrying on a tradition set by Benjamin Bristow. As a tract written about Bristow's life in connection with his much anticipated bid for the Republican presidential nomination in 1876 described:

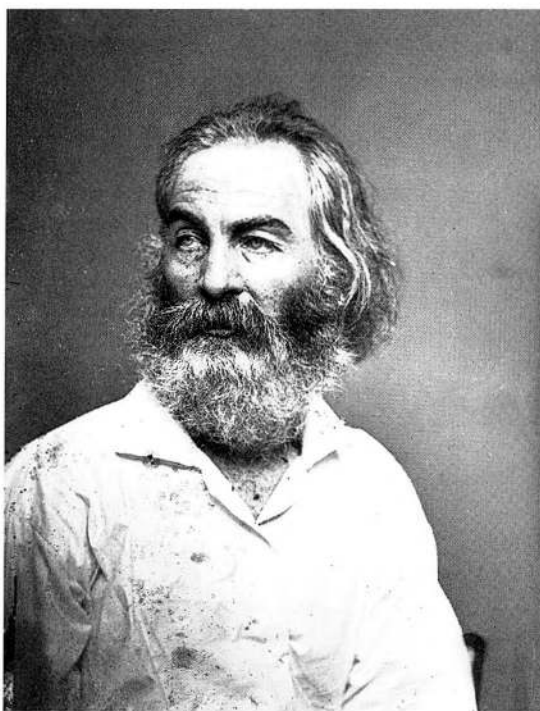
One marked characteristic of Mr. Bristow's arguments was an absence of all attempt at display. He always thoroughly prepared himself, going over every case in which he did not make the brief, with as much care as

if nothing had been done in its preparation, and making voluminous notes and memoranda. But when he came to speak he would never make any further use of these than the posture of the case demanded; and if he thought the case had been sufficiently argued by his associate, would add but a few remarks on one or two of the most vital points. The great judgment he thus showed in arguing the important questions and leaving the others alone, and never unnecessarily taking up the time of the overworked judges, was one reason why he was so great a favorite with them, and was always listened to with respectful attention.<sup>79</sup>

What President Grant and his successors wanted in a Solicitor General—and what they got—were advocates of the first order.

The Solicitors General did not, however, completely fulfill one litigation function Congress had contemplated—conducting important government litigation around the country.<sup>80</sup>

**When the time came to decide which legal officers and their clerks should be moved to the new Department of Justice and which should be fired, a particularly notable third-class clerk, poet Walt Whitman, was singled out for termination. A few years earlier he had been recommended for termination on the ground that he lacked the requisite moral character for public service—as evidenced by the views he expressed in *Leaves of Grass*. At that time, supporters helped him obtain a job in the Attorney General's office.**



The early Solicitors General did participate in some important matters in the lower courts. One of Bristow's first assignments as Solicitor General, for example, was to monitor the district court trial in *Ex parte Walton*, in which twenty-eight persons were indicted under the Enforcement Act<sup>81</sup> for killing a Negro in Monroe County, Mississippi.<sup>82</sup> The defendants had petitioned for a writ of *habeas corpus*, alleging that they were being held illegally because the Enforcement Act exceeded Congress's authority under the Fourteenth Amendment.<sup>83</sup> When Bristow arrived in Oxford, Mississippi, near the close of the trial, tensions were high and order was being maintained by a full company of United States infantry and a cavalry brigade.<sup>84</sup> The case ended successfully, with the district court confirming (at least for the time being)<sup>85</sup> that the Enforcement Act was a valid exercise of Congress's authority under the Fourteenth Amendment.<sup>86</sup>

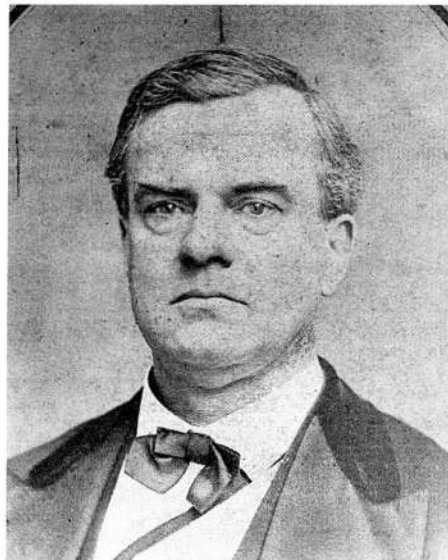
But overall, there were simply too many other responsibilities for any Solicitor General to be much of a circuit rider. In addition to his Supreme Court responsibilities, the Solicitor General was required both to substitute for the Attorney General in the latter's absence and also to issue legal opinions to the President, the Attorney General, and the other department heads on a range of statutory and constitutional issues, and to the United States district attorneys and marshals in particular cases.<sup>87</sup> As to the former responsibility, the exigencies of Reconstruction politics often required the Attorney General to travel for extended periods from Washington, D.C.<sup>88</sup> And, as the era was also characterized by a rapid turnover in Attorneys General (recall that Solicitor General Phillips served under six different Attorneys General), the early Solicitors General frequently served as the Acting Attorney General.<sup>89</sup> Attendance at Cabinet meetings and other functions required of the Attorney General, and responsibility for all of the administrative duties of a Cabinet Secretary, occupied a very considerable portion of the time of the early Solicitors General.

The responsibility to prepare legal opinions was likewise very demanding—to the point that, by the 1930s Congress was required to create a new Senate-confirmed position, Assistant Solicitor General (later renamed Assistant Attorney General for Legal Counsel), to handle it.<sup>90</sup> One interesting exercise of that function focused on a burning issue of the early twentieth century—the meaning of the term “whisky.” The Secretary of Agriculture had designated certain products as “whisky,” which made them subject to federal taxation. The distillers complained noisily—so much so that President Taft, himself a former Solicitor General, referred the issue to his own Solicitor General, Lloyd W. Bowers, for a legal opinion.<sup>91</sup> Taft obviously felt that a matter of such overriding importance could be entrusted only to an officer “learned in the law.” After hearing testimony that fills 2,365 pages, “[a] voluminous mass of documentary evidence,” and extensive briefs and argument by multiple counsel, Solicitor General Bowers entered a lengthy and detailed report on the meaning of the term.<sup>92</sup>

Lest one think that perhaps this might not have been the most productive use of a Solicitor General's time, the story does not end there. When the distillers took exception to Bowers' conclusions, President Taft himself conducted a hearing in the White House.<sup>93</sup> Ironically, President Taft went even further than his Solicitor General in adopting the broadest definition of “whisky” and directed that the regulatory agencies use his construction of the applicable statutes.<sup>94</sup> Thus do we learn an important lesson that Solicitors General try to impart to their client agencies: on appeal, things can always get worse.

Returning to Benjamin Bristow, and most relevant to the theme of this lecture, Bristow's nonlitigation duties did not prevent him from devoting his attention to what is perhaps the most significant function performed by Solicitors General to this day: determining and harmonizing the litigation position of the United States in courts across the country.

**Bristow's successor, Samuel Field Phillips of North Carolina, had a background similar to Bristow's when he became the second Solicitor General in 1873. A renowned advocate before the Court, who served as Solicitor General for a record twelve years, Phillips' best-known case was his representation of Homer Plessy in *Plessy v. Ferguson* (1896), a case he argued after leaving the Solicitor General's office.**



Bristow began the practice of reviewing each case in which the government received an adverse decision in a lower court to determine whether the case should be appealed. "If his decision was to appeal," one early biographer of Bristow wrote, "it was his job to decide how best to defend the cause of the Government."<sup>95</sup> Thus, some eighty years after Attorney General Randolph first bemoaned the inability to coordinate the government's legal positions in the lower courts, a sustained and systematic attempt was finally made to supervise and harmonize the government's appellate litigation.<sup>96</sup>

But decades of bureaucratic inertia and institutional jealousy were not easily overcome. The greatest obstacle to effective consolidation was the fact that, although the 1870 Department of Justice Act reflected an obvious intent to centralize control over the government's litigation in the Department of Justice, Congress had failed to repeal its earlier statutes creating the law officers of the other departments and giving them allegiance to their department heads. The Commissioner of Internal Revenue, for example, resisted the Attorney General's supervision and asserted that, under his original statute, he still retained unfettered control over internal revenue cases

and independent authority to direct the district attorneys in the handling of such cases.<sup>97</sup> The Solicitor of the Treasury took the position that the unrepealed laws protected his control over Treasury litigation.<sup>98</sup> Before long, the Solicitor of the Navy and the Examiner of Claims in the Department of State adopted similar positions.<sup>99</sup>

Despite the Attorney General's vigorous protests,<sup>100</sup> Congress made no attempt to clarify the issue and, in fact, took actions that further muddied the waters. In 1872 it created legal positions in the Interior and Post Office Departments that were nominally called Assistant Attorneys General but that reported to the heads of those Departments.<sup>101</sup> Even worse, when Congress passed the Revised Statutes a few years later, it reenacted, probably inadvertently, all of the old statutes giving duties and authority to the solicitors of the other departments—further bolstering their assertions of independence.<sup>102</sup>

### The Supreme Court to the Rescue

Fortunately, the seeming ambivalence of Congress was not shared by the Supreme Court, which played a key role in consolidating the government's litigation. The Justices were no

doubt frustrated indeed to be subjected to a succession of attorneys who ostensibly spoke on behalf of the United States, but who took inconsistent and ill-considered positions on questions of federal law. And when the Justices had opportunities to do something about it, they did.

In 1867 the Supreme Court held, in a case called *The Gray Jacket*, that where the United States appeared through the Attorney General or his representative, no counsel could be heard taking a conflicting position on behalf of another department of the government.<sup>103</sup> Two years later, in the *Confiscation Cases*, in an opinion written by Justice Nathan Clifford, himself a former Attorney General, the Supreme Court expanded this rule and held that the Attorney General had control over—including the power to dismiss—any action brought in the name of, or for the benefit of, the United States in any court.<sup>104</sup> Likewise, in the 1878 case of *United States v. Throckmorton*, the Supreme Court upheld the Attorney General's contention that a suit by the United States or any of its agencies to set aside a patent to land could only be brought by or at the direction of the Attorney General.<sup>105</sup>

The capstone of this line of authority was *United States v. San Jacinto Tin Co.*,<sup>106</sup> argued for the United States by Solicitor General George Jenks and decided in 1888. The Attorney General had brought an action to set aside a land patent allegedly obtained by fraud, but the defendant argued that the Attorney General had no express authority, statutory or constitutional, to commence a suit in the name of the United States to set aside a patent or other solemn instrument. Echoing earlier positions taken by past Presidents and Attorneys General,<sup>107</sup> the Court reasoned that authority over such litigation must exist somewhere; that some officer of the government must decide what cases are appropriate for the government to bring; and that the appropriate officer is the Attorney General, or his statutory delegate, the Solicitor General.

The Court based that holding on two

grounds. First, Congress had vested supervisory authority in the Attorney General over the government's litigation, and that authority in turn had been delegated to the Solicitor General. And second, when Congress created the office of Attorney General in 1789, it was presumed to have been aware that the English Attorney General possessed absolute control over governmental litigation, so the Court assumed that Congress similarly intended to confer that same authority on the American Attorney General. Thus, under the Court's reasoning, the Attorney General had—and had always had—supervisory authority over the government's litigation, even in the lower courts, unless a statute placed a specific duty elsewhere.<sup>108</sup>

*San Jacinto* was in many ways the culmination of an effort begun by Edmund Randolph in his 1791 letter to President Washington. After decades of legislative efforts by Presidents and Attorneys General, the primacy of the Attorney General's authority over the conduct of federal litigation—and the responsibility of the Solicitor General to supervise that litigation—was largely secured.

Occasionally, even to this day, questions still arise—particularly with respect to representation of the so-called “independent” agencies of the United States. As times change, and new agencies are created, the dialectic between an independent agency's desire to advance its mandate and the overriding need for the government to speak with one voice continues—with understandable centrifugal tendencies on the agencies' part. On balance, the Supreme Court appears to remain strongly convinced of the desirability of a centripetal counterweight. Earlier this decade, for example, in *FEC v. NRA Political Victory Fund*, the Court held that the Federal Election Commission lacked authority independent of the Solicitor General to petition for certiorari even in actions brought under the very statute the FEC was created to administer.<sup>109</sup> Ultimately, of course, the power to allocate litigating authority belongs to Congress and the

President. Still, particularly given the modern inclination to create Executive Branch agencies that are “independent” of the President, it is wise to remember the very substantial benefits in retaining approval authority centralized in the Solicitor General—so that when the United States speaks, it is with a voice that has considered, and reflects, the interests of the whole United States.

### Conclusion

In the nearly thirteen decades since the Office of the Solicitor General was created, its core litigation functions have largely remained the same. During October Term 1997, for example, the Solicitor General handled approximately 2,800 cases before the Supreme Court. The Office filed thirty petitions for a writ of certiorari and participated in oral argument in seventy-five percent of the cases the Court heard on the merits. During that same one-year period, the Solicitor General decided whether to authorize appeal or to appear as an intervenor or *amicus curiae* in over 2,300 cases, covering subjects as varied as the activities of the government he represents.

The nonlitigation duties of the early Solicitors General are largely gone—and that absence may be, after all, one of the principal charms of the position. Since creation of the office of Deputy Attorney General in 1953, the Solicitor General has largely been relieved of the administrative and policy functions he earlier performed.<sup>10</sup> The other nonlitigation responsibility of the early Solicitors General—writing legal opinions for the President and the other Departments—was assigned elsewhere even earlier. By the 1930s, the press of litigation—particularly in the Supreme Court—had pushed the opinion-writing function of the Solicitor General to the very back burner. In 1933 Congress created a new position, Assistant Solicitor General, to assume principal responsibility for preparation of legal opinions, but after several years in which the Solicitor General himself was unable to

devote enough time to review the opinions, form followed function and the position was restyled Assistant Attorney General, where it remains today.<sup>11</sup> The situation that provoked this transfer was perhaps best epitomized in the front-page article of *The New York Times* on December 11, 1935, recounting Solicitor General Stanley F. Reed’s physical collapse from exhaustion during the second day of his oral argument before the Supreme Court in defense of successive pieces of New Deal legislation.<sup>12</sup>

Since the early 1950s, relief from nonlitigation responsibilities has left modern-day Solicitors General free to concentrate on the “interest of the United States” with respect to litigation. That concept is elusive, and it is often difficult to discern just what position the interest of the United States supports. But so long as Solicitors General apply the principle best articulated by my predecessor Frederick Lehmann—that “[t]he United States wins its point whenever justice is done its citizens in the courts”<sup>13</sup>—and so long as Solicitors General maintain fidelity to the rule of law, it will continue to be true, as Francis Biddle wrote following his tenure in the Office, that “[t]he Solicitor General has no master to serve except his country.”<sup>14</sup>

### Endnotes

\* *This article is the printed version of a lecture delivered at the Supreme Court Historical Society’s Annual Meeting on June 1, 1998. The author gratefully acknowledges the assistance of David B. Salmons, a Bristow Fellow in the Office of the Solicitor General during October Term 1997, and David C. Frederick, an Assistant to the Solicitor General.*

<sup>1</sup> Eugene C. Gerhart, *America’s Advocate: Robert H. Jackson* 143 (1958); Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 171 (1987).

<sup>2</sup> Caplan, *supra* note 1, at 261.

<sup>3</sup> Act of June 22, 1870, ch. 150, § 2, 16 Stat. 162.

<sup>4</sup> In addition to his offices in the Department of Justice, the Solicitor General has a working office in the Supreme Court building, located on the main floor in close



proximity to the courtroom.

<sup>5</sup> See, e.g., 8 Op. Off. Legal Counsel 183, 193-99 (1984); 40 Op. Att'y Gen. 158 (1942); 39 Op. Att'y Gen. 11 (1937); 38 Op. Att'y Gen. 252 (1935); 38 Op. Att'y Gen. 136 (1934); 36 Op. Att'y Gen. 21 (1929); 31 Op. Att'y Gen. 475, 476 (1919).

<sup>6</sup> See Caplan, *supra* note 1, at 3.

<sup>7</sup> Simon E. Sobeloff, "Attorney for the Government: The Work of the Solicitor General's Office," 41 *A.B.A. J.* 229, 229 (Mar. 1955).

<sup>8</sup> Among the more comprehensive analyses are Caplan, *supra* note 1; "Symposium: The Role and Function of the United States Solicitor General," 21 *Loy. L.A. L. Rev.* 1047 (1988); and Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (1992).

<sup>9</sup> Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93. That the Attorney General's first enumerated duty has always been to represent the United States in the Supreme Court underscores the Attorney General's close connection with Article III courts. This connection becomes even more pronounced when one considers that in the original bill of the Judiciary Act introduced in the Senate, the Attorney General was to be appointed by the Supreme Court, and the district attorneys by the district courts, rather than by the President. See 4 *The Documentary History of the Supreme Court of the United States, 1789-1800* 106-07 (Maeva Marcus & James R. Perry eds., 1992); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 108-09 (1924). For a discussion of the brief legislative history regarding the change, see Susan L. Bloch, "The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism," 1989 *Duke L.J.* 561, 570-72 & n.33.

<sup>10</sup> As a result, all of the Attorney General's opinions, letters, and briefs had to be written out in his own hand, or by staff provided at his own expense. See Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive*, 154-58 (1937); James S. Easby-Smith, "Edmund Randolph—Trail Blazer," 12 *J. Bar Ass'n D.C.* 415, 419 (1945) (hereinafter cited as Easby-Smith, *Edmund Randolph*); Sewell Key, "The Legal Work of the Federal Government," 25 *Va. L. Rev.* 165, 175-76 (1938). Moreover, because Congress had not even thought it necessary to provide the Attorney General with office space, for years the Attorney General served as an absentee, coming to the seat of government only when called on specific business. See James S. Easby-Smith, *The Department of Justice: Its History and Functions* 8 (1904) (hereinafter cited as Easby-Smith, *Department of Justice*).

<sup>11</sup> Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92-93.

<sup>12</sup> *Id.*; see Cummings & McFarland, *supra* note 10, at 19; Easby-Smith, *Department of Justice*, *supra* note 10, at 5.

<sup>13</sup> Letter from George Washington to Edmund Randolph (Sept. 28, 1789), reprinted in 30 *Writings of George Washington* 418-19 (John C. Fitzpatrick ed., 1939); see

Cummings & McFarland, *supra* note 10, at 19 & n.37; Easby-Smith, *Edmund Randolph*, *supra* note 10, at 419.

<sup>14</sup> Easby-Smith, *Edmund Randolph*, *supra* note 10, at 420; Henry Barrett Learned, *The President's Cabinet* 159 (1912); Rex E. Lee, "Lawyering in the Supreme Court: The Role of the Solicitor General," 21 *Loy. L.A. L. Rev.* 1059, 1061 (1988).

<sup>15</sup> 2 U.S. (2 Dall.) 409 (1792). At issue was the constitutionality of the Invalid Pensions Act of 1792, which required the circuit courts to receive the applications of invalid veterans of the Revolutionary War and to certify to the Secretary of War their opinions on the applications. Many of the circuit judges and justices believed the act to be unconstitutional because it conferred upon the courts a nonjudicial function. When the application of William Hayburn, an invalid veteran, came before a panel of judges in Pennsylvania composed of Justices Wilson and Blair and District Judge Peters, the judges refused to take any action. For a thorough treatment of *Hayburn's Case* and its subsequent, if not misguided, impact on the Court, see Maeva Marcus & Robert Teir, "Hayburn's Case: A Misinterpretation of Precedent," 1988 *Wis. L. Rev.* 527.

<sup>16</sup> See 1 *The Documentary History of the Supreme Court of the United States, 1789-1800* 206 (Maeva Marcus & James R. Perry eds., 1985). After hearing Randolph's argument in his capacity as Hayburn's counsel, the Court concluded it would hold the motion under advisement until the next Term—by which time, it turned out, Congress had revised the underlying statute, making resolution of the case unnecessary. *Id.*; 2 U.S. (2 Dall.) at 409-10.

<sup>17</sup> Letter from Edmund Randolph to George Washington (Dec. 28, 1791), reprinted in 1 *American State Papers (Misc.)* 45-46 (1834); see Easby-Smith, *Edmund Randolph*, *supra* note 10, at 424-25; Key, *supra* note 10, at 176.

<sup>18</sup> *American State Papers*, *supra* note 17, at 45-46; see 2 *Annals of Cong.* 1765-66 (1791); Easby-Smith, *Edmund Randolph*, *supra* note 10, at 425.

<sup>19</sup> See Report from Rep. Lawrence (Jan. 18, 1792), reprinted in 1 *American State Papers (misc.)* 46 (1834); 3 *Annals of Cong.* 329-31 (1792); see also Bloch, *supra* note 9, at 585-89; Easby-Smith, *Edmund Randolph*, *supra* note 10, at 425; Key, *supra* note 10, at 176-79.

<sup>20</sup> Indeed, twenty-seven years passed before Congress, in 1818, finally gave the Attorney General a clerk and made some provision for office space. See Act of Apr. 20, 1818, ch. 87, § 6, 3 Stat. 445, 447. The following year, Congress provided a small contingent fund of \$500 for such essentials as stationery, fuel, and "a boy to attend the menial duties." See Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500; Cummings & McFarland, *supra* note 10, at 80-81, 155-56; Easby-Smith, *Department of Justice*, *supra* note 10, at 10. It took sixty-two years before the Attorney General's salary was made comparable to those of other Cabinet offic-



ers, *see* Act of Mar. 3, 1853, ch. 97, § 4, 10 Stat. 189, 212; Easby-Smith, **Department of Justice**, *supra* note 10, at 15, and seventy years before Congress gave the Attorney General supervision and control over the district attorneys, *see* Act of Aug. 2, 1861, ch. 37, 12 Stat. 285, 285-86; Cummings & McFarland, *supra* note 10, at 142, 218, 491; Bloch, *supra* note 9, at 618-20.

<sup>21</sup> *See* 1 **A Compilation of the Messages and Papers of the Presidents, 1789-1897** 577-78 (James D. Richardson ed., 1897).

<sup>22</sup> 2 **A Compilation of the Messages and Papers of the Presidents, 1789-1897** 453-54 (James D. Richardson ed., 1897).

<sup>23</sup> 6 *Cong. Deb.* 276, 276 (1830).

<sup>24</sup> *Id.* For a discussion of Jackson's proposal, and Webster's successful opposition, *see* Key, *supra* note 10, at 177-79; Cummings & McFarland, *supra* note 10, at 144-46.

<sup>25</sup> 6 *Cong. Deb.* 276, 277.

<sup>26</sup> Act of May 29, 1830, ch. 153, 4 Stat. 414, 414. Although President Jackson signed Webster's bill into law, he nonetheless remained unsatisfied with the structure of the government's legal work. In his second annual message to Congress, he stated, "I am convinced that the public interest would be greatly promoted by giving [the Attorney General] the general superintendence of the various law agents of the Government, and of all law proceedings, whether civil or criminal, in which the United States may be interested." 2 **A Compilation of the Messages and Papers of the Presidents 1789-1897** 500, 527 (James D. Richardson ed. 1897).

<sup>27</sup> On Webster and Adams, *see* generally Samuel Flag Bemis, **John Quincy Adams and the Union** 150-51, 155-57, 289-90, 311 (1956).

<sup>28</sup> For example, in his first annual message on December 2, 1845, President James Polk called attention to the need to place the Attorney General on the same footing as the heads of the executive departments. 4 **A Compilation of the Messages and Papers of the Presidents, 1789-1897** 385 (James D. Richardson ed. 1897); *see* also Cummings & McFarland, *supra* note 10, at 147-48; Key, *supra* note 10, at 180. Shortly thereafter bills were introduced in both the House and Senate, the latter under the sponsorship of former Attorney General John M. Berrien, to implement Polk's proposals. Most notably, the bills would have made it the duty of the Solicitor of the Treasury "to act in subordination to the Attorney General." Opposition arose and, as with previous proposals, the bill was tabled. Cummings & McFarland, *supra* note 10, at 148 (citing *Cong. Globe*, XV 613, 873, 881, 1130-31, 1134 (1845)).

<sup>29</sup> 6 Op. Att'y Gen. 326, 335 (1854).

<sup>30</sup> *See H.R. Exec. Doc. No. 95*, 33d Cong., 1st Sess. (1854).

<sup>31</sup> *See Exec. Order No. 1855-17-2* (July 16, 1855) (Order of President Pierce); Cummings & McFarland, *supra* note

10, at 152, 218.

<sup>32</sup> Act of May 15, 1820, ch. 107, § 1, 3 Stat. 592, 592. Prior to this time, the power to institute such suits had been lodged in the Comptroller of the Treasury, *see* Act of Mar. 3, 1797, ch. 20, §§ 1,3, 1 Stat. 512, 514-15; *see* also Key, *supra* note 10, at 177.

<sup>33</sup> 6 *Cong. Deb.* 322-24; Key, *supra* note 10, at 177. A similar situation arose in the Post Office Department. In recommending the bill to create the Department of Justice in 1870, Representative William Lawrence of Ohio lamented that "[t]he Auditor of the Post Office Department, in charge of the prosecution of mail depredations—immense in number and importance as they are—and controlling them throughout the country, is merely a fourth-class clerk. He gives opinions and directions, and has compiled and published the Post Office laws without the aid of or the accuracy to be secured by the profounder attainments and riper skill of the Attorney General." *Cong. Globe*, 41st Cong., 2d Sess., 3038 (1870).

<sup>34</sup> *See* Key, *supra* note 10, at 177. The amount of litigation directed by the agent was significant. By 1828 he was overseeing more than 3,000 pending cases. *See* 1 Op. Att'y Gen. 694 (1824); Cummings & McFarland, *supra* note 10, at 144. Needless to say, this situation was in need of reform. *See Id.*; Key, *supra* note 10, at 177.

It is not entirely fair to say that Congress did nothing in the face of frequent requests by the Executive to reform and consolidate the legal work of the government in the decades prior to the Civil War. As early as 1824, the Attorney General was given control over litigation involving land claims arising out of the Louisiana Purchase, and he was charged with instructing the district attorneys in such litigation and with deciding which adverse district court rulings to appeal. Act of May 26, 1824, ch. 173, § 9, 4 Stat. 52, 55; 6 Op. Att'y Gen., *supra* note 29, at 337. In 1852 Congress gave the Attorney General supervisory authority over a large body of suits dealing with land claims in California and directed the Attorney General to review the transcripts of cases decided by the commission charged with adjudicating the claims to determine which cases should be appealed to the district courts and to the Supreme Court. *See* Act of Mar. 3, 1851, ch. 41, 9 Stat. 631; Act of Aug. 31, 1852, ch. 108, § 12, 10 Stat. 76, 99. Describing those responsibilities to the President and to Congress, Attorney General Cushing stated in 1854 that "[t]his branch of business . . . involves responsible present relations to, and ultimate management of, a large number of suits of the highest importance and interest, and therefore constitutes one of the most onerous of the present occupations of the Attorney General." 6 Op. Att'y Gen., *supra* note 29, at 338. And in 1853 Congress finally set the salary of the Attorney General on a par with that of the heads of the executive departments. Act of Mar. 3, 1853, ch. 97, § 4, 10 Stat. 189, 212; *see* also Easby-Smith, **Department of Justice**, *supra* note 10, at 15.

<sup>35</sup> Act of May 29, 1830, ch. 153, § 5, 4 Stat. 414, 415. *See supra* note 26 and accompanying text.

<sup>36</sup> *See Cummings & McFarland, supra* note 10, at 220-22, *Key, supra* note 10, at 179.

<sup>37</sup> Act of July 2, 1836, ch. 270, § 16, 5 Stat. 80, 83.

<sup>38</sup> By the outbreak of the Civil War, the law officers of the United States, other than the district attorneys, were the Attorney General, the Solicitor of the Treasury, the Solicitor of the Court of Claims, and the Assistant Attorney General. Soon would be added the Solicitor and Naval Judge Advocate General, Solicitor for the War Department, Post Office Solicitor, Assistant Solicitor for the Treasury, Solicitor of Internal Revenue, and Solicitor for the Department of State. *See Cong. Globe*, 41st Cong., 2d Sess., 3035 (1870); *Cummings & McFarland, supra* note 10, at 221-22.

<sup>39</sup> Act of Aug. 2, 1861, ch. 37, 12 Stat. 285.

<sup>40</sup> Act of Aug. 6, 1861, ch. 65, 12 Stat. 327; *see also* Act of Mar. 3, 1863, ch. 76, § 13, 12 Stat. 737, 741; *see Cummings & McFarland, supra* note 10, at 218-19.

<sup>41</sup> Act of Mar. 2, 1867, ch. 169, § 3, 14 Stat. 471, 471-72.

<sup>42</sup> *Cong. Globe*, 41st Cong., 2d Sess., 3035 (1870). Representative Lawrence of Ohio, one of the original sponsors of the 1870 Department of Justice Act, explained the growth in the expenditures for outside counsel as follows:

Under various laws, and sometimes, perhaps, without any very definite law, a practice has grown up largely since 1860 of giving employment to counsel for the Government in almost every conceivable capacity and under a great variety of circumstances—to counsel who are not officers of the Government, nor amenable as such. Under appropriations for collecting the revenues, and other general purposes, very large fees have been paid for services which could have been performed by proper law officers at much less expense.

*Id.* at 3038.

<sup>43</sup> *H.R. Exec. Doc. No.* 40-198, at 3-4 (1868). Notably, the average annual expenditure for outside counsel in Supreme Court cases during this period was greater than the \$7,500 annual income originally set for the Solicitor General. *See* Act of June 22, 1870, ch. 150, § 10, 16 Stat. 162, 163.

<sup>44</sup> *See Cong. Globe*, 41st Cong., 2d Sess., 3038 (1870).

<sup>45</sup> *Id.* at 3035. The obvious potential for waste and abuse in this system caused Representative Lawrence to describe the bill to create the Department of Justice as “a measure of economy” designed to “reduce expenditures for legal services to the Government and put an end to a system which might be perverted to purposes of favoritism.” *Id.* at 3038. Indeed, Representative Lawrence predicted that the 1870 Act would “save the unnecessary expenditure of more than one hundred thousand

dollars annually for extra-official fees to counsel.” *Id.* at 3065.

<sup>46</sup> Among other things, the Senate wanted to know whether the staff of the Attorney General’s Office was sufficient; what amounts had been spent securing nongovernmental attorneys to represent the government’s interests in the Supreme Court and for similar counsel to assist the district attorneys; and whether the solicitors and law clerks in the various departments and the Court of Claims could be dispensed with and their duties placed under the direction of the Attorney General, “so as to bring all the law officers of the Government under one head, with saving of expense and benefit to the public service.” *Cong. Globe*, 40th Cong., 2d Sess., 196 (1867); *see also Cummings & McFarland, supra* note 10, at 222.

<sup>47</sup> *S. Exec. Doc. No.* 40-13, at 2 (1867).

<sup>48</sup> *Id.*

<sup>49</sup> As is the case of the Attorney General, the position is of English origin. Sir William Holdsworth explains that by 1509 the position of the King’s solicitor was well entrenched. 6 *A History of English Law* 462-63 (1924). Like his counterpart in private practice, the King’s solicitor was inferior to the King’s attorney and served as a general assistant to the attorney in the handling of the King’s legal business. *Id.* at 463, 469-70. Indeed, beginning in 1530, it became the custom on the change of law officers to make the King’s solicitor the King’s attorney. *Id.* at 463. By the seventeenth century, the King’s attorney and solicitor were the only officials authorized to initiate legal proceedings on behalf of the Crown, and they were given direction over the King’s lesser law officers. *Id.* at 471-73. They also became important political, as well as legal, counselors to the crown, but the basic role of the King’s solicitor—to assist the King’s attorney in fulfilling his important legal responsibilities—has remained unchanged. *Id.*

<sup>50</sup> *See infra* notes 70-92 and accompanying text.

<sup>51</sup> *See supra* notes 9-18 and accompanying text.

<sup>52</sup> *Cong. Globe*, 40th Cong., 2d Sess., 153 (1867).

<sup>53</sup> *Cong. Globe*, 40th Cong., 2d Sess., 934 (1868).

<sup>54</sup> *See id.* at 196, 934, 1116, 1271-73, 1633, 1860, 2480 (1868); *Cong. Globe*, 41st Cong., 2d Sess., 3035 (1870). For a general description of these legislative efforts, *see Cummings & McFarland, supra* note 10, at 223.

<sup>55</sup> *Cong. Globe*, 40th Cong., 2d Sess., 1271-73 (1868).

<sup>56</sup> *See Cummings & McFarland, supra* note 10, at 223.

<sup>57</sup> Act of June 25, 1868, ch. 71, § 5, 15 Stat. 75, 75-76.

<sup>58</sup> Act of Mar. 3, 1869, ch. 121, 15 Stat. 283, 294.

<sup>59</sup> *See Cummings & McFarland, supra* note 10, at 224.

<sup>60</sup> *Cong. Globe*, 41st Cong., 2d Sess., 1568 (1870). Although Lawrence disagreed with certain minor aspects of the bill—for example, he preferred calling the new department the “law department”—he gave it his full support. *See id.* at 3039.

<sup>61</sup> *Id.* at 4490.

<sup>62</sup> *Id.* at 3036.

<sup>63</sup> *Id.* at 3035. Jenckes further explained that “[o]ne of the objects of this bill is to establish a staff of law officers sufficiently numerous and of sufficient ability to transact this law business of the Government in all parts of the United States.” *Id.*

<sup>64</sup> Act of June 22, 1870, ch. 150, 16 Stat. 162. The Office of the Solicitor General of the United States and the Department of Justice came into formal existence on July 1 of that year. *Id.* § 19, 16 Stat. at 165.

<sup>65</sup> *Id.* § 2, 16 Stat. at 162.

<sup>66</sup> See *id.* § 1, 16 Stat. at 162; Rev. Stat. §§ 346, 347 (1878); 28 U.S.C. § 503 (1994); see also Charles Fahy, “The Office of the Solicitor General,” 28 *A.B.A. J.* 20, 22 (1942).

<sup>67</sup> **III Dictionary of American Biography** 55 (1929). One case from Bristow’s days as district attorney is of particular note. In the fall of 1869, Bristow secured the murder convictions of two white men, John Blyew and George Kennard, for the brutal murder of a black family. Bristow brought the case in federal court under a section of the Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. at 27, which gave federal courts jurisdiction over “all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State . . . where they may be,” any of the rights granted by the act, including the rights to “give evidence” and to have “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” *Id.* § 1, 14 Stat. at 27. Bristow brought the murder charges in federal court because all of the witnesses to the murder were black, and Kentucky law prohibited blacks from testifying against white defendants. See Robert D. Goldstein, “Blyew: Variations on a Jurisdictional Theme,” 41 *Stan. L. Rev.* 469 (1989).

The defendants were found guilty of murder and sentenced to death. They appealed to the Supreme Court, arguing that the district court lacked jurisdiction over what was in essence a state murder trial. When the Supreme Court took up their claim, Benjamin Bristow, now the newly appointed Solicitor General, together with Attorney General Amos T. Ackerman, presented the case for the government. The Supreme Court held that the so-called “affecting jurisdiction” of the act only applied to cases in which the affected persons were the actual parties to the case. *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 594 (1872). This excluded the impact on the black witnesses, mostly surviving family members, and it also excluded the victims, since “[m]anifestly the act refers to persons in existence.” *Id.* at 594. Thus, the Court held that the district court lacked jurisdiction and vacated the convictions.

Bristow’s efforts, however, were not entirely in vain. Due in part to Bristow’s tenacity in pursuing the issue,

Kentucky repealed the testimonial bar in January 1872, shortly before the Supreme Court handed down its decision in *Blyew*. See Goldstein, *supra* at 563; Ross A. Webb, **Benjamin Helm Bristow: Border State Politician** 82-85 (1969). Some modicum of justice was eventually imposed on the culprits. Kennard was convicted of the murders in state court in 1876 and sentenced to life imprisonment. He served approximately nine years in prison before being pardoned by the governor on the ground of poor health. See Goldstein, *supra*, at 564 n.358. Blyew’s first trial, in 1873, resulted in a hung jury. He escaped before he could be retried and remained free for seventeen years, until he was found and convicted of the murders in 1890. Although sentenced to life imprisonment, Blyew served less than six years in prison before receiving a pardon from the Democratic acting governor of Kentucky, who expressed doubts about the evidence used to convict Blyew. See *id.* at 563-66.

<sup>68</sup> Letter from Secretary Wilson to Attorney General Williams (June 30, 1874), quoted in Cummings & McFarland, *supra* note 10, at 228 n.27. Whitman had actually been in poor health for some time and for at least a year prior to his discharge had employed a substitute to fulfill his duties to the Department. See generally George Rice Carpenter, **Walt Whitman** 116-138 (1924).

<sup>69</sup> On June 30, 1874, Attorney General George H. Williams wrote Whitman that his service would be terminated as of July 1, 1874, although shortly thereafter the Attorney General granted Whitman two months’ pay, which was customary in such circumstances. See Gay Wilson Allen, **The Solitary Singer: A Critical Biography of Walt Whitman**, 461 (1967). This was not the first time Whitman was faced with discharge from public employment. In May 1865 President Andrew Johnson’s newly appointed Secretary of the Interior, James Harlan, issued a circular to the bureau heads in the department asking them to report on the “loyalty” of each of the employees under him, and also “whether there are any whose fidelity to duty or moral character is such as to justify an immediate dispensation of their services.” *Id.* at 344 (quoting a *New York Herald* article dated May 31, 1865). Word apparently got back to Harlan of Whitman’s authorship of **Leaves of Grass**, which was by then in its third edition. Harlan, a devout Methodist from Iowa, apparently concluded that Whitman failed his test for “moral character” and abruptly sent Whitman a notice dated June 30, 1865, informing him that his services would be “dispensed with from and after this date.” *Id.* at 345. With the aid of William O’Connor, a prominent Washingtonian and loyal supporter of Whitman, and Assistant Attorney General J. Hubley Ashton, it was arranged instead for Whitman to be transferred to a position as a clerk in the Attorney General’s Office. The entire episode received moderate press coverage, with one paper

wryly commenting that Whitman “now occupies a desk in the Attorney General’s office, where we suppose they are not so particular about morals.” *Id.* at 347 (quoting July 12, 1865, editorial in the *Eagle*).

<sup>70</sup> 77 U.S. (10 Wall.) 395 (1870).

<sup>71</sup> Letter from John M. Harlan to Bristow (Nov. 16, 1870), quoted in Webb, *supra* note 67, at 74.

<sup>72</sup> Letter from W.A. Meriwether to Bristow (Nov. 18, 1870), quoted in Webb, *supra* note 67, at 74. Justice Noah Swaine’s opinion for the Court accepted the new Solicitor General’s position that ignorance can never be the basis of a legal right in its entirety. *See Hodson*, 77 U.S. (10 Wall.) at 409.

<sup>73</sup> These figures are derived from the counsel notations in the early published cases, and are less than conclusive because special counsel for the government were apparently not consistently designated. *See Lee*, *supra* note 14, at 1065 & n.20.

<sup>74</sup> *See Lee*, *supra* note 14, at 1066.

<sup>75</sup> Indeed, it was not until the 1920s that the Solicitor General’s name began appearing on all of the government’s briefs to the Supreme Court. *See id.*

<sup>76</sup> Phillips served as Assistant District Attorney in 1871 and 1872 at Raleigh, North Carolina. During this time, he oversaw the prosecution of several important Klan cases. *See* “R.H. Battle, Obituary of Samuel Field Phillips, LL.D.,” 1 *N.C.J.L.* 22, 27 (1904); *see also* Robert D. Miller, “Samuel Field Phillips: The Odyssey of a Southern Dissenter,” 58 *N.C. Hist. Rev.* 263, 275 (1981).

<sup>77</sup> From a search of WESTLAW’s database, for example, in 1873 Attorney General Williams appears to have participated in ten oral arguments; however, in none of these did he argue solo. Attorney General Charles Devens, who held office between 1877 and 1881, participated in nine arguments during his entire tenure. And Attorney General Benjamin H. Brewster, who served between 1881 and 1885, when both he and Phillips resigned, appears to have argued only two cases as Attorney General. Subsequent Attorneys General were often more involved in Supreme Court matters.

<sup>78</sup> Battle, *supra* note 76, at 26-27. Phillips is perhaps best known for an argument that he presented after leaving the Solicitor General’s Office. In 1896 he helped represent Homer Plessy in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Interestingly, the only vote Phillips got in *Plessy* was from Justice John Marshall Harlan, Benjamin Bristow’s former Kentucky law partner.

<sup>79</sup> **Some Facts about the Life and Public Services of Benjamin Helm Bristow of Kentucky** 21-22 (1876), Bristow Papers, Library of Congress. In fact, Bristow served the Supreme Court with such distinction that his name was often mentioned to fill the vacancy of Associate or Chief Justice. *See* Charles Fairman, **Reconstruction and Reunion, 1864-68**; 7 **The Oliver**

**Wendell Holmes Devise: History of the Supreme Court of the United States**, 21-24, 35, 504-05 (1987); Webb, *supra* note 67, at 128, 131, 267-73.

<sup>80</sup> *See supra* text accompanying note 63.

<sup>81</sup> Act of May 31, 1870, ch. 114, 16 Stat. 140.

<sup>82</sup> *See* Webb, *supra* note 67, at 88; James Wilford Garner, **Reconstruction in Mississippi**, 351-352 (1901).

<sup>83</sup> Because of the constitutional issues presented, a select committee created by Congress to investigate abuses of the Ku Klux Klan, the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, would later describe the case as “[t]he first important trial in the United States under the enforcement act,” *S. Rep. No.* 42-41, at 936 (1872), and the Committee included the entirety of the trial transcript, minus argument by counsel, in its report. *See id.* at 936-87.

<sup>84</sup> *See* Webb, *supra* note 67, at 88; Cummings & McFarland, *supra* note 10, at 235-36.

<sup>85</sup> The Supreme Court later struck down portions of the Enforcement Act in *United States v. Reese*, 92 U.S. 214 (1876), and narrowly construed other portions of the Act in *United States v. Cruikshank*, 92 U.S. 542 (1876). Both cases were argued for the government by Solicitor General Phillips and Attorney General Williams.

<sup>86</sup> Webb, *supra* note 67, at 88; Garner, *supra* note 82, at 351-52. Despite such victories, Klan convictions were difficult to obtain. Between the problems of packed juries and perjured testimony, the district attorneys complained of their inability to secure convictions, despite the numerous indictments they filed. *See id.*; *H.R. Exec. Doc. No.* 42-268, at 30-41 (1872). Bristow wrote to another district attorney facing similar challenges: “The higher the social standing and character of the convicted party, the more important is a vigorous prosecution and prompt execution of judgment.” Letter from Bristow to D.H. Starbuck (Oct. 2, 1871), quoted in Webb, *supra* note 67, at 92; *see also* Cummings & McFarland, *supra* note 10, at 237.

<sup>87</sup> Section 4 of the 1870 Department of Justice Act provided:

That questions of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution . . . may be by him referred to such of his subordinates as he may deem appropriate, . . . and if the opinion given by such officer shall be approved by the Attorney-General, such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General.

Act of June 22, 1870, ch. 150, § 4, 16 Stat. 162, 162. The Attorneys General, particularly during Solicitor General Phillips's tenure, increasingly took advantage of this provision to assign opinion-writing responsibilities to the Solicitor General. *See, e.g.*, 15 Op. Att'y Gen. 491-665 (1875-1878); 14 Op. Att'y Gen. 585-684 (1872-1874); 13 Op. Att'y Gen. 572-73 (1870), 588-91 (1871); *see also* Webb, *supra* note 67, at 73-74.

<sup>88</sup> As Bristow's biography reflects, drawing upon his letters during the period, Attorney General Ackerman's frequent and long absences from the Capital placed a considerable weight on the Solicitor General. *See* Webb, *supra* note 67, at 86, 90, 92, 94.

<sup>89</sup> *See, e.g.*, 17 Op. Att'y Gen. 240-50 (1881); 15 Op. Att'y Gen. 28-35, 106-09 (1875-1876); 13 Op. Att'y Gen. 440-66 (1871).

<sup>90</sup> *See* Act of June 16, 1933, ch. 101, § 16, 48 Stat. 283, 307-08; Reorg. Plan No. 2 of 1950, §§ 3, 4, 64 Stat. 1261, 1261.

<sup>91</sup> Proceedings Before and By Direction of the President Concerning the Meaning of the Term "Whisky" 1243-60 (1909) (report of Solicitor General Bowers).

<sup>92</sup> *Id.* at 1244.

<sup>93</sup> *Id.* at 1265-1325 (hearing before President Taft on distillers' exceptions to Solicitor General Bowers' report). Also present at President Taft's hearing was the Attorney General, George W. Wickersham, and the Secretary of Agriculture, James Wilson. Before hearing argument on the distillers' exceptions, President Taft noted the novelty of such a proceeding, stating that "I want to say that it is not usual for the President, I think, to give hearings of this sort." *Id.* at 1266.

<sup>94</sup> *See* Nancy V. Baker, **Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789-1990** 14 (1992); Cummings and McFarland, *supra* note 10, at 513.

<sup>95</sup> Webb, *supra* note 67, at 74. Unfortunately, we have not been able to locate in the National Archives the original sources on which Webb relied for that statement.

<sup>96</sup> Although the Attorney General was given formal supervisory authority over the district attorneys as early as 1861, the press of the Attorney General's other work, the inadequacy of his budget and staff, and confusion over the overlapping authority of the Solicitor of the Treasury and other departmental officers made it impossible for the Attorney General to exert control over the district attorneys in all but the most important of cases. *See* Cummings & McFarland, *supra* note 10, at 219-20.

<sup>97</sup> 1871 Att'y Gen. Ann. Rep. 5.. In requesting that Congress "destroy the exception which is now supposed to exist in internal revenue cases," Attorney General Ackerman, quite accurately it turned out, warned that "[t]he theory upon which such control is retained, if consistently applied, would make district attorneys controllable by an officer of

the Post-Office Department in post-office cases; by the Commissioner of Customs in custom cases; by the Commissioner of Pensions in pension cases; by the Commissioner of Indian Affairs in cases relating to Indians; and so on." *Id.*

<sup>98</sup> *Id.* at 6 ("It was probably the purpose of Congress that the distribution of business in the Department of Justice should be made by the Attorney General in his discretion, but the laws, mostly of long standing, which impose specific duties upon the Solicitor of the Treasury, interfere with such discretionary distribution.")

<sup>99</sup> 1872 Att'y Gen. Ann. Rep. 16. After reminding Congress that the Department of Justice Act had transferred the Solicitor of the Treasury, the Solicitor of Internal Revenue, the Naval Solicitor, and the examiner of claims in the Department of State to the Justice Department, Attorney General Williams complained that "the act implies, and is so construed by the heads of the different Departments, that their duties are to be the same as they were before the transfer was made, and that their practical relations to the Departments to which they were attached before said act was passed remained unchanged." *Id.* He concluded that "[w]hile these officers are nominally subjected to the control of this Department, they are attached to and exclusively perform duties assigned to them by the heads of other Departments. Obviously, this is an arrangement which not only creates a divided jurisdiction, but produces confusion in the transaction of the public business." *Id.*

<sup>100</sup> *See* 1871 Att'y Gen. Ann. Rep. 5-6; 1872 Att'y Gen. Ann. Rep. 16. Attorney General Williams in 1872 secured the introduction into the House of a bill to put an end to the remaining divisions of authority in his department and strongly urged passage of the measure in his annual reports to Congress in 1872 and 1873, *see* 1872 Att'y Gen. Ann. Rep. 16; 1873 Ann. Rep. Att'y Gen. 18, but to no avail.

<sup>101</sup> Act of June 8, 1872, ch. 335, § 3, 17 Stat. 283, 284; 1872 Att'y Gen. Ann. Rep. 16.

<sup>102</sup> *See* Key, *supra* note 10, at 185. Those statutory impediments to creating a unified legal apparatus were exacerbated by Congress's failure to provide adequate quarters for the new Department of Justice. In his annual report to Congress, less than six months after the creation of the Department, Attorney General Ackerman complained that "the offices of this Department are dispersed in five buildings, some of them at a considerable distance from the others." 1870 Att'y Gen. Ann. Rep. 1. The departmental solicitors were left in their old offices in close proximity to their department heads, with whom they continued their prior allegiances with little or no regard for the consolidation Congress envisioned in the Department of Justice Act. Even the Attorney General and the Solicitor General did

not share the same office building. Attorney General Ackerman warned that “[u]ntil a building sufficient for all of them shall be provided, the purpose of Congress to bring under one direction all the law officers of the Executive Departments will not be thoroughly accomplished.” *Id.*

The following year showed some improvements. The officers of the Justice Department not previously affiliated with other executive departments all moved into three floors of the Freedman’s Savings Bank building on Pennsylvania Avenue at Fifteenth Street, where they remained until 1899. But these offices, too, were less than ideal. The space was crowded, there was often no heat, and the sewer beneath the building caused foul air to permeate the building, especially in hot weather. *See* 1871 *Att’y Gen. Ann. Rep.* 4; Cummings & McFarland, *supra* note 10, at 228. And because of a shortage of space, the department solicitors were again left in their former locations. By the time of his 1871 report to Congress, “[t]he want of sufficient accommodations in one building,” together with the intransigence of the solicitors, had forced Attorney General Ackerman to lower his expectations. 1871 *Att’y Gen. Ann. Rep.* 5. “As long as this physical difficulty prevented the literal execution of the law,” Ackerman wrote, “it was thought unwise to put other Departments to inconvenience by disturbing the practical relations previously existing between these officers and the heads of those Departments. But an effort has been made by frequent conference to approach as near as possible to the execution of the intention of Congress, expressed in the law.” 1871 *Att’y Gen. Ann. Rep.* 4. *Id.*

<sup>103</sup> 72 U.S. (5 Wall.) 370 (1867).

<sup>104</sup> 74 U.S. (7 Wall.) 454 (1869).

<sup>105</sup> 98 U.S. 61 (1878).

<sup>106</sup> 125 U.S. 273 (1888).

<sup>107</sup> Indeed, there are marked parallels between the Court’s reasoning in *San Jacinto Tin* and Attorney General Randolph’s arguments in *Hayburn’s Case*. For a discussion of Randolph’s arguments, *see* Marcus & Teir, *supra* note 15, at 535-41; Cummings & McFarland, *supra* note 10, at 27-28.

<sup>108</sup> *San Jacinto*, 125 U.S. at 278-88.

<sup>109</sup> 513 U.S. 88 (1994).

<sup>110</sup> *See* Reorg. Plan No. 4 of 1953, § 1, 3 C.F.R. 1026 (1949-1953), reprinted in 67 Stat. 636, codified as amended at 28 U.S.C. § 508 (1994).

<sup>111</sup> *See* Act of June 16, 1933, § 16 48 Stat. 283, 307-08; Reorg. Plan No. 2 of 1950, §§ 3, 4, 3 C.F.R. 1002, 1003 (1949-1953), reprinted in 5 U.S.C. app. at 1468 (1994), and in 64 Stat. 1261, 1261; *see also supra* note 90 and accompanying text. In his memoirs, former Solicitor General Erwin Griswold describes his surprise in discovering that, as a young attorney in the Solicitor General’s

Office in the early 1930s, he was called upon to draft opinions for the Attorney General on important subjects with little or no oversight by the Solicitor General, who was too busy with the press of Supreme Court litigation to review the drafts.

Because of the number and significance of these opinions of the Attorney General, and related matters, I became concerned. It seemed to me that the work was both adequate in volume and of such importance that it should not be handled by a young lawyer in the Solicitor General’s office. In particular, I felt that these drafts of opinions, and other policy matters, should be the responsibility of an officer appointed by the President after confirmation by the Senate. Since it was clear that the Solicitor General did not have time available to handle these matters himself, I recommended that a new office should be established, and that the new officer should have the title of Assistant Solicitor General, nominated by the President, and confirmed by the Senate. Such a statute was enacted.

Erwin N. Griswold, **Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer** 101 (1992).

<sup>112</sup> “Reed in Collapse; AAA Cases Halted,” *The New York Times*, Dec. 11, 1935, at 1, 9. The article begins with the heading “Federal Pleader is Taken Ill in Midst of New Hail of Questions by Judges” and describes the incident as follows:

Bringing to a dramatic halt the second day of argument in the Supreme Court on the constitutionality of the Agricultural Adjustment Act and the Bankhead Cotton Control Law, Solicitor General Stanley Reed faltered this afternoon and sat down, physically unable to continue.

His collapse as he defended the Bankhead act was in the midst of a barrage of technical questions from the nine judges . . . .

*Id.* at 1. The article explains that as Reed attempted to argue “that the case was a non-adversary one and that there was nothing in the record to show opposition between the plaintiff and the defendant or an effort to try out the issue[,] . . . [a] hail of questions followed from Justices Hughes, McReynolds, Butler, Van Devanter and Roberts, all asking Mr. Reed why he alleged the record to be non-adversary when both sides said that it was not and whether the contention was based on both sides stipulating certain allegations.” *Id.* at 9. As

Reed struggled with this “nest of questions,” Chief Justice Hughes, broke in and “in one crisp sentence” declared that “[t]he court does not desire to hear you further on that point.” *Id.*

Then, as Reed began to make an additional point about the record and was again faced with a barrage of hostile questions from the Justices, he “immediately paled and said in a low voice: ‘I must beg the court’s indulgence, but I am too ill to proceed further.’” *Id.* Reed’s face, we are told, “was ashen and he showed signs of utter exhaustion.” *Id.* at 1.

Of course, the repeated prospect of defending New Deal legislation before the Hughes Court may have been enough to make any advocate feel faint. But the magnitude of the Solicitor General’s Supreme Court

litigation during this period placed immense pressure on the office and no doubt left little or no room for the Solicitor General’s nonlitigation-related duties. As the *The New York Times* put it, “Court officers and representatives of the Department of Justice explained that the Solicitor General was suffering from extreme weakness caused by the strain of the major cases he had prepared and argued.” *Id.*

<sup>113</sup> Lehmann’s poignant words have been inscribed on the wall of the Attorney General’s rotunda in the United States Department of Justice building. See *Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) (quoting Solicitor General Simon Sobeloff, in turn paraphrasing Lehmann); James L. Cooper, “The Solicitor General and the Evolution of Activism,” 65 *Ind. L.J.* 675, 676 n.8 (1990); Caplan, *supra* note 1, at 17.

<sup>114</sup> Francis Biddle, *In Brief Authority* 98 (1962).

# Constitutional Change in the United Kingdom: British Solutions to Universal Problems

Alexander Andrew Mackay Irvine

## Universal Problems

All legal systems have to confront the way individuals and governments interrelate. In countries that maintain democracy and uphold the rule of law, attachment to these fundamental values must find expression in the constitutional framework that regulates the relationship between the individual and the state. The United States of America stands as a preeminent example of a society that has striven to order its constitutional arrangements in this way. My theme is the importance of securing this objective by means sensitive to national political and legal cultures.

In the United States this task was begun by those who came together, over 200 years ago, in Philadelphia, to draft the text of the Constitution. However, the Framers of the Constitution must share the credit for its success with the way it has been interpreted and applied by the Supreme Court of the United States. Former

Chief Justice Charles Evans Hughes famously remarked that “[t]he Constitution is whatever the judges say it is.” More recently it has been said that “the obverse is true as well: if the judges are not prepared to speak for it, a constitution is nothing.” I can assure you that on our side of the Atlantic we are well aware that *Marbury v. Madison* is not merely of historical significance. We know that the Supreme Court has in the last few months reaffirmed that the Constitution is superior and paramount law, whose protections cannot be impaired by shifting legislative majorities. It is this commitment to the Constitution that explains, more than any other factor, the ample protections that now inhere in the relationship between the United States’ institutions of government and American citizens.

The incidents of that relationship, dictated by the demands of democracy and the rule of law, are numerous. Foremost must be the protection of fundamental rights; the accountabil-



ity of, and public participation in, the governmental process; and an ethos of open government that acknowledges that true democracy is incompatible with an unthinking culture of institutional secrecy.

That these objectives are pursued in the United States is apparent beyond doubt. The human rights guarantees in the federal and state Constitutions; the federal structure itself that locates government closer to the governed; and the freedom of information legislation that has been adopted both at national and state levels demonstrate, in the clearest terms, a concern to imbue relationships between citizen and state with characteristics based firmly on democracy and the rule of law.

The pursuit of these goals is not, of course, the exclusive preserve of the United States. In the sphere of human rights, many transnational agreements demonstrate international recognition of the high value given to respect for fundamental rights. The Universal Declaration of Human Rights is a distinctive example, in this, the year of its fiftieth anniversary. The International Charter on Civil and Political Rights, and the European Convention on Human Rights, are important, too, as is the legal system of the European Union. In its short history it has developed its own doctrine of fundamental rights. National legal orders also increasingly recognize the need to uphold human rights. This is witnessed by the adoption of the Canadian Charter of Rights and Freedoms in 1982 and the New Zealand Bill of Rights Act in 1990, as well as by the assertion by the Australian High Court of a jurisdiction to review primary legislation that interferes with basic rights.

As with human rights, so too with the other necessary ingredients of a proper relationship between the individual and the state. Through their federal arrangements, many legal systems enhance the accountability of and public participation in the business of government. The importance of this policy is also recognized in the legal order of the European Union, finding expression in the principle of subsidiary.

Similarly, there exists broad recognition that it is necessary to dismantle the culture of secrecy that has so often enveloped government. In 1982, Australia, Canada and New Zealand all moved to enact legislation to create public rights of access to official information.

### British Solutions

It is a strong ambition to fashion solutions to these fundamental problems that underlies the constitutional changes we are now carrying into effect in the United Kingdom. Since its election to office, just over twelve months ago, the new British Government has embarked on a comprehensive program of constitutional renewal as a major political priority. My central point this evening is that, although the impetus for these reforms is a set of problems universal in character, the solutions being adopted in the United Kingdom are, of necessity, tailored to the particular needs of the British constitution. Let me try to substantiate this argument by reference to the Government's proposals to enhance human rights protection in the United Kingdom. I begin, however, by offering two other examples that illustrate my thesis.

I have already spoken of the way in which federal arrangements—as those of the United States—promote governmental accountability and public participation in the governmental process by locating that process closer to the people. The same objective informs the United Kingdom Government's proposals to create devolved legislatures in Scotland and Wales—proposals approved by referendums in those countries last summer. Similarly our plans for a strategic authority for London, led by an elected mayor, were approved by Londoners as recently as May 7, 1998, that demonstrates the continuing support for our constitutional reforms. In the longer term, if there is a local demand for it, we propose to devolve power to the English Regions. And a central element of the peace agreement, recently reached in Northern Ireland, will be a local Assembly, substan-

tially a hybrid of the Scottish and Welsh patterns of devolution, which will also be put to a referendum later this month.

At present, all primary legislative power resides in the Westminster Parliament. Scotland and Wales are administered by executive departments that are accountable to that Parliament. Following referendums in 1997, the Government is promoting legislation to create a Scottish Parliament and a Welsh Assembly whose members will be directly elected by the people of Scotland and Wales. In turn, these arrangements will provide a more democratic framework for the government of those parts of the Union.

I know that the British are often accused of not understanding what "federalism" means, perhaps something as elusive as British theories of Parliamentary sovereignty. However, I do not think our constitutional reform program heralds a federal structure for the United Kingdom in the United States sense. Although a strictly federal approach has been adopted successfully in many countries, it would not be right for Britain. The needs of the various parts of the Union differ. It is the diversity of the countries that make up the United Kingdom that constitutes one of its greatest strengths. This is reflected in the system of devolution that is planned. Rather than imposing a pure federal structure on the UK as a whole, varying degrees and types of power will be devolved to different parts of the Union in light of their needs and desires. It is for this reason that the reform packages planned for Scotland and Wales are fundamentally different. The Scottish legal system is already substantially independent of that of England and Wales. This tradition will be built upon by the new Scottish Parliament, that will have the power to pursue a distinctive legislative agenda for Scotland over an extensive range, including the law, economic development, industrial assistance, universities, training, transport, the police, and the prosecution system. However, in spite of this broad competence, fundamental human rights are "ring fenced." The new Scottish Parliament will not

have competence to infringe fundamental rights. In contrast to the Scottish Parliament, however, the Welsh Assembly will have no power to enact primary legislation; rather, it will serve an executive function, exercising the executive powers previously exercised by the Secretary of State for Wales, so providing a more transparent and democratic framework for the government of Wales.

Only by adopting this pragmatic approach has it been possible to fashion a devolution scheme appropriate to the special circumstances of each part of the United Kingdom.

The same point can be made about freedom of information. Before publishing its proposals, the Government considered the regimes that operate in other countries—the United States, Canada, Australia, and New Zealand. Although this comparative analysis was illuminating, it was appreciated that a unique approach would be needed in the UK, to take account of the particular circumstances of the British legal system. For instance, there presently exists in Britain a nonstatutory freedom of information regime (much weaker than the new statutory framework that is being constructed). No other country, in developing statutory rights of access to official information, has had to do so against this kind of background. It has also been necessary to consider all the many existing statutory provisions giving rights of access to personal information, as well as those that restrict disclosure of official information on, for example, national security grounds.

So, the development of the new freedom of information system illustrates that, although the United Kingdom legal order is highly receptive to fresh ideas through processes of cross-fertilization—we have recognized that ultimately we must respond to universal problems by cultivating domestic solutions suitable to national conditions, rather than simply transplanting approaches favoured elsewhere.

Nowhere is this plainer than in the area of human rights protection.



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## Protecting Fundamental Rights

### Introduction: The Problem and the Solution

It is well known that the United Kingdom today is without a systematic human rights regime. So the protections of human rights in Britain today are the fruit of a number of different legislative and judicial initiatives.

In certain contexts, Parliament has stepped in to provide a statutory framework for the protection of human rights, sometimes borrowing ideas from elsewhere. For example, British legislation on gender and race equality was modelled on State antidiscrimination legislation, introduced in the aftermath of the Second World War, starting with the State of New York, followed closely by Massachusetts and then Pennsylvania. The law of the European Union also plays an important part in the field of human rights both in terms of trans-

European legislation and the indigenous doctrine of fundamental rights developed by the Community Court.

Although they lack any comprehensive human rights jurisdiction, the contribution of the British courts has been central to the protection of individuals' rights in the United Kingdom. In limited areas, the judges have been able to develop common law rights to safeguard against legislative and executive encroachment, relying on basic postulates of a democracy under the rule of law, for example, the existence of courts and the necessity of access to justice. More generally, the courts have considerably enhanced their powers of judicial review in recent decades. They have begun to scrutinize a broader range of decisionmaking powers, holding that all governmental functions are in principle amenable to review, irrespective of the legal source of the power in question. Also, the courts have dispensed with a range of technical fetters that

previously limited their jurisdiction, for example by relaxing the standing requirements and boldly resisting occasional legislative attempts to curtail judicial scrutiny of executive action. Although the British courts are constrained by the doctrine of Parliamentary sovereignty from reviewing primary legislation itself, their supervisory powers nevertheless contribute substantially to human rights protection in two key ways. First, by imposing requirements of fairness and rationality on public decisionmakers, judicial review ensures that individuals are not subjected to arbitrary treatment by those entrusted with governmental power. Secondly, the courts subject executive action that impacts on fundamental rights to particularly thoroughgoing scrutiny.

Notwithstanding these advances, United Kingdom law is undoubtedly deficient. Let me outline some of the main problems. First, British law possesses no statute that systematically sets out citizens' rights. Second, there exists no obligation on governmental and other public authorities to respect substantive human rights. While our courts have taken account of the European Convention on Human Rights in certain limited contexts, they are ultimately powerless to apply the Convention in the face of a clear infringement of fundamental rights where statute sanctions what has been done. More generally, the UK lacks a legal culture of rights: for instance, no institutional procedure exists that seeks to ensure that new legislation conforms to human rights norms.

The former Prime Minister, John Major, in a major speech opposing a Bill of Rights for Britain, famously declared, "We have no need of a Bill of Rights because we have freedom." While it is true that British citizens have a *residual* freedom to do that which is not prohibited by law, Mr. Major overlooked the capacity of Acts of Parliament to invade basic human rights. His claim also gave away an enervating insularity.

It is precisely for these reasons that the new British government has introduced into Parliament a Human Rights Bill. It will, for the

first time, provide the United Kingdom with a modern charter of fundamental rights, enforceable in national courts. The rights that the Bill enshrines are those defined by the European Convention on Human Rights. Mechanisms will be established that aim to ensure the compatibility of new legislation with these rights. The courts will be directed to interpret all legislation as being consistent with the Convention so far as is possible, and, where this is truly interpretively impossible, the higher courts will be given a unique competence to declare a provision of an Act of Parliament incompatible with the Convention. Moreover, public authorities will be placed under an entirely new obligation to act in a way that does not violate human rights.

Not only will the Human Rights Bill substantially enhance the protection and profile of fundamental rights in Britain, it will also resolve an historic anomaly that is of more than academic relevance. The UK played an important part in drafting the European Convention on Human Rights. It was among the first group of countries to sign the Convention. It was the very first State to ratify it, in March 1951. In spite of this, the aberrant position has been reached that the United Kingdom is virtually the only state party to the Convention that has failed to give proper effect to it in domestic law. This has arisen through a combination of the British duellist tradition, according to which international treaties become part of domestic law only through legislative incorporation; and the long standing unwillingness of successive governments within our separation of powers to legislate to confer "excessive" powers on the judiciary at the expense of an elected Parliament. This has disadvantaged the British people by requiring them to vindicate their human rights not in their own courts but before the European Commission and Court in Strasbourg. In turn, this has imposed considerable expense and delay on litigants, and has tended to insulate Britain from the culture of fundamental rights that the Convention regime has developed. The enactment of the Human

Rights Bill will change this position radically by giving effect in national law to the human rights guaranteed by the European Convention.

I began by underlining the significance of infusing the relationship between the individual and the state with values based on democracy and the rule of law, whilst taking account of the nuances of national legal systems. The Human Rights Bill secures these dual objectives by combining the well known and well proven principles of our constitutional democracy with modernity, harnessing both in its quest to fashion a regime of fundamental rights protection in harmony with our British political and legal culture. Thus, the Bill fully respects the principle of Parliamentary sovereignty and, as a result, will not require the courts radically to reinvent their role by adjudicating on the validity of legislation. However, as well as respecting these well proven principles of the British Constitution, the government's proposals are equally consistent with a series of more modern trends in British public law thinking, particularly the shift toward a more substantive conception of the rule of law; a greater awareness of the relevance of rights-based adjudication; and the increasing receptiveness of United Kingdom law to the influences of other legal systems.

Let me set out these ideas in a little more detail, beginning with the way in which the Human Rights Bill reconciles its objectives with the fundamental principle of the sovereignty of Parliament.

### **Maintaining Constitutional Tradition:**

#### **Parliamentary Sovereignty in a Rights-Sensitive Environment**

The omnicompetence of the British Parliament has long been regarded as the cornerstone of the UK's constitutional structure. However, many commentators have argued that Parliamentary supremacy is inconsistent with the effective protection of human rights. I recognize, because of the importance of ju-

dicial review of legislation in the US, that it may appear paradoxical from the American perspective even to countenance the enactment of a bill of rights without even attempting formally to entrench it.

However, a British approach based on strict entrenchment would overlook the realities of our Constitution. It would be anathema to the political and legal culture of the United Kingdom under which ultimate sovereignty rests with Parliament. That is why the government has instead adopted a model that accommodates the sovereignty principle.

The need to find a solution sensitive to domestic circumstances has been recognized elsewhere, too, as can be seen from the divergent approaches to rights protection that operate in different legal systems. So, in its recent human rights legislation, New Zealand favored an essentially interpretive approach, that has proved successful and appropriate to that legal culture. In contrast, the Canadian model confers greater powers on the judges by allowing them to strike down unconstitutional legislation, while preserving the ultimate power of the legislature to infringe the Charter of Rights and Freedoms where this is thought necessary. The American system is, of course, different again, assigning full supremacy to the Constitution by denying to the legislative branch any power to override, other than by amendment.

It is therefore clear that a broad spectrum of solutions may be adopted to uphold fundamental rights. Each country must embrace an approach appropriate to its own circumstances. The American model, providing for judicial review of legislation, and motivated substantially by considerations arising from the federal structure of the United States, would be unsuited to Britain with its long history of legislative supremacy and its nonfederal arrangements.

This unequivocal commitment to the ultimate sovereignty of Parliament will not, however, reduce the efficacy of the new British human rights system in practice. The want of any jurisdiction to strike down incompatible



**Lord Irvine chatted with Justice Sandra Day O'Connor and Justice Stephen G. Breyer after delivering the National Heritage lecture. At left, Solicitor General Waxman (whose article appears on pages 3-25) waits to have a word with him.**

primary legislation will not, in the vast majority of cases, impair the ability of the courts to ensure that the executive and other public authorities exercise their discretionary and rule-making powers consistently with human rights. Also, although the sovereignty of Parliament is preserved, the Human Rights Bill will impact significantly on how it is exercised in practice. In particular, a declaration by a higher court that British law is incompatible with the European Convention is likely to create immense political pressure to amend the offending legislation to secure in national law the protection of the relevant right. The Bill encourages corrective action by providing a "fast-track" procedure for that purpose. Also, the Bill will require ministers, when introducing new legislation, to state to Parliament whether it is compatible with the European Convention. Parliament will, no doubt, scrutinize closely any draft legislation that risks infringing human rights. So, while the ultimate sovereignty of Parliament is undisturbed by the Human Rights Bill, that sovereignty will in future have to be exercised within an environment highly sensitive to fundamental rights.

There are clear precedents for this approach, by which constitutional innovation is reconciled with the ultimate sovereignty of the British Parliament. The most striking illustra-

tion is the reception of European Union law into United Kingdom law. It is an axiom of European Union law that it must take priority over any inconsistent national provision. This requirement is normally met simply by interpreting national legislation as being consistent with Community law. In the *Factortame* litigation, however, the British courts were presented with an irreconcilable conflict between United Kingdom legislation and European Union law. The national legislation provided that fishing vessels could only be registered as British, so gaining the right to exploit the United Kingdom fishing quota, if "a genuine and substantial connection with the United Kingdom" could be demonstrated. It was argued that this requirement conflicted with certain guarantees set out in the Treaty of Rome, such as the right not to be discriminated against on grounds of nationality and the right of individuals and businesses to establish themselves anywhere in the Community. After receiving guidance from the European Court of Justice, it was held that an English court could disapply national legislation that conflicted with Community law. However, this does not impair the ultimate sovereignty of Parliament, because, in giving effect in this way to Community law, the courts are simply heeding Parliament's intention—as expressed in the legislation that facilitated British member-

ship of the Community—that European law should take priority. This creative solution was inspired by the fact that the Treaty of Rome makes it a *requirement* of Community membership that European law should be accorded priority over municipal law. Moreover, it is well recognized that Parliament’s ultimate sovereignty remains undisturbed, since it is unquestioned that it may enact legislation to withdraw the UK from the European Union.

This reconciliation of constitutional innovation with the orthodox theory of sovereignty is also apparent in the human rights sphere. For example, although the courts have expressed a particularly strong commitment to the common law right of access to the courts, they have emphasised that respect for parliamentary sovereignty dictates that this right is enforced only by interpretive means. The same kind of accommodation can be discerned in the vindication of procedural values by way of judicial review. The *ultra vires* doctrine, that is the foundation of the review jurisdiction, provides that those values must ultimately be related to, and therefore reconciled with, the sovereign will of Parliament.

Thus, the first strength of the Human Rights Bill is its ability to accommodate fully the axiom of parliamentary sovereignty. In doing so, it draws on the long-established practice in English public law of reconciling constitutional innovation with established principle.

## **The Human Rights Bill and the New Public Law Culture in Britain**

### **Introduction**

The Human Rights Bill is equally in tune with a series of *contemporary* strands in public law thinking that favour a shift towards rights-based adjudication. Some believe there exists an unbridgeable divide between these more novel aspects of British public law and its traditions, so that a modern regime of rights protection can be achieved only at the expense of discarding established constitutional prin-

ciple. The Human Rights Bill disproves that. Its capacity to harness both constitutional principle and the new ethos of public law is its defining characteristic. This is the single most important factor that will ensure its success in forging a politically acceptable system of rights protection in harmony with British political and legal structure.

### **Building on the Common Law’s Commitment to Fundamental Rights**

I have already referred to the common law’s commitment to fundamental rights. Its respect for liberty has a long history. Neither the absence of a written catalogue of rights nor the doctrine of parliamentary sovereignty has made British judges impotent to protect fundamental rights. The courts have shown particular confidence in recent years in the field of access to justice, applying a strong presumption that Parliament does not intend to interfere with the citizen’s right of access to the courts. Thus, when the previous government sought to increase significantly the court fees that must be paid by intending litigants, it was held that this measure was unlawful because of its considerable adverse impact on the right of access to justice. Notwithstanding its essentially interpretive character, this approach secures a high degree of protection for those rights to which it applies. Precisely the same point can be made in relation to the procedural rights that are safeguarded by way of judicial review.

It is therefore apparent that the contribution of the Human Rights Bill will be to strengthen and enlarge an already existing edifice of rights protection in English law, the foundations of that are to be found in the common law itself. In this way the Human Rights Bill is wholly in tune with the current nature of public law in the UK, given that both the Bill’s objective of promoting rights and its interpretive methodology are already, and increasingly, embraced by the courts.



### Changing Conceptions of the Rule of Law

The growing confidence of the judiciary in articulating and enforcing a limited catalogue of common law rights can be related to a broader development in English public law. It has long been recognized that the rule of law is a fundamental aspect of the unwritten British Constitution. The Victorian jurist, Albert Venn Dicey, famously wrote that the rule of law is one of "the two principles that pervade the whole of the English constitution." The other, of course, is the doctrine of parliamentary sovereignty.

The rapid development in recent decades of the High Court's supervisory jurisdiction reflects a growing judicial awareness of the need to vindicate the rule of law by imposing standards of legality on public authorities. However, while British judges have steadily extended the *procedural* rights that individuals enjoy as they interact with the state, this has not been matched by the development of a jurisdiction to check executive action for compliance with *substantive* human rights norms.

There are some signs that this position is slowly changing. In a number of lectures and articles, senior members of the judiciary have displayed their appetite for a shift in British public law away from exclusively procedural concerns and towards an adjudicative approach that also upholds substantive rights. It is clear that this desire is born of a wish to give effect to a conception of the rule of law that has both procedural and substantive dimensions. Thus, the judges have called for the incorporation of the European Convention on Human Rights into British law, and, in the meantime, the recognition of a more developed indigenous jurisdiction to uphold human rights.

This extracurial discourse has to some extent been given practical effect through the courts' willingness to subject to particularly intensive scrutiny executive action that is alleged to have interfered with fundamental rights.

However, it is important to appreciate the

limits of this approach. An example concerned with the right of freedom of expression is illustrative. Some years ago, the government issued regulations imposing restrictions on the broadcasting of interviews with representatives of particular terrorist organizations. The impact of the regulations was relatively minor, effectively prohibiting only live interviews with these individuals. Still, it was alleged, in judicial review proceedings, that these regulations improperly interfered with freedom of expression. The House of Lords refused to deal directly with the substantive question whether this interference was justifiable or proportionate to the government's objective. Apart from asking whether the adoption of the regulation was manifestly irrational or perverse—a test that is very hard to satisfy—the court focused exclusively on the propriety of the decisionmaking *procedure* that had led to the adoption of the regulation.

This example demonstrates that, at the heart of the human rights debate in the UK, lies a paradox. Undoubtedly there is a groundswell of enthusiasm for the protection of fundamental rights under a more substantive conception of the rule of law. Nevertheless, the courts consistently hold back from giving full effect to this trend, preferring instead to perpetuate an almost exclusively procedural approach to the rule of law. Thus, in spite of the widespread recognition in judicial and other circles of the importance of upholding fundamental rights, English courts still possess no comprehensive jurisdiction capable of securing this objective in substantive terms.

The reason for this paradox lies in the uncertainties of the unwritten British constitutional order. The United States Constitution guarantees to citizens that certain fundamental rights are paramount, beyond even the reach of the legislative branch. The existence of such an explicit catalogue of rights carries with it, as Chief Justice Marshall recognized almost 200 years ago, important implications for the judicial function. In particular, it is recognized as conferring on the courts a constitutional war-



rant to vindicate these rights through judicial review. The exercise of this jurisdiction by the Supreme Court is often the subject of public debate and even controversy. Crucially, however, the Constitution provides a focal point for discussion and is the benchmark against which the legitimacy of the Court's development of American public law can be evaluated.

In contrast, the disparate and largely unwritten character of the British Constitution makes it harder to delineate the respective functions of the different branches of government. It is this problem with which the judges are grappling in relation to human rights. Although they clearly wish to give effect to a substantive theory of the rule of law by affording direct protection to fundamental rights, the courts are ultimately deterred from doing so by a concern to avoid transgressing the bounds of their allotted constitutional province.

Judicial adoption of a substantive theory of the rule of law would involve a much greater exercise of power by the courts. The judges would become exposed to the charge of claiming for themselves a jurisdiction that is not properly theirs. The attendant increase in the intensity of review would at least raise the spectre of improper judicial interference with executive functions. And judicial determination of which rights are sufficiently fundamental to qualify for legal protection would create the appearance of judicial law-making in the sphere allocated to an elected Parliament.

These considerations have led me, in the past, to argue that "it is the constitutional imperative of judicial self-restraint that must inform judicial decisionmaking in [English] public law." In the United Kingdom—unlike the United States—the three branches of government are not equal and coordinate: it is, ultimately, Parliament that is the senior partner. It is for this reason that, if, as I think it must, the judiciary is to set about the task of protecting substantive rights, the content of those rights and the nature of the courts' function in upholding them, must be "crystallized in a democratically validated Bill of Rights." That

is what our Human Rights Bill does.

The success of the U.S. Constitution in delivering a developed system of human rights protection is, I am sure, because it supplies individuals and the courts with a catalogue of rights that has a consensual basis and provides the judiciary with the constitutional warrant it needs to uphold those rights. Those characteristics also underlie the new rights protection that will be instituted in the United Kingdom. It is the Human Rights Bill that will resolve the paradox to which I referred earlier and that has hitherto stunted the development of a proper human rights jurisdiction in Britain. The Bill will harness the growing trend towards human rights protection and a substantive conception of the rule of law, while giving democratic impetus to that development. Against this background, the courts will be able to begin the important task of forging a substantive rights-based jurisprudence without any fear of exceeding their proper constitutional province.

### Changing Conceptions of the Judicial Function

Thus far, I have explained how the Human Rights Bill, while respecting constitutional principle, also intersects with more contemporary features of British public law, such as the development of common law rights and the movement towards a more substantive notion of the rule of law. I would like to mention two further aspects of public law thinking that the Human Rights Bill embraces. Let me begin by saying something about changing conceptions of the judicial function.

It would be misleading to suggest that a concern for civil liberties is the exclusive preserve of the *modern* judiciary in Britain. In *Dr. Bonham's Case* in 1603, Chief Justice Coke argued that "when an act of parliament is against common right and reason, or repugnant . . . , the common law will control it, and adjudge such act to be void." Although this case predates the constitutional settlement that

affirmed the sovereignty of Parliament and therefore does not form part of the modern law, it nevertheless serves to illustrate that the protection of fundamental values has traditionally been viewed in England as an aspect of the judicial function.

It is fair to say, however, that the extent to which the judges have felt obliged to speak up for these values has varied considerably over time. The history of English administrative law in the twentieth century is the litmus paper of this phenomenon. During the earlier part of the century the judges often attached little weight to protecting the rights of the individual. A classic example is the decision of the House of Lords in *Liversidge v. Anderson* in 1941. The Secretary of State was empowered to make an order detaining any person whom he had reasonable cause to believe was, in some way, a threat to public safety or national security. The majority of the court held that, provided the Minister had acted in good faith, they could enquire no further into the propriety of his action. In particular, it was said that the court could not determine whether the detention order was, in fact, justified on objective grounds. It was only Lord Atkin, in his historic dissenting speech, who spoke up for the protection of liberty as an important component of the judicial function. I quote:

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on this liberty by the executive, alert to see that any coercive action is justified in law.

Fortunately, the attitude of the English courts has since changed almost beyond rec-

ognition from the decision of the majority in *Liversidge v. Anderson*. In 1979, the House of Lords acknowledged that the decision in *Liversidge v. Anderson* was simply wrong. Beginning in the 1960s, the judges started to re-discover constitutionalism as part of their function. This renaissance, seen principally in the field of judicial review, has been described in colorful language by Mr. Justice Sedley. Speaking extrajudicially, he has remarked that by the early 1980s, "the courts were waiting with refined instruments of torture for ministers and departments . . . who took their public law obligations cavalierly."

English law is not, of course, unique in witnessing alterations across time in the conception of the judicial function, as the jurisprudence of the U.S. Supreme Court demonstrates. It is hardly necessary to mention the rejection of the old, "separate but equal" doctrine, of *Plessy v. Ferguson* by the Supreme Court in *Brown v. Board of Education*. What may have changed between 1896 and 1954 was not the concept of equal protection, but perhaps rather a change in the conception of the judicial function and the Court's perception and understanding of the requirements for the practical implementation of equal protection. In the United Kingdom, we are traditionally more wedded to the concept of *stare decisis*. But the Supreme Court of the United States is prepared to depart from prior decisions when adherence to them involves a collision with principle that is "intrinsically sounder, and verified by experience."

Britain and America are not alone in having experienced, particularly during the latter part of this century, the "constitutionalization" of the judicial function. It is the massive expansion of the administrative state that, more than any other factor, has prompted the judges to reassess their constitutional role. As the comparative lawyer Mauro Cappelletti has observed, the courts in many jurisdictions are "becoming themselves the 'third giant' to control the mastodon legislator and the leviathan administrator."

It is this emerging view of the judicial function with which the British human rights legislation not only intersects but also legitimates. The United States Constitution permits—and requires—American courts to recognize that duties of a constitutional character inform the nature of their judicial function. United Kingdom law has hitherto possessed no analogue. It is the Human Rights Bill that will capture the current *zeitgeist* of British public law favoring the constitutionalization of the judicial function. By conferring democratic legitimacy upon this development, the new legislation will allow the judges to fulfill a stronger constitutional role in a wholly constitutional way.

And it is not only the Human Rights Bill that will contribute to this process. The other constitutional reforms that I outlined earlier will have similar consequences. Thus, it is the courts, through their judicial review jurisdiction, that will have the last word on freedom of information. Moreover, the devolution of governmental power will confer on the British judiciary a wholly new function of a constitutional character, since it is the judicial system that will bear ultimate responsibility for ensuring that the Scottish Parliament does not transgress the bounds of its legislative competence.

Of course, the American courts have, since the inception of the federal Constitution, exercised this kind of function by resolving demarcation disputes between Congress and the state legislatures. By conferring on UK courts an analogous jurisdiction, the devolution regime will contribute to the further constitutionalization of the judicial function in Britain.

### **The Trend Toward Cross-fertilization of Legal Norms**

The final trend in UK public law that I mention is this: the increasingly outward-looking attitude of the courts. In recent years, English law has grown more receptive to the influences of other legal orders, both domestic and transnational.

British membership of the European

Union has been a major catalyst. The UK was required, as a condition of membership, to receive Community law into its national legal system. However, the impact of this “incoming tide”—as Lord Denning, the former Master of the Rolls, once famously referred to European Law—has been felt not only in areas governed directly by Community law: it has also exerted a more general, indirect influence on national law. In a number of important decisions—dealing with issues as diverse as the liability of the Crown to be restrained by injunction and the interpretation of ambiguous national legislation—the indirect influence of European law on the development of domestic law has been clear.

This more outward-looking attitude of the English courts is to be seen in other areas, too. For instance, they are increasingly willing to look to other national legal orders to help them resolve hard cases. There are also some indications that the English courts are beginning to refer more readily to international law, both customary and conventional. This is particularly true of international human rights law. Thus, despite its unincorporated status, the European Convention on Human Rights has exerted an indirect influence on the jurisprudence of domestic courts in the UK, that have used it to guide their development of the common law and as an aid to the construction of ambiguous legislation.

It is within this context that the issue of human rights has now taken center stage in public law discourse in the UK. As British public lawyers increasingly look at the experiences of other legal systems, they become more acutely aware of the shortcomings of their domestic law in the field of human rights.

Against this background, it is appropriate that the institution of a British system of fundamental rights protection is to involve recourse to the European Convention on Human Rights, an *international* human rights instrument. By adopting this solution, the Human Rights Bill once again intersects with an important aspect of modern thinking in British

public law. Now, more than ever, it is apparent that the British legal system exists within a broader European—and, ultimately, international—community of legal families. Just as English law has long exerted important and valuable influences on other legal orders, so it is increasingly recognized that other legal orders are a rich source of inspiration for English courts. Crucially, however, this permeation of English law is to occur through the subtle influences of cross-fertilization, rather than by crudely transplanting into English law a regime that is unsuited to its political and legal culture.

### Conclusion

Professor Ronald Dworkin recently wrote that:

Great Britain was once a fortress for freedom. It claimed the great philosophers of liberty—Milton and Locke and Paine and Mill. Its legal tradition is irradiated with liberal ideas: that people accused of crime are presumed to be innocent, that no one owns another's conscience, that a man's home is his castle, that speech is the first liberty because it is central to all the rest.

The program of constitutional reform now being undertaken in the United Kingdom will provide a modern institutional framework capable of giving contemporary effect to this proud libertarian tradition. I began by observing that all legal systems must confront the relationship between the individual and the state. It is precisely that issue that is tackled by the current reforms of the British constitution. Individuals will acquire a legal right of access to official information. Government itself will become more accessible through the devolution of executive and, where appropriate, legislative power. British citizens will, at long last, be empowered to vindicate their fundamental

rights before British courts. In these ways, the relationship between the individual and the state will acquire a new, constitutional dimension. It will be imbued, far more than ever before, with values—based on democracy and the rule of law—that the British Constitution has traditionally championed.

It is axiomatic that this process of renewal will take full account of the contours—ancient and modern—that shape the landscape of British public law. Thus, the Human Rights Bill accommodates both the constitutional orthodoxy of parliamentary sovereignty and the series of contemporary, rights-oriented trends in public law thinking that I have identified this evening. Far from being an uneasy compromise, this accommodation that the Bill achieves is its foremost strength. It is the means without which it would not have happened. By placing principle and modernity side by side in harness, the Human Rights Bill ensures a catholic approach that will lead to the strongest possible foundation for a uniquely British regime of human rights protection.

The importance of adopting an approach of this kind should not be underestimated. It is widely known that Canada's Bill of Rights, passed in 1960, largely failed to achieve any genuine constitutional status. Neither the Canadian Supreme Court nor the federal government displayed the enthusiasm that is necessary to ensure the success of a human rights regime. As Professor Harry Arthurs observed some years ago, "Only when [a] Bill [of Rights] begins to command the loyalty of individuals—will its aspirations be translated into reality." This reality was realized by Canada through the Charter of Rights and Freedoms that it adopted in 1982, by which time the political and legal culture was ready to receive a human rights regime. Similar factors help to explain the success that the New Zealand Bill of Rights has enjoyed since its inception in 1990. As the New Zealand commentator Paul Rishworth observes, the enactment of the Bill "coincided with a spring tide of judicial enthusiasm for the enforcement of fundamental rights and control of

governmental power.”

These experiences are of great relevance to Britain as it renews its own constitution. They underscore the importance of achieving a synthesis between political and legal culture and the measures by which the constitution is reformed. The foundations of this synthesis are established by the capacity of the Human Rights Bill to harness both the strengths of our democratic principles and the new ideologies of British public law.

I fully acknowledge, however, that the institution of a new human rights regime is a hugely complex undertaking. While the characteristics of the Human Rights Bill that I have discussed this evening provide an excellent starting point, much work remains to be done. The proof of this as with every pudding will be in the eating. Politicians, public servants, lawyers, and citizens all have their distinct roles to play to ensure that a new culture of respect for fundamental rights comes to pervade all our public authorities, including the courts, and extends throughout the whole of our society.

It is, though, the judges who will probably

bear the heat of the day in this collective endeavour. The task that now lies before the British judiciary is one that was begun by the Justices of the Supreme Court of the United States over 200 years ago. The magnitude of the task appears from the many fraught and courageous decisions the Supreme Court has taken during its history. I am confident that the British courts will rise to the challenge they now face with wisdom and enthusiasm. In doing so, however, they will do well to look to the long experience of the American courts and the impressive body of jurisprudence that they have amassed in the field of human rights.

Still, in discharging their new constitutional duties, the ultimate task of the British courts will be to build on the foundations laid by Parliament in the Human Rights Bill, by upholding human rights in a manner appropriate to our national political and legal culture. This will be their contribution to the development of a uniquely British solution to this most universal of issues—the proper balance of power and right between the individual and the state in a democracy under the rule of law.

# Supreme Court Law Clerk, 1957-1958 A Reminiscence

Alan C. Kohn

Thursday, January 31, 1957, was a normal news day. President Eisenhower defended his Secretary of Defense, Charles E. "Choo Choo" Wilson, for commenting that the National Guard was a haven for draft dodgers during the Korean War. Ike disapproved of the statement. Wilson was "short-cutting and making a very. . . unwise statement without stopping to think what it meant." The guardsmen were not slackers. Wilson, I recall, made unwise statements fairly often.

Ike was also defending his Secretary of State, John Foster Dulles, for allegedly rupturing our traditional alliances with Great Britain and France during the abortive attempt by the latter to retake the Suez Canal in the Fall of 1956. No, the President said, he had "no reason whatsoever to change his opinion that John Foster Dulles was the best Secretary of State he had ever known." He went on to add, in response to a question, that this was his last term and he would not run again, even if the

Constitution were amended to permit more than two terms.

In sports, Lew Hoad, the world's best amateur tennis player, did not have a herniated disc, just low back strain. In basketball, the Knicks were in first place, one and a half games ahead of Philadelphia, after beating Rochester, 92 to 80.

The stock market had a good day. The Dow Jones was up over 3 points to close at 480.53 on a volume of 1,950,000 shares. Big business was looking for secretaries at \$60 a week to start. In Detroit, the big three car manufacturers were turning out lots of cars stylized with large rear fins. A new car cost \$2,100, unless you wanted to pay for extras such as power steering, power brakes, heater, air conditioning, defroster and a radio, in which case the price went up to \$3,000. Ford was busy with its plans to come out with its brand new concept in automobiles, the Edsel, scheduled to be in the showrooms in October.

On Broadway, Rosalind Russell was in *Auntie Mame*, Paul Muni was in *Inherit the Wind* and Rex Harrison and Julie Andrews were in *My Fair Lady*. If you wanted to buy new clothes, Bergdorf's had some nice frocks for \$100, and Saks Fifth Avenue had men's suits for \$60, dress shirts for \$5.95 and ties for \$4.

In Washington, the Honorable Stanley F. Reed announced his retirement as a Justice of the Supreme Court of the United States. That was the news that was going to affect my life. I was in the Army in Germany and totally unaware, and somewhat uncaring, about what was happening in the States. I rarely read the *Stars and Stripes*, the Army overseas newspaper, and it contained very little news anyway.

I was a "short-timer" and was headed home in early April to practice law with my father in St. Louis. My wife, Joanne, was disappointed. Two years before, when we thought I would be stationed in Washington, D.C., she had applied and was accepted for admission to Catholic University's graduate drama school which had a famous and charismatic chairman, Father Hartke. I was sent to Germany. She was told that her admission could be deferred for the two years I was in Germany, but I had no plans to go to Washington after the Army. After all, what would I do there while she was in school?

Not to worry, she said. I could apply for a clerkship to a Justice of the Supreme Court of the United States. She was being a little naive, I thought. Those jobs were reserved for the best law students from Harvard, Yale and Columbia. I graduated from a second-tier school, Washington University in St. Louis. No, she reminded me, my constitutional law professor, Charles Fairman, a national legal figure who was using our school as a weigh station on his academic journey to Harvard, had told me that I should apply.

Dutifully, I prepared my application, or I should say my applications. Justice Tom C. Clark was the Justice assigned to the federal circuit court headquartered in St. Louis, and so one application went to him. The other went to

Chief Justice Earl Warren. After all, he had three law clerks, rather than the usual two, and I increased my chances by 50% by applying to him. My applications were mailed in November and shortly thereafter I received a polite personal rejection from Justice Clark. But I heard nothing from the Chief Justice. Too busy, I thought, and the whole idea was ridiculous anyhow. November, December and January rolled by and still no letter of rejection. I made plans to return to St. Louis.

With the announcement at the end of January of Justice Reed's resignation, speculation about his successor was immediate. Among those mentioned was Judge Charles E. Whittaker from Kansas City. Judge Whittaker had been appointed to the Federal Court of Appeals for the Eighth Circuit by President Eisenhower and had been on that court only since June 22, 1956. Before that, he served on the federal district court in Kansas City for two years. His booster was Roy Roberts, publisher of the *Kansas City Star*. Roberts was a close friend of the President and a charter member of the Republican "Draft Eisenhower" movement of 1952. On February 28, 1957, Attorney General Herbert Brownell called Judge Whittaker and told him that he would be the nominee for the Supreme Court vacancy. President Eisenhower made the formal announcement on March 2.

Chief Justice Warren had not selected me as one of his law clerks, but he had remembered my application. When Judge Whittaker was nominated, the Chief asked him if he had a law clerk and the Judge replied in the negative. The Chief gave him my application and told him that I had come highly recommended by a distinguished constitutional law professor, Charles Fairman, and by Dean Milton Green and Chancellor Ethan Shepley of Washington University. He also noted that I would be available at the beginning of April, about the time it was expected that Judge Whittaker would assume the Supreme Court Bench. While Whittaker did not know Fairman, he did know both the Dean and the Chancellor.

On March 25, 1957, Judge Whittaker became a Justice of the Supreme Court, and a few days later I received a letter from him inviting me to come in for an interview. The letter came as a total shock. I did not know Justice Whittaker or that he had been appointed to the Supreme Court or how he came to be in possession of my clerkship application. On April 6, Joanne and I flew home to the United States on Slick Airways, a military air transport contractor. On April 8, I was discharged from the Army and picked up my new Volkswagen beetle, which I had shipped ahead. On April 9, I presented myself for the interview.

I was both terrified and awestruck. How could this be happening? His chambers were huge, as was his desk. Whittaker was a slight, wiry individual and seemed much too small for his vast office and desk. I felt I was not ready for the interview. I had studied no constitutional law for two years and had forgotten much of what I had learned. I had dragged along with me to Germany a text, Corwin on Constitutional law, and I had crammed for my interview by devouring that book. But because the book was published in 1954, there was a three-year gap in my knowledge.

I need not have worried. The Justice asked me a few questions about myself and said he needed help in his new job. Then he asked me when I could start. I said tomorrow and he said that would be fine. End of interview. Thus, with lightening-like suddenness, I became the beneficiary of an incredible chain of serendipitous coincidences.

When I arrived for work on April 10, I was briefed by Manley O. ("Lee") Hudson, who had been one of Justice Reed's law clerks, but who had agreed to stay on with Justice Whittaker until his second law clerk was chosen and in place. Lee explained to me that while a law clerk's duties varied from Justice to Justice, we basically were going to do three jobs for the Justice, all of which required typing skills.

First, we had to read all the applications by the losing party in the court below requesting

that the Court review the case (a petition for a writ of certiorari) and type a summary so that the Justice could review the matter quickly. Second, we needed to review all the briefs filed in the cases the Court had agreed to review and type a summary of the briefs. The third task consisted of helping the Justice in any way he wished in the drafting of opinions. Typing turned out to be the most useful course I had taken at high school in University City, Missouri, a suburb of St. Louis. Essentially, my life became reading and typing, reading and typing, reading and typing.

While I was working on cases in which my Justice was participating, decisions were being handed down in cases in which Whittaker took no part but which were affecting the entire Court. On May 5, 1957, the Court decided *Konigsberg v. State Bar* and *Schware v. Board of Bar Examiners*. Konigsberg passed the California bar examination but because he refused to answer questions as to whether he was or ever had been a member of the Communist Party, he was denied admission to the bar. Schware told the New Mexico bar committee that he had once been a member of the Young Communist League and had been in and out of the Communist Party in the 1930s but quit permanently in 1940. He was denied admission to the New Mexico bar. The Supreme Court held that both had been denied due process of law because these circumstances failed to show that either was disloyal or not of good moral character.

On June 3, in *Jencks v. United States*, the Court reversed Jencks' conviction for falsely swearing that he was not a member of the Communist Party because the government failed to produce FBI reports of conversations it had with two government witnesses for use by Jencks' attorney in cross-examination. Then, two weeks later, the Court handed down *Yates v. United States*, *Service v. Dulles*, *Watkins v. United States* and *Sweezy v. New Hampshire*. In *Yates*, the Court reversed the defendant's conviction of a conspiracy to advocate and teach the violent overthrow of the government.



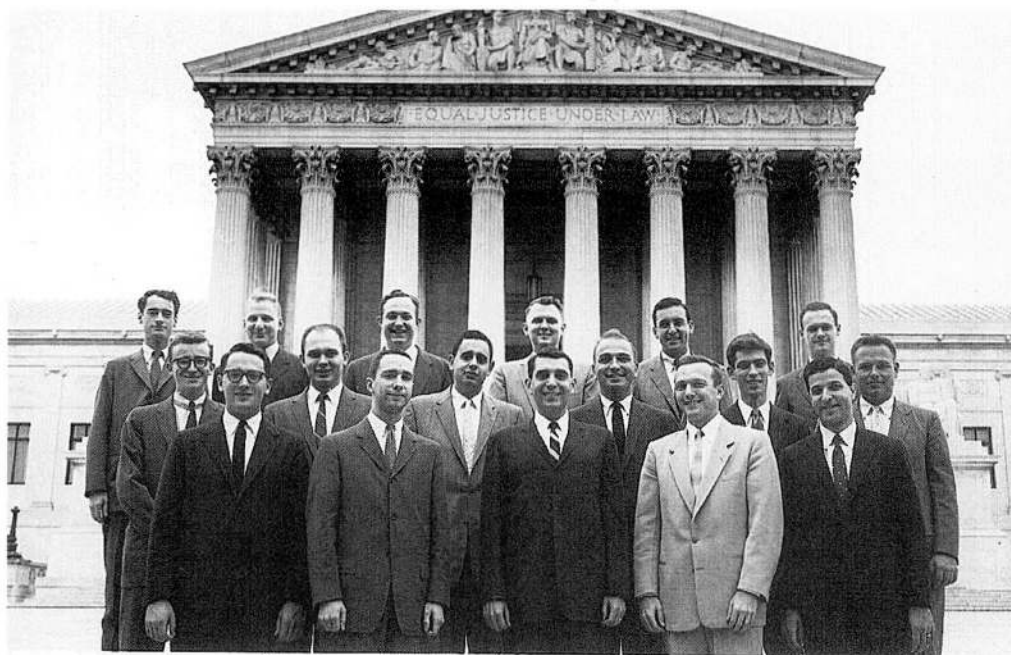
In *Service*, the Court held that there was no basis in the evidence to find that Service was or had been a member of the Communist Party or to have any reasonable doubt about his loyalty.

*Watkins* and *Sweezy* involved, respectively, the proper scope of federal and state legislative inquiries. *Watkins*' conviction of contempt of Congress for refusal to testify whether certain persons were members of the Communist Party was reversed because the inquiry was outside the scope of the investigating committee's authority. *Sweezy*'s conviction of contempt of the state legislature was reversed because his refusal to answer questions about whether he advocated "Marxism" or believed in Communism, or questions about his alleged prior contacts with communists, was justified since the New Hampshire legislative committee asking the questions had exceeded the proper scope of its power of inquiry.

There was a public outcry about all these "pro-communist" decisions. Editorials suggested legislation to prevent accused Communists from poring over documents in J. Edgar

Hoover's library. The Attorney General of New Hampshire opined that the decisions had set the country back twenty-five years in the Cold War with the Soviet Union. The minority leader of the United States House of Representatives, Republican Joe Martin, lamented the crippling of Congress' ability to investigate for the purpose of enacting needed legislation.

How could loyal American Justices of the Supreme Court of the United States give such aid and comfort to the enemy? David Lawrence, editor of *U.S. News & World Report*, was ready to suggest the answer in the July 12 issue of the magazine. The problem lie with the "ghost writers," the eighteen law clerks to the Justices. This "second team" was having far too much influence on the nine old men. The article paid lip service to the fact that the law clerks were mainly typing factual memoranda for the Justices to read before they made up their own minds about cases. The clear message, however, was that these young persons were too influential in the decision-making process and in writing the opinions of the Court.



**The law clerks of the October 1957 Term posed in front of the Supreme Court building. Each of the Justices was invited to have lunch during the year with the eighteen clerks in their lunchroom.**

The article went on to suggest that there were two problems with the clerks that could explain this spate of "Red" decisions. First, they had no security clearance. After all, it was "fundamental" that there should be no reasonable doubt about their loyalty to avoid their doing unimaginable damage to national security, yet the American public had no assurance whatsoever that they were not providing false information to the Justices in crucial security cases.

Second, were these young men experienced lawyers? Indeed, were they even lawyers? The article contained two pages of mug shots of the clerks. Instead of numbers across the bottom of each picture, there was the law clerk's name, home town, law school and whether he was a member of the bar. Fully one-third had earned the opprobrium, "Not a Member of the Bar." Fortunately, I had made the grade. I had been lucky enough to have taken and passed the Missouri Bar just before I went into the Army.

At the Court, life went on as usual. I remained busy reading and typing. The Chief Justice was described in the same magazine issue as not being "disturbed or ruffled by the reaction in Congress and in the country" to the Court's latest decisions. My Justice was unfazed. He had a predicament of his own that manifested itself that Spring with the case of *Green v. United States*.

Everett Green was sixty-three years old and had apparently set fire to the apartment in Washington, D.C., where he and his eighty-one-year-old female companion were living. She died in the fire but he did not. Green was indicted for first degree murder, which carried a mandatory death penalty. At his trial, the jury found Green guilty of *second* degree murder rather than first degree murder, perhaps because the jury felt sorry for him and was unwilling to sentence him to death. Green's lawyers appealed on the ground that the trial court had erred in submitting an instruction permitting a second degree murder conviction because there was no evidence of second degree

murder, only first degree murder. The court of appeals agreed and remanded the case for a new trial with orders to the trial judge to submit the case only on first degree murder. The trial judge complied and this time Green was convicted of first degree murder and was sentenced to death in the electric chair.

Green again appealed, this time contending that his constitutional right not to be subjected to double jeopardy had been violated. The second degree murder conviction implied an acquittal of the first degree murder since the jury had had an opportunity to convict him of first degree murder and had declined. The second trial for first degree murder, therefore, made him walk the plank twice after his first success and therefore entailed double jeopardy.

The court of appeals disagreed. There was a case directly in point, *Trono v. United States*, which clearly held that a conviction of a lesser included charge did not imply an acquittal of the greater offense. The defendant could therefore be retried for murder in the first degree.

The Supreme Court agreed to review the case and it was argued shortly after Justice Whittaker ascended the Bench. Green's attorney pointed out that about half of the state supreme courts that had considered the identical issue had decided that the bar against double jeopardy applied. The government relied on *Trono*.

After oral argument, Whittaker was unsure. He had been put on the Court by a conservative President, Dwight D. Eisenhower, and the Justice was committed to the doctrine of *stare decisis*, meaning that a judge would be bound by a prior decision to provide continuity to the law and respect for the integrity of the judicial process.

On the other hand, the defendant faced certain death by electrocution. When Justice Whittaker had been a federal district judge, he had sentenced a man to death, and it continued to trouble him a great deal. Fundamentally, he was a dirt farmer from the plains of Kansas who had moved to Kansas City when he was seventeen and, in true Horatio Alger fashion,



**The son of a dirt farmer, Justice Charles E. Whittaker worked his way up from night law school to become a top trial lawyer. The author believes that the Justice's lack of educational background prevented him from developing a judicial philosophy. Although Whittaker felt more comfortable with the conservatives, he sometimes provided the crucial fifth vote in cases upholding individual rights over the rights of government.**

had worked his way up from night law school to become a top-notch trial lawyer in one of the most prestigious firms in town. Somewhat amazingly, he had risen from a district court judge to a Supreme Court Justice in less than three years — a meteoric rise that led Justice Felix Frankfurter to quip that the Supreme Court could get a judge from the district court faster than it could get a case. The Justice could not forget his humble origins and it troubled him that this poor, elderly man might be executed.

Every Friday the Court held a private conference attended only by the nine Justices. Each case argued that week was debated and a vote taken. Justice Whittaker always wrote incredibly complete notes of those meetings and when he emerged from the Conference on the Friday that Green's case was debated, I eagerly borrowed his Conference book. The notes revealed that the Chief Justice said it was not fair to try Green twice for "murder first" and he would therefore reverse. Justice Hugo L. Black agreed and then went into a long dissertation

of the law and explained in intricate detail why the history of the Double Jeopardy Clause and the weight of legal authority required a reversal. Justice Frankfurter then weighed in with an equally long and compelling argument explaining why history and precedent required an affirmation of the death sentence. Justice Douglas said simply, "I agree with Hugo." Justice Burton said he agreed with Felix as did Justices Clark and Harlan. Justice Brennan was with Justice Black. So the vote was 4-4 when it came time for my Justice to voice his opinion. He said he could not make up his mind and asked that the case be discussed again the following Friday.

At each Conference until the end of the Term, Justice Whittaker continued to announce that he was unsure. I had written the memorandum about the case and had recommended that the case be reversed, but the Justice was not influenced by this young inexperienced law clerk, even if I was a member of the bar. Finally, on June 25, the last day of the Term, an

order was entered that the case was “restored to the calendar for re-argument.”

That summer the Justice went back to Kansas City for a rest. At his direction, I did more research and gave the case more thought. I sent him another memorandum discussing English law and state cases raising the same issue. When the Justice returned to Washington, he announced that he had made up his mind: Green had been subjected to double jeopardy, and his conviction should be reversed. The opinion by Justice Holmes to the contrary in *Trono v. United States* was not in point because it arose in the Philippine Islands with a tradition of Spanish law. Never mind that Justice Holmes made it clear in his opinion that he was deciding the case as if it had arisen in the United States and that American federal common law applied. The case was reargued, but a decision to reverse had already been made. Justice Black wrote the 5-4 opinion and complied with Justice Whittaker’s request that *Trono* not be overruled by stating in his opinion that *Trono* was not quite in point because it arose in a peculiar factual setting in the Philippines under long established Spanish legal procedures alien to United States jurisprudence.

And so a pattern was established for a number of cases that were argued during the year and a half that I was with the Justice. There were four liberals and four conservatives on the Court. Justices Black and Douglas had been carrying the liberal torch for years, often alone and outvoted 7-2. Now they had two allies, Chief Justice Warren and Justice William J. Brennan. They were Eisenhower appointees and there were rumors in the press that the President was unhappy with both appointments. The clerks nicknamed the four liberal Justices the “Four Framers” [of the Constitution] because they often could find a fifth to agree with them. Whittaker was a good candidate for that fifth vote in cases upholding individual rights over the rights of government.

The Justice had no educational background to assist him in developing a judicial philosophy. He completed high school at the

same time that he began law school. He felt inadequate because his academic qualifications did not measure up to those of his Brethren. At his core, he was probably a Libertarian. A raw-boned farmer from northeastern Kansas, he had a strong distrust of government. This made him a conservative on economic issues. If a man owned a business he should be allowed to run it any way he pleased. In the area of individual rights he sympathized with persons caught in the governmental web. In his first years on the Court, that outlook found him siding with the Four Framers in several cases even though he felt more comfortable with the conservatives, especially Justice John Marshall Harlan, whom he described as one of “God’s anointed souls.”

Justice Whittaker provided a fifth vote in the October 1957 Term of Court in *Moore v. Michigan* in which the Court held that a young, uneducated black man had not knowingly waived his right to the benefit of counsel. And in a series of three cases involving the question whether the government could strip a person of his United States citizenship, Justice Whittaker was on the liberal side in all of them. In *Perez v. Brownell*, the Court held, 5-4, that a person could lose his citizenship by voting in a foreign election. Justice Whittaker joined the Chief Justice and Justices Black and Douglas in dissent. In *Trop v. Dulles*, he sided with Warren, Black, Douglas and Brennan to strike down a section of the Nationality Act of 1940, which provided that a wartime deserter could be stripped of his citizenship. And in *Nishikawa v. Dulles*, the Four Framers, plus Justices Whittaker, Frankfurter and Burton, held that the government had failed to prove that Nishikawa’s service in the Japanese army was voluntary and that therefore he had been improperly stripped of his citizenship.

Besides having no peace of mind because he perceived himself as *the* Supreme Court where the vote divided along liberal-conservative lines, Justice Whittaker was personally unhappy, as was his wife. They both loved Kansas City and missed their friends back home. The Justice had enjoyed being a lawyer

and then a federal trial judge for two years. Then, for nine months, he was a federal appellate judge, a job that he disliked because he missed the excitement and interaction with trial lawyers and jurors.

After work, he would drive me to my bus stop in his maroon Cadillac, an automobile that was the source of great joy to him. One summer day in 1957, as he pulled up to the curb to drop me off, the valve on one of his tires snapped off and the tire went flat. It was rush hour and unbearably hot. I suggested we call a service station. "We'll fix this ourselves," he told me as I stood there, totally embarrassed. While we were changing the tire he confided that he had "sold himself down the river for a pot of porridge." He should, he said, never have left the trial court bench where he could interact with the real people of the world. He seemed ready to quit right then and there. Just a bad day at the office, I thought at the time. But it was more than that. He was not just unhappy. He was distraught and in serious emotional distress.

At the Court, the other Justices were aware of his condition and were sympathetic. They would come by and cheer him up, but also, incidentally and not uncommonly, to lobby him for their particular point of view in one case or another. Sometimes they would come by and say hello to me and my fellow law clerk, Ken Dam, who had replaced Lee Hudson. Between those congenial visits and their guest appearances at the law clerks' lunch room, I came to realize that, like Justice Whittaker, they were also quite human.

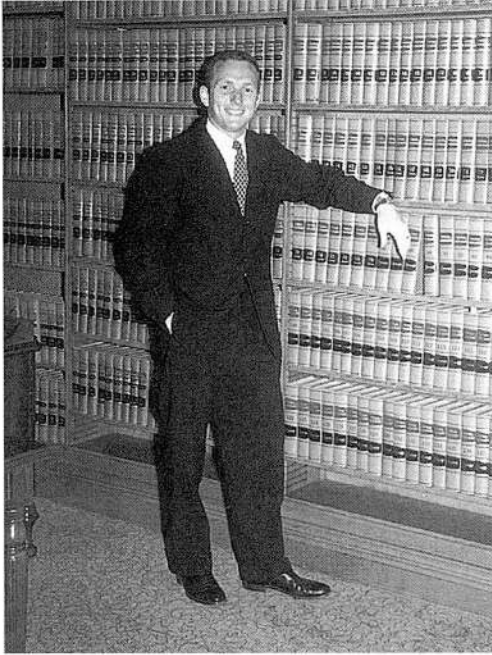
On one occasion, Justice Douglas visited Whittaker while he was having difficulty writing the majority opinion in *United States v. Hvas*. Douglas offered to help and a short time later he sent over two key sentences that Whittaker adopted as his own. The opinion was adopted by the Court, 8-1. Ironically, it was Justice Douglas who filed the sole dissent.

The Chief Justice dropped by one day. He sat on a table in our law clerks' office and lambasted the American Bar Association for its

conservatism and also the Congress, which had that day given him a difficult time when he asked for \$25,000 to pigeon-proof the portico in front of the Courthouse where lawyers, litigants and tourists were being bombarded daily. A congressional committee had been unfriendly, and the Chief joked that if he had asked for \$25,000,000 instead of \$25,000, the committee would have undoubtedly voted him the money with great enthusiasm.

The Chief and Justice Frankfurter did not get along well. Frankfurter seemed to have little respect for the Chief's intellect and the Chief apparently had a minimal regard for Frankfurter's strict attention to procedure. In *Payne v. Arkansas*, Payne was convicted of murder and sentenced to death. But his trial was flawed because a coerced confession had been received in evidence. The Supreme Court decided to review the decision of the Supreme Court of Arkansas with a view toward reversing. At the Conference after oral argument, however, Justice Frankfurter pointed out that the Court should not have taken the case in the first place because at trial and on appeal, Payne's lawyer, while arguing that the confession was coerced, had not argued that the use of a coerced confession violated the *federal* constitution, only that it violated the *state* constitution. Under well-settled practice and authority, a litigant in a coerced confession case was obliged to cite the federal Due Process Clause of the Fourteenth Amendment to the United States Constitution so that there was a federal issue for decision. But Payne's lawyer had not done so. Justice Frankfurter therefore argued that the case should be dismissed in the Supreme Court and the death penalty permitted to stand.

The Chief was upset. How could the Court allow an electrocution when all the Judges agreed that the confession was coerced and the trial was therefore flawed. The Court should not decide matters of life and death based on technicalities and procedural niceties. Frankfurter stood his ground. They were not dealing with niceties or technicalities. The Constitu-



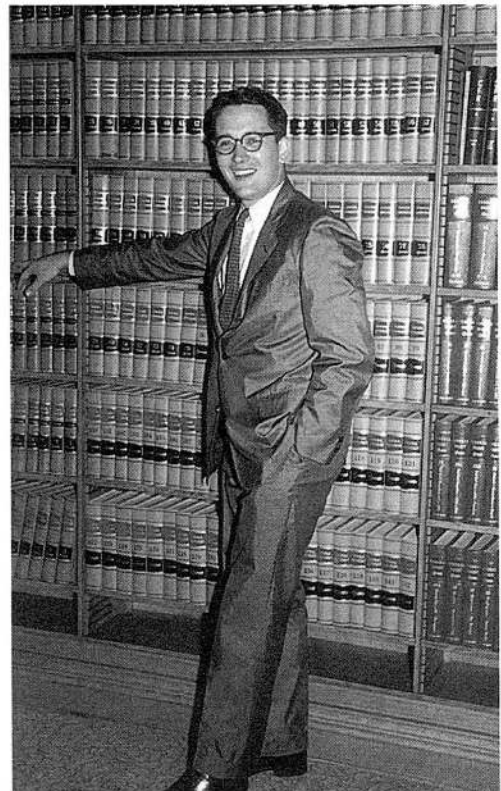
tion was adopted on the basis of federalism. The states had jurisdiction over state matters and the federal government, including the Supreme Court, could not intervene unless there was a federal question. And here there was no federal question raised.

A spirited argument ensued among the Justices. Everyone agreed that the confession was coerced but everyone also agreed that the federal question apparently had not been properly raised. A compromise was reached. Under Justice Whittaker's direction, the Clerk of the Court would write to the Clerk of the Arkansas Supreme Court and obtain the entire state court file, including all the briefs written when the case was argued in the Supreme Court of Arkansas. If there was any reference in Payne's briefs to the federal constitution, directly or indirectly, the Court would be satisfied that a federal question had been raised, and Justice Whittaker would write the decision reversing the conviction. Otherwise, the Justices would meet again to decide what to do.

A few days later the Arkansas briefs were delivered to our chambers by the clerk. I opened the package and read Payne's briefs.

At one point in the argument section of the brief, Payne's lawyer had argued that the confession was coerced and had cited several cases, all decided by Arkansas state courts, except one, which turned out to be a federal case in which a confession had been held to be coerced under federal law. Justice Whittaker advised the other Justices, and they unanimously agreed that a federal question had therefore been properly raised. Justice Whittaker wrote the opinion holding the confession coerced and ordering a new trial. Not one word was mentioned concerning whether Payne's lawyer had properly raised the federal question.

Another incident occurred that involved somewhat of a role reversal for these two judicial strongmen, Warren and Frankfurter. Luis Caritativo was sentenced to die in the California gas chamber. Under California law, a person could not be executed if insane at the time of the execution. Luis claimed he was insane, but the warden of the penitentiary refused to





Alan C. Kohn (opposite page, upper left) and Ken Dam (opposite page, bottom right) both clerked for Whittaker during the 1957 Term. Celia Barrett (right) was the Justice's secretary. Justice Whittaker's advice to the author on finishing his clerkship was "Get in a pocket, Alan." By that he meant join a law firm with a good trial practice.



initiate proceedings to determine Luis' sanity. State law gave the warden the authority to refuse a hearing on the matter if he felt there was no cause to believe Luis was insane. Judicial proceedings followed and the case eventually came to the Supreme Court on the question of whether the warden had an absolute constitutional duty to initiate a sanity hearing before going forward with the execution. The Court decided, 6-3, that the California law allowing the warden to refuse a hearing was constitutional and that Luis could therefore be executed.

A majority of the Court decided not to write an opinion but simply to announce the decision by reading a one line order in open court. The Chief Justice made the announcement on Monday, the usual day for handing down decisions. Justice Frankfurter then launched into a biting oral dissent from the Bench. California, he said, had a procedure that shocked the conscience and was intolerable in a civilized society. It was profoundly abhorrent to execute an insane man and Luis was entitled to a hearing on the question of his sanity. The State of California would have on its conscience a barbaric execution. The Justice was a great orator and made a compelling argument worthy of the finest of trial lawyers.

The Chief Justice was stung. Perhaps he felt uncomfortable defending a questionable, and rigidly formal, result, while Frankfurter spoke passionately about due process and fundamental justice. Also, the Chief's home state of California was being criticized. Warren had been Governor and Attorney General of the state and he believed that California was a leader in the humane treatment of prisoners. He could not remain silent. He launched into a rebuttal from the Bench, something that was entirely unheard of and stunningly unprecedented. The majority had announced its decision and the dissenters had announced theirs. There was no such thing as a rebuttal. But the Chief was not about to follow protocol. He said that the criticism of his home state was unjustified and that California's penal system was modern and humane, not barbaric.

Frankfurter was furious. He literally spun around in his chair. The Chief had no right to issue a rebuttal. It breached fundamental traditions of the Court. After the Court session, when the law clerks had lunch together, Frankfurter's clerks said that the Justice had returned to his chambers in a tizzy.

It happened that on that same day Justice Whittaker was having a late afternoon cocktail party. He had invited a number of people

including all of the Justices and his two law clerks. This would be the first time the Chief and Justice Frankfurter would be seeing each other after the brouhaha. I made sure I was on time so that I could watch to see what happened. The Chief arrived and was his usual, ebullient, friendly self. I began to wonder if Justice Frankfurter would show. He reportedly did not attend social events because his wife was an invalid and otherwise in poor health and thus could not accompany him. But after a while, the Justice did indeed arrive. As he walked into the middle of the living room, the Chief seized the occasion. He shook Justice Frankfurter's hand energetically, gave him a huge Earl Warren "Hello, how are you, Felix," and then put his big arm around the diminutive Justice. Frankfurter politely returned the hello and smiled. The Chief was a politician with a capital "P."

Justice Black would occasionally eat lunch at the public cafeteria in the courthouse and when any of the law clerks saw him going through the line, they would jockey for a position behind him, thereby earning an invitation to sit with him. On one such occasion, a fellow law clerk asked him if it was really true that he had once been a member of the Ku Klux Klan. I was shocked by the question because I did not know that indeed it was well known that he had once been a member and also because of the seeming impertinence of the question. But Justice Black did not seem offended. He smiled, and in his southern drawl, replied that, yes, when he was young and running for office in Alabama, he had joined the Klan. He added that he would have joined B'nai B'rith and the Knights of Columbus also if they would have admitted him.

In all, there were eighteen law clerks. The Chief had three law clerks, Justice Douglas had one, and the remaining Justices had two apiece. The clerks had lunch together in their own lunch room, and each Justice joined us once a year. When Justice Frankfurter arrived, he played a little trick to show off his intellect and his professorial skills. Usually the Jus-

tices would simply answer questions from the clerks as they were asked. Justice Frankfurter waited until all eighteen questions had been asked, and he then proceeded to answer them, pretty much in the order asked. It was a little bit like trial lawyers who memorize the names of prospective jurors and then, without the jury list before them, call the prospective jurors by name when they are questioning them about their qualifications to serve as jurors.

Justice Burton was suffering from Parkinson's disease, but was gracious enough to have lunch with us. He told us about the varied nature of his law practice in Cleveland, Ohio. One clerk noted that the Justice did not indicate that he had defended any criminal cases. The Justice replied that he had not wanted to get into the criminal practice because he did not like the clientele. I had not previously thought much about that. I had enjoyed studying criminal law procedure in law school and thought I might be happy as a criminal defense lawyer. Now I was not so sure.

When Justice Douglas came to lunch, he indicated that President Roosevelt had wanted him to be his running mate in the election of 1944. If that had happened, he would have become President in 1945 when Roosevelt died. When a law clerk asked him how he would have selected a Justice of the Supreme Court if he had become President, he said the answer was easy. He would have appointed persons who would vote the way he wanted them to vote.

Justice Clark was undoubtedly the most gracious Justice on the Court. He even had all the clerks, along with the Justices, to his home for a small cocktail buffet. And his wife was even more gracious than he. I had been told about southern hospitality, but now I was able to enjoy it first-hand.

Justice Harlan was decent, honorable and caring, besides being a fine Judge. There was no apparent guile to the man. When he called upon my Justice, it was because he cared about him, and not just about his vote. When the law clerks had a softball game against Covington



& Burling, the biggest law firm in Washington, he showed up and pitched one inning dressed in his bow tie and felt hat.

Justice Brennan took his seat on the Supreme Court only a few months before Justice Whittaker. Little did any of the law clerks know that he would become one of the greatest of all Supreme Court Justices. I first met him casually and briefly in a group during the Spring of 1957, but did not see him again until three months later when I took an infrequent ride on the Justices' elevator. As I got in, he was standing there alone and quickly said, "Hi, Alan, how are you?" I was totally nonplused. How could he have remembered me? How could he know my first name? How could he be so friendly? Certainly, that personal warmth and disarming congeniality, plus his keen mind and old-fashioned hard work, helped make him such an extremely able and effective Justice who was able to forge Court majorities for constitutional points in which he strongly believed.

Life as a law clerk was more than just reading and typing. It was also a lot of fun. Among the eighteen law clerks were a hard core of jolly jocks who loved sports. This led to a number of touch football and softball games on the Mall, and also basketball games on "the one court above the Supreme Court"—the basketball court located above the Supreme Court courtroom.

Jon Newman was Warren's chief law clerk and was in charge of inviting guests for lunch in the law clerk's lunchroom. One guest was Senator John F. Kennedy of Massachusetts who proved to be engaging, charming, rather subdued and quite unassuming. Senator Wayne Morse of Oregon showed up with his waxed mustache and unabashed liberalism. Former Secretary of State Dean Acheson attended and opined that John Foster Dulles, the current Secretary of State, had at least one good attribute: "Give Foster a job to do and he will do it." Attorney General William Rogers encouraged us to become trial lawyers because so few



**Justice John Marshall Harlan pitched for the Supreme Court law clerks in their game against Covington & Burling in the Spring of 1957. Whittaker described Harlan to the author as one of "God's anointed souls."**

lawyers really wanted to try a case. J. Lee Rankin, the Solicitor General, was pleasant, quiet and a little bit dull.

Mostly, the clerks spent their lunchroom time talking about sports and about the cases that were being argued or opinions that had been written but had not yet been filed. Justice Whittaker asked me and his other clerk, Ken Dam, to read and comment on a draft of his dissenting and concurring opinion in *Byrd v. Blue Ridge*. After he read it, Ken asked me, "What are you going to do about this? It cannot be circulated as it is. We'll get crucified at the lunch table." The sentences were way too long and there was no pithy explanation of how the Justice had come to his conclusion. Since I had written the memorandum for the case, I agreed, at Ken's insistence, to discuss the matter with the Justice.

"How did you like it?" the Justice asked. "Ken and I think maybe it could use a little work," I mumbled. The Justice became quite angry. He picked up the opinion and threw it at me across his gigantic desk. "If you think you can do better, take a crack at it and have it back by tomorrow morning," he shouted so loud that Celia Barrett, his secretary, could hear it in the next room. Shaken, I slinked back to the office I shared with Ken and told him what had happened. I edited the opinion by cutting down

the length of the sentences and by adding a short final paragraph that, I felt, clarified the rationale of the opinion.

The next morning I arrived at work early and left the opinion on his desk. A short time later he came into the office and said the revisions were excellent. "Send it to the printer," he said. Whittaker was a kind, gentle person who would not do harm to anyone, and he obviously felt badly about this uncharacteristic outburst. At lunch, after the opinion had been distributed, the law clerks had no comments, and I had in print the only paragraph I ever authored for the Justice.

By August 1958, it was time for me to return to St. Louis. I had read thousands of certiorari petitions and briefs and typed many hundreds of memoranda. I was "clerked out." I wanted to practice law with my father, who was dying of cancer, although still trying cases. Justice Whittaker wished me well but gave me some good advice — which I did not fully appreciate at the time. "Get in a pocket, Alan," he said. By that he meant that I ought to go to a law firm with a good trial practice. He cautioned me that there were a lot of good lawyers starving to death in Kansas City because they were not in a pocket. I eventually took that advice, and I also took with me a memorable and treasured law-clerking experience.

# ***Wheaton v. Greenleaf*\*: A (Story) Tale of Three Reporters**

**Stephen R. McAllister**

*\*33 U.S. (8 Green.) 420 (1834). For reasons that become apparent below, this is a fictional case citation and case name.*

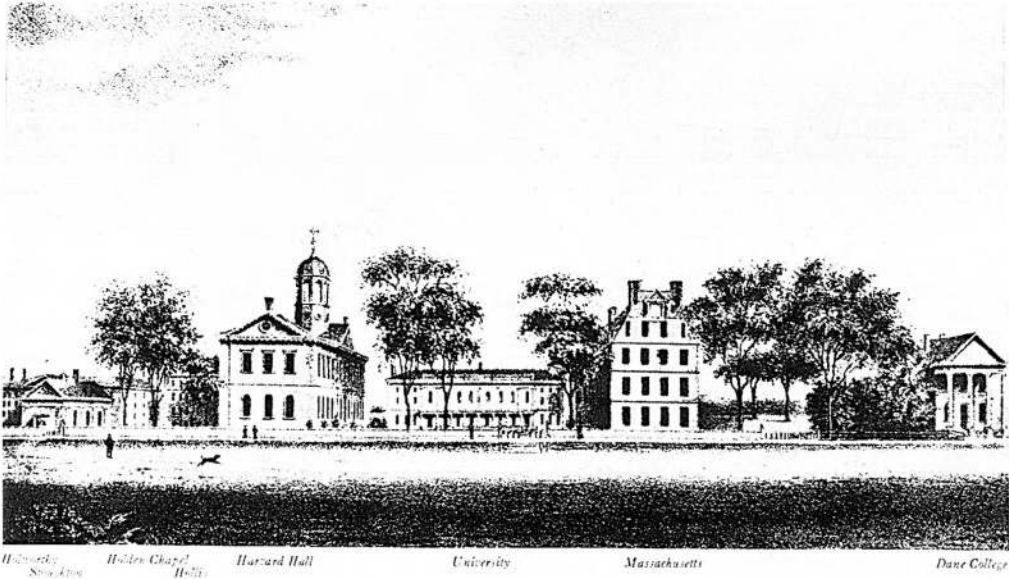
## **I. Introduction**

In the realm of American constitutional law, no institution is more important than the Supreme Court of the United States. The Court's decisions interpreting the Constitution are the law of the land. They are studied and dissected by lawyers and scholars, praised and disparaged by the press, and perhaps often not understood by the general public. Although millions of Americans probably have never read a Supreme Court opinion, it is not for lack of access. Law libraries and many other public libraries possess the volumes of the **United States Reports**, and the opinions are available through computer databases and even on the Internet.

It was not always so. In the Court's earli-

est days, often there were no written opinions, and certainly the Court's decisions were not widely available nor easily accessible even to the bar, much less to the public. From an institutional standpoint, the regular and comprehensive reporting of the Supreme Court's decisions, along with the practice of issuing written opinions in most, if not all, of its cases, were critical developments in establishing a coherent body of constitutional law. Primarily responsible for the practice of the Supreme Court issuing written opinions were prominent figures such as Chief Justice John Marshall and Justice Joseph Story. Playing perhaps just as important a role, however, were some of the prominent lawyers who served as the reporters of those opinions, men such as Henry Wheaton and, to a lesser degree, Simon Greenleaf.

Wheaton and Greenleaf were two of the most important and influential reporters of judicial decisions during the early years of the



**Simon Greenleaf (below) was appointed to be Reporter of the Maine Supreme Court in 1820, a position he held until 1832 when he was named to the Royall Professorship at Harvard Law School (above). Justice Joseph Story was instrumental in Harvard's decision to hire the prominent Maine lawyer, and the two of them oversaw the law school's rise to prominence.**

American republic. Wheaton was the third reporter of decisions for the Supreme Court, while Greenleaf was the first reporter of the Maine Supreme Court. The two men never squared off in a court battle, however, and there is no such case as *Wheaton v. Greenleaf*.

Instead, the two Supreme Court Reporters who battled over the copyright to reported Supreme Court opinions were Wheaton and Richard Peters, Jr., the fourth Supreme Court Reporter. In their famous dispute, *Wheaton v. Peters*,<sup>1</sup> the Supreme Court established that the copyright to opinions of the Court belongs not to the individual reporter who is responsible for publishing them but to the people of the United States. Less well-known is that, but for a matter of two weeks in the fall of 1826, Simon Greenleaf might perhaps have been pitted against Henry Wheaton in the epic battle over the rights to Supreme Court opinions.

It is well documented that Justice Story was perhaps the decisive factor in the hiring of Wheaton as the Court's third reporter in 1815, and that he maintained a close relationship with Wheaton throughout the reporter's tenure.

Story, Wheaton, and Greenleaf were all three members of a loosely knit group of lawyers who were actively promoting the formal and accessible reporting of judicial decisions in the 1810s and 1820s. In this day and age, in which the Federal Reporters are now on their third



series, with volumes numbering in the thousands, and the **United States Reports** volumes number in excess of five hundred, it may be difficult to imagine the case reporting situation during the early years of the Supreme Court's history. At the beginning of the nineteenth century, a regular, methodical, consistent, and thorough system of case reporting simply did not exist in any American jurisdiction. The Supreme Court of the United States was no exception. Justice Story, however, actively sought to improve the situation when he joined the Court. Indeed, he was perhaps the critical early judicial champion of regular, thorough, and widespread reporting of Supreme Court decisions.

Thus, when Wheaton made clear in 1826 that he would soon resign the position of Supreme Court Reporter, it was not surprising that Greenleaf, the highly respected reporter of the Maine Supreme Court since 1820 and good friend of Justice Story, should seek Story's support in securing the position of Supreme Court Reporter, which was filled by a vote of the Justices. But by chance, and perhaps by virtue of the delay in communications between Washington and Maine, Richard Peters, Jr., contacted Story first and ultimately succeeded Wheaton to become the fourth Reporter of the Supreme Court of the United States, with Greenleaf narrowly missing out.

Greenleaf contacted Story by letter dated October 7, 1826, expressing interest in the Reporter position. That letter, which is the genesis for this commentary, is published for the first time below. Unfortunately for Greenleaf, and to the dismay of Story, Peters already had successfully solicited Story's support for his candidacy for Reporter by a letter dated September 22, 1826. It is clear from Justice Story's letter responding to Greenleaf's inquiry,<sup>2</sup> that had Greenleaf contacted Story first, he undoubtedly would have had Story's critically important support for the Reporter position. Thus, one of the premier, if not the preeminent, legal reporters of the early nineteenth century missed perhaps his grandest reporting oppor-

tunity by a mere two-week delay in expressing his interest in the position to Justice Story.

This commentary will examine Greenleaf's background, his relationship with Justice Story, and their mutual interest in the formal, regular, thorough, and accessible reporting of court decisions. Their goal was to develop the law as a science, to enhance its stature and prestige, as well as perhaps their own. They viewed the reporting of decisions as a critical component in achieving that goal. Although it is speculation, an argument can be made that when Greenleaf lost out to Peters, who by all available evidence appears to have been more interested in turning a profit than producing scholarly reports or achieving any other higher purpose, the Supreme Court missed a golden opportunity to enhance its stature and promote its decisions in a professional and dignified fashion.

This essay will also briefly recount the replacement of Wheaton by Peters, and Greenleaf's missed opportunity. The purpose of this discussion is to place Greenleaf's October 7, 1826, letter to Story in historical context. The commentary concludes by following up on post-1826 developments in the careers of Greenleaf, Wheaton, and Peters. Although he lost out to Peters, it appears that Greenleaf's professional life suffered little for the missed opportunity of becoming the Supreme Court Reporter in 1826. The Court itself, however, may have been the ultimate loser in this story, at least from an institutional perspective.

## II. Simon Greenleaf and Justice Story

### A. Simon Greenleaf<sup>3</sup>

Simon Greenleaf was born on December 5, 1783, in Newburyport, Massachusetts, a town in which his ancestors had first settled in 1635. When Greenleaf was seven, his family moved to New Gloucester, Maine, but Greenleaf remained in Newburyport with his grandfather to take advantage of the superior educational opportunities available there. In

Newburyport, he received a classical education in the Latin School, which he attended until he was sixteen.

In 1801, Greenleaf entered the law office of Ezekiel Whitman (who later served as the Chief Justice of the Maine Supreme Court (1841-1848)). He was admitted to the bar in 1806 and thereafter engaged in the private practice of law. In 1816, Greenleaf, who was allied with the Federalist Party, ran unsuccessfully for the Massachusetts Senate. In 1818, he relocated to Portland, Maine.

Following Maine's admission to the Union as a state, Greenleaf was appointed the first Reporter for the Maine Supreme Court in 1820. Greenleaf in 1820 also was elected a member of the first Maine legislature and served one term. He held the Reporter position until 1832. In addition to his reporter duties, he continued to practice law and is reported to have had one of the largest practices of any member of the bar in the State of Maine during the time he was Reporter.

In 1833, on the strong recommendation of Justice Story, Greenleaf was named to the Royall Professorship at the Harvard Law School. At the time, he may have been the most prominent and well-known member of the Maine bar. Greenleaf quickly became an active and prominent member of the Harvard law faculty. Along with Story, he is considered one of the leading forces behind the Harvard Law School's rise to prominence. Upon Story's death in 1845, Greenleaf assumed the Dane Professorship, which Justice Story had held from its inception.

While on the Harvard faculty, Greenleaf continued to engage in private practice at least occasionally, including appearing before the Supreme Court of the United States. At the time, the professional salary he received from Harvard was too small to sustain his large family.<sup>4</sup> Greenleaf published a number of works, the best known of which is **A Treatise on the Law of Evidence**, volumes 1 (1842), 2 (1846), and 3 (1853), a significant work in nineteenth-century legal scholarship. As Royall Profes-

or, Greenleaf was the chief academic officer of the law school and, according to the catalogue, gave "instruction in the common law, and all other juridical studies."<sup>5</sup> In 1848, perhaps due to failing health, Greenleaf resigned and was appointed an emeritus professor. He died suddenly in Cambridge on October 6, 1853.

## B. Justice Story and Simon Greenleaf

Apparently, Justice Joseph Story and Simon Greenleaf first became acquainted in 1819, when Story was riding circuit and hearing cases in Portland, Maine. Their earliest correspondence apparently began in connection with Greenleaf's efforts to compile and publish an annotated edition of Henry Hobart's **Reports** (1671),<sup>6</sup> and a work titled **A Collection of Cases Overruled, Denied, Doubted or Limited in Their Application** (1821).<sup>7</sup> It appears that Justice Story did not inspire Greenleaf's initial interest in the reporting of court decisions but that, rather, Greenleaf had an independent interest that coincided with Story's interests and that Story actively encouraged and supported.

Once Greenleaf assumed the position of the first Reporter for the Maine Supreme Court in 1820, and perhaps even in 1819 when he reported some of Story's circuit court decisions, he became a member of an unofficial group, led by Justice Story, which strove to promote and improve the reporting of court decisions.<sup>8</sup> This group included, or eventually would include, Chief Justice John Marshall; Justice Story; Justice Bushrod Washington; Philadelphia federal circuit judge Joseph Hopkinson; treatise authors Nathan Dane; James Kent; David Hoffman; Timothy Walker, and Peter DuPonceau; and court reporters Henry Wheaton, William Johnson, Richard Peters, Jr., John Gallison, William Mason, and Simon Greenleaf.<sup>9</sup>

The group's goals were to further "the publication and dissemination of judicial opinions; encourage the production of digests, collections of documents, and treatises; secure

judgeships, reporterships, and professorships for persons committed to the scientific study of law; and write unsigned reviews of each other's published works."<sup>10</sup> As one historian puts it, "[f]or Story and Greenleaf, compiling digests of English cases, reporting state judicial decisions, writing treatises, giving lectures, and deciding cases were all pursuits of one devoted to legal science."<sup>11</sup> Moreover, "Story, Greenleaf, and their juristic associates were claiming the authority to articulate the prevailing rules and doctrines and to formulate the principal legal issues of their times. They were creating and publicizing their interpretations of American law, and in the process enhancing their own authority and the image of the their profession."<sup>12</sup>

Story actively cultivated the friendship of those who reported his Supreme Court and circuit court decisions. Apparently, Story and Henry Wheaton, the third Supreme Court Reporter (1816-1827) who published twelve volumes of the **United States Reports**,<sup>13</sup> were very close. During Wheaton's first few years as Reporter, Story himself frequently wrote the commentary or notes to accompany his own and other reported decisions of the Supreme Court, although that fact was not disclosed in the Reports themselves.<sup>14</sup> Moreover, from 1815-1817, Story proposed, drafted, and promoted legislation that would establish the Reporter as a salaried official of the Court, rather than essentially an independent operator.<sup>15</sup> The measure finally passed Congress in 1817, providing Wheaton with an annual salary of \$1,000.<sup>16</sup> Story and Wheaton's close relationship apparently was the cause of some friction between Story and at least one rival on the Bench, namely Justice William Johnson.<sup>17</sup>

But the most impressive and distinguished legal scholar, and "[p]erhaps the most important to Story of all the reporters he cultivated was Simon Greenleaf . . ."<sup>18</sup> Story repeatedly praised Greenleaf's efforts in producing the Maine Reports, even encouraging him to title them "Greenleaf's Reports."<sup>19</sup> Thus, it was no surprise that, upon hearing rumors in 1826 that

Wheaton soon would be resigning the Supreme Court Reporter position, Greenleaf was emboldened to approach Story about the possibility of succeeding Wheaton.

### III. A Missed Opportunity

#### A. Simon Greenleaf's Letter

Apparently encouraged by Justice Story's effusive praise of his reporting efforts for the State of Maine, Simon Greenleaf wrote the following letter to Story in October 1826,<sup>20</sup> inquiring whether Story might support him for the position of Supreme Court Reporter if Henry Wheaton were to resign:

Portland Oct. 7, 1826

My Dear Sir,

Since you mentioned at Wiscasset the probability of Mr. Wheaton's appointment to the office of District Judge of New York, it has occurred to me that with the aid of friends I might possibly hope to succeed him in that of Reporter. And your past kindness emboldens me to ask that in the event of such a vacancy, if there are no stronger claims, you would mention my name to the President as a candidate for the office — If any other application, in your judgment, would be useful, I shall esteem it an additional favor if you would take the trouble to suggest it.

The brief in the case of *Williams v. Reed* will be forwarded as soon as Mr. Orr returns from Augusta Court.

I am, Dear Sir,

Very respectfully truly

Your obliged and faithful

Simon Greenleaf (Signed)

The fact that Greenleaf's letter was too late has been documented previously. A full two weeks earlier, Richard Peters, Jr.,<sup>21</sup> had written to Story (and most of the other Justices) soliciting his support for Peters suc-



**Justice Story was very close to Henry Wheaton, (above) the third Supreme Court Reporter (1816-1827), and often wrote the commentary to accompany his and other Justices' reported decisions.**

ceeding Wheaton as Supreme Court Reporter.<sup>22</sup> Story responded positively a few days later,<sup>23</sup> thereby precluding him from supporting Greenleaf after receiving the Maine reporter's subsequent enquiry regarding the position. This situation apparently pained Story, who assured Greenleaf that the choice between Peters and Greenleaf easily would have been in favor of Greenleaf had Story known of his interest.<sup>24</sup> Story also appears to have promised Greenleaf that he would seek to compensate him for this missed opportunity in some way in the future.<sup>25</sup>

### **B. A Few Observations about the Letter**

Greenleaf's letter contains several interesting features. First, it appears that Story himself may have tipped Greenleaf off to the possibility that Wheaton would resign in order to take a position as a federal judge. Although the judgeship for Wheaton did not materialize in 1826, he was appointed to the position of Minister to Denmark in 1827.<sup>26</sup> Whether Story

was actively recruiting Greenleaf for the position, or simply mentioned Wheaton's situation in casual communication, is not known. The letter from Greenleaf and Story's pained response both suggest the latter, although it would not be difficult to imagine Story purposefully planting a seed in Greenleaf's mind by casually commenting that Wheaton was unhappy and desired to leave the Reporter position.

Second, Greenleaf apparently misunderstood the process by which a new Reporter would be selected, although given the circumstances he can hardly be faulted. Greenleaf's letter indicates that he thought the position involved presidential appointment, which it does not and never has. Rather, the Reporter (probably correctly) has been perceived as a member of the judicial branch. Lacking the Article III status of a federal judge, a position that would require presidential appointment and Senate confirmation, the Reporter has never been so formally selected. (Had Greenleaf been correct in his belief, the President in office in 1826 was John Quincy Adams.) The actual selection process, at least in hiring Wheaton and subsequent Reporters in the nineteenth century,<sup>27</sup> involved a simple vote among the Justices. Thus, though apparently unknown to Greenleaf, his direct solicitation of Story was precisely the manner in which to seek the position.

Third, the case to which Greenleaf refers, *Williams v. Reed*, is a Maine case that Story decided as circuit justice in 1824. The case is in essence a legal malpractice case involving an alleged conflict of interest that the attorney-defendant did not disclose to his client, the plaintiff. Greenleaf himself appears to have represented the plaintiff (the former client), along with William Mason (another member of Story's unofficial group promoting the reporting of decisions and legal science). The case is reported, and by none other than William Mason.<sup>28</sup> Although such relationships among the attorneys, the judge deciding the case, and the reporter of decisions would no



doubt raise eyebrows today,<sup>29</sup> it appears that Story showed no favoritism for his friends and allies in this particular case. Indeed, he ultimately dismissed the claim of Greenleaf & Mason's client.<sup>30</sup>

#### IV. Postscript

##### A. Simon Greenleaf

Greenleaf's professional career was hardly eclipsed when he missed the opportunity to succeed Wheaton as the Supreme Court Reporter. Indeed, Justice Story made good on his promise to remember Greenleaf "in better season." In 1829, Greenleaf informed Story that he was relinquishing his position as the reporter of the decisions of the Maine Supreme Court and he inquired of Story whether the Supreme Court Reporter's position might again become available.<sup>31</sup> At that time, Story assured Greenleaf that it was possible Peters might not be Reporter much longer.<sup>32</sup>

Three years later, however, with Peters firmly entrenched as the Reporter, Story wrote to Greenleaf to inform him vaguely of "events" that might bring Greenleaf "back to Massachusetts."<sup>33</sup> These "events," as it turned out, were the death in 1833 of John Ashmun, one of Story's colleagues on the Harvard Law faculty and the holder of the Royall Professorship. At the urging of, and with the strong support of Story, Greenleaf was elected to the Royall Professorship in April 1833.<sup>34</sup> Greenleaf held the position until he took emeritus status in 1848. He and Story remained close friends and professional colleagues until Story's death in 1845.<sup>35</sup>

Not all of Greenleaf's professional accomplishments following his unsuccessful bid to succeed Wheaton were in the realm of academia. Perhaps most notably, he represented the Warren Company in a suit brought against it by the Charles River Bridge Company.<sup>36</sup> The Charles River Bridge opened in 1786, connecting Boston and Charlestown. It essentially replaced a ferry service that previously existed and for which the State of Massachu-

setts had granted a charter to Harvard University. To compensate Harvard for effectively losing the ferry service charter, Massachusetts (which had chartered the Charles River Bridge, too) required that an annual payment be made to Harvard from the Charles River Bridge's revenues. Some years later, Massachusetts chartered a second bridge virtually alongside the Charles River Bridge. Unlike the Charles River Bridge, which was a toll bridge and was chartered to be so until approximately 1856 (later extended by thirty years), the Warren Bridge — as the competitor bridge was to be known — was to be toll free when the costs of construction had been recovered or, in any event, not more than six years after it was built.

Not surprisingly, the Charles River Bridge Company sued the Warren Company, arguing that the State of Massachusetts effectively had abrogated its charter with the Charles River Bridge Company in violation of the Constitution's Contract Clause,<sup>37</sup> and seeking a restraining order against construction of the Warren Bridge. Unsuccessful in the Massachusetts state courts, the Charles River Bridge Company appealed to the Supreme Court of the United States, which heard arguments in the case in 1831. Due to a combination of judicial vacancies, absences, and disagreements, however, the case went undecided for six more years, a situation Chief Justice Rehnquist would never tolerate today.

Finally, in 1837, the case was reargued before the Supreme Court. The Charles River Bridge Company retained Daniel Webster to make its case,<sup>38</sup> and the Warren Company hired none other than Simon Greenleaf to defend it.<sup>39</sup> Justice Story, who throughout the litigation was a member of the Harvard Law faculty, participated fully in the case and decision, and obviously was an important vote on the Court. Story apparently was greatly impressed by the performances of the two prominent advocates, both of whom he counted as good friends.

Ultimately, Story voted for Daniel Webster's client, the Charles River Bridge Company, and indirectly thus for Harvard, too, which

stood to lose its annual payment from the Charles River Bridge Company if the suit was lost. In *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), Story was on the short end of the decision, however, which came out 5-2 in favor of the Warren Company. Chief Justice Taney wrote the opinion for the Court, and established the important propositions that State charters will be strictly construed against the recipient, and that the Contract Clause will not be interpreted as a significant restraint on the states' ability to act for the public welfare. The Court applied these principles to rule in the Warren Company's favor, even though the new legislation had a clear and adverse effect on the contract the State of Massachusetts had with the Charles River Bridge Company. Story was relegated to a majestic, learned dissent of more than 31,000 words that is almost fifty percent longer than the other opinions in the case combined.<sup>40</sup>

### **B. Henry Wheaton & Richard Peters, Jr.**

In the end, Greenleaf probably fared better than either Wheaton or Peters after 1826. As mentioned previously, Wheaton never obtained the judicial positions he had sought, including a federal judgeship or a seat on the Supreme Court itself. Instead, he settled for the post of Minister to Denmark. Nor did Peters ever manage to make the Supreme Court Reporter's position as profitable as he probably hoped when he actively campaigned for the position in 1826 and eventually obtained it in 1827. Indeed, he may not have done even as well as Wheaton had during his tenure,<sup>41</sup> although in part his lack of financial success was due to congressional rejection of his efforts to establish a government subscription for 1,250 copies of each volume of his reports.<sup>42</sup>

But Wheaton was not done with the Supreme Court in 1827. Rather, he and Peters were to square off in one of the classic cases of the first half of the nineteenth century. After assuming the Reporter's position, Peters

moved to condense and summarize all of the volumes of the **Supreme Court Reports** through 1827 — including Wheaton's volumes — to make them cheaper and thus more widely available (and not by coincidence to make more money for himself). Although in a foreword Peters expressly disavowed any intent to do harm to his predecessors' work product or to detract from the desirability of Wheaton's volumes,<sup>43</sup> sales of the Wheaton volumes plummeted when the Peters condensed version became available at a fraction of the original cost of genuine Wheaton volumes. Peters' activity did not initially provoke much of a reaction from Wheaton, who apparently was confident that the mere threat of a lawsuit would make Peters back down. When that prediction proved wholly incorrect, an infuriated Wheaton took a leave of absence from his position in Denmark and returned to Philadelphia where he and his publisher filed suit against Peters, seeking a permanent injunction against the sale of the condensed volumes and requesting an accounting of the profits Peters made from the sales of those volumes.<sup>44</sup>

After some delay, the federal circuit court in Philadelphia dismissed Wheaton's suit.<sup>45</sup> The judge who dismissed the case was none other than Joseph Hopkinson, Story's friend and a member of the Justice's unofficial group promoting the reporting of judicial decisions. In another interesting coincidence, or perhaps an illustration of the close-knit nature of the federal Bench and Bar in the 1830s, Hopkinson had assumed the federal circuit court position previously held by Peters' father.

Wheaton appealed to the Supreme Court and was represented by Elijah Paine and Daniel Webster. The Court upheld Peters' circuit court victory in all significant respects in 1834.<sup>46</sup> The Supreme Court's decision in *Wheaton v. Peters* established bedrock principles of American copyright law. These principles include that (1) the federal authority over copyright law, as embodied in Article I, §8, is supreme over copyright protection under state common law,

(2) federal statutory copyright law therefore supplants state common law, and (3) the copyright to the Supreme Court's written opinions belongs to the American people, not to any individual Supreme Court Reporter.<sup>47</sup>

The *Wheaton v. Peters* decision prompted Wheaton, who proved to be a most ungracious loser, to lambaste publicly both Chief Justice Marshall and Justice Story.<sup>48</sup> Although some factual questions remained to be decided, such as whether Peters had infringed on Wheaton's potential copyright of Wheaton's *abstracts* of the Court's opinions, the litigation dragged on for so long that both Wheaton and Peters died before its conclusion. Their estates finally settled the litigation in 1850 for \$400.<sup>49</sup>

Wheaton's fortunes changed for the better, however, following the Court's decision. He returned to Europe, published a well respected work on international law, and eventually became the minister to Prussia.<sup>50</sup> After twenty years in diplomatic service, he returned to the United States in 1847 and was preparing notes for a lectureship at Harvard when he died in 1848.<sup>51</sup>

Although Peters essentially won his copyright battle with Wheaton, he, like Wheaton, ended his association with the Supreme Court on an ignominious basis. Apparently lacking the strength of Wheaton's intellect, scholarly inclinations, or attention to detail (and apparently not receiving the assistance from Story that had so benefitted Wheaton's reports and upon which Wheaton had so heavily relied), neither the Justices nor the bar ever regarded Peters' reports as highly as Wheaton's. Eventually, Peters lost the confidence of most of the Justices. As many of the Justices who had selected him in 1827 were replaced on the Bench in the 1830s, he ultimately found himself with little support among the Justices, except for Justice Story who remained loyal to Peters to the end. While Story was absent from the Court in 1843, a majority of the Justices summarily dismissed Peters and hired Benjamin Howard as the fifth Reporter of the Supreme Court of the United States.<sup>52</sup> The



**Simon Greenleaf's letter to Justice Story arrived too late to persuade him to support his nomination for Court Reporter. Richard Peters, Jr., (above) had already solicited Story and the other Justices and had managed to obtain a commitment from Story to support his candidacy.**

move angered Story who considered resigning over the incident, but ultimately let it pass.<sup>53</sup>

### C. An Opportunity Lost?

Although it is necessarily speculation, a plausible argument can be made that the Supreme Court as an institution suffered by never having Simon Greenleaf serve as one of its Reporters during a critical period in establishing the Court's legitimacy. The events following the selection of Peters in 1827, as well as other available evidence, strongly support such an argument. Greenleaf's extensive and lauded experience as the Reporter for the Maine Supreme Court prior to Wheaton's departure from the Supreme Court gave him more than adequate training for the position. Moreover, unlike Peters, he was an accomplished private lawyer, in addition to performing his reporter duties. Peters' main qualification, on the other

hand, appears to have been the fact that his father was a federal judge in Philadelphia at the time Wheaton resigned.

Greenleaf also appears to have had scholarly talents that Peters simply did not possess. Story apparently recognized Greenleaf's talent very quickly, repeatedly praising Greenleaf's work for the Maine Supreme Court and causing one writer to observe that "[p]erhaps the most important to Story of all the reporters he cultivated was Simon Greenleaf . . ."<sup>54</sup> Indeed, Greenleaf's three-volume **Treatise on the Law of Evidence**, published from 1842-1853, earned him national and international stature as a legal scholar. For example, in testimonials included in one of Greenleaf's final works,<sup>55</sup> he was praised in the following terms:

Author of a treatise on the law of evidence, which has become a classic in the hands of the profession which he adorns, and teacher in one of the Law Seminaries which do honor to our country in the eyes of Europe, he brings rare qualifications for the task he assumes.

\* \* \* \* \*

It is the production of an able and profound lawyer, a man who has grown gr[e]y in the halls of justice and the schools of jurisprudence; a writer of the highest authority on legal subjects, whose life has been spent in weighing testimony and sifting evidence, and whose published opinions on the rules of evidence are received as authoritative in all the English and American tribunals; for fourteen years the highly respected colleague of the late Mr. Justice Story, and also the honored head of the most distinguished and prosperous school of English law in the world.

\* \* \* \* \*

It is no mean honor to America that her schools of jurisprudence have produced two of the first writers and best esteemed legal authorities of this century — the great and good man, Judge Story, and his worthy and eminent associate Professor Greenleaf. Upon the existing **Law of Evidence** (by Greenleaf), more light has shone from the New World than from all the lawyers who adorn the courts of Europe.<sup>56</sup>

A well-known mid-nineteenth century bookseller, John Livingston, recognized the importance of Greenleaf's scholarship when he compiled a catalogue of legal works that belonged in the library of any American lawyer.<sup>57</sup> Because the complete list was relatively expensive at the time, Livingston also developed a shorter subset of the absolutely essential works.<sup>58</sup> The works of Justice Joseph Story are found in abundance. Also found are the publications of Story's Harvard colleague, Simon Greenleaf, the first great American evidence expert.<sup>59</sup> As for Richard Peters, Jr., no glowing testimonials appear to exist. Although he apparently was a capable Reporter, and in some respects quite enterprising, he never garnered the respect accorded to his predecessor or Greenleaf. In 1826, Peters was well-connected. He had for several years reported decisions of his father (a federal judge in Philadelphia) and decisions of Bushrod Washington as a Circuit Justice. He also could count himself among Story's circle of friends and professional colleagues who generally supported the promotion of law as a science, including the reporting of decisions. And Peters did, after all, quickly obtain Story's support in his successful quest to become the fourth Supreme Court Reporter. Nonetheless, his ignoble firing by the Justices in 1843 suggest, he was not without faults.

In the end, Simon Greenleaf probably fared better and accomplished as much or more than any Supreme Court Reporter of his era, including Wheaton and Peters. Had Greenleaf become

the Supreme Court's fourth Reporter, perhaps the Court of the 1830s and 1840s would have acquired even greater stature, or perhaps its opinions and official reports would have been even more respected and desired by the practicing bar and the nation. We will never know.

*\*Author's Note: This research was supported in part by the General Research Fund of the University of Kansas. The author thanks Michael H. Hoeflich, Dean, John H. and John M. Kane Professor of Law, and Courtesy Professor of History, University of Kansas School of Law, and Martin S. Flaherty, Professor, Fordham School of Law, for reviewing and providing suggestions on an earlier draft of this commentary. The author also gratefully acknowledges the research assistance of Holly Pauling.*

## Endnotes

<sup>1</sup> 33 U.S. (8 Pet.) 591 (1834).

<sup>2</sup> J. Story to S. Greenleaf, Oct. 10, 1826, Simon Greenleaf Papers, Harvard Law School Library (quoted and cited in G. Edward White, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35*, Vol. 3-4, p. 107 n. 137 (1988)).

<sup>3</sup> The following brief biographical sketch of Simon Greenleaf is drawn from three sources: *The National Cyclopaedia of American Biography*, Vol. VII, 360-61 (1897); *Dictionary of American Biography*, Vol. VII, 583-84 (Johnson & Malone, eds. 1946); *Who Was Who In America 1607-1896*, p. 218 (1963). Professor Alfred S. Konefsky, of the State University of New York at Buffalo School of Law, is currently at work on a biography of Greenleaf.

<sup>4</sup> Harvard Law School Association, *Centennial History of the Harvard Law School 1817-1917*, at 70 (1918).

<sup>5</sup> Printed in "Law Institution of Harvard University," 11 *Am. Jur. & L. Mag.* 259, 260 (Jan. 1834).

<sup>6</sup> G. Edward White, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35*, Vol. 3-4, p. 106 and nn. 131-133 (1988).

<sup>7</sup> Charles Warren, *History of the Harvard Law School*, Vol. 1, p. 481 (1908); R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 260 (1985).

<sup>8</sup> White, *supra* note 6, at 105.

<sup>9</sup> *Id.* Examples of this brotherhood include Hopkinson's appointment to a federal circuit court judgeship in Philadelphia on the strong recommendation of Story, *see* J. Story to J. Hopkinson, Mar. 8, 1826, in Joseph Hopkinson Papers, Historical Society of Pennsylvania (cited in G. Edward White, *supra* note 6, at 105 n. 125), and Dane's creation of a chaired professorship in law at Harvard on the condition that Story occupy the chair. *See* William W. Story, *Life and Letters of Joseph Story*, Vol. II, at 1-7.

<sup>10</sup> White, *supra* note 6, at 105. For a comprehensive review of the development of the Supreme Court Reporter position from its beginning through the term of Richard Peters, Jr., and the reporting of Supreme Court decisions, *see* Craig Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy," 83 *Mich. L. Rev.* 1291 (1985). For a more lighthearted discussion of the personalities and work of the early Supreme Court Reporters, *see* Gerald T. Dunne, "Proprietors—Sometimes Predators: Early Court Reporters," *Supreme Court Historical Society, Yearbook 1976*, 61.

<sup>11</sup> White, *supra* note 6, at 108.

<sup>12</sup> *Id.*

<sup>13</sup> Joyce, *supra* note 10, at 1292 n. 7.

<sup>14</sup> *Id.* at 1333-37.

<sup>15</sup> *Id.* at 1342-46.

<sup>16</sup> *Id.* at 1347.

<sup>17</sup> David T. Pride, "Joseph Story" in *The Supreme Court Justices, Illustrated Biographies, 1789-1995*, at 89 (Clare Cushman, ed., 2d ed. 1995); White, *supra* note 6, at 393-95.

<sup>18</sup> White, *supra* note 6, at 106.

<sup>19</sup> *Id.* at 107.

<sup>20</sup> The letter is now in the University of Kansas School of Law Library.

<sup>21</sup> Peters was the son of a distinguished Philadelphia federal judge and had been engaged in reporting decisions, including those of his father and of Bushrod Washington as a circuit justice, for several years prior to 1826. White, *supra* note 6, at 404.

<sup>22</sup> R. Peters, Jr., to J. Story, Sept. 22, 1826, Richard Peters Papers, Historical Society of Pennsylvania (cited in White, *supra* note 6, at 405 n. 101).

<sup>23</sup> J. Story to R. Peters, Jr., Sept. 25, 1826, Richard Peters Papers, Historical Society of Pennsylvania (cited in White, *supra* note 6, at 405 n. 102).

<sup>24</sup> White, *supra* note 6, at 405 and n. 103; Joyce, *supra* note 10, at 1355 n. 388.

<sup>25</sup> Story closed his letter responding to Greenleaf with the suggestion that "I will remember you hereafter in better season." J. Story to S. Greenleaf, Oct. 10, 1826 (cited in White, *supra* note 6, at 107).

<sup>26</sup> Joyce, *supra* note 10, at 1350.

<sup>27</sup> There apparently is no record of the manner in which the first and second Supreme Court Reporters (Alexander

James Dallas and William Cranch, respectively) assumed the position. *See id.* at 1307 (“it seems most likely that Cranch, like Dallas, appointed himself to report the decisions of the Court”).

<sup>28</sup> 29 Fed. Cas. 1386, n. 1 (1824) [3 Mason 405].

<sup>29</sup> This combination of relationships and the potential conflicts of interest pale in comparison to the conflicts that appear to have been ignored in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), discussed below.

<sup>30</sup> 29 Fed. Cas. at 1394.

<sup>31</sup> White, *supra* note 6, at 107.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 107-08; Gerald T. Dunne, **Justice Joseph Story and the Rise of the Supreme Court** 320 (1970).

<sup>35</sup> *See, e.g.*, Newmyer, *supra* note 7, at 260-62 (describing their relationship as prominent members of the Harvard Law Faculty).

<sup>36</sup> For a more complete description of *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), and the surrounding circumstances, *see* Dunne, *supra* note 34, at 357-63.

<sup>37</sup> Art. I, §10 (“No State shall . . . pass any . . . Law impairing the obligation of Contracts . . .”).

<sup>38</sup> *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 514 (1837).

<sup>39</sup> *Id.* at 461.

<sup>40</sup> For a detailed discussion of the case and Justice Story’s dissenting opinion, *see* James McClellan, **Joseph Story and the American Constitution** 215-226 (1971), and Newmyer, *supra* note 7, at 225-235.

<sup>41</sup> Joyce, *supra* note 10, at 1362 (suggesting that Peters probably netted under \$1,500 per year, less profit than Wheaton turned even in some of his worst years).

<sup>42</sup> *Id.* at 1362-65; White, *supra* note 6, at 413-14.

<sup>43</sup> *See* Dunne, *supra* note 34, at 325.

<sup>44</sup> Wheaton’s predecessors, Alexander James Dallas and William Cranch, were never parties to any litigation against Peters. Dallas had died in 1817, and no one asserting any interest in Dallas’ volumes ever contacted Peters. Joyce, *supra* note 10, at 1367 n. 428. Cranch agreed to settle without litigation in return for fifty copies of the condensed reports. *Id.* at 1369.

<sup>45</sup> *Wheaton v. Peters*, 29 Fed. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486).

<sup>46</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

<sup>47</sup> Although the Constitution expressly grants Congress the power “[t]o promote the Progress of Science and use-

ful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” U.S. Const., art. I, §8, and Congress did enact federal copyright statutes, enforcing copyright protection appears to have been a serious problem in the first half of the nineteenth century. Interestingly, in 1836, not long after the decision in *Wheaton v. Peters*, British author Harriet Martineau wrote to her “dear kind friend,” Justice Joseph Story, imploring him to use his “influence” to persuade Congress to pass stronger copyright laws, especially to protect British authors from American publishers “cutting up” their works for sale. Martineau’s letter of November 8, 1836, to Story concerning the state of American copyright laws is housed in the manuscript collection of the Spencer Research Library at the University of Kansas.

<sup>48</sup> Dunne, *supra* note 34, at 326-27; Joyce, *supra* note 10, at 1390; White, *supra* note 6, at 422-23.

<sup>49</sup> Joyce, *supra* note 10, at 1385.

<sup>50</sup> Dunne, *supra* note 10, at 66.

<sup>51</sup> *Id.*

<sup>52</sup> White, *supra* note 6, at 426.

<sup>53</sup> Dunne, *supra* note 10, at 66.

<sup>54</sup> White, *supra* note 6, at 106.

<sup>55</sup> Late in his life, Greenleaf undertook a very different, if not bizarre, project: to examine the “Testimony of the Evangelists” (by which he was referring to Matthew, Mark, Luke and John) and “the trial of Jesus” in the light of modern rules of evidence, apparently for the purpose of ascertaining whether or not the stories and events related in the Gospels are proved by the “evidence.” *See* Simon Greenleaf, **The Testimony of the Evangelists** Ch. 1, §3 (“The present design, however, is not to enter upon any general examination of the evidences of Christianity, but to confine the inquiry to the testimony of the Four Evangelists, bringing their narratives to the tests to which other evidence is subjected in human tribunals.”).

<sup>56</sup> *See Testimonials* contained in Simon Greenleaf, *Testimony of the Evangelists* (Soney & Sage, 1903).

<sup>57</sup> *See* M.H. Hoeflich, “Legal History and the History of the Book: variations on a Theme,” 46 *U. Kan. L. Rev.* 415, 426-28 (1998) (discussing John Livingston, **Catalogue of Law Books Comprising a Catalogue of a Select Law Library Including the Dates and Prices of the Latest Editions of the Most Approved Works in Every Department of the Law, Carefully Revised and Corrected up to March, 1856** (New York, Livingston 1856)).

<sup>58</sup> *Id.* At 428-29

<sup>59</sup> *Id.* at 429.

# Race, Marriage, and the Supreme Court from *Pace v. Alabama* (1883) to *Loving v. Virginia* (1967)

Peter Wallenstein

On June 12, 1967, Chief Justice Earl Warren delivered the unanimous opinion of the Supreme Court of the United States in a decision that transformed American law on interracial marriage. The Chief Justice began by observing, “This case presents a constitutional question never [before] addressed by this Court.” The question before the Court was, he stated, “whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”<sup>1</sup>

From time to time in the past, despite opportunities, the Supreme Court had declined to face the question on which it now ruled. Never before had it been prepared to render the decision it now did. The story of the Lovings—their travails at the hands of Virginia justice, their persistence through nine years of uncertain marriage, and, finally, their fortunate timing

in 1967—punctuated the Civil Rights movement. It brought to an end nearly three centuries of the kind of legislation that had made the Lovings criminals in the first place.

What was the crime of interracial marriage, of miscegenation? What related kinds of questions came to the Court before the *Loving* case did? How did the Court deal with such questions? Before tagging along with the Lovings to learn what we can from their nine-year odyssey through the state and federal courts, we will first review a case from the 1880s and then, more briefly, three cases from the mid-1950s and early 1960s. Though the Court dealt with four related earlier cases, the Chief Justice was right that the Court had never in fact ruled on the question of interracial marriage. It waited until 1967 to rule on that question.

How and why did the Supreme Court avoid the earlier opportunities? How and why did it rule in favor of the Lovings?

### Race, Sex, Marriage, and the Penitentiary

The first case on race and marriage to reach the Supreme Court came from Alabama only a few years after the Civil War and Reconstruction periods. The reasoning displayed in the Supreme Court's decision in 1883 had its origins in a series of Alabama decisions dating from as early as 1868.

In the late 1860s and the 1870s, the Alabama Supreme Court issued a wide range of rulings regarding laws that governed sexual and marital relations between interracial partners. For people in Alabama at the time, that range of rulings could mean a great deal of uncertainty as to whether a wedding ceremony might lead to marital bliss or to hard time in the state penitentiary. Looking back more than a century later, it suggests the possibility, though a slim one, that a different conclusion might have been reached to the debate at that time. It raises the question: Might the Supreme Court have overturned laws against interracial marriage long before the time of the Lovings?

Alabama's first postwar constitutional convention directed that the legislature enact a ban against interracial marriages, and the legislature did so as part of the state's Black Code. Countering such Black Codes across the South, Congress passed the Civil Rights Act of 1866, the substance of which it subsequently guaranteed in the Fourteenth Amendment, ratified in 1868. The Fourteenth Amendment offered protection against denials by state governments of "equal protection of the laws," "due process," and citizens' "privileges or immunities." In *The Slaughterhouse Cases* in 1873, the Supreme Court construed very narrowly the "privileges or immunities" of citizens of the United States under that amendment. In the meantime, Congress passed the Reconstruction Acts in 1867 and gave black men in the reconstructed states the right to vote; a biracial coalition of Republicans came to power in Alabama; and the new electorate placed new judges on the state supreme court. Not long

afterwards, the Democratic Party retrieved power in Alabama, a different set of judges took the bench, and the counterrevolution produced new results in civil rights cases. This context frames the postwar history of litigation regarding the constitutionality of Alabama laws that threatened to make felons of both partners in interracial relationships.

Most of the postwar political events had not yet occurred when Thornton Ellis and Susan Bishop, a black man and a white woman, went to trial in Lee County for violating Alabama's laws governing sexual relations. Unable to marry, they had managed to share their lives the best they could under Alabama law. Yet, under Section 3598 of the Alabama Code of 1867, people—if of the same race and convicted of living "together in adultery, or fornication"—were to be fined at least \$100, and they could also be sentenced to as much as six months in the county jail or at hard labor. A second conviction "with the same person" subjected the offender to a minimum fine of \$300 and a maximum imprisonment of twelve months, while an additional conviction, again "with the same person," carried a mandatory sentence of two years, either in the penitentiary or at hard labor for the county. While Section 3598 covered same-race couples who lived together outside of marriage, Section 3602 covered interracial couples who lived together, regardless of whether they were married. It mandated imprisonment, for a term of two to seven years each, of a white person and a "descendant of any negro, to the third generation," if they "intermarry or live in adultery or fornication with each other."<sup>2</sup>

A jury found Bishop and Ellis guilty of violating Section 3602—and imposed a \$100 fine on each of them, as though they had been convicted under Section 3598.<sup>3</sup> No matter their race, they had received the lightest possible penalty for the crime they stood convicted of.

They appealed their convictions. The Alabama Supreme Court upheld the convictions but reversed the penalty. The court suggested that the trial judge had believed Section 3602 to



violate the Civil Rights Act of 1866, and it rejected that premise. The federal law, Chief Justice A. J. Walker wrote, “does not prohibit the making of race and color a constituent of an offense, provided it does not lead to a discrimination in punishment.” As for Section 3602, it “creates an offense, of which participation by persons of different race is an element. To constitute the offense, there must be not only criminal intercourse, but it must be by persons of different race.” The Alabama statute, which outlawed interracial liaisons for both the white partner and the black one and then imposed identical sentences for infractions, met the standard required under the 1866 Civil Rights Act, according to the Alabama Supreme Court.<sup>4</sup>

Thus the state supreme court upheld the Alabama law and sustained the convictions, but it reversed the sentences and remanded the case. What Thornton Ellis and Susan Bishop each gained for their appeal was at least two years in prison rather than a \$100 fine. They would have fared better if they had not appealed their convictions—or if their case had come to the Alabama Supreme Court on appeal just one term later than it did. The June term in 1868 was the last one before a new court was elected. The new Republican court began its work in 1869. By that time, too, the Fourteenth Amendment had been ratified.

The next miscegenation case to reach the Alabama Supreme Court developed in 1872 after a justice of the peace named Burns was indicted for presiding in Mobile over a wedding of an interracial couple. When Burns appealed his conviction, Justice Benjamin F. Saffold spoke for a court that viewed the miscegenation laws in a very different light than the court had four years earlier. The court now found that Section 3602 violated both the state and federal constitutions. “Marriage is a civil contract,” Justice Saffold wrote. “The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it.”<sup>5</sup>

The Republican judge relied on the U.S. Supreme Court’s 1857 *Dred Scott* decision to bolster his interpretation of the law of freedom as it contrasted with the law of slavery. Chief Justice Roger B. Taney, he noted, had stressed state laws banning marriage between blacks and whites to support the conclusion that blacks were not citizens. As the Alabama judge stated, “an inhabitant of a country, proscribed by its laws, approaches equality with the more favored population in proportion as the proscription is removed.” He applied that notion to the statute at hand: “Dred Scott was not allowed to sue a citizen because he was not himself a citizen. One of the rights conferred by citizenship, therefore, is that of suing any other citizen. The civil rights bill,” declared Saffold, “now confers this right upon the negro in express terms, as also the right to make and enforce contracts, amongst which is that of marriage with any citizen capable of entering into that relation.” Whatever the authority of Congress to pass the Civil Rights Act in 1866, the Fourteenth Amendment enshrined “its cardinal principle” in the federal constitution. The second section of Article One of Alabama’s constitution of 1868, Justice Saffold continued, had “the same effect,” for all citizens, it said, possessed “equal civil and political rights and public privileges.”<sup>6</sup> Mr. Burns was ordered freed.

Between 1868 and 1872, the Alabama Supreme Court reversed direction on the state’s miscegenation laws; it did so again in the years that followed. By 1875, the Republican interlude of Reconstruction had ended in Alabama, and the state supreme court was again under the control of Democrats. In a series of cases, between 1875 and 1877, the court overturned *Burns* and perfected a new interpretation of the law of freedom. The new interpretation endured for nearly a century.

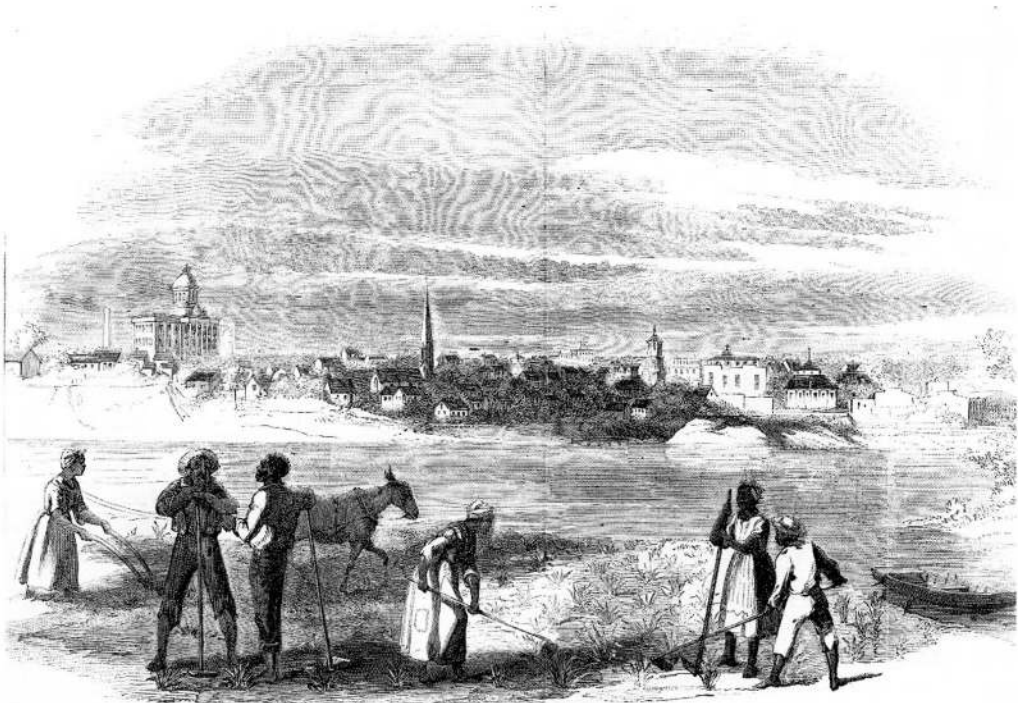
In the Barbour Circuit Court, a white man named Ford and a black woman were tried, under Section 3602, on the felony charge of “living together in adultery or fornication” in an interracial relationship. They challenged the

constitutionality of that statute, and they pleaded not guilty. Yet they were convicted and sent to the penitentiary. They appealed to the Alabama Supreme Court, where their lawyer, relying on the decision in *Burns*, argued: “The legislature had no power to make an act[,] which when committed by persons of the same race is only a misdemeanor, a felony when committed by persons of different races.” John W. A. Sanford, the Alabama attorney general in 1875—as he had been in 1868 and 1872, when he argued the state’s side in the *Ellis* and *Burns* cases—harked back to *Ellis v. State*. He insisted that Section 3602 contravened neither the state nor the federal constitutions. Relying on the U.S. Supreme Court’s decision in *The Slaughterhouse Cases*, he argued: “Every State has the right to regulate its domestic affairs, and to adopt a domestic policy most conducive to the interest and welfare of its people.” As far as the decision in *Burns v. State* was concerned, he

declared that it “should be overruled.”<sup>77</sup>

The attorney general won a partial victory. The court stated that, “On the question involved in this case, we can add nothing to the thorough discussion it received” in the *Ellis* decision. Yet the court professed to see no “conflict” between *Ellis* and *Burns*. “The latter case involved only the validity of the statute prohibiting marriage between whites and blacks. The validity of the statute prohibiting such persons from living in adultery was not involved. Marriage may be a natural and civil right, pertaining to all persons. Living in adultery is offensive to all laws human and divine, and human laws must impose punishments adequate to the enormity of the offence and its insult to public decency.”<sup>78</sup>

The court spoke in its decision in *Ford v. State* as if the only question were whether “adultery or fornication” should be a criminal offense. It chose to ignore the racial component.



CITY OF MONTGOMERY, ALABAMA.—DRAWN BY OUR SPECIAL ARTIST TRAVELING WITH W. H. RUSSELL, LL.D.—[SEE PAGE 241.]

**As part of Alabama’s Black Code in the nineteenth century, the state enacted laws banning interracial marriages—making them a misdemeanor beginning in 1852 and a felony following emancipation. This early engraving of the city of Montgomery shows African-American slaves toiling in the fields prior to the Civil War.**

It displayed no effort directly to address the difference between a misdemeanor offense, with a \$100 fine, and a felony conviction that carried at least two years' imprisonment. By implication, the court ruled that "the enormity of the offence" was greater if the adulterous partners were of different races than if they were of the same race.

In two cases in the December 1877 term, the court completed the counterrevolution that it had begun two years before. Like *Ellis*, but unlike *Ford*, each involved the marriage of a black man and a white woman. Having chosen to distinguish between a statutory ban on interracial marriage (which had been struck down in *Burns*) and a similar ban on interracial adultery or fornication (which it had upheld in *Ford*), the court now threw out the distinction and upheld the statutes.

Aaron Green married Julia Atkinson in Butler County on July 13, 1876. They were soon indicted for violating Section 4189 of the revised Alabama Code of 1876, which, like its predecessor Section 3602, banned interracial marriages and established greater penalties for fornication and adultery in cases of interracial couples than when both partners were of the same race. Julia Green's case would reach the Alabama Supreme Court.<sup>9</sup>

Green pleaded not guilty to the charge, but she did not dispute the facts. Judge John K. Henry instructed the jury that, "if they believed the evidence, they must find the defendant guilty." The jury convicted her, and Judge Henry sentenced her to two years in the penitentiary. Citing the *Burns* decision, she appealed. Attorney General Sanford, as he had two years earlier in *Ford*, urged that *Burns* be overturned.<sup>10</sup>

Justice Amos R. Manning spoke for the court in a thoroughgoing rejection of the decision made by "our immediate predecessors" in *Burns*. Returning to the court's line of argument in *Ellis*, he insisted that the Alabama law "no more tolerates" interracial marriage on the part of a "white person" than of a "negro or mulatto." Each, he insisted, "is punishable

for the offense prohibited, in precisely the same manner and to the same extent. There is no discrimination made in favor of the white person, either in the capacity to enter into such a relation, or in the penalty."<sup>11</sup>

Later that term, in another case, the court also applied the new law of freedom to interracial sex and marriage. Robert Hoover, a black man, had married Betsey Litsey, a white woman, on March 6, 1875, in Talladega County, and the next year the grand jury indicted them for living together in "adultery or fornication." At the conclusion of their trial, the judge instructed the jury "that the marriage shown in this case was forbidden by law, is a nullity, and is no protection to the parties who are guilty as charged in the indictment, if the evidence shows, beyond a reasonable doubt, that Hoover is a negro man and Litsey a white woman, and that they have been cohabiting as husband and wife." The jury saw no reasonable doubt. The case was appealed to the Alabama Supreme Court, which upheld the trial court. The Hoovers' "marriage being absolutely void, the offending parties must be treated as unmarried persons, and their sexual cohabitation as fornication within the statute."<sup>12</sup>

In Alabama, by 1878, nobody identified as white could legally marry anyone identified as black. If such a marriage took place, the couple could be tried on the charge of living together without being married. If a couple living together outside of marriage was interracial, the charge was a felony. Both parties, if convicted, would be sentenced to at least two years in the penitentiary. Between 1868 and 1878, the state had developed a line of argument defending such a legal environment against attacks based on the Civil Rights Act of 1866 or the Fourteenth Amendment.

Would the Supreme Court of the United States rule differently?

### Tony Pace and Mary Cox

Tony Pace and Mary Cox spent time together near their homes in Clarke County,

north of Mobile. They were not married, nor could they marry each other under Alabama law. Maybe they wished to marry each other but knew that, under the law at that time and place, they never could. Maybe they consciously attempted to avoid falling into a trap under the law so they chose not to share a home but, rather, visited from time to time and place to place. The law found them nonetheless.

In November 1881 the grand jury indicted them under two provisions of the Alabama Code, one that prohibited a man and a woman from living together outside marriage, and one that imposed a greater penalty if an interracial couple did so. When their case came to trial in April 1882, Mary Jane Cox asked that her indictment be quashed on the basis that it named Mary Ann Cox. The court refused to let her off, so she, the white woman, like her black partner, had to face the charges. They pled not guilty. The court did not bother with the lesser charge but went after them as an interracial couple.<sup>13</sup>

After the evidence had been presented, the defendants hoped to sway the outcome with an instruction they urged the trial judge to give the jury. Jurors should consider “where the parties each lived, and with whom, and where the adulterous acts took place, if they did in fact take place,” and they should consider, too, whether those acts “took place in a house controlled or occupied by either party or were mere occasional acts of illicit intercourse in out of the way places.”<sup>14</sup> In short, the couple denied that they lived together, and thus they could hardly have been living together “in adultery or fornication with each other,” even if they had a sexual relationship.

The judge refused the instruction. The jury convicted, and each defendant was sentenced to a term of two years in the state penitentiary. Pace and Cox discovered a virulent form of “separate” as it related to “equal”—an equal punishment for failure to keep separate.

The couple appealed to the Alabama Supreme Court. Speaking for that court, Justice Henderson M. Somerville denied that the stat-

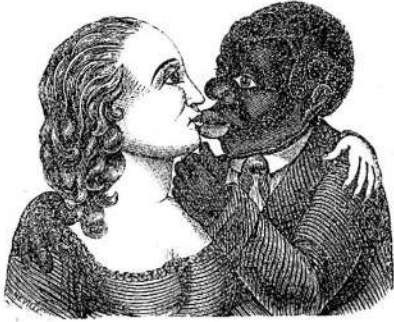
ute violated the privileges and immunities or equal protection clauses of the Fourteenth Amendment. In the case of sexual relations, penalties for same-race infractions did not have to be the same as for interracial crimes, for the crime was not the same. The nature of the crime was “determined by the opposite color of the cohabiting parties. The punishment of each offending party, white and black, is precisely the same.” Interracial cohabitation jeopardized “the highest interests of government and society,” for it could result in “the amalgamation of the two races, producing a mongrel population and a degraded civilization.”<sup>15</sup>

The court produced a series of precedents supporting its approach to the case at hand. Among them were recent decisions in Virginia, North Carolina, Texas, and Indiana, as well as the Alabama court’s rulings in *Ellis*, *Ford*, *Green*, and *Hoover*. Conspicuously missing was mention of the *Burns* decision. *Burns* had vanished without a trace, in the eyes of the couple’s lawyer as well as the state supreme court. *Burns*, the great aberration, never happened. It had no relevance, as became clear when the couple took their appeal to the Supreme Court of the United States.

The couple’s attorney, John R. Tompkins, had no quarrel with *Green*, “on the intermarriage of the races,” which he declared to be “good law” in his brief for the Supreme Court. But he did object to *Ellis* and *Ford* as “bad law,” for they entailed “unequal punishments measured against different races according to color.” He continued: “Marriage is a social blessing; adultery and fornication are social evils.” He conceded, however, that “marriage is a social institution subject to the regulation of the sovereign power of the State without violation of any provision of the Constitution.” Yet he objected that, according to the law under which his clients had been convicted, “an ordinary misdemeanor is made a felony because one of the offending parties happened to be a negro.” The Alabama law on interracial cohabitation had to fall, John R. Tompkins insisted, because, under the Fourteenth Amend-

## WHAT MISCEGENATION IS!

—AND—



## WHAT WE ARE TO EXPECT

Now that Mr. Lincoln is Re-elected.

By L. SEAMAN, LL. D.

WALLER & WILLETTS, PUBLISHERS,  
NEW YORK.

**This anti-Lincoln pamphlet attacking the President's views on ending slavery also shows how repugnant many white Americans considered miscegenation. The first case on race and marriage reached the Supreme Court in the 1880s; the Court upheld an anti-miscegenation statute then and did not reverse itself until the 1960s.**

ment, it mandated “an illegal discrimination between the offending party and others of his own race who might commit a like offense with an Indian, a Chinese, a Corean or one of his own people.”<sup>16</sup>

The state would have none of the distinction Tompkins insisted upon. Repeating the language of the act at issue, which equally criminalized actions when an interracial couple “intermarry or live in adultery or fornication with each other,” the state’s attorney declared the purpose to be twofold: “*First* to prevent the intermarriage of persons of the two races; and *second*, to prevent illicit intercourse between them, the end to be accomplished by each prohibition being the same—the prevention of the amalgamation of the two

different races.”<sup>17</sup>

Noting that the couple’s attorney had conceded the ban on interracial marriage to be both constitutional and wise, the attorney for the state, Henry Clay Tompkins, insisted that he indulged in two fallacies in his approach to the cohabitation law. First, there was “no discrimination against any race” and “no denial of any privilege belonging to any citizen.” No such “privilege” as living in adultery or fornication “ever did or ever will exist,” and the law imposed equal punishments on both parties in an interracial couple. Second, the general law of sexual relations, the one related to same-race infractions, “refers and relates only to the crime of adultery when committed by parties between whom marriage is not forbidden.”

Where marriage was forbidden, whether in terms of race or incest, the state imposed greater penalties for “living together in adultery or fornication.”<sup>18</sup>

The two sides argued over the application of *The Slaughterhouse Cases*. The couple’s lawyer claimed that, according to *The Slaughterhouse Cases*, the Fourteenth Amendment was designed to “reach precisely such cases as the one at bar,” where racial distinctions resulted in discrimination in the law. The state, for its part, appreciated the *Slaughterhouse* distinction between state and federal citizenship, insisted that many “privileges” remained the province of the state governments, and concluded that “the regulation of marriage is purely a power relating to internal police.” Thus the state could argue that “the power to say who may and who may not marry is one of the ordinary police powers of every government, restrained only by legislative discretion,” and “the policy of the law has always been to punish acts of criminal intimacy between those who are forbidden to marry with greater severity than where no such prohibition exists.”<sup>19</sup>

The state laid out its arguments. First, each state had the power, “unlimited except by legislative discretion,” to declare “who of its citizens may marry, when they may marry, and how they may marry.” Second, “the state’s power to forbid marriages between persons of different races carries with it the power to impose a greater punishment for acts of criminal intimacy between such persons than . . . for the same acts committed by persons between whom marriage is not forbidden.” Third, since the power to regulate marriages resides in the states, “for the protection of his rights in connection therewith, if there are any such, the citizen must look to the States.” And fourth, “a law which punishes persons of each race in the same manner and to the same extent for its violation is not a discrimination against either race, nor does it deny to any person the equal protection of the laws.”<sup>20</sup>

The state claimed, as a matter of historical

fact, that “the right of the State” to outlaw marriages “between persons of different races, or even different religions, has been exercised and sustained.” The state went farther, farther than the truth could take it. “This question has never been before this court, but has been before several of the State courts and also several of the lower courts of the United States, and in every instance the validity of such laws has been upheld.”<sup>21</sup> But neither side was mentioning *Burns*, and neither side was contesting the authority of the state to criminalize interracial marriage. The only question seemed to be whether the Fourteenth Amendment permitted the state to distinguish “criminal intimacy” between races from that by members of the same race.

Writing for a unanimous court, Justice Stephen J. Field rejected the argument that the Fourteenth Amendment’s Equal Protection Clause offered a shield. Rather, he adopted the Alabama court’s line of reasoning. Viewing the two sections of the Alabama law, Justice Field found them “entirely consistent” and in no way racially discriminatory. Each, he insisted in all earnestness, dealt with a different offense. Section 4184 treated the races in an identical manner, in that it “equally includes the offense when the persons of the two sexes are both white and when they are both black.” Section 4189 also treated the races in an identical manner, in that it “applies the same punishment to both offenders, the white and the black,” in an interracial relationship.<sup>22</sup>

Section 4189, unlike 4184, the Court ruled, “prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race.” “Indeed,” wrote Justice Field, the offense against which Section 4189 “is aimed cannot be committed without involving persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race.”

### The Supreme Court and Interracial Marriage, 1880s-1910s

The nation's High Court accepted the main lines of argument that supporters of the Alabama miscegenation laws had developed from *Ellis* in 1868 to *Hoover* in 1877. By 1883, the aberration of *Burns* was already invisible to attorneys and judges, but it serves as a reminder to us, more than a century later, that the course of judicial history regarding laws against interracial marriage was not perhaps entirely inevitable—that the Lovings might have had an uneventful marriage, one into which the law never intruded. Yet it is hard to see much likelihood that the Supreme Court of the United States might have ruled differently than it did in *Pace*. Justice John Marshall Harlan did not dissent from the ruling in *Pace*, though he was the sole dissenter from the Court's narrow construction of the Fourteenth Amendment in the *Civil Rights Cases*—decided in October 1883, just nine months after the *Pace* decision—and again in 1896 in *Plessy v. Ferguson*.<sup>23</sup>

The *Pace* decision was understood, from the 1880s to the 1960s, as reflecting a validation of state miscegenation laws. Yet only by implication had the ban against interracial marriage been addressed, as the state had argued for stiffer penalties for cohabitation if a couple was prevented by state law from marrying. Regardless, the Court had upheld the Alabama laws, and no southern state, for the next eight decades, displayed any inclination to repeal such laws. The Supreme Court's 1883 decision in *Pace v. Alabama* would have an even more durable career in the American law of interracial sex and, by extension, marriage than the 1896 decision in *Plessy v. Ferguson* would have on segregated transportation and, by extension, education.

In the *Plessy* case, the Court itself took occasion to comment on the constitutionality of miscegenation laws. Justice Henry Billings Brown—making his way to a conclusion that state legislatures did not necessarily violate the

Fourteenth Amendment by enacting laws requiring railroad facilities that were “equal, but separate,” for the two races—wrote: “Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State.”<sup>24</sup>

Indicating no awareness of any exceptions to his generalization of universality, Justice Brown relied for his example of such decisions not on the Supreme Court's opinion in *Pace v. Alabama* but, rather, on one of the leading state court decisions on the subject, one from a northern state, Indiana. As Chief Justice Warren would suggest many years later, *Pace* had not ruled directly on the constitutionality of laws banning interracial marriage. Yet in neither *Pace* nor *Plessy* had the Court noted any difficulties with such laws.

The matter of the constitutionality of miscegenation legislation came up again in *Buchanan v. Warley*, a 1917 case in which the Supreme Court determined that municipal zoning ordinances segregating residential housing patterns by race violated the Fourteenth Amendment. Proponents of the ordinances argued that such regulations were just another expression of a state's police power, like other segregation laws, and such “laws have existed for many years separating black from white in schools, in railroad cars[,] and in the matter of marrying.” Opponents conceded that the issue was closed in education, transportation, and marriage, but they sought to distinguish housing as a separate issue, one that hinged on property rights.<sup>25</sup>

The Supreme Court adopted the opponents' position, reasoning, and language and based its decision on “fundamental rights in property.” The Court observed that residential separation “is said to be essential to the maintenance of the purity of the races,” but it insisted: “The case presented here does not deal with an attempt to prohibit the amalgamation of the races.”<sup>26</sup> In *Buchanan v. Warley*, as in *Pace*, all sides operated from the premise that the

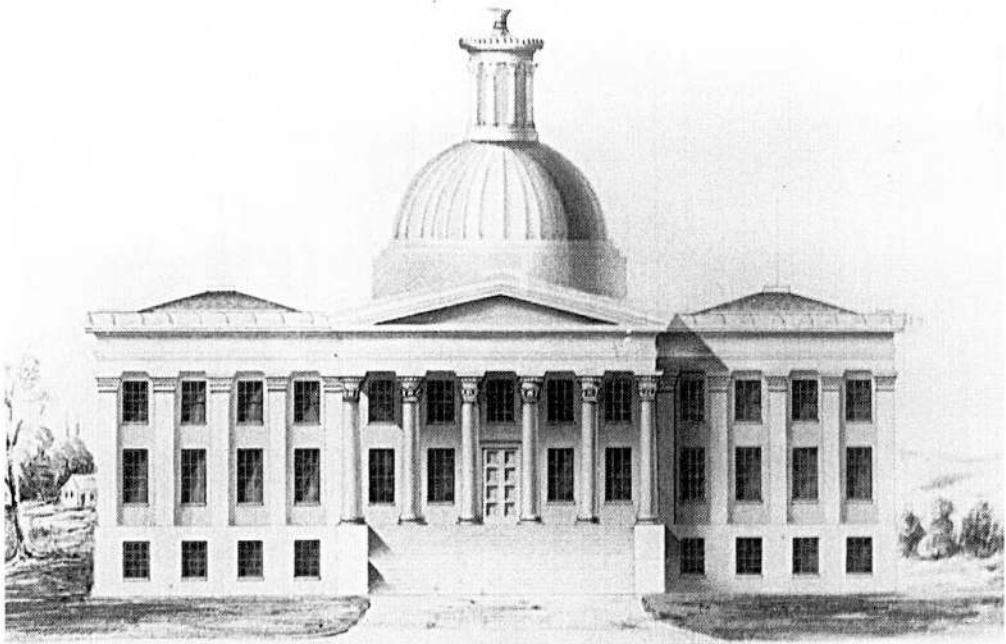


laws against interracial marriage were safe from the Fourteenth Amendment. They differed on other matters before the Court.

Laws against interracial marriage vanished from the statute books in various states in the years to come, from Maryland and Indiana in the East to Utah and Oregon in the West. But—until the *Loving* decision—they almost always did so as a result of action in the legislatures, not in the courts, and certainly not in the federal courts.

### The Case of Linnie Jackson

Some seventy years after Tony Pace went to trial, a black woman named Linnie Jackson was convicted for her miscegenous relationship with a white man named A. C. Burcham. E. B. Haltom, Jr., her lawyer, relying on a long train of twentieth-century civil rights decisions from the Supreme Court of the United States,



**Between 1868 and 1872, during the Reconstruction era, the Alabama Supreme Court under the leadership of Chief Justice Benjamin F. Saffold (top) reversed direction on the state's miscegenation laws and held that blacks had the right to make and enforce contracts, including marriage contracts "with any citizen capable of entering into that relation." The drawing above shows Alabama's state capitol, which housed the Alabama Supreme Court until 1870.**



challenged the proceeding on Fifth and Fourteenth Amendment grounds. Nonetheless, the Alabama Court of Appeals (a twentieth-century appellate court below the Alabama Supreme Court) surveyed the history of decisions in miscegenation cases in the Alabama courts, declared that, after all, the nation's high court had affirmed the *Pace* decision, and noted that "the decisions of the [Alabama] Supreme Court shall govern the holdings and decisions of this court." It upheld her conviction.<sup>27</sup>

Jackson did not give up. She took her case to the Alabama Supreme Court, which rebuffed her as well, and then to the Supreme Court of the United States. There she found that the Justices were by no means eager to push an equal-rights agenda on the matter of miscegenation. Focused as they were on the school segregation cases that had been decided in 1954, they recognized that, were they to take on miscegenation, they might only get in their own way. Any decision that the Court might make on miscegenation could undermine their stance in the school desegregation cases. The first decision announced in *Brown v. Board of Education* came in May 1954; the second, implementing decision came in May 1955. Linnie Jackson's case came to the Court between those two dates.<sup>28</sup>

The *Brown* decision eventually led to a decision overturning the laws against interracial marriage, but in the short run it caused too much turmoil to have any such effect. Early writers surmised that "these statutes are unconstitutional," yet "the Court, or at least some of its Justices, did not believe that airing this inflammatory subject, of little practical significance, would be in the public interest while strident opposition is being voiced to less controversial desegregation because it allegedly leads to intermarriage."<sup>29</sup> The papers of various Supreme Court Justices make it clear that such speculations were exactly right.

Harvey M. Grossman, law clerk to Justice William O. Douglas, expressed his conflicted response when advising his boss on the *Jack-*

*son* case. "It seems clear that the statute involved is unconstitutional," he wrote on November 3, 1954. And yet, he continued, "review at the present time would probably increase the tensions growing out of the school segregation cases and perhaps impede solution to that problem, and therefore the Court may wish to defer action until a future time. Nevertheless, I believe that[,] since the deprivation of rights involved here has such serious consequences to the petitioner and others similarly situated[,] review is probably warranted even though action might be postponed until the school segregation problem is solved."<sup>30</sup>

Later that month, the Supreme Court dodged the bullet. It denied certiorari. Three Justices had voted to hear the case: Hugo L. Black, William O. Douglas, and Earl Warren. But five others voted not to: Harold H. Burton, Tom Clark, Felix Frankfurter, Sherman Minton, and Stanley F. Reed.<sup>31</sup>

Seven decades had elapsed between *Pace* and *Jackson*, and nothing, it seemed, had changed. The precedent of *Pace*, such as it was, remained intact. Linnie Jackson went to the penitentiary. And the next year, while she was in prison, the court dodged another such case, one that came from Virginia.

### Ham Say Naim

On June 26, 1952, Ham Say Naim, a Chinese sailor, married a white woman from Virginia in Elizabeth City, North Carolina. That state, like Virginia, banned marriages between whites and blacks, but, unlike Virginia, it permitted marriages between Caucasians and Asians. For some months, the Naims made their home in Norfolk, Virginia. Then they separated. On September 30, 1953, Ruby Elaine Naim filed a petition seeking annulment on grounds of adultery, and if that effort failed, she asked that an annulment be granted on the basis of Virginia's ban on interracial marriages.<sup>32</sup>

Judge Floyd E. Kellam of the Portsmouth Circuit Court knew an easy case when he saw



**When the case of Mary Jane Cox and Tony Pace, an interracial couple accused of living together, was decided by the Alabama Supreme Court in 1882, Associate Justice Henderson M. Somerville (above) wrote that interracial cohabitation jeopardized “the highest interests of government and society,” for it could result in “the amalgamation of the two races, producing a mongrel population and a degraded civilization.”**

one. Here was a marriage between a white person and a nonwhite. The couple had gone to North Carolina in order to evade the Virginia law, as much a crime as having had the ceremony in Virginia. Of course the marriage was void, and he granted the annulment Mrs. Naim sought.<sup>33</sup>

It was Mr. Naim’s turn to go to court. On the basis of his marriage to an American citizen, he had applied for an immigrant visa, and unless he remained married he could not hope to be successful. His immigration attorney, David Carliner, mounted a test case in the Virginia Supreme Court.<sup>34</sup>

Speaking for a unanimous court, Justice Archibald Chapman Buchanan relied on the Tenth Amendment to fend off the Fourteenth. “Regulation of the marriage relation,” he insisted, is “distinctly one of the rights guar-

anteed to the States and safeguarded by that bastion of States’ rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights.”<sup>35</sup>

What about *Brown v. Board of Education* and its incantation of the Equal Protection Clause? No problem, Justice Buchanan assured Virginia authorities. “No such claim for the intermarriage of the races could be supported; by no sort of valid reasoning could it be found to be a foundation of good citizenship or a right which must be made available to all on equal terms.” He could find nothing in the U.S. Constitution, he wrote, that would “prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.” Rather than promote good citizenship, he suggested, “the obliteration of racial pride” and “the corruption of blood” would “weaken or destroy the quality of its citizenship.”<sup>36</sup>

Refusing to give up, Naim appealed to the Supreme Court of the United States. Unhappily for Naim, his case came to the Supreme Court only one year after Jackson, and the Court was no more eager to confront the issue then than it had been the year before.<sup>37</sup>

The Supreme Court neither accepted nor refused the case. Rather, it sent the case back to Virginia. Claiming to have determined the record insufficiently clear or complete to address the question Naim raised, it directed the Virginia Supreme Court of Appeals to remand the case to Portsmouth for further proceedings. But Virginia’s highest court refused to cooperate with the federal court’s request—or, rather, it acted to help the Court out of its dilemma. It remonstrated that “the record before the Circuit Court of the City of Portsmouth was adequate for a decision of the issues presented to it. The record before this court was adequate for deciding the issues on review. . . . The decree of the trial court and the decree of this court affirming it have be-

come final so far as these courts are concerned." The Virginia statutes were sound, the Naims' marriage was void, and the Virginia courts' decisions were final, said the court.<sup>38</sup>

The *Richmond Times-Dispatch* published an editorial about the standoff. While acknowledging that the Virginia court had "used some rather tart language in refusing to comply," it insisted nonetheless that "the Virginia court has not defied the nation's highest tribunal." Rather, the paper noted, the state court had simply declared that "it had *no* legal means of conniving with the Federal court's order." Noting "many" Virginians' "displeasure" with the Supreme Court's recent rulings on segregation, the editorial observed that those "many Virginians . . . also applaud the Virginia court in rebuffing the Federal court's attempt to operate in an area of State affairs over which it has no jurisdiction."<sup>39</sup>

Naim took his case back to the Supreme Court, but there it died. The nation's high court simply noted that the response of the Virginia Supreme Court "leaves the case devoid of a properly presented Federal question." The Virginia court had helped take the Supreme Court of the United States off the hook.<sup>40</sup> Thus no judicial reconsideration took place by the Supreme Court in the 1950s regarding miscegenation laws in Alabama, Virginia, or anywhere else.

### **Dewey McLaughlin and Connie Hoffman**

In the 1960s, the Supreme Court of the United States displayed a new willingness to take on the issue of miscegenation. Recovering from the paralysis it had suffered in the mid-1950s, the Court now drove toward total demolition of the structure of Jim Crow in American public life—and thus in private life as well. In the *Pace* decision eighty years before, the Court had unblinkingly upheld Alabama's miscegenation law. In the 1950s, it had refused to deal with the question. The Court began to confront it in 1964 and com-

pleted the task in 1967.

The first of the 1960s cases was *McLaughlin v. Florida*. Dewey McLaughlin and Connie Hoffman, after living for a few weeks in an efficiency apartment in Miami, had been indicted under a Florida statute, Section 798.05, that said: "Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars." Convicted, they were each sentenced to thirty days and a \$150 fine. When they appealed their convictions, the Florida Supreme Court relied on the authority of *Pace v. Alabama* and upheld the trial court.<sup>41</sup>

McLaughlin and Hoffman took their case to the Supreme Court of the United States. There they objected, first, that they had been prevented from a defense that they had a common-law marriage, for the trial judge had insisted that, as an interracial couple, they had no freedom to marry under Florida law. Second, they argued that they were denied equal protection of the laws, as they had been convicted under a statute that applied only to interracial couples. Finally, they contended that no conclusive evidence had been introduced to identify McLaughlin as being at least one-eighth of African ancestry, as would be necessary under Florida law for the two convicts to be an interracial couple.<sup>42</sup>

A unanimous Court struck down their convictions, but it dealt only with one of the three points, the issue of equal protection. The Court objected that the conduct criminalized under Section 798.05 related only to interracial couples. Writing for the Court, Justice Byron R. White noted three elements of the couple's offense, "the (1) habitual occupation of a room at night, (2) by a Negro and a white person (3) who are not married." The provision under which they had been indicted and convicted, he observed, fell among several other sections designed to "deal with adultery, lewd cohabi-

tation and fornication,” most of them “of general application.” But this particular provision specified an interracial couple and, unlike any of the others, “does not require proof of intercourse along with the other elements of the crime.”<sup>43</sup>

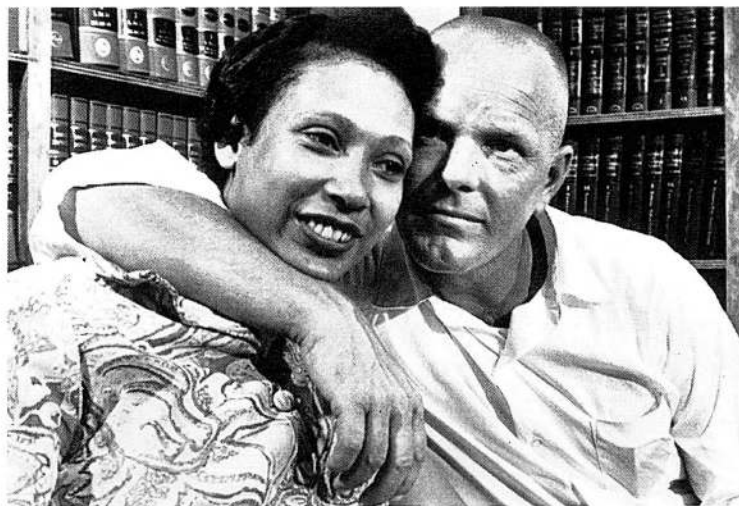
The Court had to deal with the ancient legacy of *Pace*. As the Court now saw things, though, “*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis.” The Court in 1883 had apparently been untroubled that an Alabama law “did not reach other types of couples performing the identical conduct” or by “the difference in penalty established for the two offenses,” one committed by a single-race couple and the other by a black-white couple.<sup>44</sup>

Whatever may have been the situation in 1883, the Court in 1964 was deeply troubled by such questions. White wrote: “The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida’s cohabitation law and those excluded. That question is what *Pace* ignored and what must be faced here.” As he explained, relying on such recent cases as *Brown v. Board of Education*, “the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.” Yet, “We deal here with a racial classification embodied in a criminal statute.”<sup>45</sup>

Other provisions of Chapter 798, Justice White wrote, “neutral as to race,” adequately expressed Florida’s “general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry[,] or those who may not. These provisions, if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage.” No compelling state purpose, he wrote, could support the offending law.<sup>46</sup>

Would the Court overturn the convictions on narrow grounds related solely to the law against interracial cohabitation, or would it rule more broadly to throw out all miscegenation laws? Plaintiffs and the state alike had attempted to tie together Florida’s laws against interracial nonmarital cohabitation and interracial marriage, the plaintiffs on the basis that marriage was not an option available to them, the state on the grounds that the “interracial cohabitation law . . . is ancillary to and serves the same purpose as the miscegenation law itself.” The Court insisted on untying the two bans: “We reject this [Florida’s] argument, without reaching the question of the validity of the State’s prohibition against interracial marriage or the soundness of the arguments rooted in the history of the [Fourteenth] Amendment.” Thus the Justices invalidated the statute under which the pair had been convicted, but they did so, they took pains to make explicit, “without expressing any views about the state’s prohibition of interracial marriage.” In the case at hand, “the state police power . . . trenches upon the constitutionally protected freedom from invidious official discrimination based on race.”<sup>47</sup>

A unanimous Supreme Court ruled that a state could not use a miscegenation statute to prosecute an interracial pair for “habitually liv[ing] in and occupy[ing] in the nighttime the same room.” The Court rejected the use of racial classification in this manner. Justice Potter Stewart appeared to go farther—he seemed ready to overturn all miscegenation laws—in a concurring opinion in which Justice William O. Douglas joined: “I cannot conceive of a valid legislative purpose . . . which makes the color of a person’s skin the test of whether his conduct is a criminal offense.” Perhaps that was insufficiently clear? He restated his objection, based on the Equal Protection Clause: “I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*.”<sup>48</sup>



**Mr. and Mrs. Richard Perry Loving were photographed in June 1967 after they learned of their court victory against a Virginia law that had denied that they could marry. They had been awakened in the middle of the night by policemen who arrested them for living as husband and wife in the state of Virginia.**

Justice Harlan also found the interracial cohabitation measure unconstitutional, but he thought *McLaughlin* “a very bad case” for overturning laws against interracial marriage.<sup>49</sup> As late as 1964, it was not possible to obtain a decision—certainly not a unanimous decision—in support of extending *Brown* that far.

Maybe the state’s marriage law was permissible under the Fourteenth Amendment, and maybe it was not. That question did not need to be answered, the Court contended, to reach a conclusion in *McLaughlin*. Florida escaped a loss in its strategic gamble, and proponents of change lost their opportunity to obtain a wider-ranging decision. The Court proved less timorous than in the cases of Linnie Jackson and Ham Say Naim, but it was clearly unprepared to go all the way.

*McLaughlin* was a crucial decision, in that the Supreme Court overturned the *Pace* precedent on interracial cohabitation, and yet the Court sidestepped the central question. One might say that it had done little better in *McLaughlin* than it had in *Pace*. Dewey McLaughlin and Connie Hoffman still could not marry under Florida law without subjecting themselves to time in the penitentiary. If they continued to live together in Florida as an unmarried couple, authorities could bring charges against them for a sexual relationship outside marriage as “any man and woman” rather than

as “any negro man and white woman.”

Meantime, another miscegenation case was in the courts, in Virginia. This one involved a “white man and negro woman,” to use Florida’s language, two people who—like the Greens and the Hoovers in Alabama in the 1870s—had thought they had a marriage and found they had a felony.

### **The Supreme Court, Virginia, and the Lovings**

On July 11, 1958, Caroline County Commonwealth’s Attorney Bernard Mahon obtained warrants for the arrest of Richard Loving and “Mildred Jeter” each for a felony associated with their marriage on June 2 in Washington, D.C. Three law officers took their flashlights into the Lovings’ bedroom and awakened them that July night. There they gathered up the couple, along with the incriminating evidence that they were living together as husband and wife.<sup>50</sup>

The Caroline County grand jury brought indictments at its October term. At their trial on January 6, 1959, the Lovings pled “not guilty” at first and waived a jury trial. At the close of argument, they changed their pleas to “guilty,” and Circuit Court Judge Leon M. Bazile sentenced them to one year each in jail. But he suspended those sentences “for a period of

twenty-five years”—all the way to the year 1984—provided that “both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years.”<sup>51</sup>

The offending parties could not live as husband and wife in Virginia. The finite suspension did not even mean that, after twenty-five years, the Lovings could move back to Virginia. One of them, it seemed, could live in Virginia with impunity. Or, after twenty-five years, both could live there separately. As matters stood in 1959, however, if they ever attempted to live together in their native state, they faced trouble. If they were caught in Virginia at any time during the next twenty-five years, they would serve their suspended sentence. If they lived together in Virginia after the twenty-five years had elapsed, they would face prosecution just as they had in 1958.

Richard Loving and Mildred Jeter, as the court knew them in Virginia, moved to Washington, D.C., and resumed their identities as Mr. and Mrs. Loving. There they lived at 1151 Neal Street Northeast with Mildred Loving’s cousin, Alex Byrd, and his wife Laura. They had three children—Sidney, Donald, and Peggy—though Mrs. Loving returned home to Virginia for each birth.<sup>52</sup> Either Mr. Loving or Mrs. Loving could visit Caroline County, but they could not legally both do so at the same time. They had to make their home and find employment outside the state. This they continued to do for more than four years.

They began to contest their fate in 1963. Mildred Loving wrote Robert F. Kennedy, Attorney General of the United States, for assistance. It was time, she felt, that her family move back home, and she had probably heard of a civil rights bill bobbing around in Congress, though the Civil Rights Act of 1964, when it became law the next year, left marriage as the one remaining pillar of the structure of Jim Crow.

The Justice Department redirected her letter to the National Capitol Area Civil Liberties Union with the suggestion that, though the fed-

eral government could not help the Lovings, perhaps the American Civil Liberties Union could. The ACLU did. That organization had been pushing litigation since the late 1940s to rid the nation of miscegenation laws like Virginia’s.<sup>53</sup>

And thus the case of the Lovings made its way back into the courts. While it did, the Lovings returned home to the Caroline County area, though they faced uncertainty there and kept their Washington, D.C., sanctuary at the ready.<sup>54</sup>

ACLU member Bernard S. Cohen, a young lawyer practicing in Alexandria, Virginia, welcomed an opportunity to take the case, and in November 1963 he returned to state court seeking reconsideration of the convictions and sentences. He filed a motion in Caroline County Circuit Court to set aside the original judgment. Cohen knew that he would have to be creative to overturn a century’s worth of adverse precedents. Of course he would argue the Fourteenth Amendment’s Equal Protection Clause to contest the constitutionality of Virginia’s miscegenation statutes. He argued, too, that the suspended sentence “denies the right of marriage which is a fundamental right of free men”; that the sentence constituted “cruel and unusual punishment” in violation of the Virginia Constitution; that it exceeded the “reasonable period of suspension” permitted by Virginia law; and that it constituted banishment and thus violated due process.<sup>55</sup>

Judge Bazile was in no hurry to second-guess himself, so nothing happened. In mid-1964, another young attorney, Philip J. Hirschkop, joined Cohen in the case and, no action having been taken on the petition in state court, Cohen and Hirschkop began a class action in October 1964 in U.S. District Court in the Eastern District of Virginia.<sup>56</sup>

Cohen and Hirschkop requested that a three-judge court convene to determine the constitutionality of Virginia’s miscegenation statutes and to enjoin the enforcement of the Lovings’ convictions under those laws. Pending a decision by a three-judge panel, they re-

quested a temporary injunction against the enforcement of those laws, which they said were designed “solely for the purpose of keeping the Negro people in the badges and bonds of slavery.” Seeing no “irreparable harm” to the Lovings in the meantime, District Judge John D. Butzner, Jr., rejected the motion. Then, with the federal panel due to meet soon, Judge Bazile finally brought the case back to trial.<sup>57</sup>

In January 1965, six years after the original proceedings, Judge Bazile presided at a hearing of the Lovings’ petition to have his decision set aside. In a written opinion, he rebutted each of the contentions that might have forced a reconsideration of their guilt. Pointing back to an 1878 Virginia Supreme Court decision, *Kinney v. Commonwealth*, he noted that the Lovings’ marriage was “absolutely void in Virginia,” and that they could not “cohabit” there “without incurring repeated prosecutions” for doing so. Referring to the Virginia high court’s decision in *Naim*, he noted that marriage was “a subject which belongs to the exclusive control of the States.” As for miscegenation statutes, he cited the federal precedent in *Pace* as well as the Supreme Court’s denial of certiorari in *Jackson* even after *Brown v. Board of Education*.<sup>58</sup>

By way of conclusion, Judge Bazile wrote: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement[,] there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”<sup>59</sup>

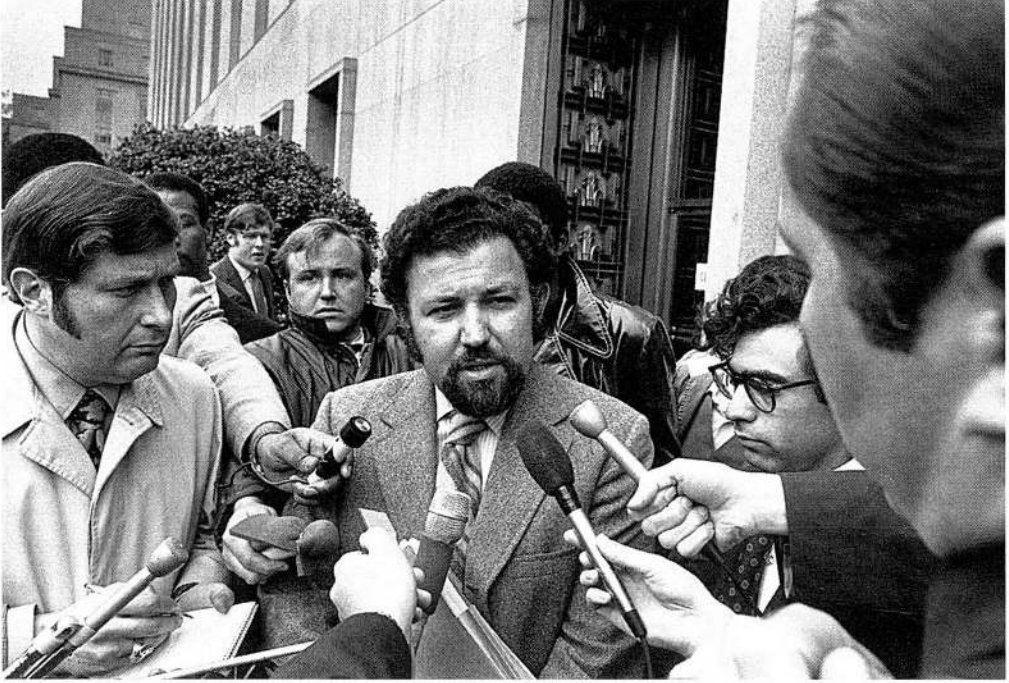
Back in federal court, the office of the Virginia attorney general, Robert Y. Button, argued that the Virginia appellate court should first rule in the case. The federal court agreed that the Lovings should exhaust their appeals in state court. District Judge Oren R. Lewis, for one, wanted assurance, however, that, if the case went to the Virginia Supreme Court, the central question would be directly faced there. And if the Virginia court failed to move promptly, the three-judge panel would resume jurisdiction and

soon render a decision.<sup>60</sup>

The Lovings appealed Judge Bazile’s decision to Virginia’s highest court. There, lawyers for the state and the Lovings rehearsed arguments that, both sides well knew, were likely to be heard again at the Supreme Court of the United States. In mounting one of their arguments, Cohen and Hirschkop quoted from *Perez v. Sharp*, a 1948 California Supreme Court decision against the constitutionality of miscegenation laws: “If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one’s liberty.” They went on to assert: “The caprice of the politicians cannot be substituted for the minds of the individual in what is man’s most personal and intimate decision. The error of such legislation must immediately be apparent to those in favor of miscegenation statutes, if they stopped to consider their abhorrence to a statute which commanded that ‘all marriages must be between persons of different racial backgrounds.’” Such a statute, they claimed, would be no more “repugnant to the constitution”—and no less so—than the law under consideration. Something “so personal as the choice of a mate must be left to the individuals involved,” they argued; “race limitations are too unreasonable and arbitrary a basis for the State to interfere.”<sup>61</sup>

The court largely adopted the brief of the state of Virginia as its opinion. On March 7, 1966, speaking for a unanimous court, Justice Harry Lee Carrico rejected the Lovings’ claim that the decision in *Naim*—having relied on *Plessy*, since overruled in *Brown*, and on *Pace*, since overruled in *McLaughlin*—should not govern the case. In *Brown*, Carrico wrote, the Supreme Court of the United States had ruled that “in the field of public education, the doctrine of ‘separate but equal’ has no place, but it had said nothing that might be construed as extending to marriage.” Justice Carrico was able to say that the nation’s high court itself, in denying certiorari in the *Jackson* case “just six months” after *Brown*, had “indicated that the





**ACLU members Bernard Cohen and Philip J. Hirschkop (pictured in 1971) represented the Lovings in challenging Virginia's antimiscegenation statutes. Something "so personal as the choice of a mate," they argued, "must be left to the individuals involved." Hirschkop later married Suzi Park Thomas, a Korean-American woman who worked for House Speaker Carl Albert.**

*Brown* decision does not have the effect upon miscegenation statutes which the defendants claim for it." Carrico concluded that *McLaughlin* had "detracted not one bit from the position asserted in the *Naim* opinion," for the Supreme Court had said in deciding that case that it did so "without reaching the question of the validity of [Florida's] prohibition against interracial marriage."<sup>62</sup>

It was clear where Carrico was going: "Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which

it is entitled under the doctrine of *stare decisis*, we hold it to be binding upon us here."<sup>63</sup>

And yet Virginia's high court still had to address the way Judge Bazile had handled the sentencing in the case when it was in trial court seven years before. Lawyers for the Lovings had objected that the suspended sentence was in effect banishment and that, as the North Carolina Supreme Court had declared in 1953, "A sentence of banishment is undoubtedly void." Carrico differed. "Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because they were permitted to return to the state, provided they did not return together or at the same time."<sup>64</sup> Judge Bazile had nonetheless erred.

The statute under which Bazile had suspended the sentence had as its purpose offenders' "rehabilitation," said the court, and



the Lovings' real offense had been their "cohabitation as man and wife" in Virginia. Thus Bazile should have related the suspension of their sentences to their cohabitation "as man and wife in this state," not their presence in Virginia. The Virginia Supreme Court remanded the case to circuit court in Caroline County, not to retry the case but merely for resentencing. Any suspension of sentence must be on "conditions not inconsistent with the views expressed in this opinion." As an aside, Carrico noted that, "although it has not been alluded to by either side," the statute called for "a sentence in the penitentiary, and not in jail."<sup>65</sup>

The Lovings had exhausted their appeals in the Virginia courts. Their convictions remained intact. No matter what sentences the Caroline County court might finally impose, they would remain unable to do what they continued to desire to do, "cohabit as man and wife" in Virginia. Perhaps they would go to the penitentiary. New terms of suspension might permit them to visit Virginia together. Perhaps, in what might appear the most likely outcome, they could both live in Virginia, but not together. Then, if they lived together, they faced—once again—prosecution, conviction, and time in the penitentiary.

They appealed their case to the Supreme Court of the United States. Cohen and Hirschkop, in their jurisdictional statement to the Court, pointed out why the case should be heard: "The elaborate legal structure of segregation has been virtually obliterated with the exception of the miscegenation laws." They continued: "There are no laws more symbolic of the Negro's relegation to second-class citizenship. Whether or not this Court has been wise to avoid this issue in the past, the time has come to strike down these laws; they are legalized racial prejudice, unsupported by reason or morals, and should not exist in a good society."<sup>66</sup>

Justice John Marshall Harlan's clerk pointed out to him that the "miscegenation issue" had been "left open" in *McLaughlin* and

"appears ripe for review here." On December 12, 1966, the Court agreed to hear the case. Indicating that interest in the question went beyond black-white marriages and the law, the Japanese American Citizens League submitted a brief as friend of the court. Cohen and Hirschkop, in their brief, reviewed the history of Virginia's miscegenation statutes—going all the way back to the seventeenth century—to characterize them as "relics of slavery" and, at the same time, "expressions of modern day racism."<sup>67</sup>

In oral argument, on April 10, 1967, they conveyed the words of Richard Loving to support their argument. "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia."<sup>68</sup>

Two months later, on June 12, 1967, Chief Justice Earl Warren delivered the opinion of the Supreme Court.<sup>69</sup> The Court rejected each of the state's arguments as well as each of the precedents on which it had drawn. Where the historical record, the judicial precedents, and the legal logic of the state's brief were incorporated in the decision of the Virginia Supreme Court, those of the Lovings made their way into the decision of the Supreme Court of the United States. The decision of the Virginia appellate court in *Naim* to the contrary, the Tenth Amendment had to yield to the Fourteenth when it came to the claim of "exclusive state control" over the "regulation of marriage."<sup>70</sup>

As for the narrow construction of the Fourteenth Amendment, dependent as it was on the state's reading of the intent of the Framers, the Court harked back to its statement in *Brown* that the historical record was "inconclusive." That Virginia's "miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage" could no longer pass muster. Should this Court "defer to the wisdom of the state legislature" on this matter? Warren gave the back of the hand to the state's contention that "these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose." The burden of proof rested on the state,

for "the fact of equal application does not immunize the statute from the heavy burden of justification" required by the Fourteenth Amendment, particularly when racial classifications appeared in criminal statutes.<sup>71</sup> That test, already applied to interracial cohabitation in *McLaughlin*, now applied to marriage as well.

The Chief Justice declared that "we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races." Moreover, the Court's recent decision in *McLaughlin* undercut the relevance of *Pace*. As Warren now put it, "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." Quoting Justice Stewart's concurring opinion in the *McLaughlin* case, in which Justice Douglas had joined, the Chief Justice wrote: "Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.'"<sup>72</sup>

The Chief Justice was sure of the Court's recent history in civil rights cases. "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."<sup>73</sup>

As for the Due Process Clause, the Chief Justice noted that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." He explained: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to

marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."<sup>74</sup>

Chief Justice Warren's final sentence put an end to the Lovings' banishment from Virginia and their odyssey through the courts. "These convictions must be reversed."<sup>75</sup> Not only could the Lovings live in Virginia without fear of prosecution for their interracial marriage, but laws similar to Virginia's fell in fifteen other southern states as well.

The Supreme Court traveled a great distance from *Pace v. Alabama* in 1883 to *Loving v. Virginia* in 1967. The Lovings had tenacity, the commitment to see their case through. In addition, they had a compelling case, able lawyers, and the good fortune to take their case to the Supreme Court at an auspicious time.

## Endnotes

<sup>1</sup> *Loving v. Virginia*, 388 U.S. 1 2 (1967).

<sup>2</sup> *Code of Alabama* (1867), 689-70 (title 1, ch. 5, arts. 3598, 3602).

<sup>3</sup> *Ellis v. State*, 42 Ala. 525 (1868).

<sup>4</sup> *Ibid.*, 526.

<sup>5</sup> *Burns v. State*, 48 Ala. 195, 197 (1872).

<sup>6</sup> *Ibid.*, 197-98; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 408 (1857); Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston: Bedford Books, 1997).

<sup>7</sup> *Ford v. State*, 53 Ala. 150, 151 (1875); *The Slaughterhouse Cases*, 83 U.S. 36 (1873); Richard L. Aynes, "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases," 70 *Chicago-Kent Law Review*, 627-88 (1994).

<sup>8</sup> *Ford v. State*, 151.

<sup>9</sup> *Green v. State*, 58 Ala. 190 (1878), 191.

<sup>10</sup> *Ibid.*, 191.

<sup>11</sup> *Ibid.*, 192.

<sup>12</sup> *Hoover v. State*, 59 Ala. 57, 58-60 (1878).

<sup>13</sup> *Pace & Cox v. State*, 69 Ala. 231 (1882); Transcript of Record, *Pace v. Alabama* (Record No. 908), 1-3.

<sup>14</sup> Transcript of Record, 5.

<sup>15</sup> *Pace & Cox v. State*, 232.

<sup>16</sup> Brief for Appellant, 4-6.

<sup>17</sup> Brief for Appellee, 2-3.

<sup>18</sup> *Ibid.*, 3.

- <sup>19</sup> Brief for Appellant, 2; Brief for Appellee, 6, 9, 11.
- <sup>20</sup> Brief for Appellee, 15-16.
- <sup>21</sup> *Ibid.*, 5, 14.
- <sup>22</sup> *Pace v. Alabama*, 106 U.S. 583, 584-85 (1883). For further analysis see David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789-1888** (Chicago: University of Chicago Press, 1985), 387-90.
- <sup>23</sup> *The Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896).
- <sup>24</sup> *Plessy v. Ferguson*, 545, 547.
- <sup>25</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917); Philip B. Kurland and Gerhard Casper, eds., **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law** (Arlington, VA: University Publications of America, 1975), 18: 36, 76-77, 130, 158-60, 272-73, 436, 442.
- <sup>26</sup> *Buchanan v. Warley*, 79, 81.
- <sup>27</sup> *Jackson v. State*, 37 Ala. App. 519, 521 (1954).
- <sup>28</sup> *Jackson v. State*, 260 Ala. 698 (1954); *Jackson v. Alabama*, 348 U.S. 888 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955). For more detailed analysis see Chang Moon Sohn, "Principle and Expediency in Judicial Review: Miscegenation Cases in the Supreme Court" (Ph.D. diss., Columbia University, 1970), 70-73, and Byron Curti Martyn, "Racism in the United States: A History of Anti-Miscegenation Legislation and Litigation" (Ph.D. diss., University of Southern California, 1979), 1247-49.
- <sup>29</sup> Jack Greenberg, **Race Relations and American Law** (New York: Columbia University Press, 1959), 345. See also Walter F. Murphy, **Elements of Judicial Strategy** (Chicago: University of Chicago Press, 1964), 192-93.
- <sup>30</sup> Justice William O. Douglas Papers, Box 1156, Library of Congress. For a related observation that, given the furor in the South over *Brown v. Board of Education*, "the last thing in the world the Justices wanted to deal with at that time was the question of interracial marriage," see Philip Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History," 100 *Harvard Law Review*, 817, 845-47 (1987).
- <sup>31</sup> William O. Douglas Papers, Library of Congress; *Jackson v. Alabama*, 348 U.S. 888 (1954).
- <sup>32</sup> *Naim v. Virginia*, 350 U.S. 891 (1955); *Naim v. Virginia*, 350 U.S. 985 (1956); Sohn, "Principle and Expediency," 73-94; *Richmond Times-Dispatch*, 7 Oct. 1954: 2; 19 Jan. 1956: 1.
- <sup>33</sup> *Richmond Times-Dispatch*, 14 June 1955: 5.
- <sup>34</sup> Sohn, "Principle and Expediency," 74-75.
- <sup>35</sup> *Naim v. Naim*, 197 Va. 80, 90 (1955).
- <sup>36</sup> *Ibid.*, 88.
- <sup>37</sup> Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (New York: New York University Press, 1983), 158-62.
- <sup>38</sup> *Naim v. Naim*, 350 U.S. 891 (1955); *Naim v. Naim*, 197 Va. 734, 735 (1956). See the caustic evaluation of the Supreme Court's actions, Mark Tushnet, "The Warren Court as History: An Interpretation," in Tushnet, ed., **The Warren Court in Historical and Political Perspective** (Charlottesville: University Press of Virginia, 1993), 5.
- <sup>39</sup> *Richmond Times-Dispatch*, 19 Jan. 1956: 12.
- <sup>40</sup> *Naim v. Naim*, 350 U.S. 985 (1956); *Richmond Times-Dispatch*, 13 Mar. 1956: 3. See Walter Wadlington, "The Loving Case: Virginia's Anti-miscegenation Statute in Historical Perspective" 52 *Virginia Law Review* 1189, 1210-12 (1966) and Martyn, "Racism in the United States," 1231-38.
- <sup>41</sup> *McLaughlin v. State*, 153 So.2d 1 (1963); *McLaughlin v. Florida*, 379 U.S. 184, 187 (1964); *The New York Times*, 1 Nov. 1963: 32.
- <sup>42</sup> *McLaughlin v. Florida*, 187.
- <sup>43</sup> *Ibid.*, 186-87, 193-94. For greater detail and further analysis, see Wadlington, "The Loving Case," 1219-22; Sohn, "Principle and Expediency," 94-107; Martyn, "Racism in the United States," 1268-79; and David P. Currie, **The Constitution in the Supreme Court: The Second Century, 1888-1986** (Chicago: University of Chicago Press, 1990), 416.
- <sup>44</sup> *McLaughlin v. Florida*, 188-89.
- <sup>45</sup> *Ibid.*, 191-92.
- <sup>46</sup> *Ibid.*, 196.
- <sup>47</sup> *Ibid.*, 195-96.
- <sup>48</sup> *Ibid.*, 198.
- <sup>49</sup> Tinsley E. Yarbrough, **John Marshall Harlan: Great Dissenter of the Warren Court** (New York: Oxford University Press, 1992), 267-69.
- <sup>50</sup> *Loving v. Commonwealth* (Record No. 6163), *Supreme Court of Appeals of Virginia*, 2-4; interview with Mildred D. Loving, 7 Jan. 1994.
- <sup>51</sup> *Loving v. Commonwealth* (Record No. 6163), 5-6.
- <sup>52</sup> Phone interview with Mildred D. Loving, 7 Jan. 1994; interview with Mildred D. Loving, 12 Aug. 1995; *Polk's Washington City Directory* (1962), 226, 950; "The Crime of Being Married," *Life Magazine* 60 (18 Mar. 1966): 85-91.
- <sup>53</sup> *Richmond News Leader*, 29 Oct. 1964: 21. At the time, no Virginia ACLU affiliate yet existed.
- <sup>54</sup> The Lovings are listed as late as 1967 as living at the home of Alex Byrd. Phone interview with Mildred D. Loving, 7 Jan. 1994; *Polk's Washington City Directory* (1967), 827.
- <sup>55</sup> Interview with Bernard S. Cohen, 4 Jan. 1994; Motion to Vacate Judgment and Set Aside Sentence, 6 Nov. 1963, *Loving v. Commonwealth* (Record No. 6163), 6-7.
- <sup>56</sup> Interview with Bernard S. Cohen, 4 Jan. 1994; phone interview with Philip J. Hirschkop, 18 Aug. 1994.
- <sup>57</sup> *Richmond News Leader*, 28 Oct. 1964: 23, Oct. 1964: 21; *The New York Times*, 29 Oct. 1964: 26, 29 Dec. 1964: 35.

- <sup>58</sup> Opinion, *Loving v. Commonwealth* (Record No. 6163), 10-12; *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858 (1878).
- <sup>59</sup> Opinion, *Loving v. Commonwealth* (Record No. 6163), 15.
- <sup>60</sup> *The New York Times*, 28 Jan. 1965: 14; 13 Feb. 1965: 17.
- <sup>61</sup> *Perez v. Sharp*, 32 Cal. 2d. 711, 734-35(1948) (J. Carter concurring); *Loving v. Commonwealth* (Record No. 6163), 10. Regarding a series of cases that had developed the concept of privacy—a concept of central importance in the Court's approach to marriage in *Loving*—see David J. Garrow, **Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade** (New York: Macmillan, 1994), ch. 4.
- <sup>62</sup> *Loving v. Virginia*, 206 Va. 924, 926-29 (1966).
- <sup>63</sup> *Ibid.*, 929.
- <sup>64</sup> *Ibid.*, 930.
- <sup>65</sup> *Ibid.*, 930-31.
- <sup>66</sup> Kurland and Casper, eds., **Landmark Briefs and Arguments**, 64: 787-88.
- <sup>67</sup> Nimetz to Harlan, 10 Oct. 1966, John Marshall Harlan Papers, Box 285, Mudd Library, Princeton University; *The New York Times*, 8 Mar. 1966: 26; 30 July 1966: 9; 13 Dec. 1966: 40; Kurland and Casper, eds., **Landmark Briefs and Arguments**, 64: 763.
- <sup>68</sup> Kurland and Casper, eds., **Landmark Briefs and Arguments**, 64: 971.
- <sup>69</sup> Schwartz, **Super Chief**, 668-69; Ed Cray, **Chief Justice: A Biography of Earl Warren** (New York: Simon and Schuster, 1997), 449-54; Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History* 83 (June 1996): 44-69; Sohn, "Principle and Expediency," 107-120; Martyn, "Racism in the United States," 1298-1320; and Robert J. Sickels, **Race, Marriage, and the Law** (Albuquerque: University of New Mexico Press, 1972), 1-3, 76-91, 104-110.
- <sup>70</sup> *Loving v. Virginia*, 388 U.S. 1, 7 (1967).
- <sup>71</sup> *Ibid.*, 8-9.
- <sup>72</sup> *Ibid.*, 10-12.
- <sup>73</sup> *Ibid.*, 11-12.
- <sup>74</sup> *Ibid.*, 12.
- <sup>75</sup> *Ibid.*, 12; *The New York Times*, 13 June 1967: 1, 28; *Richmond Times-Dispatch*, 13 June 1967: 1, 4.

# Antitrust and Baseball: Stealing Holmes

Kevin McDonald

## I. Introduction

It happens every spring. The perennial hopefulness of opening day leads to talk of baseball, which these days means the *business* of baseball — dollars and contracts. And whether the latest topic is a labor dispute, alleged “collusion” by owners, or a franchise considering a move to a new city, you eventually find yourself explaining to someone — rather sheepishly — that baseball is “exempt” from the antitrust laws.

In response to the incredulous question (“Just how did *that* happen?”), the customary explanation is: “Well, the famous Justice Oliver Wendell Holmes, Jr. decided that baseball was exempt from the antitrust laws in a case called *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,<sup>1</sup> and it’s still the law.” If the questioner persists by asking the basis for the Great Dissenter’s edict, the most common responses depend on one’s level of antitrust expertise, but usually go like

this:

**LEVEL ONE:** “Justice Holmes ruled that baseball was a sport, not a business.”

**LEVEL TWO:** “Justice Holmes held that personal services, like sports and law and medicine, were not ‘trade or commerce’ within the meaning of the Sherman Act like manufacturing. That view has been overruled by later cases, but the exemption for baseball remains.”

The truly dogged questioner points out that Holmes retired some time ago. How can we have a baseball exemption now, when the annual salary for any pitcher who can win fifteen games is approaching the Gross National Product of Guam? You might then explain that the issue was not raised again in the courts until

the late 1940s, when there were several more cases challenging baseball's reserve clause on antitrust grounds. In fact, a Second Circuit panel including Learned Hand held in 1949 that an antitrust complaint against major league baseball could not be dismissed on its face, because the plaintiff might prove that the effect of radio, television, and other developments had transformed the game into an enormous interstate business.<sup>2</sup>

When one of those cases finally reached the Supreme Court in 1953, however, the Court did not agree with Judge Hand, holding in a *per curiam* opinion that Holmes' decision in *Federal Baseball* would be followed "[w]ithout re-examination of the underlying issues."<sup>3</sup> The Supreme Court also made it clear that the rule of *Federal Baseball* would be strictly limited to baseball, however, in a series of other decisions during the 1950s refusing to apply the same exemption to professional boxing and football. ("Oh, so baseball is exempt, but football isn't. *That* makes sense.")

The ballplayers gave it one more try in the early 1970s when Curt Flood flatly refused to be traded from St. Louis to Philadelphia and persuaded the Supreme Court to revisit the issue.<sup>4</sup> However, Justice Blackmun, in a giddy opinion that began with his listing eighty-eight of his favorite old-time ball players, pointed out that *Federal Baseball* had never been overruled, that those involved in professional baseball had relied on their exemption from the antitrust laws for fifty years, and that Congress had failed to remove the exemption during that time. Thus, he concluded, it was up to Congress, not the Supreme Court, to change the result in *Federal Baseball*. Congress has done nothing, so the exemption remains.

### A. Brahmin Bashing

Plainly, *Federal Baseball* has left the antitrust lawyer's Justice Holmes a rather bedraggled figure. My colleague Joe Sims has provided a characteristically unvarnished summation of what I take to be the prevailing view

of the baseball exemption:

[I]n *Federal Baseball*, Justice Holmes (very wise in many respects, but not here) set forth a very limited view of interstate commerce. . . . *Federal Baseball*, which held that professional baseball was not in interstate commerce and thus not subject to the federal antitrust laws, is still the law today, enshrined on the throne of *stare decisis* by *Flood v. Kuhn*, even though it was described by Justice Douglas in his dissent in that case as "a derelict in the stream of the law."<sup>5</sup>

The reaction of others has ranged from thumping denouncement (Judge Jerome Frank of the Second Circuit called the decision, and I am not making this up, "an impotent zombi[e]"<sup>6</sup>) to gentle embarrassment on Holmes' behalf (Judge Henry Friendly, also of the Second Circuit, "acknowledge[d] . . . that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days. . . .")<sup>7</sup> On the facts, one recent Holmes biographer calls *Federal Baseball* "remarkably myopic, almost willfully ignorant of the nature of the enterprise."<sup>8</sup> On the law, Justice Douglas was at his most dismissive when noting in *Flood v. Kuhn* that the "narrow, parochial view of commerce" reflected in *Federal Baseball* could not survive the Court's "modern decisions."<sup>9</sup>

For still others, the *Federal Baseball* decision is only Count I in a wide-ranging indictment of Holmes' antitrust expertise. Holmes' dissent in *Northern Securities Co. v. United States*,<sup>10</sup> has received similar failing marks. Hans Thorelli, the author of one of antitrust's weightiest tomes (the copy in my firm's library weighs a daunting 6.1 pounds), dismissed Holmes' opinion as follows:

Undoubtedly Holmes was one of the great justices of this century, but

it is doubtful whether he would have earned that reputation had he not in later cases reached beyond the level of sophistication evidenced in this dissent.<sup>11</sup>

Former Circuit Judge Robert Bork also has difficulty with Holmes in *Northern Securities*, not because he dissented (Judge Bork would have dissented too), but because he so clearly rejected Judge Bork's view of the original purpose of the Sherman Act.<sup>12</sup> Bork asserts instead that Holmes "mistook [Justice] Harlan's meaning" in the majority opinion, and thus simply raised some fundamental questions not unworthy of analysis, but irrelevant in *Northern Securities*.<sup>13</sup> When he had occasion to cite that dissent in an opinion of his own, Judge Bork characterized Holmes as "misconstruing the rule applied by the majority."<sup>14</sup>

Obviously, this is heavyweight criticism. These are famous judges and accomplished antitrust experts; their disdain for Holmes' antitrust opinions in general, and *Federal Baseball* in particular, is impressive. Placing the reputation of the author and the baseball opinion side-by-side, moreover, adds to the wonderment. This is *Holmes*, after all. Despite the trendy deconstructions of recent years, "Holmes remains the towering figure of American law."<sup>15</sup> Those are the words of antitrust's own towering figure, Richard A. Posner, who concludes his introduction to a symposium on the 100th anniversary of **The Path of the Law** with the observation that



"Holmes was the greatest legal thinker and greatest judge in our history."<sup>16</sup> Compare these sentiments to the derision heaped upon *Federal Baseball* (along with "zombie" and "derelict," it has been tagged with the law's most demeaning label: "limit[ed] . . . to [its] facts"<sup>17</sup>), and the contrast is compelling. If this critique is accurate, *Federal Baseball* represents our most exalted judge at his lowest moment.

### B. When Did He Lose His Fastball?

Several springs ago, I set out to discover how this could have happened. How could Holmes be so wrong? Did his weak hold on



**Eight new ball parks, including Chicago's Wrigley Field (pictured above), were constructed in 1913. Coal magnate James Gilmore (top) had persuaded a group of tycoons to finance them in order to transform the Federal League from a minor league in the Midwest into a third major league.**

antitrust issues cause him to misapprehend the true interstate nature of professional baseball? Was he too old at eighty-one to see that big-league baseball was an essential thread in the American fabric, a cultural fixture embodying all the principles of healthy competition and sportsmanship that make it the quintessential national game?

At this point, something clicked. I had a mental picture of Holmes sitting across from the mountainous first Justice Harlan discussing the *Northern Securities* case, and saying: "Now, hang on there, J.M.; you're going too fast for me. Please repeat that last point." It didn't quite work. Most of these critiques acknowledge that Holmes was brilliant in some areas, but conclude that he was a dullard on the question of antitrust. In other words, Holmes, master of the common law of unfair competition and at the height of his powers on the Massachusetts Supreme Judicial Court when the Sherman Act was passed in 1890, just did not get it. Sure, he got lucky on some First Amendment cases, and was dead solid perfect on *Lochner*, but this antitrust stuff was too much for him.

Poor dumb Holmes.

And poor dumb Brandeis, too. The *Federal Baseball* decision was unanimous, after all. You are not as much to blame if you did not write the opinion, but it can't be one of your "happiest days" either. (Whether one praises or denounces Brandeis' responsibility for the Federal Trade Commission Act, he is seldom accused of being a dull tool.) Poor dumb Chief Justice Taft, as well. Taft is revered by most antitrust historians, including Judge Bork, for his opinion while still a Circuit Judge in the *Addyston Pipe* case<sup>18</sup>—one of the first decisions to make it clear that the Sherman Act had not unwittingly outlawed virtually all commercial arrangements. Such a prescient thinker must certainly have looked back with shame on his vote in *Federal Baseball* if it is as bad as the conventional wisdom holds.

If that is not enough to make you uncomfortable, consider this: Who is the antitrust oracle cited for the proposition that *Federal Baseball* is a "derelict in the stream of the law"? William O. Douglas. That is, the same Justice who was responsible (along with Justice Black) for the theories of the 1960s that led to such excesses as *Von's Grocery*,<sup>19</sup> in which the Court blocked a grocery store merger in Los Angeles because the post-merger store would have had a five percent share of the market. The same Justice who suggested that exclusive territories for paper routes might be illegal in *Albrecht v. Herald*,<sup>20</sup> a case generally perceived as a disservice both to the law of antitrust conspiracy and price fixing, and unanimously overruled by the Supreme Court in 1997.<sup>21</sup> In other words, this is the "trees have standing" Bill Douglas,<sup>22</sup> being widely quoted to bash *Holmes* on an antitrust issue. (And you thought the '69 Mets were surprising.)

That did it. I decided it was time to re-read *Federal Baseball*, *Toolson*, and *Flood v. Kuhn*. They in turn led me to read some other things. The result was a historical romp that ultimately focused on two of baseball's most fascinating eras, some thirty years apart. The featured baseball personalities are larger than life, ranging from Shoeless Joe Jackson and Babe Ruth to Casey Stengel and Stan Musial. The same holds for the judges, from Holmes and Hand to Frankfurter and Douglas. Most of the journey consists of simply following the progress of baseball in the antitrust courts from *Federal Baseball* in 1922 to *Flood* in 1972. With the knowledge gained along the way, we can step back and ask whether the antitrust laws could be applied to professional baseball now without repudiating *Federal Baseball*. We may find that the truth about the baseball "exemption" and the conventional wisdom are somewhat different; as different as Ty Cobb and Joe DiMaggio; as different as the telegraph and the television; as different as baseball in 1919 and baseball in 1949.



## II. Antitrust in 1919

### A. The Federal League

Since the predecessor of the current National League was founded in 1876, several rival leagues have sprung into existence. While most of these upstart leagues are gone, nearly all could be described as “successful,” at least for many of those who made and controlled the investments. The story of the Federal League fits comfortably within the general pattern: A group of exceptionally wealthy men quickly formed a league to compete head-to-head with the National and American Leagues, easily lured many outstanding players with the promise of more money, and ultimately merged much of the new league and its assets with the existing league for hefty compensation.<sup>23</sup>

The Federal League was a minor league in the Midwest when coal magnate James A. Gilmore became its president in 1913. He soon persuaded a group of businessmen to convert the Federal League into a third major league. The group included cafeteria king Charles Weeghman (Chicago), oil tycoon Harry Sinclair (Newark), bakery executive Robert B. Ward (Brooklyn), and ice-and-fuel operator Phil Ball (St. Louis).<sup>24</sup> Eight new ball parks were erected in three months, one of which grew up to be Wrigley Field.

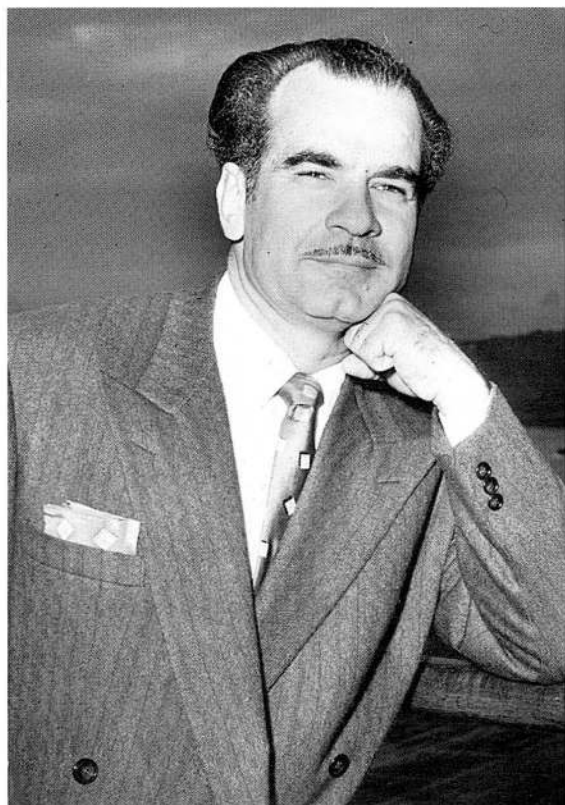
Many top players were enticed away by the Federal League’s offers of more money, including Joe Tinker, Hal Chase, Mordecai “Three Finger” Brown, and Eddie Plank (baseball’s winningest left-handed pitcher). For the National and American League players who did not jump, the resulting price wars for their services were fierce. For example, Ty Cobb’s salary doubled, and Tris Speaker received the stunning sum of \$18,000 per year to remain with the Boston Red Sox.<sup>25</sup> The cafeteria king, Weeghman, was especially driven to buy Washington’s Walter Johnson (who had gone a mere 36-7 in 1913) for his Chicago Whales. His offer of a \$16,000 salary and a \$10,000 signing bonus was one that the financially strapped Clark Griffith, owner of the

Senators, could not match. Griffith boldly went to Chicago and asked Charley Comiskey for the \$10,000, on the grounds that Comiskey would not want the Big Train drawing crowds away from his cross-town White Sox. Comiskey complied, and Johnson remained a Senator. After two reasonably successful seasons,<sup>26</sup> the Federal League brought an antitrust suit against all the National and American League teams, which was heard by a federal judge with a name worthy of a power forward in the NBA: Kenesaw Mountain Landis. Perhaps auditioning for his future role as baseball’s first commissioner, Landis simply sat on the case.<sup>27</sup> With the lawsuit standing still, and the over-supply of professional baseball failing to create its own demand in the mid-1910s, the Federal League suit was resolved by the “Peace Agreement” reached in December 1915. The agreement required the defendants to assume \$385,000 in Federal League players’ contracts; it allowed Weeghman to buy the Chicago Cubs, and Phil Ball the St. Louis Browns; it provided for substantial annual payments to several of the Federal League owners over many years; and it transferred two of the new Federal ball parks to organized baseball.

The Federal Baseball Club of Baltimore would have none of this treaty. That club was therefore excluded from the settlement, and it filed the antitrust suit that became *Federal Baseball*. The case was tried in Washington, D.C., during the spring of 1919. The jury came back on April 12, with a plaintiff’s verdict for \$80,000, which was trebled as provided in the statute.<sup>28</sup> In December 1920, however, the Court of Appeals, “after an elaborate discussion, held that the defendants were not within the Sherman Act.”<sup>29</sup> The plaintiff chose to stand on the record and appeal directly to the Supreme Court.

### B. *Federal Baseball*: The Opinion

The opinion in *Federal Baseball* was classic Holmes; after describing the “nature of the business” of organized baseball, he set out his legal analysis in a single, intense paragraph,



After World War II the leader of the Mexican League, a wealthy businessman named Don Jorge Pasquel (left), decided to turn the tables on the American leagues by recruiting their best talent by offering exorbitant salaries. When Pasquel tried to lure the great Stan Musial from St. Louis (below, sliding home), however, he so rattled the U.S. leagues that the president of the Cardinals, Sam Breadon, flew to Mexico City and somehow persuaded him to quit making such wild offers.



which I will quote momentarily in all its damning brevity. In that paragraph, he first addressed the issue found conclusive by the Court of Appeals, that is, whether the interstate aspects of organized baseball were sufficient to bring it within the Sherman Act, or were merely “incidental” to the concededly local exhibition itself. This analysis had been established by the Supreme Court in *Hooper v. California*.<sup>30</sup> I say the baseball exhibition itself was “concededly” local because the plaintiff was careful *not* to argue in its brief to the Supreme Court that the game itself was interstate commerce:

The Court is not concerned with whether the mere playing of baseball, that is the act of the individual player, upon a baseball field in a particular city, is by itself interstate commerce. . . .

The question . . . is whether the business in which defendants were engaged when the wrongs complained of occurred, *taken as an entirety*, was interstate commerce. . . .<sup>31</sup>

The plaintiff argued that, even if the exhibitions were not interstate, the interstate travel required to bring them about, as well as several other interstate “incidents” (*e.g.*, telegraph reports, baseball and equipment contracts, etc.), demonstrated the interstate nature of organized baseball.

In the remainder of the crucial paragraph, Holmes responded to the argument made by the plaintiff to counter the defendants’ even broader assertion that “[p]ersonal effort, not related to production, is not a subject of commerce.” That point is irrelevant, the plaintiff had argued:

. . . [W]e are not concerned with any such question here. It may be passed by saying . . . that interstate commerce may be created by the

mere act of a person in allowing himself to be transported from one State to another, without any personal effort.<sup>32</sup>

In other words, even if something is not commonly considered an item of commerce (*e.g.*, a person), it can affect interstate commerce simply by its interstate transport.

Holmes responded in a two and a half-page opinion, the essence of which is this:

[1] The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U.S. 648, 655, the transport is a mere incident, not the essential thing. [2] That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such

commerce because the lawyer or lecturer goes to another State.<sup>33</sup>

As usual, the concepts are densely packed, the pace is quick, and the prose is free of patronizing words of transition (e.g., “now I will turn from *Hooper v. California* to consider plaintiff’s other argument . . .”) I have placed a [1] and [2] in brackets to indicate the point at which he turns to consider the second argument.

Plainly, it is the second argument that has been the principal source of derision among antitrust lawyers over the years. For its underlying assumption is the outdated notion that “services” should be treated differently under the antitrust laws than “manufactures.” (Today, the antitrust economist would point out—while gesturing with an extinguished pipe—that one can measure the price elasticity of demand as effectively for legal services as for shoes.) Thus, that second, or alternative, argument is the one that rankles; those are the words from which Holmes fans avert their gaze.

If you think that describing Holmes’ paragraph as a two-part argument in the alternative is contrived, rest assured that it has been so construed as far as I am aware by every commentator and Judge that has addressed the question. No less a student of Holmes than G. Edward White has written that the “critical paragraph” of Holmes’ opinion

made the following arguments in succession. . . . The transport [in interstate commerce] was merely ‘incidental’ to the exhibition. The exhibition, in fact, could not be called ‘trade or commerce’ at all . . .<sup>34</sup>

He even describes the place in the paragraph where I have inserted a “[2]” as the “point . . . where Holmes sought to move on from his discussion of . . . interstate transportation” as incidentally affecting commerce, in order to make the additional point that the exhibition

of baseball “would not be called trade or commerce as those terms were commonly understood.”<sup>35</sup>

Nor is Professor White’s reading new. Although Holmes’ opinion was little noted when it came out, a rash of commentary appeared as the second series of cases culminating in the Supreme Court’s 1953 *Toolson* decision moved through the courts. In a typical description, the *Harvard Law Review* had Holmes’ opinion

resting on dual grounds, holding that baseball was a local enterprise unchanged in character by the elements of interstate transportation incident to the exhibition, and that personal effort in the sport, since unrelated to production, was not a subject of commerce.<sup>36</sup>

When Learned Hand issued his 1949 opinion in favor of a ballplayer named Danny Gardella, a commentator could not resist pointing out that Holmes’ opinion required any successful antitrust plaintiff to jump through two separate hoops:

In order to bring “organized baseball” within the purview of [the antitrust] laws, two fundamental questions must be answered in the affirmative. (1) Is baseball an interstate activity? (2) Is baseball trade or commerce?<sup>37</sup>

Since both questions must be resolved in the plaintiff’s favor, the author argued, giving a different answer to the first question, as did Learned Hand in *Gardella*, is insufficient to change the result in *Federal Baseball*:

The rationale of the *Federal [Baseball]* case is that baseball is not trade or commerce, and it is submitted that the court’s decision would have been quite the same had the facts shown

that every ball park was located on a state line and the players had to pass from one state to another as they ran from first to second base.<sup>38</sup>

The judges, too, strained to find a graceful exit for Holmes with the common understanding that *Federal Baseball* had “decided that professional baseball was then neither ‘commerce’ nor ‘interstate.’”<sup>39</sup> Justices like Sherman Minton<sup>40</sup> and Felix Frankfurter<sup>41</sup> would have accepted the result in *Federal Baseball* and applied it to other sports. Justices like William O. Douglas<sup>42</sup> and William Brennan<sup>43</sup> would have overruled it outright. Justices like Earl Warren<sup>44</sup> and Tom Clark<sup>45</sup> ultimately persuaded their Brethren to accept the holding of *Federal Baseball* but confine it to a single sport. Yet none of these judges questioned the prevailing reading of Holmes’ opinion. Thus, when the Supreme Court last considered the question in *Flood v. Kuhn*, several Justices dissented, but none disputed Justice Blackmun’s description of *Federal Baseball* as a dual holding that baseball “was not ‘trade or commerce in the commonly-accepted use of those words’ . . . ; nor was it interstate, because the movement of ball clubs across state lines was merely ‘incidental’ to the business.”<sup>46</sup>

This is understandable. For Holmes *does* address a two-part argument, and the “trade or commerce” aspect of the opinion has stood as an enduring obstacle to those who would defend him. It has frustrated glib attempts to let Holmes off the hook with nice debating points or facile attempts to switch the burden of persuasion. (One could, for example, note that the trial court had directed a verdict for the plaintiff, and argue that the verdict would have had to be reversed anyway.<sup>47</sup>) But that is a good thing; this mission is not for sycophants. The reputation of *Federal Baseball* is as tarnished as it is because Holmes is said to have been wrong — dismally wrong — both on the law (antitrust) and on the facts (baseball). He failed to be precisely what he is given credit

for being on other issues, that is, “a strikingly modern figure who anticipated the temper of an America which had not yet been born.”<sup>48</sup> If a deeper understanding of *Federal Baseball* can be found — or at least an understanding of what went wrong — it will be worth the effort only if we keep our standards high. He must walk away under his own power or stand and take his medicine. This is Holmes, after all.

### III. Antitrust in 1949

#### A. The Mexican League

As America’s soldiers returned triumphant to home, hearth, and ballpark after World War II, the next serious competitive threat to major league baseball was launched by five dazzling brothers named Pasquel: Don Jorge, Alfonso, Gerardo, Bernardo, and Mario.<sup>49</sup> They controlled the Mexican League, which was eager to expand and improve its image. The eldest brother, Don Jorge Pasquel, had a personal fortune estimated at \$30 million, and in 1946 he decided that it would be interesting to have his league — long drained of its best talent by American teams — return the favor. There was a collective gasp before the 1946 season when Luis Olmo of the Dodgers announced that he had signed a three-year contract to play in Mexico for \$40,000.<sup>50</sup>

Despite the size of the offers, few of the early defectors were stars, or even players who were breaking their contracts, and the Mexican League threat was largely regarded as “a nuisance rather than a problem.”<sup>51</sup> Then three New York Giants under contract for 1946, including starter George Hausmann, jumped to Mexico. Commissioner William “Happy” Chandler responded with a warning that those who did not report for the season would be suspended for five years. Neither the players nor the Pasquels desisted, however, and early in the season the Mexican League scored its finest catch to date by signing three St. Louis Cardinals. Most notable was pitcher Max Lanier, who had already won his first six starts.<sup>52</sup>

It was then that Don Jorge crossed the line.

He went after Stan the Man. Stan Musial was only twenty-five in 1946, and just back from a year in the Navy, but he had already proven that he was “the National League’s greatest player and drawing card. . . .”<sup>53</sup> In his first four seasons, he led St. Louis to four pennants and three world championships; he won the batting title in 1943 and placed second in 1944. He was an all-star twice, and in 1943 was voted the league MVP. He would go on to play in ten more all-star games and win two more MVP awards (1946 and 1948). He placed second in MVP voting four more times, including 1957, the year he won his last batting title at age 36.<sup>54</sup> Beyond his talent on the field, however, Stan epitomized the postwar wholesomeness to which professional baseball had so longingly aspired. As he was intensely courted by the Mexican League that spring, St. Louis papers reported that the “apple-cheeked” father of two small boys and a baby girl was “moving his family from a crowded hotel to a furnished bungalow in southwest St. Louis.”<sup>55</sup>

The Pasquels pursued Musial with purpose. When he rebuffed their initial offers, they offered more, until the amount reported grew to \$130,000 for five years, with a \$65,000 signing bonus. Don Jorge must have thought he was getting close, because he sent his brother Alfonso and player-manager Mickey Owen (formerly of the Dodgers) to St. Louis to close the deal, and he announced to the fans at Vera Cruz that Musial was on the way.<sup>56</sup> After a “long conference” in early June, however, Musial turned them down again.<sup>57</sup>

At that point, Sam Breadon, the President of the Cardinals, had had enough. He quickly traveled to Mexico City to have his own “long conference” with the Pasquels. Although Breadon’s hope for complete secrecy was dashed when he ran into a vacationing Cleveland sportswriter in the hotel lobby, precisely what transpired at the meeting remains a mystery. We only know that Don Jorge came out and announced that he would no longer seek to lure players away from “my friend, Sam Breadon.”<sup>58</sup>

After Breadon’s meeting, two things combined to end the competitive threat from the Mexican League. First, the Pasquels stopped making wild offers. Second, most of the players who went to Mexico came back like a spiked volley ball, howling in protest over the conditions in the Mexican “show.”<sup>59</sup> In all, only seventeen players broke their contracts in 1946.<sup>60</sup>

But the legal threat had just begun, for the circumstances of the Mexican League defections and blacklisting combined to create “an almost exact parallel to the Federal League controversy” of the teens.<sup>61</sup> And the returning (and suspended) players had little choice but to sue; by 1948, Max Lanier was pitching in Quebec and Mickey Owen was an auctioneer in rural Missouri. Thus did the case of Danny Gardella, an undistinguished former outfielder for the New York Giants, who was then supporting himself as a hospital orderly, come before the Second Circuit Court of Appeals.

### B. Gardella’s Helping Hand

The opinion in *Gardella v. Chandler*<sup>62</sup> fits well among the quirks and oddities that frequent the history of baseball’s antitrust exemption. For one thing, the principal opinion — coming first and announcing the judgment in favor of the plaintiff — was the dissent by Judge Chase. For another, one of the two separate majority opinions was authored by the bombastic Jerome Frank, who waited no longer than the first sentence to characterize Holmes’ *Federal Baseball* opinion as an “impotent zombi[e].”<sup>63</sup> And Judge Frank was only warming up at that point; he would ultimately liken the reserve clause to slavery, calling it “shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America.”<sup>64</sup> Those who would defend it (such as his Brother, Judge Chase, apparently) must of necessity be “totalitarian-minded.”<sup>65</sup>

The other majority opinion was written by the seventy-seven-year-old judicial icon, Learned Hand. Hand instantly focused on the

obvious difference between professional baseball in 1919 and 1949, to wit, the central role of broadcasting by radio and television. The business was no longer limited to giving exhibitions of baseball to patrons at a ballpark, Hand observed, but to viewers and listeners in other states as well:

[T]he situation appears to me the same as that which would exist at a “ball park” where a state line ran between the diamond and the grandstand. Nor can the arrangements between the defendants and the companies be set down as merely incidents of the business, as were the interstate features in *Federal Baseball Club v. National League*, *supra*. On the contrary, they are part of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and the television spectators are the audiences.<sup>66</sup>

Far from an obstacle, Hand found the *Federal Baseball* opinion helpful in its recognition that the “incidents” to the exhibition were interstate in nature, even though insufficient then “to fix the business — at large — with an interstate character.” Thus, on remand, the issue at trial would be

whether all the interstate activities of the defendants — those, which were thought insufficient before, in conjunction with broadcasting and television — together form a large enough part of the business to impress upon it an interstate character.

Hand’s next sentence concluded with an odd note of frustration: “I do not know how to put it in more definite terms.”<sup>67</sup>

That frustration may have come from seeing his two Brethren reach out (in a case that asked only whether a complaint should be dis-

missed on its face) to declare the reserve clause *per se* legal on the one hand (Judge Chase) and a virtual violation of the Thirteenth Amendment on the other (Judge Frank). Nonetheless, an immediate question arises from Hand’s analysis: what about the alternative argument in *Federal Baseball*? If, as Professor White and so many others have noted, *Federal Baseball* held “that baseball was *neither* a subject of commerce *nor* an interstate activity,”<sup>68</sup> how can the result change simply by raising the level of interstate activity until it is not incidental? Doesn’t the second argument considered by Holmes mean that *Federal Baseball* would have come out the same way even if the bleachers had been in New Jersey?

Worse yet, Learned Hand did not even *address* the issue. This is especially disturbing when contrasted with the opinion by Judge Frank, who overcame the interstate commerce point much as Judge Hand did, but then noted that Holmes’ opinion “assigned as a further ground of its decision that the playing of games, although for profit, involved services, and that services were not ‘trade or commerce’.”<sup>69</sup> Judge Frank handled this “further ground” by arguing that later decisions of the Supreme Court had “undeniably repudiated” this view, and that lower courts could therefore properly treat *Federal Baseball* as limited to its first ground — the “incidental” interstate aspects.<sup>70</sup> But that reasoning compels the conclusion that Holmes was simply wrong on the second point and overruled *sub silentio*. This kind of anticipatory overruling of the Supreme Court, moreover, is a dangerous practice for a lower court, as Judge Chase powerfully argued in his dissent.

As a judge, Learned Hand was a first-ballot hall-of-famer. Constitutional scholar Gerald Gunther has noted that “Hand is numbered among a small group of truly great American judges of the twentieth century.”<sup>71</sup> What explanation can there be for his failure to step up to the controlling second argument, for his addressing only the easy and obvious point, and then expressing pique at his inability to resolve

the issue in “more definite terms”? Did he ignore the issue because he had too much respect for Holmes to concede that Holmes had been wrong, or at least hopelessly archaic, in *Federal Baseball*? Unless there is something more, *Gardella* leads us to conclude that the only way to reach the right result in 1949 without expressly rejecting Holmes in *Federal Baseball*, even for the inimitable Learned Hand, was to cut a jurisprudential corner.

If so, *Federal Baseball* has claimed yet another great judge as a victim. If so, Holmes and his beleaguered opinion are in deeper than ever.

#### IV. From Toolson to Flood

The repercussions of Danny Gardella's success were swift and dramatic, both for baseball and the antitrust laws. The *Gardella* decision was issued on February 9, 1949, perhaps to coincide with the opening of spring training. Commissioner Chandler was suddenly inspired to “temper [j]ustice with mercy,” and issued a declaration of amnesty for all Mexican contract jumpers for the 1949 season.<sup>72</sup> Eight months later, during the 1949 World Series, the *Gardella* case was settled for \$60,000 — an act that seemed to close the chapter on the Mexican League challenge to professional baseball.

The legal repercussions, however, were more significant. First, Congress began to look into the affairs of baseball. The Subcommittee on Study of Monopoly Power of the House Judiciary Committee would issue a report in 1952 concluding (unsurprisingly) that organized baseball was “intercity, intersectional, and interstate.”<sup>73</sup> Accordingly, “with due consideration of *modern* judicial interpretation of the scope of the commerce clause,” Congress could and should “legislate on the subject of professional baseball.”<sup>74</sup> Many bills were introduced at that time and thereafter, which would have codified the holding in *Federal Baseball* by providing an express exemption.<sup>75</sup> None were

enacted.<sup>76</sup>

The effect of *Gardella* was even more pronounced in the courts, where it generated a new supply of antitrust plaintiffs. When George Earl Toolson sued the Yankees, for example, he had not been blacklisted for going to Mexico; he was not even a Yankee. He had simply refused to accept a demotion from the Yankees' AAA farm team in Newark to their Class AA farm team in Binghamton. And although virtually all lower courts facing antitrust attacks on professional baseball quickly dismissed them on the authority of *Federal Baseball*,<sup>77</sup> it was *Gardella* that provided the essential “split” in Circuit Court authority and ultimately led to the Supreme Court's grant of *certiorari* in several cases, including *Toolson v. New York Yankees, Inc.*

The trial judge in *Toolson* had framed the issue as “whether the game of baseball is ‘trade or commerce’ within the meaning of the Anti-Trust Acts.” He noted that *Gardella* was “[t]he only decision directly challenging [the] present day validity” of *Federal Baseball*, but he was entirely unimpressed

by the opinion of Judge Frank wherein he assumes the role of crystal gazer in attempting to determine in advance that the Supreme Court is going to . . . reverse the Federal Baseball Club case.<sup>78</sup>

Thus, the issue was clearly framed for the Supreme Court in *Toolson*, and it had three obvious choices: (1) uphold the dismissal on the strength of *Federal Baseball*, as had every lower court except the Second Circuit, (2) reverse the dismissal based on the reasoning of Learned Hand in *Gardella*, or (3) overrule *Federal Baseball* for the reasons suggested by Judge Frank and others. But the Court took none of these courses. Instead, it took the first step in the greatest bait-and-switch scheme in the history of the Supreme Court.





**Daniel Gardella, an undistinguished former outfielder for the New York Giants, was supporting himself as a hospital orderly when his case challenging the black-listing of players who had joined the Mexican League came before the Second Circuit Court of Appeals in 1949.**

### A. The Bait

The *Toolson* decision was handed down *per curiam*. In a single paragraph, shorter even than the pivotal paragraph in Holmes' opinion, the Court noted that, due to *Federal Baseball*, "the business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." Thus, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." The paragraph — and the opinion — then concluded with this stunning sentence:

Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.<sup>79</sup>

Well, now. You can stare at the *Federal Baseball* opinion as long as you like, but there is no suggestion — express or implied — that the Congress of 1890 intentionally *excluded* baseball from the Sherman Act. The *Toolson* Court seemed to imply that it had unearthed some previously unknown piece of legislative history, that may have gone like this:

Senator Edwards: Surely the Senator from Ohio does not suggest that this Anti-Monopoly law — this Magna Carta of the working class — would be applied to the purveyors of our beloved national pastime! (The Louisville Colonels are white-hot, by the way.)

Senator Sherman: Of course not, Senator.

If such a passage exists, neither the author of *Toolson* nor any one since has disclosed it.

Indeed, the last sentence of *Toolson* reads

like an oxymoron. How can one affirm *Federal Baseball* “so far as that decision determines that Congress had no intention of including the business of baseball” within the Sherman Act, when that decision “determined” no such thing? If that is the case, in the apt phrasing of a contemporary law review article, “*Toolson* would then seem to reaffirm nothing.”<sup>80</sup>

Let us take some names here. The seven members of this *per curiam* majority were Earl Warren, Felix Frankfurter, Hugo L. Black, William O. Douglas, Robert H. Jackson, Tom Clark, and Sherman Minton. This is arguably as powerful a line-up as that of the 1995 Cleveland Indians, for whom the first baseman batted *eighth*.<sup>81</sup> As will become clear, however, not even all of these Justices realized the import of that mischievous last sentence in *Toolson*.

Justice Burton, joined by Justice Reed, dissented in *Toolson*. He made short work of the new notion that there had been any kind of congressional exemption exclusively for baseball: “The [*Federal Baseball*] Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act.” Relying heavily on the changes in baseball since Holmes had written, especially radio and television (“[r]eceipts from these media of interstate commerce were nonexistent in 1929”) and the elaborate system of minor leagues “throughout the United States, and even in Canada, Mexico and Cuba,” Justice Burton pronounced it “a contradiction in terms to say that the defendants in the cases before us are not *now* engaged in interstate trade or commerce.”<sup>82</sup>

Like Learned Hand, Justice Burton argued that the result he sought was consistent with *Federal Baseball*, because that case did not foreclose the eventuality that the interstate aspects of the business would someday become more than “incidental.” Unlike Hand, however, Justice Burton could not bring himself to ignore the alternative “trade or commerce” argument (it was, after all, the sole basis of the

lower court’s opinion), and that is where he stumbled:

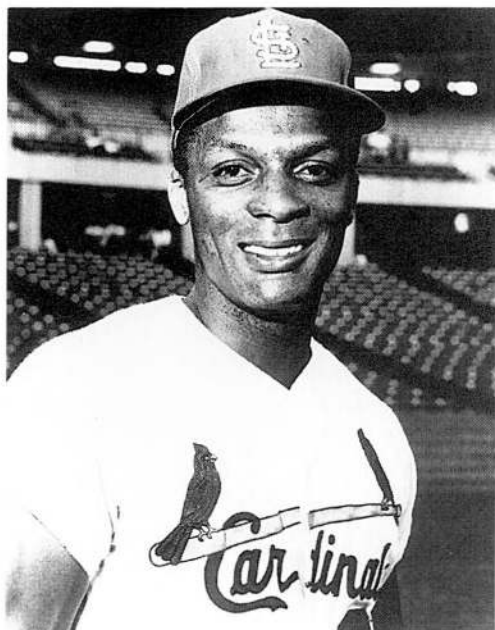
Although counsel [in *Federal Baseball*] did argue that the activities of organized baseball, even if amounting to interstate commerce, did not violate the Sherman Act, the Court significantly refrained from expressing its opinion on that issue.<sup>83</sup>

Justice Burton did not cite anything in *Federal Baseball* to support this view, nor could he. For the notion that the Court “refrained from expressing its opinion” on the alternative argument is hard to square with the actual words Holmes used: “As it is put by the defendants, personal effort, not related to production, is not a subject of commerce.”<sup>84</sup> Holmes even chose to “repeat the illustrations given by the Court below” to show that lawyers and Chautauqua lecturers do not engage in commerce simply by going to another state to provide their services.

Justice Burton elsewhere showed his lack of comfort with the second argument in *Federal Baseball* with his references to the “modern” definition of commerce, and to the facts and circumstances of baseball “now.” He even included a footnote with a string-cite to the cases that later rejected the restricted view of commerce that prevailed in 1922 — the same cases relied on by Judge Frank in *Gardella*.<sup>85</sup> This demonstrates, once again, the stubbornness of the alternative argument for those who would attempt to preserve *Federal Baseball*’s reasoning while changing its result. Justice Burton’s heart was in the right place, but we cannot evade the hard question by asserting — inaccurately — that Holmes evaded it.

## B. The Switch

No doubt because it finds no support in the statute or in *Federal Baseball*, the *Toolson* Court’s attempt to insert an express exclusion for baseball into the Sherman Act made no im-



The St. Louis Cardinals' decision to trade their star outfielder Curt Flood (pictured) to the Philadelphia Phillies was considered a tragedy by some, but did not raise a legal issue that would normally warrant Supreme Court review. Nonetheless, the Court agreed in 1972 to review baseball's antitrust exemption, thus affording some Justices the opportunity to change their positions on the question.

pression on the lower courts. Instead, they reacted to the news that *Federal Baseball* would not be disturbed by dismissing challenges to all forms of exhibitions for entertainment that they found indistinguishable in principle from *Federal Baseball*. Thus, the very next Term, the Court faced two such cases, one involving theatrical presentations booked in multi-state theaters (*Shubert*),<sup>86</sup> the other involving professional boxing (*International Boxing Club*).<sup>87</sup> Both opinions were written by Chief Justice Warren, whose apparent mission was to emphasize that, “[i]n *Federal Baseball*, . . . Justice Holmes was dealing with the business of baseball and nothing else.” He explained, moreover, that *Toolson* was based on “a unique combination of circumstances,” and was thus “a narrow application of the rule of *stare decisis*.”<sup>88</sup>

In *Shubert*, moreover, the Court had as pre-

cedent another decision, also authored by Holmes only one year after *Federal Baseball*, concerning an interstate vaudeville circuit. In *Hart v. B.F. Keith Vaudeville Exchange*,<sup>89</sup> Holmes had applied precisely the same analysis as in *Federal Baseball*, but because the *Hart* complaint had been dismissed without a trial for lack of jurisdiction, the Supreme Court reversed and remanded it to the Southern District of New York on the ground that “what in general is incidental in some instances may rise to a magnitude that requires it to be considered independently.”<sup>90</sup> Chief Justice Warren therefore argued in *Shubert* that *Federal Baseball* and *Toolson* could not have intended an anti-trust exemption for “every business based on the live presentation of local exhibitions.” Accordingly, “[i]f the *Toolson* holding is to be expanded — or contracted — the appropriate remedy lies with Congress.”<sup>91</sup>

The defendants in *International Boxing Club* thought they had an even better case. For if the Court were drawing lines between different types of “live” exhibitions, surely it would agree that an athletic exhibition like boxing would be grouped with baseball rather than with a vaudeville act. Once again, however, those litigants and the lower courts that agreed with them failed to recognize that *Toolson* had tried to convert the reasoning of *Federal Baseball* into an express exemption rather than an application of a general interstate commerce test. “Surely there is nothing in the Holmes opinion in the [vaudeville] case,” responded Chief Justice Warren in *International Boxing*, “to suggest, even remotely, that the Court was drawing a line between athletic and non-athletic entertainment.”<sup>92</sup> Indeed, there was not — which is precisely why the theater defendants in *Shubert* were so vexed about losing. But what conclusion does that lead to? For the Chief Justice, it meant that the line had to be drawn even more arbitrarily, that is, between baseball and all live exhibitions that were *not* baseball.<sup>93</sup> This is an argument that works only if one takes seriously the last sentence of *Toolson*, attributing the baseball exemption to

congressional intent.

But not even everyone who voted for the *per curiam* opinion in *Toolson* believed that. Two of those Justices, Minton and Frankfurter, dissented in the boxing case. Justice Minton relied on the alternative argument in *Federal Baseball* in its purest form: “Personal effort, not related to production, is not a subject of commerce,” whether interstate or not.<sup>94</sup> In *Toolson*, he mistakenly thought, the Court had “reaffirmed the holding” of *Federal Baseball*.<sup>95</sup> Because no one was arguing that boxing matches were more like trade or commerce than baseball games, he reasoned that the result had to be the same. Justice Frankfurter, on the other hand, dissented because the holding in *International Boxing* made the Court’s “narrow” application of *stare decisis* in *Toolson* too, well, *narrow*:

I cannot translate even the narrowest conception of *stare decisis* into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it.<sup>96</sup>

In other words, the application of *stare decisis* should be based on a principle, even a narrow one, but not on the name of the game you play. These dissents demonstrate that not even those in the *per curiam* majority realized that the final sentence of *Toolson* could possibly be taken to mean what it said.

And the lower courts *still* did not get it. When an antitrust suit was brought against the National Football League shortly thereafter, the Ninth Circuit was sincerely perplexed. The court compared the results in *Federal Baseball* and *International Boxing*, groping for a principled distinction. Unable to use the level of interstate activity or the general category of sports as the basis, the lightning bolt finally struck: baseball is a *team* sport, while boxing is an *individual* sport. Thus, the Ninth Circuit held that *Federal Baseball* and *Toolson* must

exempt from the Sherman Act all “team sports,” which would include football.<sup>97</sup>

At this point, the Supreme Court apparently perceived a need to speak more plainly. The opinion of Justice Clark in *Radovich v. National Football League*, therefore, announced that henceforth the rule of *Federal Baseball* and *Toolson* would be confined “to the facts there involved, *i.e.*, the business of organized baseball.” Justice Clark allowed that the baseball exemption might be considered “unrealistic, inconsistent, [and] illogical, . . . [and] were we considering the question of baseball for the first time upon a clean slate we would have no doubts.”<sup>98</sup> The *Radovich* Court was willing to live with that mistake, but nothing more. Ultimately, the distinction between baseball and other businesses for which the lower courts had been searching came down to this and only this: “*Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication.”<sup>99</sup>

With *Radovich*, the “bait and switch” was complete. Those courts and defendants lured by *Toolson* to apply *Federal Baseball* to a variety of indistinguishable businesses had been slapped down in every instance. Far from finding a rationale that would change the result in *Federal Baseball* in the 1950s while preserving Holmes’ reasoning, the Court had issued a series of rulings that seemed to make the result judicially untouchable while publicly exposing Holmes’ reasoning to even greater ridicule.

In retrospect, it is not hard to divine the plan that at least some of the Justices had in mind at the time of *Toolson*. No one could dispute that refusing to apply the antitrust laws to professional sports in the age of radio and television was, as Professor White puts it, “absurd.”<sup>100</sup> Apparently recognizing that absurdity, moreover, Congress had held extensive hearings and considered numerous bills in the 1950s that would deal with the problem. At one such hearing, Congress heard testimony

from Casey Stengel, Ted Williams, Stan Musial, and Mickey Mantle. After Stengel offered a rambling, pages-long answer consisting of dizzying double-talk, the room dissolved in laughter when Mantle began by saying: “My views are just about the same as Casey’s.”<sup>101</sup> With Congress on the verge of acting, the *Toolson* Court must have found the following solution irresistible: instead of overruling Holmes and seeming to betray the baseball powers that be, why not find a way to limit the exemption to baseball alone, so that no other sport or business could claim it, and then let Congress remove the exemption for baseball? Then *Federal Baseball* would be neither overruled nor problematical; it would be moot.

Two things went wrong. First, Congress is Congress, and nothing happened. Second, when your solution is based on the absolute fabrication of an express exemption for baseball, the chance of a result that seems intellectually defensible depends inversely on how often and how publicly you have to explain yourself. Which brings us to the third and final time professional baseball was brought before the Court on this issue, in *Flood v. Kuhn*.<sup>102</sup>

### C. Strike Three

Perhaps the clearest indication that no one, including the Supreme Court, found the state of the law after *Radovich* remotely satisfying is the decision to grant certiorari fourteen years later in *Flood v. Kuhn*.<sup>103</sup> Because, technically, there was nothing “cert-worthy” about the case. The question presented had been before the Court twice (and arguably five times) and there was no split in the Circuits to be resolved. And while the St. Louis Cardinals’ decision to trade star outfielder Curt Flood to the Philadelphia Phillies was no doubt important — even tragic — to some, it was not a matter affecting national security or world peace. Indeed, all Justice Blackmun could say in describing the decision to hear the case was that the Court “granted certiorari in order to look once again at this troublesome and unusual situation.”<sup>104</sup>

But *Flood* did provide the opportunity for some members of the Court to change their positions on the question — which itself may be the best explanation for the grant of certiorari.

Justice Blackmun’s opinion is memorable for the opening section, subtitled “The Game,” wherein he describes the early history of baseball in the voice of a bedazzled schoolboy: “[t]he ensuing colorful days are well known.”<sup>105</sup> At one point, he notes that there are “many names [of old-time players] . . . that have provided tinder for recaptured thrills” and he proceeds to list *eighty-eight* of them. At the end of the list, he writes, without apparent irony: “The list seems endless.”<sup>106</sup> Only two other Justices in the majority joined Part I of the opinion.

The lengthiest portion of Justice Blackmun’s opinion was his description of “The Legal Background.” This contained lettered paragraphs A through I, describing in detail the leading Supreme Court cases, the legal commentary on them, and the numerous congressional investigations of baseball. It was followed by a brief, concluding section applying this background to the case at hand. The decision to reaffirm the rule of *Federal Baseball* and *Toolson* was based on three principal points:

(1) Congress has had the baseball “exemption” under consideration many times. It has had the opportunity to overrule Holmes legislatively, but has not done so. Thus, by its “positive inaction,” Congress “has clearly evinced a desire not to disapprove [*Federal Baseball* and *Toolson*] legislatively.”

(2) “[S]ince 1922, baseball . . . has been allowed to develop and to expand unhindered by federal legislative action.” The Court has thus been concerned “about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*.” This is yet another reason to prefer a legislative solution, which, “by its nature, is only prospective in operation.”<sup>107</sup>

(3) Although the rule of *Federal Baseball* is “an anomaly” and “an aberration,” it is “an established one . . . that has been with us now for half a century.” To reject it now, more-

over, would require “withdrawing from the conclusion as to congressional intent made in *Toolson*.” The question was no longer whether *Federal Baseball* was right or wrong, but who should overrule it: “If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.”<sup>108</sup>

Justice Blackmun concluded his opinion by adopting and quoting in full the last sentence of *Toolson*, and then adding these final words:

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972; the remedy, if any is indicated, is for congressional, and not judicial, action.<sup>109</sup>

Justice Douglas’s dissent was simply an updated version of Judge Frank’s opinion in *Gardella*. The principal difference was that his first sentence converted *Federal Baseball* from a “zombie” to “a derelict in the stream of the law.” Otherwise, he echoed Judge Frank by pointing out that Holmes’ “narrow, parochial view of commerce” had been repudiated by “the modern decisions” of the Court.<sup>110</sup> The interesting question was how Douglas would handle his previous vote for the opinion in *Toolson*. His answer came in a disarming footnote:

While I joined the Court’s opinion in *Toolson* . . . , I have lived to regret it; and I would now correct what I believe to be its fundamental error.<sup>111</sup>

Justice Brennan joined Douglas in this dissent, even though Brennan had dissented in *Radovich* on the ground that the rule of *Toolson* should apply not only to baseball but to football as well. In his case, however, no explanation or expression of regret was provided in *Flood*.

Chief Justice Burger offered a brief con-

currence, even though he expressly agreed with Justice Douglas’s dissent on two points: that *Toolson* was probably in error, and that the Court’s reliance on “congressional inaction is not a solid base” for refusing to correct a mistake. Nonetheless, he joined the majority’s opinion and result, but left these marching orders for the House and Senate members across the street:

[T]he least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve the problem.<sup>112</sup>

Since *Flood*, there has been no serious attempt to have the Court consider the question for a fourth time. The various opinions in *Flood* demonstrate, however, that the question for the Court by 1972 was no longer what *Federal Baseball* actually meant, but how the mistake that had been made should be corrected. The “least undesirable” solution decreed was congressional action. Yet, despite the virtual injunction from Chief Justice Burger in his *Flood* concurrence, Congress has failed to remove the exemption for more than twenty-five years.

So who is ultimately responsible for this “troublesome and unusual situation”? There is no doubt where the *Radovich* Court laid the blame: “But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business . . . has such an adjudication.”<sup>113</sup> Nor is there doubt about Justice Blackmun’s view: “It is an aberration that has been with us now for half a century.”<sup>114</sup> Nor is Justice Douglas hard to read: “In 1922 the Court had a narrow, parochial view of commerce,” he wrote, while citing the “regret[ful]” decision in *Toolson* only once, in a footnote.<sup>115</sup> For these Justices, the problem, in all its aberrant glory, begins and ends with Holmes.

To determine whether this historical judgment is correct, it is time to return to our original question: could the antitrust laws have been applied to baseball in 1949 or thereafter with-

out overruling *Federal Baseball*? By tracing the exemption all the way through to the decision in *Flood*, we have now accumulated the evidence necessary to answer that question. For the answer lies in understanding *Federal Baseball* the way Holmes understood it, and that is something that no judge who has discussed the issue has managed to do — no judge, that is, except one.

## V. Wrong on the Facts

One thing that the progression from *Toolson* to *Flood* makes plain is that Holmes' opinion has been battered and mocked much more for the alternative argument about "trade or commerce" than for the conclusion that the interstate aspects of the business were merely "incidental" to the game. This is because such a conclusion, even if wrong when made, is at least not immutable; it can change when the facts do. The presence of radio and television in the later cases, therefore, made it largely unnecessary to dwell on the first argument.

But Holmes has not gone unscathed on that point by any means. Some have argued that Holmes was not only "sophistic" in his view of trade or commerce, but "remarkably myopic, almost willfully ignorant of the nature of" professional baseball.<sup>116</sup> As Professor White asks rhetorically in his book, **Creating the National Pastime**, "How could anyone fairly characterize baseball games as 'purely state' or 'local' affairs?" There is the sense that Holmes has let us down by failing to perceive the cultural importance that baseball had, or clearly would have, in America. In attempting to explain this myopia, Professor White finds in the decision of the D.C. Circuit in *Federal Baseball* "the persistent belief that baseball was not just a 'business,' but a 'game.'"

It was easy to think of buying a product as part of one's "business." It was much harder to think of watching a baseball game in the same manner.

Professor White finds "astonishing [the] inability

of the Supreme Court of the United States to grasp the practical meaning" of organized baseball's structure. In contrast, he argues, "[t]hose closest to baseball, and most directly affected by its decisions, knew full well that it was a *business*, and a buyer's monopoly at that."<sup>117</sup>

Among the statements for which Holmes is revered, rather than ridiculed, is this: "It is most idle to take a man apart from the circumstances which, in fact, were his."<sup>118</sup> We will therefore attempt to place Holmes and *Federal Baseball* in context as a means of addressing this critique.

## A. Primitive Baseball

In evaluating the place of professional baseball in the American culture when *Federal Baseball* was decided, two points should be considered. The first, and less important, is that the game at that time was still quite primitive in many respects in comparison even to 1949. When we hear the stories of the (now) famous players from that era, we tend to envision them playing in stadiums and circumstances essentially as they exist now — the uniforms are a little baggier, perhaps, and we see things in black and white, rather than in color, but that's about it. Yet there were fundamental differences affecting everything from the rules (the spitball was not banned until 1921), to the equipment (today, World Series announcers point out that the American and National Leagues have different strike zones; in the teens, they used different baseballs<sup>119</sup>). Indeed, some of the most basic trappings of the baseball "experience" were simply not yet born.

Take the high-collared uniforms, for example. Not only did they lack the player's names, they did not even have numbers. Nor were the starting lineups announced, because there were no sound systems. (John McGraw's remarks at his twenty-fifth anniversary celebration on July 19, 1927, were not amplified, because the Polo Grounds did not have a speaker system until 1930.<sup>120</sup>) Accordingly, you

could not tell the players even *with* a scorecard. As for music, playing the Star-Spangled Banner was not traditional, but a recent innovation by one team, the Boston Red Sox, introduced in 1918 by its show-producer owner, Harry Frazee. The famous tune, "Oh, Take Me Out to The Ball Game," had been written in 1908, but the composer had never even seen a ball game.<sup>121</sup>

Or take something as fundamental as the name of the team. In that era, the team name was as variable as the whim of a local sports-writer. At the beginning of the teens, the Red Sox were called the Pilgrims.<sup>122</sup> When four of the Dodgers got married in the same year the team became the "Bridegrooms." The Indians were known for several years as the Cleveland "Naps" in honor of their player manager, Napoleon Lajoie.<sup>123</sup> When the Indians won the 1920 World Series, they defeated the Brooklyn "Robbins," then named for their own manager, Wilbert Robinson. (Brooklyn's all-time low on the name parade came in 1915 when the team was called the "Tip-Tops."<sup>124</sup> Honestly.)

Of greater importance than the primitive trappings, however, is the second point: the health of professional baseball in 1919 was not good. The teens had been baseball's most lack-luster decade. Attendance had been dropping since the close pennant races of 1908 and 1909. By 1915, one of baseball's early publications, the *Reach Guide*, was speculating about the reasons for professional baseball's general malaise and the fans' waning interest. Among the possible reasons given were "excessive player salaries" and "movies."<sup>125</sup>

One of the reasons *not* given was that the game may have been getting a little boring. Baseball historian Bill James notes that the pitchers gained "control" beginning around 1913.<sup>126</sup> The team batting averages for the decade hovered around .250 and the most home runs hit in a year from 1909 to 1918 were twelve.<sup>127</sup> In fact, When Boston pitcher Babe Ruth hit 29 home runs in 1919, he broke the American League record by thirteen.<sup>128</sup> The pitchers' statistics were correspondingly colos-

sal. When the Federal League was wooing Walter Johnson, he was a 36-game winner. Smokey Joe Wood was 34-5 in 1912, for a winning percentage of .872.<sup>129</sup> The lowest earned run average in history was recorded in 1914 by Dutch Leonard (1.01). To underscore the dominance of pitching in the teens, compare the 1915 rookie season statistics of Boston's Babe Ruth with those of the Dodgers' Fernando Valenzuela in 1981. Valenzuela's record was 13-7, with a 2.48 earned run average. The Babe was better on both counts (18-6 and 2.44), and batted .315 for good measure. The result: Valenzuela won the Cy Young Award and was named Rookie of the Year, while Ruth was not even carried on Boston's 1915 World Series roster. Given the dominance of the pitchers, it is no surprise that the longest game in baseball history was played on May 1, 1920, — a less than riveting, 26-inning, 1-1 draw that was called on account of darkness.<sup>130</sup>

Boring or not, there is no question that professional baseball was poorly positioned to withstand the distraction and financial hardships inflicted by World War I. In 1918, the owners agreed in July to shorten the season; the World Series was completed by September 11,<sup>131</sup> and the owners promptly cut all players from their rosters to save on the balance of salaries due (agreeing, of course, not to sign each others' free agents). In 1919, the owners agreed again to shorten the season, delay spring training, and trim each team's roster to 21 players in order to save more money.<sup>132</sup> Attendance nosed up slightly in 1919, but the improvement was grudging and short-lived.

At that point, as the *Federal Baseball* appeal worked its way through the appeals court in 1920 and the Supreme Court in 1921, professional baseball was traumatized by two additional events: The Black Sox scandal and the death of Ray Chapman.

## 1. The Black Sox Scandal

In 1919, players on the Chicago White Sox



threw the World Series. The story of the scandal has been chronicled most notably in Eliot Asinof's famous "Eight Men Out."<sup>133</sup> The mastermind was a New York gambler named Arnold Rothstein. Eight White Sox players, who included Shoeless Joe Jackson, pitcher Eddie Cicotte, and third baseman Buck Weaver, were subsequently indicted and tried, but all were acquitted. In the meantime, however, former federal judge Kenesaw Mountain Landis was appointed baseball's first Commissioner, and he banned all eight of the indicted players from organized baseball for life.<sup>134</sup>

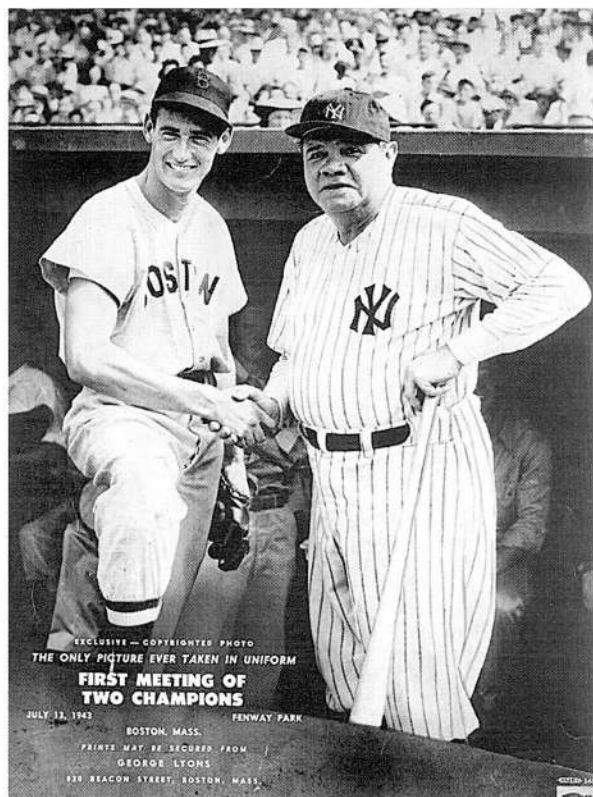
The story from the players' perspective was more pathetic than villainous. They were manipulated by the gamblers during the scandal and manipulated by White Sox owner Charles Comiskey afterward. Only two of the players actually received any of the promised bribe money — Jackson and Cicotte.<sup>135</sup> Cicotte was thirty-five in 1919, but arguably the best left-handed pitcher in baseball. He had nonetheless suffered the penury of his owner for years. In addition to paying him half of what other pitchers made, Comiskey had him pulled from the starting rotation two years earlier after winning twenty-nine games, ostensibly to "rest" him for the World Series. In fact, however, Cicotte had an incentive clause that would have paid him \$10,000 for winning thirty games.<sup>136</sup> By 1919, Cicotte knew he was too old to recoup the money he had lost in salary. When Comiskey cut salaries in connection with the war-shortened season, Cicotte and several other players agreed to the scam.<sup>137</sup>

In recent years, there have been revisionist attempts to clear Shoeless Joe Jackson of the charges. One such attempt is found in the movie, "Field of Dreams," in which the ghost of the deeply Southern and deeply uneducated Shoeless Joe is played with perfect diction by New Yorker, Ray Liotta. All of these efforts are complicated by Joe's written confession at the time. Buck Weaver, on the other hand, protested his innocence for decades, and the evidence supports his claim that he only listened to the plan without assent and thereafter

played all-star baseball for the entire Series.<sup>138</sup> That was enough to warrant expulsion in the view of Commissioner Landis, however, who correctly perceived the danger that this scandal presented for baseball. From his position as owner, Comiskey decided that the best management of the problem would be for the players to be banned, but acquitted of the criminal charges.<sup>139</sup> During the trial, therefore, Jackson's written confession disappeared. A few years later, when Jackson brought a civil suit against the White Sox, the confession conveniently resurfaced — in Comiskey's lawyer's briefcase.

The timing of the scandal could not have been worse, as baseball struggled to right itself after the war. This conduct rubbed the public's nose in organized baseball's worst-kept secret: that it was badly corrupted by gambling. Gamblers had been present since the first league had been established in the 1870s, and a major scandal involving the Louisville Club had been exposed in 1876. Since then gambling had been unmentioned, but largely tolerated. In 1917 and 1918, for example, first baseman Hal Chase had repeatedly been caught soliciting others to throw games, but repeatedly let off.<sup>140</sup> Asinoff notes that "[b]y 1919, gamblers openly boasted that they could control ball games as readily as they controlled horse races."<sup>141</sup> Publicity such as the Black Sox scandal tends to injure an enterprise seeking to become the cultural cornerstone of American life.

And consider the timing in connection with *Federal Baseball*. The rumors that the World Series had been thrown persisted through the 1920 season, casting a cloud over a close pennant race between the White Sox, Indians, and Yankees. The indictments came down dramatically in September of 1920, just as the D.C. Circuit was preparing its opinion in *Federal Baseball*, which was issued in December. During the 1921 season, the last full season before the Supreme Court ruled in *Federal Baseball*, baseball news was overshadowed as the Black Sox trial dragged on in June, July, and August.<sup>142</sup> Thus, even if the members of



Ted Williams and Babe Ruth (left to right), two of baseball's greatest hitters, met for the first time in 1943 at Fenway Park. Many of baseball's most colorful and beloved characters, including Casey Stengel (opposite page, upper right) and Mickey Mantle (opposite page, lower right, running home), were called to testify before Congress on the antitrust exemption.

the unanimous Supreme Court in *Federal Baseball* were paying attention to baseball at this time, they would doubtlessly have shared the assessment of this period advanced by Stephen Jay Gould:

The game had been in trouble for several years already. Attendance was in decline and rumors of fixing had caused injury before. The Black Sox Scandal seemed destined to ruin baseball as a professional sport entirely.<sup>143</sup>

## 2. The Pitch That Killed<sup>144</sup>

Only one major leaguer in the history of baseball has been killed by a pitch. His name was Ray Chapman, and he played shortstop for the Cleveland Indians. On August 16, 1920, Cleveland played in New York during a crucial series in a tight pennant race. The Yankees' best pitcher, Carl Mays, beamed Chapman behind

the left ear, and Cleveland's rising star was dead several hours later.

The death of a young ballplayer would be devastating under any circumstances, but the circumstances in this case — including the personalities of the two protagonists — heightened the tragedy. In 1920, Ray Chapman was a golden boy, well on his way to owning the town of Cleveland. Young and classically good looking, he was reputed to be the fastest man in baseball. He was also an outstanding fielder who had been made the protege of Cleveland's already legendary player-manager, Tris Speaker. By all reports Ray was unerringly affable and charming. As the 1920 season got underway, moreover, he had just married the beautiful daughter of one of Cleveland's richest men.

The man who threw the pitch, Carl Mays, was a different story. Mays had come to Boston as a pitcher along with Babe Ruth in 1914 (they rode the same train together from Baltimore).<sup>145</sup> By 1919, Mays had established himself as one of the premier right-handed pitch-

ers in the American League. He had an underhanded delivery, snapping the ball from near his shoe tops at the release. Unlike Chapman, however, Mays was not considered charming. Although he apparently did not drink, smoke, or curse, he was such an unrelenting jerk that he was thoroughly disliked, even by his own team. His universal lack of popularity was so obvious that Mays would discuss it in interviews.

Nor did Mays' conduct make his reputation a mystery. When Mays decided in mid-1919 that the floundering Red Sox were not providing enough run support, he walked out on his team and his contract. Despite the supposedly impregnable reserve clause, the ambitious owners of the Yankees quickly offered him another contract, which touched off a dispute so bitter that some owners threatened to dissolve the league. After several lawsuits, countersuits, and injunctions, the matter was finally settled on the eve of the 1920 season. As a result, Mays stayed in New York, where he was rejoined that



year by Babe Ruth.

Another reason Mays was unpopular was that he beaned people. Despite his outstanding record, he was virtually always at the top



of the list for hit batsmen.<sup>146</sup> When Chapman died, the Yankees' owner noted that "[i]t is unfortunate that it should have been Mays who pitched the ball, too, because of the tremendous publicity he has already had."<sup>147</sup> As for the pitch that hit Ray Chapman, the case against Mays is necessarily circumstantial, but impressive. First, he was a low-ball pitcher, who seemed to go high only when someone's head was in the way. Second, he was fiercely, and justly, proud of his control (continually making the point to interviewers). Third, he was usually among the league leaders in fewest walks.<sup>148</sup> In fact, he still holds the record for pitching the most innings (26) in a World Series without allowing a walk. As if to ensure his place in history, Mays offered this assessment of what happened: "It was the umpire's fault."<sup>149</sup>

Chapman's death, followed one month later by the Black Sox indictments, provided grisly confirmation of the worst image of professional baseball and its participants. Regarded as lower class ruffians, the players of the teens have been described by one of the preeminent baseball historians in crisp terms: "Shysters, con men, carpet baggers, drunks and outright thieves."<sup>150</sup> Today, individual names do provide "tinder for recaptured thrills," in the words of Justice Blackmun, but the image of the entire enterprise as shabby and probably corrupt would die hard, especially for the older generation. When Yogi Berra took up the game decades later, his parents were ashamed.<sup>151</sup> Despite the exciting pennant race of 1920 (Cleveland replaced Chapman with a minor league shortstop named Joe Sewell, who is now in the Hall of Fame, and came back to win the pennant and the World Series), attendance dropped significantly in 1921.<sup>152</sup> Professional baseball was at its nadir.

## B. Postwar Bliss—and Broadcasting

But turn now to February of 1949, when *Gardella* was decided, and we approach

baseball's historical summit. Postwar America felt good about itself and even better about baseball. The age of DiMaggio, Williams, and Musial was in full flower. The American League race in 1948 had been riveting, as Lou Boudreau and Cleveland's incomparable pitching narrowly edged the storied Yankees and the ever-tragic Red Sox. Those three teams alone drew more fans in 1948 than had the entire American League in 1920.<sup>153</sup> The following "Summer of '49"<sup>154</sup> would become the stuff of baseball legend, with the Yankees taking the pennant from the Red Sox on the final day of the season. That summer produced perhaps the finest moment for baseball's finest symbol, Joe DiMaggio. Due to a second, career-threatening foot operation, he played for the first time that season in late June, in a crucial series against the Red Sox in Boston. Leading the Yankees to a three-game sweep, Joe batted .455 (5 of 11), with four home runs and nine RBIs. As he rounded third on one homerun, Casey Stengel came out of the dugout and bowed in the "we are not worthy" salute.<sup>155</sup> America agreed. That Yankees team commenced a run of five consecutive world championships that may never be duplicated. To take the pennant back in 1954, the Indians had to win a record 111 games; the Yankees won a mere 103.<sup>156</sup>

By 1949, baseball had not only a new generation of players, but a new generation of fans. That generation, moreover, followed the game in a fundamentally different way than its predecessors — by listening to the radio. It is difficult to overestimate the role of broadcasting in the rise of baseball (as well as other sports) in the American cultural consciousness. In David Halberstam's words, "Radio made the games and the players seem vastly more important, mythic even." Radio coverage began to define the game in the 1940s, but was still not universal. In 1946, New York sportscasters made their coverage comprehensive, providing the first live broadcasts of away games.<sup>157</sup> For baseball and radio, all the stars were in alignment:

[R]adio as a prime instrument of sports communication, and Mel Allen as one of its foremost practitioners, ascended at the very moment that Joe DiMaggio did.<sup>158</sup>

By the end of the decade, television was not far behind. The first World Series games were televised in only five cities in 1947, when Gillette paid \$175,000 for the rights. Fans did not have to own a T.V. to see the games; city taverns bought them and aggressively promoted televised sports as part of their postwar strategy to resist the advent of (1) suburbia and (2) canned beer. By 1949, comedian Fred Allen asserted that the only New Yorkers who had not watched television were children too young to frequent saloons.<sup>159</sup> For the 1949 Series, Gillette paid \$800,000 for the television rights, and an estimated ten million watched.<sup>160</sup>

In deciding whether Holmes failed to grasp the true (or at least imminent) nature of professional baseball, we must keep in mind that broadcasting is not just the obvious reason that professional baseball games are today “interstate.” It is the reason that we now perceive baseball and other professional sports as a ubiquitous, permeating cultural feature of everyday life. Only with broadcasting can there be a collective American experience — from sea to shining sea — based on a single moment of a single game. Because of broadcasting, Bobby Thompson’s home run to win the pennant for the Giants in 1951 truly was a “Shot Heard ‘Round The World’”<sup>161</sup> — or at least around America. By the late 1940s, therefore, we can say that major league baseball had genuinely become an experience that was not only seen but heard. It is no accident that every movie made about baseball, from 1949’s “It Happens Every Spring” to the dopey (but fun) “Major League,” shows scenes of live baseball action from the perspective of the play-by-play announcer in the booth. The filmmakers under-

stand that it is not the same for American audiences to see a swing and a miss without hearing “swing and a miss.” Strictly speaking, broadcasting may not be part of the game, but it is a principal reason why the game is part of us.

Holmes and his Brethren did not have this perspective. As for broadcasting, although the first experimental transmission from a ballpark occurred in August of 1921, the “incalculably positive” impact of regular radio broadcasts<sup>162</sup> was still more than a decade away. Most teams did not broadcast even home games until the early 1930s, and “[a]s late as 1939 none of the New York clubs broadcast any of their games.”<sup>163</sup> As for iconography, far from boasting an all-American hero like Joe DiMaggio, the era of *Federal Baseball* was symbolized by the peerless and ruthless Tyrus R. Cobb. While he truly did dominate (in 1919, he won the batting title for the eleventh time in twelve years), his penchant for fighting, cheating, and beating up fans (he once kicked a hotel chambermaid down a flight of stairs) left him generally despised.<sup>164</sup> At the end of one season, when Cobb was locked in a tight race for the batting crown with Napoleon LaJoie, an opposing manager pulled his infield back so that LaJoie could “beat out” six bunts for infield hits. Cobb, being Cobb, won the title anyway.<sup>165</sup>

For the Justices who decided *Federal Baseball*, therefore, the game of baseball had a secure place in the culture as a means of local recreation — there were hundreds of amateur leagues, virtually all contained within their home state<sup>166</sup> — but the enterprise known as organized baseball was more than arguably corrupt, declining, and possibly near extinction. Their mental image of baseball, if they had one, was likely to be the game in which Ty Cobb, dusted off by a Carl Mays pitch aimed at his head, retaliated by pushing a bunt toward first base and then spiking the covering Mays so badly that he could not walk.<sup>167</sup> The Justices may have been grateful that such a spectacle had been witnessed only by a local audience.

### C. The "Business" of Baseball

Those who are disappointed or embarrassed by Holmes' conclusion that the interstate aspects of organized baseball at the time of *Federal Baseball* were "incidental" do not grasp the simplicity of the analysis of both Holmes and the D.C. Circuit Court of Appeals. "Trade" and "commerce" were terms of art at that time. To determine whether the defendant baseball clubs were engaged in *interstate* trade or commerce, the first step for the Court of Appeals was to determine just what it was that the defendants were selling. This is what contemporary antitrust lawyers would call defining the product market. The answer for both courts was this: they were selling baseball games, or as Holmes put it "giving exhibitions of base ball."<sup>168</sup> If the next question is whether the game, from the first pitch to the last out, was an interstate event or an intrastate event, it is hard to argue against the view that the game was "local in its beginning and in its end."<sup>169</sup> The game — the relevant product — was produced and consumed in its entirety in one place, at one time, in one state.

If we recognize how firmly this analysis focused on the actual experience of the fan "consuming" the exhibition as it was exhibited, we will understand why so many have wrongly suggested that Holmes' opinion ignored the nature of this "business." For the *Federal Baseball* opinion described the business in *precisely* the terms Holmes is claimed to have been unable to grasp. He referred to organized baseball as a "business" on five separate occasions in two and one-half pages. He noted that "the scheme requires constant traveling on the part of the clubs, which is provided for, controlled and disciplined by the [leagues]." He further noted that the traveling was interstate: "[T]hese clubs . . . play against one another in public exhibitions for money, one or another club crossing a state line in order to make the meeting possible." Indeed, he even acknowledged that "to attain for these exhibitions the great popularity that they have achieved, competitions

must be arranged between clubs from different cities and States,"<sup>170</sup> thereby granting the plaintiff its point that the quality of the games was directly affected by the out-of-state "identity" of the opponent.

But the fact remains that, when the game with the out-of-state rival was actually played (*i.e.*, produced and consumed), business was being transacted on an interstate basis in only the most indirect and subtle way. When the Dodgers played the Redlegs in Cincinnati, for example, the fans in Brooklyn could care deeply, but they could not partake. The most they could do was to read of the results after the fact in newspaper or telegraph reports. To participate in any meaningful way in the "essential" part of the business (the game), you had to be in Ohio. The only interstate aspect of the "exhibition" itself was the implicit effect it would have on the importance of the games played in other states. In other words, what happened in Ohio in May could make the game played in New York in September vastly more important and exciting. (As current fans are painfully aware, this is a point that seems entirely lost on players today.) But, at least until broadcasting was widely available, the September game in New York would still be a "local" exhibition, consumed only by those who were there. If one accepts any analysis that attempts to distinguish between the incidental and the essential, the amount of genuine interstate commercial exchange that took place in a baseball park in Holmes' day must be below the line.

Accordingly, if your task in the spring of 1919 (as, say, trial counsel for the plaintiff in *Federal Baseball*) was to produce evidence that the interstate aspects of producing this local exhibition were more than incidental, you were in trouble. In the 1970s Justice Douglas would point out in *Flood v. Kuhn* that "[b]aseball is today big business that is packaged with beer, broadcasting and with other industries."<sup>171</sup> But we know that broadcasting was not part of the business when *Federal Baseball* was decided, and beer was *illegal*

(ouch). (The Eighteenth Amendment was ratified on January 29, 1919, and the Volstead Act was held constitutional in January 1920.) Could you make it seem important to a court that the balls, bats, and uniforms of the visiting team may have crossed a state line? (Not really.) If the visiting team's equipment had been hijacked, would the game have been canceled? (Doubtful.)

The lawyers for the *Federal Baseball* plaintiffs seem to have understood the challenge before them. In their brief to the Supreme Court, therefore, they strenuously argued that the interstate aspects of baseball were not simply important, but the heart of the enterprise. There was even a spiritual aspect: "The personality, so to speak, of each club in a league is actually projected over state lines and becomes mingled with that of clubs in all the other States."<sup>172</sup> The main activity of each club, according to the plaintiff, was not playing ball, but *traveling*. Thus, although the plaintiff grudgingly admitted that each club had "a local legal *habitat* . . . it [was] primarily an ambulatory organization."<sup>173</sup> My favorite exposition of this theme is as follows:

[T]hroughout the playing season the ball teams, their attendants and paraphernalia, are in constant revolution around a pre-established circuit. *Their movement is only interrupted to the extent of permitting exhibitions of baseball to be given in the various cities.*<sup>174</sup>

Drat those interruptions. Holmes and his Brethren were unlikely to be moved by an argument that made the game itself "incidental."

I suspect that what bothers most modern readers of *Federal Baseball* is Holmes' failure to reject the incidental effects analysis altogether, overrule *Hooper v. California sua sponte*, and declare (as the current Court might) that any interstate aspect of any business, no matter how incidental, renders that business

subject to any statutory imposition Congress cares to impose.<sup>175</sup> But the "house-that-jack-built" reasoning underlying that view, while perhaps inevitable today with the revolution in communication technology, has no more claim to intellectual rigor than the incidental effects analysis, which at least was designed to preserve some distinction between interstate and local businesses. Thus, when Professor White finally asks in frustration how "anyone [could] conclude, whatever the legal nomenclature, that major league baseball teams were not engaged in interstate commerce,"<sup>176</sup> we see that he has lost sight of the controlling issue. It was not whether baseball was a business, or was a monopsony (a "buyers' monopoly"), but whether that business should be characterized as intrastate rather than interstate. The plaintiff in *Federal Baseball* knew that that was the issue, and argued it under the prevailing standard. There was no request that the Court adopt a different analysis, much less overrule binding Supreme Court precedent.

This is now, but that was then. Holmes was analyzing a record made in 1919 about the nature of the business in 1914 and 1915. The broadcasting, front offices, and minor league structures of today did not exist. The issue in *Federal Baseball*, everyone agreed, was whether this "popular" business was interstate or local. Everyone also agreed that the question turned on the difference between incidental and non-incidental effects. That was precisely the way in which Learned Hand, with the benefit of twenty-seven years of additional antitrust law, would frame the issue in 1949. In 1922, the answer was clear.

## VI. Wrong on the Law

### A. Whose Alternative Argument?

If Courts had construed the incidental effects analysis of *Federal Baseball* as the sole ground of decision, both the opinion and its holding would long ago have faded away. Whether Holmes was right or wrong is immaterial, the next court would have said, for the

facts have changed, and under *Federal Baseball* that means the result must change as well. Let us turn, then, to the alternative argument on “trade or commerce,” which has shown such a sheer face to those who would attempt to help Holmes climb from the reputational hole dug by his baseball opinion. Very few have even argued that finding baseball subject to the antitrust laws today could be made consistent with *Federal Baseball*. Justice Burton tried in his dissent in *Toolson*, but ultimately had to (1) mischaracterize Holmes’ opinion and (2) still cite the cases said to “repudiate” Holmes’ view of interstate commerce. The only other person to make the effort, the great Learned Hand, seemed to leave his bat on his shoulder, simply blinking as the hard issue went by.

The beginning of wisdom here comes in considering the other Holmes decision mentioned above in the discussion of *U.S. v. Shubert*. The case was called *Hart v. B.F. Keith Vaudeville Exchange*. It involved an interstate vaudeville circuit and was decided in 1923, in the next Term after *Federal Baseball*. On the facts, there was no obvious distinction from *Federal Baseball*, just a dispute over whether the “transportation of large quantities of scenery, costumes and animals” was “merely incidental” to the performance. The District Court had dismissed the complaint on its face. Noting that “[t]he jurisdiction of the District Court is the only matter to be considered on this appeal,” Holmes reversed for a unanimous court. The issue was not whether the plaintiff ultimately would prevail on his cause of action, but whether the antitrust laws applied at all:

The bill was brought before the decision of the *Base Ball Club Case*, and it may be that what in general is incidental in some instances may rise to a magnitude that requires that it be considered independently.<sup>177</sup>

There are several ways to interpret the

result in *Hart*, coming only one year after *Federal Baseball*. One is that the result turns purely on the difference between the concepts of “jurisdiction” and “cause of action.” Jurisdiction considers only whether the court has power to act on the controversy; cause of action considers whether the plaintiff has a right to actual relief on the stated claim.<sup>178</sup> Recall that *Federal Baseball* came to the Court after a full trial and verdict. In *Hart*, however, as in most all of the cases we have discussed, the Court dismissed the complaint *ab initio* on the ground that the antitrust laws confer no jurisdiction over baseball. Was Holmes saying in *Hart* that the plaintiff had a right to claim that the antitrust laws governed the dispute, even though the claim would later have to be dismissed under *Federal Baseball* as a matter of law? Or was he leaving open the possibility that the plaintiff in *Hart* could somehow prevail on the merits? The first option seems overly formalistic, especially for Holmes. The second seems flatly inconsistent with the alternative argument in *Federal Baseball*.

For Holmes, the distinction between jurisdiction and cause of action was real, but not mindlessly formal. He had made the point ten years earlier in *The Fair v. Kohler Die & Specialty Co.*<sup>179</sup> *The Fair* was brought under the federal patent law, and Holmes defined jurisdiction as the “authority to decide the case either way.” He also noted two ways in which a complaint could be dismissed on a motion for lack of jurisdiction: (1) “if it should appear that the plaintiff was not really relying on the patent law,” or (2) “if the claim of right were frivolous.” In the latter instance, “the jurisdiction would not be denied, except, possibly, in form.” In other words, if it were clear that the claim raised was not “a substantial claim under an act of Congress,” a federal court would not be required to engage in the charade of taking jurisdiction where later dismissal was inevitable. In *The Fair*, jurisdiction was proper because the claim advanced was “made in good faith and [was] not frivolous.”<sup>180</sup>





In finding antitrust jurisdiction over the vaudeville circuit in *Hart*, therefore, Holmes adhered to the distinction set forth in *The Fair*. He agreed that the holding in *Hart* did not repudiate those cases dismissing claims for want of jurisdiction that were “absolutely devoid of merit.”<sup>181</sup> That was not the case in *Hart*, however:

It is enough that we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress, or at least that the claim is not wholly frivolous.<sup>182</sup>

Thus, *Hart* cannot be read to mean that the plaintiff would inevitably lose anyway because the local exhibition — consisting exclusively of “personal effort” — was not trade or com-

**Ray Chapman (above) was the rising star of the Cleveland Indians in 1920 when he was killed by a pitch that struck him behind the left ear. The Yankees’ best pitcher, the universally disliked Carl Mays (right), threw the ball, the only lethal pitch in the history of major league baseball.**

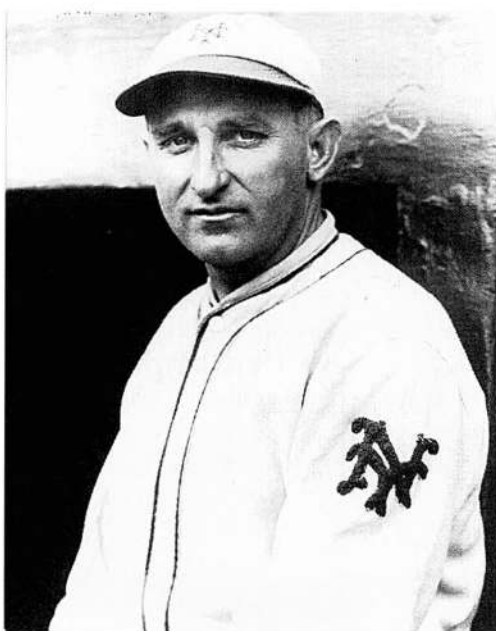
merce as a matter of law. *Hart* means that a plaintiff satisfying the “incidental” effects test potentially could win on the merits.

But how can that result be squared with the alternative argument in *Federal Baseball*? Recall that Justice Minton began his dissent in *International Boxing* with these words:

To make a case under the Sherman Act, two things among others are essential: (1) there must be trade or commerce; (2) such trade or commerce must be among the States.<sup>183</sup>

No one on the Supreme Court has ever disputed this reading of *Federal Baseball*, which went on to be the express (and unchallenged) interpretation of Justice Blackmun in *Flood v. Kuhn*.<sup>184</sup> If this reading is right, baseball’s “personal effort” will always be personal effort; thus, it will never be trade or commerce. Was Justice Minton just wrong?

He was, actually. He and many others misread *Federal Baseball* in a small way with large consequences. Holmes did address a two-part alternative argument in *Federal Baseball*, but it was an alternative argument that worked in



favor of the *plaintiff*, not the defendant; it gave the plaintiff two chances to *win*, not to lose. We can see the alternative argument Holmes was responding to by looking at the briefs before the Supreme Court. The defendants in *Federal Baseball* made the argument that personal effort was not commerce, and the plaintiff had responded that the claim was irrelevant. Whether or not the personal effort involved in baseball was “an article of commerce,” plaintiff argued, “interstate commerce may be created by the mere act of a person in allowing himself to be transported from one State to another, without any personal effort.”<sup>185</sup> Holmes was expressing his opinion on that argument in the second half of his dense paragraph in *Federal Baseball*.

In doing so, Holmes recognized that the plaintiff’s argument had two parts: in addition to arguing that the interstate “incidents” were sufficient to stamp the whole business as interstate, plaintiff argued that crossing a state line to engage in an activity that was not otherwise trade or commerce was enough to “create” interstate commerce. Wrong, said Holmes: “That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.”<sup>186</sup> All this exchange establishes is that the plaintiff had made its own formalistic argument — that crossing a state line could change something that was not commerce at all into interstate commerce — and Holmes rejected it. It is only because others have misread this passage as a pronouncement that baseball could never be subject to the Sherman Act that the subsequent mistakes of *Toolson* and *Flood v. Kuhn* have loomed so large.

Understanding the alternative argument in *Federal Baseball* in this way explains a lot. For one thing, it explains the result in favor of the vaudeville plaintiffs in *Hart*. For another, it answers an obvious question that no judge has ever posed, to wit, if baseball could never be trade or commerce, why did Holmes place that argument second? We know that he was a practical guy who wrote standing up and tried

to get to the point as quickly as he could. It is hard to imagine that he would order his arguments in this way: “Let’s see, one ground of decision means that baseball by definition can never, ever be subject to the Sherman Law; the other is a fact-intensive analysis requiring evidence of interstate aspects of the business and a careful balancing to determine whether those aspects are incidental or not. I guess I’ll lead with the incidental balancing test.”

Holmes was not wasting our time. The plaintiff could prevail by showing that the interstate aspects of the baseball business were more than incidental. If so, the alternative argument rejected in *Federal Baseball* would neither hinder the plaintiff nor save the defendant. In fact, if the plaintiff did not raise the point, there is no reason why a court who read *Federal Baseball* accurately would have to address the alternative argument — at all.

## B. “Just The Smartest Guy Who Ever Lived”

In his justly famous lecture series on the law of evidence, the late Irving Younger discussed a session of the Practicing Law Institute concerned with restating the law on Burdens of Proof and Presumptions. The issue had been studied for some time. When a proposal was made to re-submit the issue to committee for more fruitless debate, committee member Learned Hand rose to oppose the effort. Painting a verbal picture of the moment as only he could, Younger described the great judge’s majestic ascent to address the room. “He looked like God incarnate; he spoke like God incarnate — just the smartest guy who ever lived —”.<sup>187</sup>

Is it possible that Learned Hand saw what so many others missed? If he read Holmes correctly, he could easily have decided *Gardella* exactly as he did — seeming to ignore the “alternative” argument, and recognizing that the advent of radio and television broadcasting had fundamentally changed the calculus regarding the “incidental” interstate aspects of baseball.

There are several reasons to think he had it right. First, the conventional wisdom that read Holmes' opinion as an alternative argument in favor of the defendant was not yet firmly in place. In fact, it was *Gardella* itself that occasioned a spate of commentary popularizing the fallacy, which continued to grow as more decisions applying the antitrust laws to professional sports were handed down during the 1950s. With no clear consensus embracing the wrong interpretation, it is far less surprising that Hand did not address what was then only the second ground for his concurring panel-member, Jerome Frank. Second, Hand and Holmes knew each other well, communicated during the period in which *Federal Baseball* came down, and conceivably could have discussed the controlling issues. Hand had encountered Holmes on a train in June of 1918, and they began a lengthy exchange of correspondence, largely on the First Amendment.<sup>188</sup> In February of 1923, during the Term following *Federal Baseball*, Holmes attended a meeting of the American Law Institute at which he saw Hand. Holmes described the meeting in a letter to Pollock, referring to Hand as "a good U.S. District Judge, whom I should like to see on our bench."<sup>189</sup>

Third, and most important, Learned Hand was no stranger to this issue or to Holmes' analysis. Shortly after Holmes saw Hand in 1923, two things happened. First, Hand was elevated to his seat on the Second Circuit, where he would remain until 1961. Second, the Supreme Court handed down its decision in *Hart v. B.F. Keith Vaudeville Exchange*. As I noted above, *Hart* had come to the Supreme Court from the Southern District of New York, to which it was remanded. Upon completion of the subsequent trial in *Hart*, the District Court found for the defendants, "principally upon the [factual] determination . . . [that] the parties were [not] engaged in interstate commerce."<sup>190</sup> The plaintiff appealed again, and the Second Circuit affirmed in an opinion by Judge Manton. On the evidence submitted, the court concluded that "the transportation in interstate commerce of

artists or actors and the costumes and paraphernalia used by them is but incidental of the main purpose to entertain or act upon the vaudeville stage."<sup>191</sup> The remaining members of the panel were Charles Hough and Learned Hand.

To Learned Hand, therefore, the analysis in *Gardella* was exceptionally straight-forward. The controlling issue was whether the interstate aspects of the business were incidental. The facts had changed radically since 1922, principally due to the role of broadcasting. When he said "the players are the actors, the radio listeners and the television spectators are the audience,"<sup>192</sup> he was speaking in terms equally applicable to *Hart* as to *Federal Baseball*. He was simply holding that the same trial that took place in *Hart* should take place in *Gardella*. It would not occur to someone who saw the issue so plainly that there was a need to address any "further ground" that Judge Frank had discovered in *Federal Baseball*, or to argue over the merits of the reserve clause. He would not have felt it necessary to labor peripheral arguments to which the responses were (to the smartest guy who ever lived) so obvious. This explains the odd note of frustration in Hand's opinion; this explains why Learned Hand simply did "not know how to put it in more definite terms."<sup>193</sup>

## VII. Stealing Holmes: Why Flood Was Wrong

What has been discussed so far should enable us to put in perspective — and to be more precise when we discuss — baseball's "exemption" from the antitrust laws. There is no statutory exemption for baseball in the antitrust laws. There is a judicially created exemption, but it did not originate with *Federal Baseball*. The Second Circuit's decision in *Gardella* made the point; it could not have been much of an exemption if the first circuit court to revisit the issue in the 1940s found that it did not exist.

It was the decision in *Toolson* that first created an exemption meant exclusively for base-

ball and no other business. The attempt by the *Toolson* majority to attribute that exclusive exemption to the actual intent of Congress, however, was so baseless that no one took it seriously. Thus, it took several years and several more opinions before the message could sink in — even for some of the Justices in the *Toolson* majority. And even after the Court put its foot down in *Radovich*, holding that not even football could have the same exemption as baseball, *certiorari* was still granted in *Flood v. Kuhn* for the simple reason that the law on this question was embarrassing.

Given the state of things when *Flood* was decided in 1972, however, is it not fair to say that the ship had sailed? The Court missed its chance, perhaps, to apply Holmes' opinion properly in *Toolson*, and improved nothing by its embrace of illogic and inconsistency in the boxing and football cases, but how could that be undone so much later in *Flood*? Surely, one may argue, it will not help the Court's stature with the legal community or the general public to add fickleness to long-standing error.

But, wait a minute. Such sentiments implicitly accept the grounds put forth in *Flood* to justify the result. If we look harder, however, we will see that none of the three bases for the decision withstands scrutiny:

(1) The first was Congress's "positive inaction" over the years, which the Court said "clearly evinced a desire not to disapprove" the baseball exemption. The opinion in *Flood*, however, did not even respond to the ineluctable argument on this point by the dissent in both *Toolson* and *Flood*: Congress had repeatedly considered and failed to pass bills that, far from "repealing" the exemption, would have granted some or all of it to baseball. The failure to pass an exemption is weak evidence of a specific intent to preserve it.

More fundamentally, however, the notion that subsequent congressional inaction should cause the Court to avoid correcting its own mistakes is, as Justice Scalia has put it, "a canard."<sup>194</sup> Since the Constitution was ratified, we have always had a single Supreme Court (which

can thus begin sentences with the words: "One hundred years ago, we held . . ."), but we have had many, many Congresses — over one hundred at last count. At this writing, both houses of Congress are controlled by the same party. Suppose that a differently constituted Congress passed a law in the 1970s, which was egregiously misinterpreted by the Supreme Court in the 1980s. Should today's Congress be permitted to carve that bad decision in stone by considering a bill to disapprove the Court's decision, and then failing to act? Or should a President with a veto-proof minority be able to achieve the same result? As often as not, we are grateful when Congress fails to act. It is dangerous to attempt to ascribe discernible intent to such failures.

(2) The Court in *Flood* expressed its concern about the "confusion and the retroactivity problems" that could come from changing the rules now, when baseball "has been allowed to develop and to expand unhindered" since "1922."<sup>195</sup> The first problem with this ground is one of logic. The *Flood* Court was, by its own terms, dealing with an "anomaly" — that baseball is exempt while other sports are not. But why would football and boxing have relied on the rule of *Federal Baseball* over the years any less? We would expect those sports *not* to have relied only if there were any basis to suspect that the exemption was exclusive to baseball, and we know that that proposition did not exist until it sprang fully formed from the last sentence of *Toolson*. The Court nonetheless turned a deaf ear to any claims of reliance in the boxing and football cases. On the other hand, if we grant that assumption and say that other sports would have known that *only* baseball was exempt, the conundrum simply shifts: if other professional sports have never relied on an antitrust exemption, they seem to have developed nicely. Why would it be so confusing and disruptive in 1972 to have baseball play by the same antitrust rules as football?<sup>196</sup>

Another fundamental flaw in this "retroactivity" concern is that its factual premise is probably false. Prior to *Toolson*, just what was

the expectation of organized baseball regarding its supposed antitrust immunity? In the late 1940s, a leading sportswriter, Lee Allen, was commissioned to write a history of baseball. The result, **100 Years of Baseball**, was published in 1950, after the *Gardella* decision, but before *Toolson*. From that perspective, Allen reached this conclusion about baseball's legal immunity:

In three quarters of a century, the validity of the reserve clause has sometimes been affirmed in court, but usually it has been denied. The issue is not yet settled, and it is likely that many additional lawsuits will be filed before it is.<sup>197</sup>

During that same window of time — between *Gardella* and *Toolson* — Commissioner “Happy” Chandler testified before Congress in 1951, offering a number of reasons for reinstating and granting amnesty to the Mexican players. His reason for settling the *Gardella* case, however, was simply this: “[T]he lawyers thought we could not win the *Gardella* case.”<sup>198</sup>

(3) The final argument in *Flood*, based on the weight of judicial precedent discussing *Federal Baseball*, had two aspects. First, the baseball exemption is an *established* “aberration” that “has been with us now for half a century.” Second, applying the antitrust laws to baseball now would require “withdrawing from the conclusion as to congressional intent made in *Toolson*.”<sup>199</sup> Taking the easier point first, the “conclusion as to congressional intent” in *Toolson* was a fabrication; no one has ever tried to defend it, and it could hardly be described as time-honored. *Flood* provides no reason why “withdrawing” from that conclusion would be inappropriate from any jurisprudential perspective. Turning to the first point, the so-called “aberration” could hardly be given a fifty-year pedigree. The baseball exemption became an aberration only when it became clear that the same exemption would

*not* apply to others similarly situated. That did not happen until *Shuster* and *International Boxing* in 1954, and the point was not truly driven home until *Radovich* was decided in 1957.

Thus, none of the grounds assigned in *Flood v. Kuhn* stands up. What the opinion in *Flood* reflects in every corner and crevice, moreover, is the Court's perceived need to enlist Holmes in support of the result. To be persuasive, in other words, the reasoning set out in *Flood* must be attributed to Holmes. Otherwise, the “retroactivity” and the “established aberration” arguments won't work. To sell the notion of entrenched principles that could not be abandoned without disruption, “fifty years” and “half a century” sound properly dramatic. Thus, the opinion explicitly referred to the age of *Federal Baseball* no fewer than five times in its last three and one-half pages (“for half a century,” “since 1922,” “half a century,” “50 years after,” “in 1922”).<sup>200</sup> Justice Douglas was an unwitting ally in this effort, because his misreading of *Federal Baseball* as turning on the “trade or commerce” point also required that the clock be turned back to 1922 and all eyes fixed on Holmes. (He understandably preferred that to even the mildest inspection of the opinion he joined in *Toolson*.) In contrast to five decades, the nineteen years that had passed since *Toolson*, or (more accurately) the fifteen years since *Radovich*, would have sounded feeble. (Elvis has been dead for more than twenty years, and I have unopened boxes in the garage that are fifteen.)

The most egregious example of falsely enlisting *Federal Baseball* to the result in *Flood* came in the final sentence, where the Court insisted that there be a congressional rather than a judicial solution to the anachronistic baseball exemption. That sentence makes the claim that this stated preference for legislative action was “what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953.” As to *Federal Baseball*, that statement is obviously false. There was no suggestion in *Federal Baseball* that Congress might choose

to bring a business under the antitrust laws unless and until it affected interstate commerce.

The last sentence in *Flood* was therefore equally as unrooted in the words of *Federal Baseball* as the last sentence in *Toolson*. Just as *Toolson* had tagged Holmes with an express congressional intent that did not exist, so *Flood* tagged him with a preference for congressional action that he did not mention. Both *Toolson* and *Flood* were wrongly decided. Both have been caught stealing Holmes.

### VIII. Conclusion

Soon after I began practicing law, I worked with a colleague who was one of the legends of the District of Columbia bar, H. Chapman Rose. Then in his mid-seventies, “Chappie” told fascinating stories of his year as the last law clerk to serve Oliver Wendell Holmes, Jr. At the time, Holmes was over ninety, and Chappie spent some of his time reading aloud to him. One day the selection was *Lady Chatterly’s Lover*. After a time, however, Holmes raised his hand: “Sonny, we will not finish this book. Its dullness is unredeemed by its pornography.”<sup>201</sup>

Another story Chappie would tell has also been chronicled by Holmes’ biographers. It was Holmes’ description of Ralph Waldo Emerson, upon reading a paper the very young Holmes had prepared as a critique of Plato. Emerson had simply said: “When you strike at a king, you must kill him.”<sup>202</sup> This discussion of Holmes’ baseball opinion has been written with the conviction that Emerson’s words, if ever true, are sadly untrue today. Now, dismissiveness has replaced analysis. The popular culture encourages us to feel intellectually superior to those in the past who did not speak precisely in our words. It requires too much work to appreciate how those who came before us could take seriously concepts we now view as trite (like the difference between interstate and local commerce). Thus, Holmes never had a chance; he has been left to dangle in the wind not because anyone has understood him fully in his terms, but because — as William

Paley said in the eighteenth century — “who can refute a sneer?”<sup>203</sup>

I am not referring to the scholars and judges mentioned in this article, who (for better or worse) thought thoroughly and hard about *Federal Baseball*. We are particularly indebted to Professor White for his engrossing book on baseball.<sup>204</sup> But for the general population of lawyers and (I love this term) non-lawyers, Holmes’ baseball opinion merits only condescension — the knowing snickers of those who do not know. As we have seen, moreover, *Federal Baseball* is scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*.

The alternative standard I propose — the *challenge*, if you will — is the one so well articulated by Allan Bloom in an essay on Shakespeare:

Every rule of objectivity requires that an author first be understood as he understood himself; without that, the work is nothing but what we make of it.<sup>205</sup>

And “we” have made a mess of *Federal Baseball*. Congress, as always, has legislation under consideration to “repeal” the baseball exemption. While I expect any such bill to be written in impenetrable prose, with several special-interest ornaments, my proposal would be simple:

No business, industry, service, or other commercial activity is exempt from the antitrust laws unless expressly so provided by act of Congress. The decision in *Toolson v. New York Yankees* is expressly disapproved.

*Note: The author is grateful for the support and help of his friends and colleagues, especially Joe Sims, Don Ayer, Joe Migas, Feroz Moideen, Dave Rutowski, Jana Crouse, and Marybeth McDonald.*

### Author's Note

This article was completed several months before the end of the historic 1998 baseball season — a year that featured the unthinkable seventy home runs of Mark McGwire and the overwhelming MVP season of Sammy Sosa, as well as a perfect game and near-perfect season by the New York Yankees. As if that were not enough history to make, October of 1998 also brought the final passage and signing of Public Law 105-297, the “Curt Flood Act of 1998.” This Act works a partial repeal of baseball’s antitrust exemption, such that a major league player — and *only* a major league player — may now file an antitrust suit.

I regret to report that the Curt Flood Act of 1998 is not as short as my legislative proposal. In fact, it is over 1,200 words long, adding a new Section 27 to the Clayton Act with no fewer than eighteen separate sections and subsections. The Act describes the purpose of Section 27 as follows:

It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (*i.e.*, that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, *e.g.*, football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

P.L. 105-297, Sec. 2. In other words, a major league player can now sue under the antitrust laws, but the “exemption” is undisturbed with respect to such matters as team relocation, league expansion, and the minor leagues. (The Act goes to nearly comical lengths of definition and loop-hole plugging to ensure that it applies only to *major* league

players — bush-leaguers need not apply. We cannot have our federal courts clogged with Toledo Mud Hens bringing monopolization claims, after all.)

As the commentary accompanying the statute, not to mention the text itself, makes clear, this partial application of antitrust to baseball is designed specifically to give the players’ union another bargaining chip in negotiations with the owners. The idea is that, when the negotiations get tough, the players can bring an antitrust suit to increase their leverage. The tricky part is that the antitrust exemption for labor agreements protects the owners unless the union is decertified before the suit is brought (if there is no union, the owners can’t claim the labor exemption).<sup>1</sup> Decertification is no small thing, and such a decision is obviously controlled by the union. Thus, the relief granted by the Curt Flood Act can *only* redound to the benefit of the union, because the union has effective control over whether any major league player will ever successfully invoke the “right” the statute provides. In the meantime, all of the other potential plaintiffs — another owner, a competitive league, or a hapless minor-leaguer like our old friend, George Toolson — are simply left out in the cold.

The news stories, legislative reports, and public statements occasioned by the Curt Flood Act are peppered not only with the usual gaffes about Holmes and *Federal Baseball*, but also with novel historical propositions that are more than a little dubious. As to the gaffes, the following is typical:

The legislation reverses what Sen. Orrin Hatch, R-Utah, a chief backer, called an “aberrant” 1922 Supreme Court decision that exempted baseball labor relations from antitrust laws on the grounds that it is a game and not a business.<sup>2</sup>

As to revisionist history, both the Senate Re-

port and the players association have pointed to another benefit of this “repeal”: preventing strikes.<sup>3</sup> In the view of hall-of-fame pitcher, Jim Bunning, then a House member from Kentucky, “the Curt Flood Act . . . gets at ‘the root cause’ of eight baseball strikes and stoppages in 30 years.”<sup>4</sup> Finally, the White House statement upon the signing of the bill spends most of its effort lauding the “courageous baseball player and individual, the late Curt Flood, whose enormous talents on the baseball diamond were matched by his courage off the field. . . . His bold stand set in motion the events that culminate in the bill [the President has] signed into law.”<sup>5</sup>

Let’s take these points one at a time. First, the notion that Holmes said baseball was exempt because it is a “game,” not a business, is so groundless that even Justice Blackmun spent time debunking it in *Flood v. Kuhn*:

It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the decision have claimed incorrectly that the court said baseball was a sport and not a business.<sup>6</sup>

As we have seen, moreover, Holmes did not use the word “exempt,” did not suggest that baseball was different from any other sport with respect to antitrust, and did not imply that his conclusion reached about the interstate nature of the business could not change as soon as the facts did. It should not be surprising that, when Learned Hand reached exactly that conclusion in 1949, he did not even face the argument that there was any special “exemption” for baseball. As we also saw, not even those closest to baseball in the early 1950s thought they had any special exemption — or even a reasonable chance to overturn Learned Hand’s decision in *Gardella*. Rather, the baseball “exemption” discussed so blithely today

was invented by the last sentence of *Toolson* in 1954, and was not rendered “aberrant” until the boxing and football cases were decided later that decade.

The second proposition — that the exemption has been the cause of strikes and work stoppages — is a bit of special pleading by the players’ union that naturally appealed to politicians wishing to appear to be “doing something” about the 1994-95 baseball strike. When this argument found its way into the Senate committee report of the “Major League Baseball Reform Act of 1995,” however, it was promptly refuted by the minority reports of both Republicans and Democrats,<sup>7</sup> which pointed out that there is no historical evidence for this alleged connection between strikes and antitrust. Take the record in baseball itself. Thomas Boswell has noted that the first “significant work stoppage” in baseball did not occur until 1981.<sup>8</sup> The Committee Report does not suggest why the antitrust exemption, which the Report dates back to Holmes, took sixty years to stop play. Then consider the plethora of work stoppages in other, non-exempt sports, such as the NHL and (as this is written) the NBA. Not even Jim Bunning can explain how those crafty NFL owners got away with using scab players (and having the games count in the standings) during a football strike, when the players had the weapon of antitrust litigation available.

Turning to the White House’s effusive “thank you” to Curt Flood for setting “in motion the events that culminate[d]” in the Curt Flood Act of 1998, let us be clear. Curt Flood was a fine man and a spectacular ballplayer. He took a stand and, unlike many in our times, accepted the full consequences. It neither questions his courage nor demeans his memory to suggest that Justice Blackmun’s opinion in *Flood v. Kuhn* probably delayed any repeal of baseball’s antitrust exemption — especially the kind of partial appeal reflected in the 1998 statute — by as much as a generation.

In sum, I would draw two initial conclu-



sions from consideration of the Curt Flood Act of 1998. First, the Act could be a poster child for the proposition that a subsequent Congress should *not* be entrusted to repair judicial mistakes in statutory construction. It has all the marks of bad legislation on it, from special interest pleading to unprincipled compromises (one explanation for the exclusion of the minor leagues was that the Chairman of the House Judiciary Committee is a minor league fan who wanted his favorite teams unaffected<sup>9</sup>). Far from removing *Toolson's* erroneous exemption of baseball from the antitrust laws, this Act works a small repeal of only arguable utility for those who need protection the least — transforming the rule of *Toolson* into a judicial exemption that inexplicably applies to some ballplayers, but not to others.

But such a result should not be surprising. We have been shown time and again that the people involved in the legislative process simply cannot help themselves. They live in the now. They pass (or fail to pass) legislation in response to the ability of *current* constituents and interest groups to reward them in the appropriate political coin. It is chimerical to expect them simply to restore the original intent of a prior Congress to a statute that a court has misread. If the correct answer to a statutory question is “black,” but a court wrongly reads it as “white,” the legislature will inevitably cure the mistake by enacting some shade of mottled gray.

The second (and highly satisfying) conclusion I draw from the Curt Flood Act of 1998 is that it provides unwitting support for my thesis here: that no “exemption” can be pinned on Holmes, and that you can “repeal” the exemption, in whole or in part, without rejecting the reasoning of *Federal Baseball*. Congress has now illustrated the point by enacting a law for the purpose of repealing baseball’s antitrust exemption that, by its terms, does not overrule Holmes’ holding. The plaintiff before Holmes, you will recall, was the Federal Baseball Club of Baltimore, not a major league ballplayer and hence not affected by the Curt Flood Act of

1998. Thus, those who have announced in the press and in committee reports that the statute works “an explicit reversal”<sup>10</sup> of *Federal Baseball* have not even read the statute they are citing. Is that too much to ask?

Of course it is. But take heart. The cases, the statutes, the *words* are there to be read and understood by those who are unembarrassed by accuracy for the sake of accuracy. Let us take solace in knowing that, even as the reasoning of *Federal Baseball* remains misunderstood, its holding remains undisturbed. And if we are the only ones who know, that’s OK too.

## Endnotes

<sup>1</sup> 259 U.S. 200 (1922). *Federal Baseball* is “still the law” despite the recent passage of the Curt Flood Act of 1998, which purports to work a partial repeal of baseball’s antitrust exemption. The new statute is discussed in the Author’s Note at the end of this article.

<sup>2</sup> *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

<sup>3</sup> *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

<sup>4</sup> *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>5</sup> Joe Sims, *Antitrust in the Health Care Field: The First Decade (1977-1987)*, (unpublished manuscript, on file with author). Before the Nat’l Health Lawyers Assoc. Tenth Annual Seminar on Antitrust in the Health Care Field (Jan. 29, 1987).

<sup>6</sup> *Gardella v. Chandler*, 172 F.2d 402, 409 (2d Cir. 1949).

<sup>7</sup> *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

<sup>8</sup> G. Edward White, *Creating the National Pastime* 70 (1996).

<sup>9</sup> *Flood v. Kuhn*, 407 U.S. at 286.

<sup>10</sup> 193 U.S. 197, 400 (1904).

<sup>11</sup> Hans B. Thorelli, *The Federal Antitrust Policy* 474 (1955).

<sup>12</sup> Robert H. Bork, *The Antitrust Paradox* 31 (1978).

<sup>13</sup> *Id.*

<sup>14</sup> *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 1986-1 Trade Cas. (CCH) ¶ 67,121 at 62,774 (1986).

<sup>15</sup> Richard A. Posner, “Foreword: Holmes,” 63 *Brook. L. Rev.* 7, 7 (1997).

<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Radovich v. Nat’l. Football League*, 352 U.S. 445, 451 (1957).

<sup>18</sup> Bork, note \_\_\_\_, at 30 (“the Addyston opinion of 1898 may well have been the highwater mark of rational antitrust doctrine”).

<sup>19</sup> *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966).

- <sup>20</sup> *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (Douglas, J., concurring).
- <sup>21</sup> *State Oil v. Khan*, 118 S. Ct. 275 (1997).
- <sup>22</sup> *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).
- <sup>23</sup> Lee Allen, **100 Years of Baseball** 180-88 (1950). Similar circumstances attended the birth of the Union Association, *id.* at 74-83, the Player's (or Brotherhood) League, *id.* at 103-14, the American Association, *id.* at 64-73, and of course the surviving American League, *id.* at 142-51. See also Hy Turkin & S.C. Thompson, **The Official Encyclopedia of Baseball** 16-20 (revised edition 1956).
- <sup>24</sup> Bob Broeg & William J. Miller, Jr., **Baseball from a Different Angle** 224 (1988); Turkin & Thompson, *supra* note 23, at 36.
- <sup>25</sup> Broeg & Miller, *supra* note 24, at 225.
- <sup>26</sup> See *National League of Prof'l Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681, 682 (D.C. Cir. 1920).
- <sup>27</sup> Roger I. Abrams, **Legal Bases, Baseball and The Law** at 55 (1998); Allen, *supra* note 23, at 185.
- <sup>28</sup> *Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922); *The New York Times*, Apr. 13, 1919, at 21.
- <sup>29</sup> **Federal Baseball**, 259 U.S. at 208.
- <sup>30</sup> 155 U.S. 648 (1895).
- <sup>31</sup> **Federal Baseball**, 259 U.S. at 201 (emphasis added).
- <sup>32</sup> *Id.* at 203.
- <sup>33</sup> *Id.* at 208-209.
- <sup>34</sup> White, *supra* note 8, at 79.
- <sup>35</sup> *Id.* at 79.
- <sup>36</sup> "The Supreme Court 1953 Term," 68 *Harv. L. Rev.* 104, 136 (1954).
- <sup>37</sup> John Eckler, "Baseball — Sport or Commerce?," 17 *U. Chi. L. Rev.* 56, 65 (1949).
- <sup>38</sup> *Id.* at 66.
- <sup>39</sup> "Recent Cases," 105 *U. Pa. L. Rev.* 110, 111 (1956).
- <sup>40</sup> *United States v. Int'l Boxing Club of New York, Inc.*, 348 U.S. 236, 251 (1954) (Minton, J., dissenting).
- <sup>41</sup> *Id.* at 248 (Frankfurter, J., dissenting).
- <sup>42</sup> *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting).
- <sup>43</sup> *Id.*
- <sup>44</sup> *United States v. Shubert*, 348 U.S. 222 (1954).
- <sup>45</sup> *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).
- <sup>46</sup> *Flood v. Kuhn*, 407 U.S. at 270 n.10 (quoting 2 Harold Seymour, **Baseball** 420 (1971)).
- <sup>47</sup> White, *supra* note 8, at 71-72; *N.Y. Times* article, April 12, 1919, p. 12, col. 2.
- <sup>48</sup> Anthony J. Sebok, "Introduction," 63 *Brook. L. Rev.* 1, 3 (1997).
- <sup>49</sup> Allen, *supra* note 23, at 291.
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.* at 291-92.
- <sup>52</sup> *Id.* at 291-93.
- <sup>53</sup> *Id.* at 293.
- <sup>54</sup> Bill James, **The Bill James Historical Baseball Abstract** 570 (Villard 1988).
- <sup>55</sup> "Musial calls 'Strike 3' on Pasquels," *St. Louis Post-Dispatch*, Jun. 7, 1946, at 8C.
- <sup>56</sup> "Card Stars Not to Jump," *N.Y. Times*, May 29, 1946, at 26:7.
- <sup>57</sup> "Musial Calls 'Strike 3' on Pasquels," *St. Louis Post-Dispatch*, Jun. 7, 1946, at 8C.
- <sup>58</sup> Allen, *supra* note 23, at 293.
- <sup>59</sup> *Id.* at 294.
- <sup>60</sup> White, *supra* note 8, at 292.
- <sup>61</sup> *Id.*
- <sup>62</sup> *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).
- <sup>63</sup> 172 F.2d at 409.
- <sup>64</sup> *Id.* at 409.
- <sup>65</sup> *Id.* at 410.
- <sup>66</sup> *Id.* at 407, 408.
- <sup>67</sup> *Id.* at 407, 408.
- <sup>68</sup> White, *supra* note 8, at 293-94 (emphasis added).
- <sup>69</sup> 172 F.2d at 412.
- <sup>70</sup> *Id.*
- <sup>71</sup> Gerald Gunther, **Learned Hand, The Man and the Judge**, xv (1994).
- <sup>72</sup> Dan Abramson, "Baseball & the Court," *Constitution*, Vol. 4/No. 3, at 74 (Fall 1992); see also Burt Solomon, **The Baseball Timeline**, 493 (1997).
- <sup>73</sup> *Toolson v. New York Yankees*, 346 U.S. 356, 358 (1953) (Burton, J. dissenting) (citing H.R. Rep. No. 2002, "Impact of Antitrust Laws on Organized Baseball" 82d Cong., 2d Sess. 4, 5).
- <sup>74</sup> *Id.*, 346 U.S. at 361 (emphasis added).
- <sup>75</sup> *Flood v. Kuhn*, 407 U.S. 258, 281 (1972).
- <sup>76</sup> See the **Author's Note** on the partial repeal in the Curt Flood Act of 1998, *infra* at p. ??.
- <sup>77</sup> *Toolson*, 101 F. Supp. 93, 94 (S.D. Cal. 1951).
- <sup>78</sup> 101 F. Supp. at 94, 95.
- <sup>79</sup> 346 U.S. at 357.
- <sup>80</sup> "Recent Cases," 105 *U. Pa. L. Rev.* 110, 112-13 n. 24 (1956).
- <sup>81</sup> His name was Paul Sorrento.
- <sup>82</sup> 346 U.S. at 360, 359 n. 3, 358, 358 (emphasis added).
- <sup>83</sup> 346 U.S. at 360.
- <sup>84</sup> 259 U.S. at 209.
- <sup>85</sup> 346 U.S. at 361, at 358 and 365, 358 n.2.
- <sup>86</sup> *U.S. v. Shubert*, 348 U.S. 222 (1955).
- <sup>87</sup> *U.S. v. International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955).
- <sup>88</sup> *Shubert*, 348 U.S. at 228 (emphasis added), 229, 230.
- <sup>89</sup> *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923).
- <sup>90</sup> 262 U.S. at 274.
- <sup>91</sup> 348 U.S. at 230.

- <sup>92</sup> 348 U.S. at 242-43.
- <sup>93</sup> *Id.* at 243.
- <sup>94</sup> 348 U.S. at 251.
- <sup>95</sup> *Id.*
- <sup>96</sup> 348 U.S. at 250.
- <sup>97</sup> *Radovich v. National Football League*, 352 U.S. 445, 447 (1957).
- <sup>98</sup> *Id.* at 451, 452.
- <sup>99</sup> 352 U.S. at 452.
- <sup>100</sup> G.E. White, *supra* note 8, at 297.
- <sup>101</sup> Abramson, *supra* note 72, at 74.
- <sup>102</sup> *Flood v. Kuhn*, 407 U.S. 258 (1972).
- <sup>103</sup> 404 U.S. 880 (1971) (certiorari).
- <sup>104</sup> 407 U.S. at 269.
- <sup>105</sup> *Id.* at 261.
- <sup>106</sup> *Id.* at 263.
- <sup>107</sup> *Id.* at 261, 258, 283.
- <sup>108</sup> *Id.* at 282, 284.
- <sup>109</sup> 407 U.S. at 285.
- <sup>110</sup> *Id.* at 286.
- <sup>111</sup> *Id.*
- <sup>112</sup> *Id.*
- <sup>113</sup> 352 U.S. at 452.
- <sup>114</sup> 407 U.S. at 282.
- <sup>115</sup> 407 U.S. at 286 & n.1.
- <sup>116</sup> G.E. White, *supra*, n. 8 at 70.
- <sup>117</sup> *Id.* at 82, 83, (emphasis added).
- <sup>118</sup> Richard A. Posner, ed. **The Essential Holmes** at 207 (1992) (excerpt from address on John Marshall).
- <sup>119</sup> Broeg & Miller, *supra* n. 24 at 15.
- <sup>120</sup> Charles C. Alexander, **John McGraw 2** (Viking 1988).
- <sup>121</sup> Broeg & Miller, *supra* note 24, at 9.
- <sup>122</sup> Mike Sowell, **The Pitch That Killed** 10 (1989).
- <sup>123</sup> *Id.* at 69.
- <sup>124</sup> Solomon, *supra* note 72 at 202.
- <sup>125</sup> James, *supra* note 54 at 101.
- <sup>126</sup> *Id.* at 86.
- <sup>127</sup> *Id.*
- <sup>128</sup> Dan Shaughnessy, **The Curse of the Bambino** 29 (1990).
- <sup>129</sup> James, *supra* note 53 at 91.
- <sup>130</sup> B.R. Sugar, **Baseball's 50 Greatest Games** 177-78 (1986).
- <sup>131</sup> Solomon, *supra* note 72 at 222.
- <sup>132</sup> *Id.* at 225.
- <sup>133</sup> Eliot Asinof, **Eight Men Out** (1963).
- <sup>134</sup> **Eight Men Out** at 5.
- <sup>135</sup> White, *supra* note 8, at 101-02.
- <sup>136</sup> Asinof, *supra* note 133, at 21-22.
- <sup>137</sup> *Id.* at 16-17.
- <sup>138</sup> G.E. White, *supra* note 8, at 105.
- <sup>139</sup> *Id.* at 95-96.
- <sup>140</sup> Solomon, *supra* note 72, at 219-20; Asinof, *supra* note 130, at 14-15.
- <sup>141</sup> Asinof, *supra* note 133, at 13.
- <sup>142</sup> *Id.* at 239 & 270.
- <sup>143</sup> Stephen Jay Gould, "Introduction," Asinof, **Eight Men Out** xviii (1988).
- <sup>144</sup> Sowell, *supra* note 122.
- <sup>145</sup> Sowell, *supra* note 122 at 3.
- <sup>146</sup> *Id.* at 20-21.
- <sup>147</sup> *Id.* at 188.
- <sup>148</sup> *Id.* at 20.
- <sup>149</sup> *Id.* at 197.
- <sup>150</sup> James, *supra* note 54 at 87.
- <sup>151</sup> David Halberstam, **The Summer of '49** at 80-81 (1989).
- <sup>152</sup> James, *supra* note 54 at 129.
- <sup>153</sup> *Compare* Halberstam, *supra* note 151, at 12 with James, *supra* note 54, at 129.
- <sup>154</sup> Halberstam *supra* n. 151.
- <sup>155</sup> Solomon, *supra* note 72, at 494.
- <sup>156</sup> *Id.* at 548.
- <sup>157</sup> Halberstam, *supra* note 151, at 23.
- <sup>158</sup> *Id.* at 150.
- <sup>159</sup> *Id.* at 207.
- <sup>160</sup> *Id.* at 252.
- <sup>161</sup> Ray Robinson, **The Home Run Heard 'Round the World** (1991).
- <sup>162</sup> White, *supra* note 8, at 207.
- <sup>163</sup> *Id.* at 206-07 & 218.
- <sup>164</sup> Sugar, *supra* note 130, at 180.
- <sup>165</sup> *Id.*
- <sup>166</sup> James, *supra* note 54, at 69 & 88; Shaughnessy, *supra* note 128, at 21.
- <sup>167</sup> Sowell, *supra* note 122, at 21-22.
- <sup>168</sup> 259 U.S. at 208.
- <sup>169</sup> 269 F. at 685.
- <sup>170</sup> 259 U.S. at 208.
- <sup>171</sup> 407 U.S. at 287.
- <sup>172</sup> 259 U.S. at 203.
- <sup>173</sup> *Id.*
- <sup>174</sup> *Id.* at 204 (emphasis added).
- <sup>175</sup> *See, e.g., McLain v. Real Estate Bd.*, 444 U.S. 232 (1980).
- <sup>176</sup> White, *supra* note 8, at 81.
- <sup>177</sup> 262 U.S. at 273-274.
- <sup>178</sup> *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (explaining the difference between "jurisdiction," "standing," "cause of action," and "relief").
- <sup>179</sup> 228 U.S. 22 (1913).
- <sup>180</sup> *Id.* at 25-26.
- <sup>181</sup> 262 U.S. at 274.
- <sup>182</sup> *Id.*
- <sup>183</sup> 348 U.S. at 251.
- <sup>184</sup> 407 U.S. at 270 n.10.
- <sup>185</sup> 259 U.S. at 203.
- <sup>186</sup> *Id.* at 209.
- <sup>187</sup> Irving Younger, **Basic Concepts In The Law of Evidence**, Tape No. 11, "Burdens of Proof and Presumptions" (Na-

tional Institute for Trial Advocacy).

<sup>188</sup> G. Edward White, **Justice Oliver Wendell Holmes, Law and the Inner Self**, 424-25 (1993).

<sup>189</sup> Holmes to Pollock (2/24/23), quoted in Richard A. Posner, **The Essential Holmes** at 216-17.

<sup>190</sup> *Hart v. B.F. Keith*, 12 F.2d 341, 344 (2d Cir. 1926).

<sup>191</sup> *Id.* at 343.

<sup>192</sup> 172 F.2d at 408.

<sup>193</sup> *Id.*

<sup>194</sup> *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (“vindication by congressional inaction is a canard”).

<sup>195</sup> 407 U.S. at 283.

<sup>196</sup> Although it is beyond the scope of this article, one historical irony of the baseball “exemption” is the lack of practical impact it has had, in large part due to the labor exemption from the antitrust laws. This is why, from issues of free agency to league organization, the various professional sports have such striking similarities — and why more recent attempts by lower federal courts and state courts to limit the reach of the baseball exemption to the reserve clause have had little practical effect as well. *E.g.*, *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D. Pa. 1993); *Butterworth v. National League of Professional Baseball Clubs*, 664 So. 2d 1021 (Sup. Ct. Fla. 1994).

<sup>197</sup> Allen, *supra* note 23, at 72.

<sup>198</sup> White, *supra* note 8, at 295.

<sup>199</sup> 407 U.S. at 284.

<sup>200</sup> 407 U.S. at 282-285.

<sup>201</sup> Rose family anecdote, as conveyed to the author.

<sup>202</sup> Catherine D. Bowen, **Yankee From Olympus, Justice**

**Holmes and His Family** 128 (1944).

<sup>203</sup> William Paley, **The Principles of Moral and Political Philosophy**, Vol. II, book V, ch. 9 (1785).

<sup>204</sup> White, *supra* note 8.

<sup>205</sup> Allan Bloom, “Political Philosophy and Poetry” (1964), reprinted in **Giants and Dwarfs: Essays 1960-1990** 61 (1990).

### Endnotes (to Author’s Note)

<sup>1</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

<sup>2</sup> J. Abrams, “Congress sends baseball antitrust bill to president” [AP wire story] October 7, 1998.

<sup>3</sup> *E.g.*, S. Ross “Clinton signs bill removing baseball antitrust exemption for labor matters.” [AP Wire story] October 28, 1998.

<sup>4</sup> M. Deibel, “U.S. Deletes Part of Baseball’s Antitrust Status,” Scripps Howard News Service, October 9, 1998.

<sup>5</sup> Statement By the President, MZ Presswire, October 29, 1998.

<sup>6</sup> *Flood v. Kuhn*, 407 U.S. 250 at 270 n.10 quoting H. Seymour, *Baseball* 420 (1971).

<sup>7</sup> Report 104-231, Major League Baseball Reform Act of 1995, S.627, 104th Congress, 2d Sess. (February 6, 1996) at 19 (Sen. Specter) & 26 (Sens. Brown and Feinstein).

<sup>8</sup> T. Boswell “NBA Steals Wrong Play From Baseball,” *Washington Post*, Sports, at C1 (November 6, 1998).

<sup>9</sup> “Baseball’s Exemption: Striking Out?” *Congressional Quarterly Weekly*, August 15, 1998 at 2222.

<sup>10</sup> See, *e.g.*, Report No. 105-118, Curt Flood Act of 1997, S.53, 105th Cong., 1st Sess. at 7 (October 29, 1997) (Congressional Budget Office Cost Estimate) (“If enacted, S.53 would represent an explicit reversal of . . . *Federal Baseball*”).

# Justice Levi Woodbury: A Reputational Study

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Roy M. Mersky\*

Justice Levi Woodbury served on the Supreme Court from 1845 until his death in 1851.<sup>1</sup> Although he was held in high esteem then, his reputation declined dramatically over the years. Today he languishes in obscurity,<sup>2</sup> recalled only by keen Supreme Court buffs. We intend to trace this striking decline and offer ideas that help to explain it, as well as explore some general implications for a better understanding of the Supreme Court. In assessing his reputation, we will briefly examine his career and analyze his jurisprudential impact and his extrajudicial scholarship. We will also examine contemporary descriptions of Woodbury, his obituaries, and relevant legal scholarship about him over time.

Levi Woodbury was born on December 2, 1789, in Francestown, New Hampshire.<sup>3</sup> Evidence of his distinctive style and rising prominence is abundant from his political and legal years in the Granite State. At the time of the War of 1812 he authored **The Hillsborough**

**Resolves**, defending the Madison administration, and thereby displaying independence and moderation in championing this controversial point of view for New England.<sup>4</sup> In 1816 Governor William Plumer appointed the twenty-seven year old Woodbury to New Hampshire's highest court, calling him a "gentleman of talents, science & legal requirements & of an irreproachable character."<sup>5</sup> Although his tenure on the Superior Court of New Hampshire is beyond the scope of this paper, it certainly was characterized by moderation and independence.<sup>6</sup> Indeed, it is pertinent to note that Justice Samuel Bell was so favorably impressed by his younger colleague that he predicted Woodbury's subsequent elevation to the Supreme Court of the United States.<sup>7</sup>

Independence, tempered by moderation, also seemed to characterize Woodbury's gubernatorial career in New Hampshire. In 1823 there was much bitter factionalism within the New Hampshire Democrat-Republican party.

In that year its caucus chose General Samuel Dinsmoor as its candidate for governor. A group of insurgent Democrat-Republicans then held an irregular public convention and selected Levi Woodbury as their nominee. Woodbury won the governorship by a landslide, displaying an ability to unite a coalition of diverse Democrat-Republicans and Federalists.<sup>8</sup>

In his Inaugural Address, he displayed his independence and moderation and advocated an eclectic combination of Democrat-Republican and Federalist principles, including primary education and public higher education, promotion of agriculture, and manufacturing, acceptance of national funds for internal transportation improvements, higher judicial salaries, limited judicial discretion, higher filing fees for litigants, and more exacting standards of quality for jury duty.<sup>9</sup> During his tenure as governor, the factionalism proved too much, even for Woodbury. By trying to bring the feuding parties together, he made himself the partial focus of their animosity and was not re-elected. To his credit, however, Governor Woodbury was able to preserve the Democrat-Republican party against Federalist resurgence and third party movements.<sup>10</sup> The electorate and the political elites duly rewarded him by election to the speakership of the New Hampshire House.<sup>11</sup>

It is also pertinent to note that like his Supreme Court predecessor, Justice Joseph Story, Woodbury was an intellectual who emulated the Ciceronian ideal of the broadly cultured lawyer.<sup>12</sup> Early on he developed numerous cerebral avocations that he pursued throughout his life. He especially enjoyed “[c]ollecting statistical and archaeological information, forming cabinets of specimens in botany, conchology, mineralogy, and other branches of natural science, studying questions connected with engineering, naval architecture, and the application of science to the useful arts generally.”<sup>13</sup> Over the years he wrote and spoke on such diverse topics as public education, science, women’s rights, and religious



**Governor William Plumer (above) appointed Levi Woodbury, then twenty-seven, to the Superior Court of New Hampshire in 1816.**

freedom.<sup>14</sup> In the area of political philosophy, Woodbury delivered lectures such as “Traits of American Character” and “The Right and Duty of Forming Independent Individual Opinions,” while he sat on the Supreme Court.<sup>15</sup> Arguably, these lectures put Woodbury in a class with Abraham Lincoln and Daniel Webster, who were contemporaneously delivering important addresses that continue to be of interest to scholars.<sup>16</sup>

In addition to his state service, Woodbury held a number of federal posts: He was twice elected to the United States Senate from New Hampshire, served as Secretary of the Navy under President Andrew Jackson, and as Secretary of the Treasury under both Jackson and President Martin Van Buren.<sup>17</sup> Indeed, according to a major work edited by Dumas Malone, Jackson valued him for “his calm determination, scholarship, and logic . . .”.<sup>18</sup> During this time, he was a perennial presidential contender and had earned the laudatory nickname “The Rock of New England Democracy.”<sup>19</sup> Woodbury’s contemporary importance is particularly evidenced by the fact that the old Jacksonian establishment, led by former President Martin Van Buren and former Senator Thomas Hart Benton, decided in 1851, just prior to

Woodbury's death, to choose him as their Presidential nominee.<sup>20</sup>

It is indicative of his high legal reputation that Senator Levi Woodbury was selected in 1826 to give the Democratic response opposing a judiciary bill that would have increased the size of the Supreme Court from seven to ten Justices.<sup>21</sup> Woodbury was also chairman of the Senate Commerce Committee, where he undoubtedly gained a valuable perspective on the difficult Commerce Clause issues that he later confronted on the Supreme Court.<sup>22</sup> As Secretary of the Navy, from 1831 to 1834, Woodbury restored efficiency to the Department and evidenced his usual work ethic by personally inspecting all of the nation's military shipyards.<sup>23</sup> While Secretary of the Treasury from 1834 to 1840, Woodbury displayed his characteristic independence as one of the few New Englanders who helped the Jackson and Van Buren administrations close the National Bank and establish an independent treasury system. Woodbury's argument that the National Bank was no longer constitutional, because it failed to meet "necessary and proper" criteria under contemporary conditions, was consistent with his later Supreme Court jurisprudence of positivist strict construction tempered by moderation.<sup>24</sup>

When Justice Story died in September of 1845, President James Polk appointed Woodbury to the Supreme Court in a recess nomination.<sup>25</sup> The Senate confirmed him on January 3, 1846, without a formal vote.<sup>26</sup> In the above context, it is not surprising that his appointment to the Supreme Court brought forth great praise. The *Boston Post*, for example, wrote glowingly that the nominee was "a thorough American statesman and jurist, and a sagacious, sound, and always republican expounder of the Constitution, . . . and above all a faithful and fearless guardian there of the constitutional rights of the States and the people."<sup>27</sup>

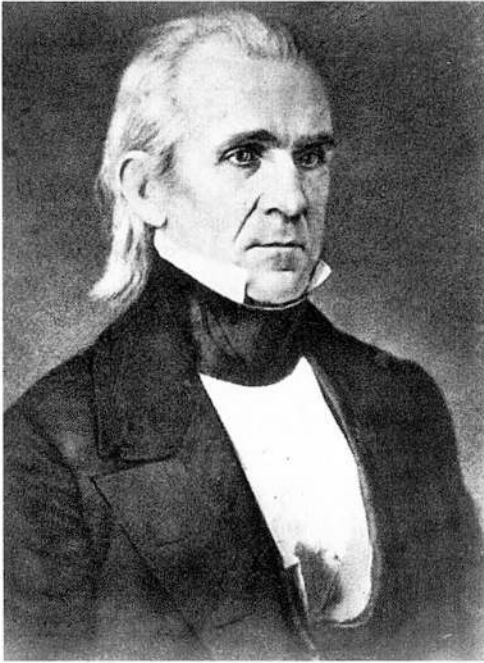
In his brief tenure on the Court, Woodbury authored some very important opinions in the major areas of contemporary

adjudication, including the Contract Clause, the commerce power, slavery, the "Political Question Doctrine," and admiralty jurisdiction. It would appear from his record that he was a leader of the Court, while also evidencing a distinctive and early concern for individual liberties.

In *Zones v. Van Zandt*, the only major decision on the constitutionally contentious issue of slavery during this time, Woodbury, who was only in his second year on the Supreme Court, was assigned to write the opinion for a unanimous Court.<sup>28</sup> Despite his personal opposition to slavery, he upheld the "Fugitive Slave Act of 1793."<sup>29</sup> In a grand jury charge, Justice Woodbury said, "Nor is the question a matter of doubt whether slavery is not generally wrong, since on that point, in New England, there is probably only one opinion."<sup>30</sup> In *Van Zandt*, he held that the Act was not unconstitutional since the Constitution explicitly sanctioned slavery. He also rejected the appellant's claim that a right of property in man violated natural law, if not the Constitution itself, thereby invalidating the Act.<sup>31</sup> Woodbury led with reasoning that clearly stated the legal positivist approach to jurisprudence, writing:

Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the constitution and laws with fidelity to their duties and their oaths. Their path is a strait [sic] and narrow one, to go where that constitution and the laws lead, and not to break both, by 32 traveling without or beyond them.<sup>32</sup>

Contract rights cases were the most frequently litigated cases during Woodbury's tenure. In the eight Contract Clause cases in which he sat, he wrote the Court's opinion in two,

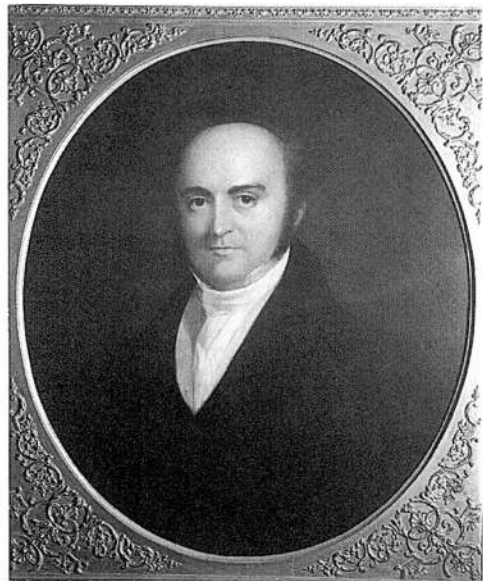


**When President James Polk (above) appointed Levi Woodbury (below) to the Supreme Court in 1846, the reaction of the press was favorable. As Secretary of the Treasury from 1834 to 1840, Woodbury had played a key role in closing the National Bank and in developing an independent treasury system.**

filed written concurrences with the majority in two, and signed the majority opinion without written comment in four.<sup>33</sup> Woodbury displayed his leadership in this area by championing moderate, case-by-case determinations. For example, in *Planters' Bank v. Sharp*, Woodbury showed this characteristic concern for specific facts over general ideology by leading the Court over the dissenting voices of Chief Justice Roger B. Taney and Justice Peter Daniel, who favored a more extreme and doctrinaire states' rights position.<sup>34</sup> Woodbury found that an 1840 Mississippi statute, which forbade a state-chartered bank from transferring notes to other banks, as it had done previously under its charter, impaired the obligation of contract under Article I, Section 10 of the United States Constitution.<sup>35</sup> In finding the State of Mississippi's action a violation of the contract clause, Woodbury was able to carry a majority of the Court with him, and thereby

against the jurisprudential tide of the Jacksonian era. Specifically, such Jacksonian jurisprudence, as exemplified by Taney and Daniel, was often characterized by an antimonopoly, antiprivilege, and somewhat antiproperty cast of mind, whereby state power took priority over contractual obligation.<sup>36</sup> Woodbury ignored such theory and honed in on the concrete particulars; to him, the bank's power to dispose of its notes was a matter of fact inherent in the very definition of a bank, and could only be denied by the express limitation of its banking charter.<sup>37</sup>

Perhaps the most complicated issue frequently presented to the mid-nineteenth century Supreme Court involved the Commerce Clause. The Court was unable to resolve it in the *License Cases* and the *Passenger Cases*,<sup>38</sup> and confusing concurring and dissenting opinions abounded. In the *License Cases* the question before the Court was whether states could regulate the importation of alcoholic beverages from other states and foreign countries. In the *Passenger Cases*, the issue was whether the imposition of a head tax on arriving aliens was a legitimate right of the states. Essentially, the various opinions centered on the nature of the commerce power itself as







**In a series of cases, the Supreme Court debated whether the Commerce Clause intended the national government to retain power over commerce or whether that responsibility should lie primarily with the states. In the *Passenger Cases*, the issue was whether a head tax on arriving aliens, such as these Russian and Polish immigrants sailing into New York harbor, was a legitimate right of the states.**

either exclusively national in origin, or primarily within the control of the several states.<sup>39</sup> Woodbury, in his first commerce clause opinion, a concurrence in the *License Cases*, found in favor of the state power, but started to innovate boldly by defining the problem in terms of the subject matter of regulation rather than the nature of the commerce power itself. He wrote:

I admit, that, so far as regards the uniformity of a regulation reaching to all the States, the grant of commerce power to congress must in these cases, of course, be exclusive. . . . But there is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it. . . . This

local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government . . .<sup>40</sup>

Justice Woodbury's reasoning in his *License Cases* concurrence, finally carried a majority in *Cooley v. Board of Wardens*, decided, shortly after his death, and marks a monumental shift in legal analysis at the Supreme Court. In fact, Woodbury's approach initiates the major movement from abstraction to a common law emphasis on the particulars of context and the modern weighing of competing interests on a case-by-case basis. Professor Archibald Cox believes that in *Cooley* "attention is shifted from a Newtonian focus on the source of an indivisible power to a thoroughly modern, pragmatic concentration . . .". Cox adds: "I have never looked for earlier evidence of this shift in constitutional thinking, but perhaps it is Justice Woodbury's great contribution to the

style of thinking in the U.S. Supreme Court.<sup>42</sup> A search of the case law fails to turn up such evidence, other than Woodbury's opinion, and thus confirms his great pioneering contribution. Nevertheless, it is likely pertinent to Woodbury's future reputational decline that Justice Benjamin Curtis, who wrote *Cooley*, did not appropriately cite Woodbury in this most seminal commerce clause opinion, thereby making it less likely that legal historians would subsequently credit him.

Woodbury displayed his independent, moderate, case-by-case judicial method, as well as a sensitivity to individual liberties that was unusual for his day, in *Luther v. Borden*.<sup>43</sup> On June 25, 1842, a rival reform government in Rhode Island, led by Thomas W. Dorr, tried to seize control of the Rhode Island arsenal held by the regular state government. The latter had been elected pursuant to the original colonial charter, which had not been amended upon statehood. The Dorr Rebellion was thwarted, and the regular charter government placed Rhode Island under martial law, permitting state officers to break into homes and search them.<sup>44</sup> Chief Justice Taney, in his opinion for the Court, held that the issue of which state government was legitimate was a political question and was therefore outside the Court's jurisdiction. Taney did not reach the constitutional question of the martial law declaration.<sup>45</sup> Justice Woodbury, who agreed with Taney on the political question doctrine, was the lone voice of dissent. Specifically, he found the Rhode Island statute declaring martial law to be unconstitutional.<sup>46</sup> In an opinion that is precursive in its concern for individual liberties, Woodbury wrote of the statute:

It exposed the whole population . . . to be seized, without warrant or oath, and their houses broken open and rifled. . . . By it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with, a

rope around his neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial

As noted above, Justice Woodbury wrote and lectured extrajudicially on various scholarly topics. Such scholarship was unusual in its day. Of those men who served with Woodbury, including Chief Justice Taney and Justices Daniel, John McKinley, John Catron, James Moore Wayne, John McLean, Samuel Nelson, and Robert Grier, only Taney and McLean evidence extrajudicial work product of any sort.<sup>48</sup> With the exception of a short biographical essay, published posthumously, Taney's writings consist of a privately reprinted judicial opinion, and some private letters published after his death.<sup>49</sup> McLean was also a letter writer; his private letters were published posthumously.<sup>50</sup>

The contents of Justice Woodbury's lectures and extrajudicial writings, which can only be accessed in rare book collections or on microfiche, truly distinguish him from his peers. Specifically, Woodbury researched and articulated concerns regarding the relationship between the individual's liberties and the state with particular reference to First Amendment freedoms, in an era when such topics were not often considered.<sup>51</sup> As Robert McCloskey described it, the Court was then centrally occupied with the nation-state relationship; in the post-Civil War era constitutional law became primarily concerned with the business-government relationship; and only after 1937 did the Justices evidence great interest in the relationship of the individual and his rights with the government.<sup>52</sup>

Characteristic of Justice Woodbury on the subject is the following, which, although displaying an unusual concern for the Taney era, is an eloquent precursor of twentieth-century constitutional preoccupation:

Liberty here [in the U.S.] also is not

partial in her influence, but a pervading principle, that electrifies everything. It is liberty of conscience and of occupation in social life as well as of government. It is not only liberty of *thought* concerning religion or public affairs, which is contended for, and which it is difficult in any country, however desired by tyranny, to overawe or suppress, — but it is liberty of speech and the press, the unlicensed printing (untrammelled by censorships) such as was advocated by that sturdy republican, Milton. It submits to no restraints but those which should control all conduct in civil life, — the moral impropriety of doing wrong, and the legal liability to atone for it after committed. It is likewise liberty of action in all things not conflicting with the previous rights of others, — running through every ramification of society, secular or ecclesiastical, public or private.<sup>53</sup>

With respect to judicial reputation, Woodbury quickly gained the highest approbation for his work on the Supreme Court. The *Boston Post's* Washington correspondent wrote in February 1846:

Judge Woodbury is taking a commanding position on the Bench which he dignifies and adorns, and the duties and details of which seem as familiar to him as if he had devoted his whole life to them. He had delivered several opinions, this Term, distinguished for ability, clearness and sound law which have elicited warm commendations from all quarters.<sup>54</sup>

One indication of Justice Woodbury's popularity with his peers is the admiration expressed in obituaries, following his Septem-

ber 4, 1851, death at age sixty-one. At the opening of the Supreme Court, shortly after Woodbury's death, Attorney General John J. Crittenden, Chief Justice Taney, and official representatives of the Bar eulogized him in glowing terms.<sup>55</sup> Crittenden remarked, ironically as it happens, in light of Woodbury's later plunge into obscurity: "He has fallen in the midst of his earthly honors; he has fallen as all of us must fall, and left with us only his fame, which is immortal."<sup>56</sup>

At the request of the city government of Portsmouth in New Hampshire, a eulogy for Justice Woodbury was composed by the prominent Jacksonian legal figure Robert Rantoul, Jr.<sup>57</sup> Rantoul was a well-known reformer and the United States attorney for Massachusetts.<sup>58</sup> Although he was personally close to Woodbury, he strongly supported Van Buren for President in 1843, and was characteristically independent of mind.<sup>59</sup> He wrote of Woodbury's tenure on the Supreme Court:

We saw with astonishment, that he had no sooner taken his seat on the bench than he handled the abstruse distinctions of the law of patents, the metaphysics of legal science, like an old practitioner. Through the vast compass of the questions originating in our widespread navigation, and diversified commercial interests, he was equally at home; while to the administration of constitutional law, and the examination of cases involving the structure of the executive machinery of the government, and its action in any of its subordinate branches, he brought an experience, which no other judge of that Court had ever enjoyed . . .<sup>60</sup>

Rantoul referred to Woodbury's as "the prophetic eye of genius," and ironically stated that although the Justice was now in his tomb he would be "leaving behind him a memory



**When Thomas W. Dorr led an attempt to establish a rival reform government in Rhode Island in 1842, he and his supporters tried unsuccessfully to seize the state government's arsenal. Dorr's case eventually came before the Supreme Court, and Chief Justice Taney held that the issue of which state government was legitimate was a political issue and outside the Supreme Court's jurisdiction. Justice Woodbury dissented, however, because he found Rhode Island's reliance on the imposition of martial law to squelch the rebellion to be unconstitutional.**

embalmed in the respect and affection of his fellow-men and the gratitude of his country."<sup>61</sup>

Another obituary was more tempered in its praise. It appeared in the *New York Tribune*, run by the very partisan Horace Greeley, who frequently stood on the opposite side of the political fence from Woodbury.<sup>62</sup> In fact, one can perceive the seeds of some later criticism of Justice Woodbury:

*Although greatly differing from him on vital points of national politics, we can not fail to recognize the energy of mind and steadfastness of character which gave him a high place*

in the counsels of the party to which he was attached, and which will cause his name to be remembered in the political history of our country . . . . Without possessing the highest order of intellect, Judge Woodbury had a large share of native shrewdness and unflinching quickness of political forecast, a very retentive memory, and a more than common power of logical reasoning . . . . *His style of writing was turgid and obscure, doing little justice to his acknowledged clearness of intellect.* (Emphasis added).<sup>63</sup>

It is interesting to note the explicit criticism of Justice Woodbury's writing style, which seems to be the main comment about Woodbury in many of today's accounts (see text below). It is also significant that the *Tribune*, as a leading abolitionist newspaper, acknowledged its political differences with Woodbury.<sup>64</sup> It would appear that Woodbury's positivist jurisprudence, as applied to the slavery issues of his time, was a significant, if not always explicit, factor in the decline of his reputation over the years.

Reflective histories of Justice Woodbury's tenure on the Court, years after his death, indicate a renewed respect for his judicial contribution. In 1894, Charles Bell published his invaluable reference work *The Bench and The Bar of New Hampshire*.<sup>65</sup> The sketch of Woodbury shows that he was still held in high esteem. Most significantly, Bell wrote, "The mental characteristics of Judge Woodbury fitted him peculiarly to administer the law."

His calmness and poise, never stirred by feeling or bias; his even-tempered patience and desire to do exact justice; his thoroughness, and determination to go to the bottom of the case before him, - these were qualities not only to make him a model judge, but

also, which is perhaps next in importance, to be recognized as such by the community, and gave him his firm hold upon their confidence.<sup>66</sup>

Charles Warren, who in his 1922 classic **The Supreme Court in United States History** evidenced high regard for Woodbury as a judge, quoted earlier laudatory descriptions,<sup>67</sup> and only displayed reservations about his writing style. For example, Warren quoted a roughly contemporary source published shortly after Woodbury's death:

He [Woodbury] has great talent for research, and his opinions are crowded with its results. As a reasoner, he is cogent and accurate but not concise . . . His decisions would be the better for pruning and thinning, but the growth is deeprooted and vigorous.<sup>68</sup>

Furthermore, Warren accurately gave Woodbury credit for first developing the Commerce Clause "*Cooley Doctrine*," discussed above: "The doctrine, so laid down [by Justice Curtis] for the control of commerce was really the adoption of a rule first stated by a strong Democrat, Judge Woodbury, in the *Passenger Cases*."<sup>69</sup>

As we approach the present, mention of Woodbury in the literature becomes much more brief and negative and often centers on his writing style. For example, in his 1964 biography of Woodbury's colleague, Justice Daniel, John Frank said of Daniel's weak style: "at his worst he was not as bad as Woodbury."<sup>70</sup>

Professor Carl B. Swisher, in his Holmes Devise volume, **The Taney Period 1836-64** published in 1974, sums up Woodbury's professional work with a quotation that originated in Greeley's *New York Tribune* obituary of the Justice:<sup>71</sup> "His style of writing was turgid and obscure, doing little justice to his acknowledged clearness of intellect."<sup>72</sup> Swisher then

adds, in his own words, that Woodbury's ". . . judicial opinions were often enormously long."<sup>73</sup> Swisher does at least hint at Woodbury's influence in the seminal *Cooley* case by stating ". . . on the subject of the commerce power Justice Curtis' position resembled that of Justice Woodbury as expressed in the *License Cases*. . . ."<sup>74</sup>

Professor David P. Currie in his **The Constitution in the Supreme Court: The First Hundred Years 1789-1880**, quickly dismissed Woodbury in the following manner: "Woodbury stayed only briefly and had little impact; he was unusually long-winded and relatively state-oriented in admiralty and contract cases."<sup>75</sup>

In **The Oxford Companion to the Supreme Court of the United States**, published in 1992, it is interesting to note that Woodbury's opinions in *Jones v. Van Zandt* and even in the *Passenger Cases* are ascribed to an enthusiasm for slavery, which the record does not support.<sup>76</sup> Woodbury's seminal contribution to the *Cooley Doctrine* is not mentioned. The relatively short entry concludes that Woodbury "possessed an acute legal mind, but his brief tenure and his tendency to write overly long, convoluted opinions, compromised his sojourn on the Supreme Court."<sup>77</sup>

Professor Bernard Schwartz reached much the same conclusion in his 1993 volume, **Main Currents in American Legal Thought**:

Yet most of the outstanding judges toward mid-century were, like Story, holdovers from an earlier period. As they left *the bench*, they were replaced by men plainly not of the same caliber, e.g., the replacement of Story himself by Levi Woodbury in 1845. Except for Taney and Benjamin R. Curtis, almost no one elevated to the bench between Marshall's death and the Civil War comes to mind as having made any

*real contribution to jurisprudence.*<sup>78</sup>  
(Emphasis added).

In present-day legal culture, the law review has become the most influential medium for the legal scholar. With the exception of the recent study by one of the present authors and his colleagues, not a single law review article about Levi Woodbury or his jurisprudence has appeared.<sup>79</sup> It is significant that Professor Robert M. Spector, in a 1967 article on judicial biography in the *American Journal of Legal History*, mentioned Woodbury as an overlooked justice who is particularly worthy of biographical treatment. He wrote: "The source material is extensive on Woodbury, and he is deserving (and capable of) a solid biography."<sup>80</sup>

Thus we see Levi Woodbury's judicial reputation progress from contemporary eminence to present-day obscurity. It is clear from the evidence that his short tenure on the Supreme Court did not work in favor of a longlasting fame. In addition, it is evident that Woodbury's dense and inelegant writing style as much as anything else has harmed his reputation over the years. Perhaps with the passage of time, many law students, and possibly some lawyers and legal scholars, have been daunted from even a cursory read of such turgid nineteenth-century prose.

Lurking beneath the surface in the abolitionist *New York Tribune* obituary, but becoming more explicit later on, is the pro-slavery characterization of Levi Woodbury. The fact that Woodbury, as a legal positivist, upheld laws that were conducive to slavery, does not help his reputation in a modern society that rejects all indicia of that evil institution. It is relevant that Woodbury's successor, Justice Benjamin Curtis, spent nearly the same short time on the Supreme Court and apparently adopted Woodbury's reasoning when writing his *Cooley* opinion,<sup>81</sup> but nevertheless has a very high modern reputation, and has even been rated as "near great," compared to Woodbury's "average," in a major poll of legal scholars.<sup>82</sup>

The main distinction seems to be that Curtis dissented in the infamous pro-slavery opinion in *Dred Scott v. Sandford*.<sup>83</sup>

Similarly, Justices Wiley Rutledge and Abe Fortas served relatively short terms on the Court—six and four years, respectively. Both of these men, like Curtis, but unlike Woodbury, have been rated as "near greats" in the Blaustein and Mersky surveys.<sup>84</sup> The key again seems to be the liberal opinions these "near greats" have authored and the high value of such in today's legal culture.<sup>85</sup> In this regard, Professor Laura Kalman, a lawyer, historian, and self-described political and legal liberal,<sup>86</sup> writes revealingly of Fortas, the subject of her own very favorable biography:<sup>87</sup>

Fortas sometimes wrote draft opinions without legal citations in them, then ordered his clerks to 'decorate' them with the appropriate legalese. That did not mean that Fortas knew the supporting law was there. It meant that he considered law indeterminate and did not care about it much at all. In his hands, realism licensed crude instrumentalism. As one of Fortas' biographers, I found his cavalier attitude toward the rule of law surprising. Since I usually liked the results he reached and since historians explain more than they diagnose, however, his approach and the Warren Court's activism posed no political or professional problems for me.<sup>88</sup>

Indeed, with respect to the post-1937 Court, and especially the Warren era, the liberal legal and political establishment was so enamored of judicial results that "no one cared" that the Court's use of history was at times "inept and perverted."<sup>89</sup>

Chief Justice John Marshall, who has enjoyed much continuing coverage and high esteem from many of today's scholars is a special case, because the ease of misinterpreting

his jurisprudence has obviated the need to ignore him like Woodbury. Specifically, Marshall's subtle judicial method, combined with his holdings in favor of strong central government, have made him easy prey for the legal liberals. They have served their cause by misconstruing this early nineteenth century judge in their own twentieth-century image, as a results-oriented, big-government thinker.<sup>90</sup> They thusly describe Marshall as a jurist motivated by belief in a strong federal government, who fashioned "his interpretation of legal rules to fit a substantive outcome that he desired," and who was primarily concerned with reaching constitutional conclusions "to suit the political ends that he cherished."<sup>91</sup> In fact, Charles Hobson, who has served as editor of the John Marshall Papers for nearly two decades, has persuasively shown the Great Chief Justice to be a principled, although subtle, analogical legal thinker, who was not especially concerned about substantive outcomes, big government ones or otherwise.<sup>92</sup>

It is relevant here that Professor Carl Swisher has identified a type of reputational phenomenon based on the popularity of outcomes in political culture, as generally pertinent to Supreme Court Justices:



**Former President Martin Van Buren (below) and former Senator Thomas Hart Benton (above) decided to choose Woodbury as their presidential nominee in 1851, just prior to the Justice's death. Woodbury had previously served as Secretary of the Treasury under Van Buren.**

The favorable or unfavorable verdict which history renders with respect to a member of the Supreme Court, or perchance its complete neglect of him, may depend upon his possession of, and his instinctive surrender to, an intuitive perception of trends in the law which will receive majority approval in the years to come. History, in other words, rewards and punishes judges like men in other walks of life not only for their brilliance, their industry, and their integrity but for being right or wrong with right and wrong being determined by the code of the age of the historian. Here, as in other fields furthermore, a single act of "sinfulness" may cloak with obscurity a thick catalog of good deeds.<sup>93</sup>



There is a somewhat disturbing trend toward reevaluating literary and historical figures according to contemporary political and social standards, while ignoring their historical context. The authors believe that Justice Woodbury may be, in part, a victim of this trend, as well as of some scholars' tendency to repeat published assessments rather than examine primary sources. The fact that Justice Woodbury checked his personal opposition to slavery at the courthouse door in the interest of legal positivism should not deter us from studying and understanding, if not admiring, the life and thought of this very influential Justice.

This is especially important because the biographical approach to Woodbury, or any Justice, has implications far beyond the story of one judge's interesting or lackluster career. John Frank accurately observed that "the judge's biography is a peephole into an era."<sup>94</sup>

The tendency among scholars has been to concentrate their biographical work on a few justices such as Marshall, Holmes, Brandeis, Black, Douglas, and Thurgood Marshall whose careers are congenial to the aforementioned trend toward reevaluation regarding "correct" outcomes, to the relative exclusion of a Justice like Woodbury.<sup>95</sup> This has resulted in major gaps in our understanding of the Supreme Court and constitutional law. Indeed, Professor Schwartz, in his assertion (above) regarding the dearth of jurisprudential contributions between Marshall's death and the Civil War, epitomizes this problem.<sup>96</sup>

This brief analysis of Woodbury's life, his jurisprudential influence, including his anticipation of future constitutional concerns, the singularity and prescience of his extrajudicial scholarship, and his general impact on contemporaries, would seem to indicate that he was a Justice of at least "near great" proportions.<sup>97</sup> He is therefore worthy of careful attention, in his own right, by scholars and practitioners. The fact that his jurisprudence (or its results) does not always comport with our current trends in outcome-"correctness," that

his writing style was somewhat dense, or that he was not explicitly credited in *Cooley*, and therefore not adequately covered in subsequent secondary sources, should no longer deter us. Furthermore, Justice Woodbury's present-day reputational obscurity is necessarily an indicator of a broader obscurity that dims our knowledge and understanding of a whole era in Supreme Court jurisprudence. If we are truly to appreciate Supreme Court history and its implications — good or bad — for today's jurisprudence, we must aggressively pursue primary sources in the study of obscure, but important, Justices like Levi Woodbury.

*\*Authors' Note: The authors especially wish to thank Justice Ruth Bader Ginsburg for her singular wisdom and her generosity in reading and commenting on drafts of this piece. The authors also want to thank many others for their comments and suggestions: Professor Henry J. Abraham, the University of Virginia; Professor Archibald Cox, Harvard Law School; John P. Frank, Esq., Lewis & Roca (Phoenix, Arizona); Professor Gerald Gunther, Stanford Law School; Pearl Gong-Bader, M.D.; Professor R. Kent Newmyer of the University of Connecticut; Professors H. Douglas Laycock, Sanford V. Levinson, L.A. (Scot) Powe, Jr., David M. Rabban, and Teresa R. Leclercq, The University of Texas School of Law; and Gwyn Anderson, Adrienne Diehr, David Gunn, Keith Stiverson, and Michael Widener, The University of Texas Jmail Center Legal Research.*

*The authors, however, are solely responsible for all the opinions expressed in this article.*

## Endnotes

<sup>1</sup> William D. Bader, Henry J. Abraham, James B. Staab, "The Jurisprudence of Levi Woodbury," 18 *Vermont Law Review* 261 (1994).

<sup>2</sup> See *Id.* at 261-312.

<sup>3</sup> Frank O. Gatell, "Levi Woodbury," in 2 *The Justices of the United States Supreme Court 1789-1978: Their Lives*



and **Major Opinions**, (Leon Friedman and Fred L. Israel eds.) (New York: Chelsea House, 1980) 843.

<sup>4</sup> Vincent J. Capowski, "The Making of a Jacksonian Democrat: Levi Woodbury, 1789-1831" (1966) (unpublished Ph.D. dissertation, Fordham University) 33.

<sup>5</sup> *Supra* note 3, at 844.

<sup>6</sup> See *Supra* note 1, at 267-276.

<sup>7</sup> Charles H. Bell, **The Bench and Bar of New Hampshire** (Cambridge, MA: The Riverside Press, 1894) 82.

<sup>8</sup> *Supra* note 4, at 125-128.

<sup>9</sup> Levi Woodbury, "Message to the Legislature of New Hampshire," in 1 **Writings of Levi Woodbury** (Charles Woodbury ed.) (Boston: Little, Brown & Co., 1852) 463.

<sup>10</sup> *Supra* note 4 at 161-167, 176.

<sup>11</sup> See at 176, 184.

<sup>12</sup> Robert A. Ferguson, **Law and Letters in American Culture** (Cambridge, MA: Harvard University Press, 1984) 65; on the influence of Cicero's classical scholarship and life on early American legal culture in general, 74-76.

<sup>13</sup> Hon. Robert Rantoul, Jr., **Eulogy on the Hon. Levi Woodbury** (Portsmouth, N.H.: C. W. Brewster & Son, 1852) 38.

<sup>14</sup> See generally, **Writings of Levi Woodbury, LL.D.: Political, Judicial and Literary** Vols. 1 and 3, (Charles L. Woodbury ed.) (Boston: Little, Brown & Co., 1852).

<sup>15</sup> See at Vol. 3 217-33, 233-47.

<sup>16</sup> *Supra* note 12, at 305-317, 213-240; letter from Professor Sanford Levinson of the University of Texas at Austin School of Law to the authors, October 7, 1997, 1, on file with the authors.

<sup>17</sup> *Supra* note 1, at 265.

<sup>18</sup> William E. Smith, "Levi Woodbury" in Dumas Malone, ed., **Dictionary of American Biography**, (New York: Charles Scribner's Sons, 1936) Vol. XX, 488.

<sup>19</sup> *Supra* note 1, at 265-266, Letter from Thomas Hart Benton to Isaac O. Barnes (September 29, 1851).

<sup>20</sup> Arthur M. Schlesinger, Jr. **The Age of Jackson** (Boston: Little, Brown and Company, 1945) 473-474.

<sup>21</sup> Levi Woodbury, "Judiciary of the United States," in 1 **Writings of Levi Woodbury**, at 41, 42.

<sup>22</sup> *Supra* note 1, at 281.

<sup>23</sup> Charles L. Woodbury, "Levi Woodbury," in 1 **Memorial Biographies of the New England Historic Genealogical Society** (Boston: University Press, 1880) 295, 303.

<sup>24</sup> H. R. Exec. Doc. No. 27, 23d Cong., 2d Sess. (1834).

<sup>25</sup> *Supra* note 3, at 845, 850.

<sup>26</sup> *Supra* note 1, at 285.

<sup>27</sup> Charles Warren, 2 **The Supreme Court in United States History**, rev. ed., (Boston: Little, Brown & Co., 1926) 145 (quoting *Boston Post*, September 13, 1845).

<sup>28</sup> 46 U. S. (5 How.) 215 (1847).

<sup>29</sup> *Id.*; Levi Woodbury, "Charge on the Slavery Question," in 2 **Writings of Levi Woodbury**, at 356.

<sup>30</sup> *Id.*

<sup>31</sup> *Supra* note 28.

<sup>32</sup> *Id.* at 231.

<sup>33</sup> *Planters' Bank v. Sharp*, 47 U.S. (6 How.) 301 (1848); *East Hartford v. Hartford Bridge Co.*, 51 U.S. (10 How.) 51 (1851); *Cook v. Moffat*, 46 U.S. (5 How.) 295 (1847) (Woodbury, J., concurring); *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (Woodbury, J., concurring); *Butler v. Pennsylvania*, 51 U. S. (10 How.) 402 (1851); *Townsend v. Jemison*, 50 U.S. (9 How.) 407 (1851); *Woodruff v. Trapnell*, 51 U.S. (10 How.) 190 (1850); *Baltimore & S.R.R. v. Nesbit*, 51 U.S. (10 How.) 395 (1851).

<sup>34</sup> 47 U.S. (6 How.) 301 (1848).

<sup>35</sup> *Id.*

<sup>36</sup> Milton Cantor, "The Taney Court and Era," in 1 **Encyclopedia of the American Judicial System**, Robert J. Janosik, ed., (N.Y.: Charles Scribner's Sons, 1987), 61-62.

<sup>37</sup> *Supra* note 34, at 322.

<sup>38</sup> 46 U.S. (5 How.) 504 (1847); 48 U.S. (7 How.) 283 (1849).

<sup>39</sup> *Id.*

<sup>40</sup> 46 U.S. (5 How.) at 624 (Woodbury, Jr. concurring).

<sup>41</sup> 53 U.S. (12 How.) 299 (1852).

<sup>42</sup> Letter from Professor Archibald Cox of Harvard Law School to William D. Bader, Esq., February 10, 1997, on file with William D. Bader, Esq.

<sup>43</sup> 48 U.S. (7 How.) 1 (1849).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 46-47; *Id.* at 45.

<sup>46</sup> *Id.* at 68.

<sup>47</sup> *Id.* at 62.

<sup>48</sup> Fenton S. Martin and Robert U. Goehlert, **The U.S. Supreme Court: A Bibliography** (Washington, D.C.: Congressional Quarterly, 1990) vii-x.

<sup>49</sup> Taney, "Chief Justice Taney," 7 *Albany Law Journal* (January 4, 1873); Taney, Decision in the Merryman Case Upon the Writ of Habeas Corpus (Philadelphia: John Campbell, 1862); Taney, "An Unpublished Letter by Roger B. Taney" 32 *Maryland Historical Magazine* (1937) 32: 225-227; Taney, "Letter of Chief Justice Taney" 12 *Maryland Historical Society Proceedings* (1873): 445-447; see also Samuel Tyler, **Memoir of Roger Brooke Taney, LL.D.** (Baltimore: John Murphy & Co., 1872) 17-95.

<sup>50</sup> John McLean, Letters of John McLean to John Teesdale, William Salter, ed., (Oberlin, OH: Bibliotheca Sacra, 1899).

<sup>51</sup> *Supra* note 14, at vol. 3, 191-247. Woodbury, as a Justice whose judicial reputation, has completely waned, has apparently not generated enough interest to make his extrajudicial work more accessible. This inaccessibility has, of course, only compounded his judicial obscurity.

<sup>52</sup> Robert G. McCloskey, **The American Supreme Court** (Chicago: University of Chicago Press, 1960) 103-104, 181.

<sup>53</sup> *Supra* note 14, at vol. 3, 218.

<sup>54</sup> *Supra* note 27, at 226, n. 2, quoting from *Boston Post*, February 3, 1846.

<sup>55</sup> "Proceedings in Relation to the Death of Judge Woodbury," 53 U.S. (12 How.) iii, (1851); Crittenden, a Ken-

tucky Whig, who supported compromise on slavery, served as U.S. Attorney General (1841, 1850-1853) and U.S. Senator (1817-1819, 1835-1841, 1842-1848, 1855-1861). In 1828 he was nominated by a lame duck President, John Quincy Adams, for the Supreme Court of the United States, but the Democratic Senate killed the appointment. **Encyclopedia of the American Constitution**, Leonard Levy, Kenneth Karst, Dennis Mahoney, eds. (N.Y.: MacMillan Publishing Co., 1986), Vol. 2, 523.

<sup>56</sup> *Id.*

<sup>57</sup> *Supra* note 13.

<sup>58</sup> Dumas Malone, editor, **Dictionary of American Biography** (New York: Charles Scribner's Sons, 1935) Vol. XV, 381-382.

<sup>59</sup> Donald B. Cole, **Jacksonian Democracy in New Hampshire 1800-1851** (Cambridge: Harvard University Press, 1970) 236.

<sup>60</sup> *Supra* note 13, at 30-31.

<sup>61</sup> *Id.* at 35, at 33.

<sup>62</sup> "Greeley stamped it [*The New York Tribune*] with his individual and then highly radical views," *supra* note 61, at Vol. VII, 529. Specifically, these views were of the extreme abolitionist variety. *Supra* note 61, at Vol. VII, 530.

<sup>63</sup> "Death of Judge Woodbury," *New York Tribune*, September 6, 1851, at 1.

<sup>64</sup> *Supra* note 62.

<sup>65</sup> *Supra* note 7.

<sup>66</sup> *Id.* at 83.

<sup>67</sup> *Supra* note 54.

<sup>68</sup> *Supra* note 27, at Vol. II, 203.

<sup>69</sup> *Id.* at 238; see *The Passenger Cases*, 48 U.S. (7 How.) 283 at 557-559 (Woodbury, J., dissenting).

<sup>70</sup> John P. Frank, **Justice Daniel Dissenting** (Cambridge: Harvard University Press, 1964) 274.

<sup>71</sup> Carl B. Swisher, **Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period 1836-64** (N.Y.: Macmillan Publishing Co., Inc., 1974).

<sup>72</sup> *Id.* at p. 237.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 405.

<sup>75</sup> David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789-1888** (Chicago: University of Chicago Press, 1985) 280.

<sup>76</sup> Robert M. Ireland, "Levi Woodbury" in **The Oxford Companion to the Supreme Court of the United States** Kermit Hall, ed., (N.Y.: Oxford University Press, 1992) 937.

<sup>77</sup> *Id.*

<sup>78</sup> Bernard Schwartz, **Main Currents in American Legal Thought** (Durham: Carolina Academic Press, 1993) 199.

<sup>79</sup> George S. Grossman, ed., **Legal Research: Historical Foundations of the Electronic Age** (N.Y.: Oxford University Press, 1994) 289, 300; *Supra* note 1.

<sup>80</sup> Robert M. Spector, "Judicial Biography and the United States Supreme Court," 11 *American Journal of Legal History*, 1, 13 (1967).

<sup>81</sup> *Supra* note 41.

<sup>82</sup> Albert P. Blaustein and Roy M. Mersky, **The First One Hundred Justices** (Hamden, CT: Archon Books, 1978) 37-38.

<sup>83</sup> 60 U.S. 9 How. 393 (1857).

<sup>84</sup> *Supra* note 86.

<sup>85</sup> See generally, Laura Kalman, **The Strange Career of Legal Liberalism** (New Haven: Yale University Press, 1996).

<sup>86</sup> *Id.* at 9 and 231.

<sup>87</sup> Laura Kalman, **Abe Fortas: A Biography** (New Haven: Yale University Press, 1990).

<sup>88</sup> *Supra* note 85, at 46.

<sup>89</sup> *Id.* at 70; *Id.* at 70 quoting Charles A. Miller, **The Supreme Court and the Uses of History** (Cambridge, MA: Harvard University Press, 1969) 6.

<sup>90</sup> See, for example, Thomas C. Shevory, **John Marshall's Law: Interpretation, Ideology, and Interest** (Westport, CT: Greenwood Press, 1994); William M. Wiecek, **Liberty Under Law: The Supreme Court in American Life** (Baltimore: Johns Hopkins University Press, 1988) 32-33; David P. Currie, **The Constitution in the Supreme Court: The First Hundred Years, 1789-1888** (Chicago: University of Chicago Press, 1985) 89, 196.

<sup>91</sup> *Id.* Shevory at 147 and 52.

<sup>92</sup> See generally, Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence, KN: University Press of Kansas, 1996).

<sup>93</sup> Carl B. Swisher, "The Judge in Historical Perspective," 24 *Indiana Law Journal* 381, 382 (1949).

<sup>94</sup> John P. Frank, "Ingredients of Judicial Biography," 24 *Indiana Law Journal* 374, 375 (1949).

<sup>95</sup> E.g., G. Edward White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations," 70 *New York University Law Review*, 576-621 (1995); Felix Frankfurter wrote: "About most of the Justices we have only mortuary estimates" quoted in Charles Fairman, "The Writing of Judicial Biography -- A Symposium," 24 *Indiana Law Journal*, 363, 367 (1949).

<sup>96</sup> *Supra* note 78.

<sup>97</sup> *Supra* note 82.

# Beyond the Bottom Line: The Value of Judicial Biography

Melvin I. Urofsky

**There is properly no history; only  
biography.**

—Walt Whitman

The market in judicial biography appears to be booming, and in recent years we have witnessed not only the publication of long-awaited biographies of Learned Hand and Hugo L. Black,<sup>1</sup> but also impressive studies of the first John Marshall Harlan, Abe Fortas, Thurgood Marshall, and Lewis F. Powell.<sup>2</sup> The interest in Holmes and Brandeis,<sup>3</sup> despite the already extensive bookshelf space devoted to them, seems to increase rather than wane. The promised study of William J. Brennan, Jr., by Stephen J. Wermiel, is eagerly anticipated by legal scholars. Even current members of the Supreme Court of the United States are the subject of biographical studies.<sup>4</sup>

Why so much activity in this area at this time? There have always been studies of particular judges in relation to particular cases or

doctrines; one can hardly pick up a copy of any law review without finding a study of “Justice X and the Development of the Law on Y.” Moreover, studies of particular Justices have been around for much of this century, starting with the hagiographic multivolume **The Life of John Marshall** by Albert J. Beveridge.<sup>5</sup> Then in 1946 modern judicial biography began when Alpheus Thomas Mason published **Brandeis: A Free Man’s Life**, and followed that up with studies of William Howard Taft and Harlan Fiske Stone.<sup>6</sup>

There are several reasons for the exponential increase in the number of judicial biographies. Biography and autobiography have always been popular forms of writing; the public seems to want to know as much as possible about the powerful and famous, as witnessed by the recent best-selling status of Katherine Graham’s memoirs.<sup>7</sup> Judges, however, have always been a reticent bunch, and we do not get much in the way of published reminiscence

from them. Stephen J. Field did publish a memoir, but it dealt with his years in gold-rush California and not with his tenure on the High Court.<sup>8</sup> Charles Evans Hughes left a biographical fragment in his manuscripts that was not published until many years after his death.<sup>9</sup> In fact, the only Justice to discuss somewhat openly his years on the Supreme Court, including his colleagues and important cases, has been the maverick William O. Douglas.<sup>10</sup> While the volumes sold well, his colleagues on the Bench frowned on the enterprise.

A second reason for the growth in interest is that the American people, especially since 1937, are far more aware of the importance of the Court's rulings in their lives as well as how individual Justices can affect those decisions. The story of Earl Warren pa-

tiently securing unanimity in *Brown v. Board of Education* (1954) is well-known, and a perfect illustration of how individual Justices can affect the nation's affairs. Moreover, because of decisions like *Brown*, *Roe v. Wade*, and the apportionment cases, we no longer consider the judiciary a less significant player than the executive and the legislature in shaping the nation's history.

From a scholar's viewpoint, perhaps the most important reason for the rise in judicial biography is the material with which we now work. There are no major paper collections for the Justices of the eighteenth and nineteenth centuries, perhaps in part because they believed the inner workings of the Court should not be open to public scrutiny, that the work of the Court should be found in, and only



**In Alpheus Thomas Mason's** *Harlan Fiske Stone: Pillar of Law*, published in 1956, the inner workings of the Stone Court—including the fractious battles between Justices Hugo L. Black, William O. Douglas, and Felix Frankfurter—are laid bare. Distressed by Mason's depiction, Justice Frankfurter (pictured with his wife, Marion) felt vindicated for having prevented Mason from using Justice Louis D. Brandeis' papers for an earlier biography of Frankfurter's colleague and friend.

in, its published opinions. Then came Holmes and Brandeis, whose papers, especially the latter's, opened a window into the inner sanctum. Of course, thanks to Felix Frankfurter, these collections did not become available until the 1980s, but the glimpses scholars received in Mark DeWolfe Howe's biographical volumes of the younger Holmes,<sup>11</sup> and the analysis of Brandeis' unpublished opinions by Alexander Bickel,<sup>12</sup> whetted the appetites of the academic community.

Alpheus Thomas Mason, whom Brandeis chose to write his biography, had access to the vast array of pre-Court papers deposited in the University of Louisville Law Library. But Frankfurter, who objected to Mason (for reasons that are far from clear<sup>13</sup>), prevented Mason from using the Court papers that Brandeis, at Frankfurter's urging, had deposited at the Harvard Law School under Frankfurter's control. As a result, Mason's **Brandeis**, while quite strong up through the Court fight, is fairly pedestrian in its coverage of the Court years. One can see the reformer at work in Mason's early chapters, but only the public face, the U.S. Reports face, in that part of the book devoted to Brandeis' tenure on the Bench.

We get quite a different story with Mason's **Harlan Fiske Stone: Pillar of the Law**, published in 1956. Frankfurter, then still a member of the Court, attacked the work and saw it as a justification for having kept Mason out of the Brandeis materials. With access to the docket files, the internal memoranda, and Stone's personal correspondence, Mason reconstructed the inner workings of the Court during Stone's tenure, including the fractious years when he occupied the center chair and had to deal with prima donnas such as Hugo Black, William O. Douglas, and of course, Frankfurter himself.

J. Woodford Howard, Jr., has described Mason's **Stone** as the first modern judicial biography, in that he tied together analysis of opinions and doctrine with personal history.<sup>14</sup> While there has been some criticism that Stone manipulated Mason so that he wound up

treated in a favorable light, the fact remains that Mason's book is the standard biographical study of Stone, and whatever its faults, stands as an enormous barrier to anyone contemplating a new study.

Those of us who either write judicial biography or, for personal or professional reasons read these volumes, are living in a wonderful time, when nearly every year brings one or more significant studies to our desks. But then one has to ask, "What do these studies tell us? What do we know after having read these volumes that we did not know before? And in terms of judicial analysis, do these volumes add one scintilla to our understanding of major legal doctrines? Does knowing why Holmes changed his mind between *Schenck* and *Abrams* matter at all in understanding the 'clear-and-present-danger' standard?"

For those who work in this field, these are important questions, ones that we often ask ourselves. In fact, all scholars at one time or another wonder if what they are doing has any extrinsic value, whether it makes any difference. For the most part we believe that even if our particular article or book is not in the Pulitzer prize category, at the least we are creating the building blocks from which other scholars will one day erect a proper edifice.

\* \* \* \* \*

The value of judicial biography was the theme of a major conference organized by Norman Dorsen and Christopher L. Eisgruber at the New York University Law School in May 1995. It brought together some of the leading judicial scholars in the country, and the various papers and commentaries explored not only the nature of judicial biography but its value as well.<sup>15</sup>

In the conference's opening paper it came as something of a shock when Judge Richard A. Posner called into question the whole value of judicial biography as an academic enterprise, and suggested that scholarly time could be better spent on other ventures. One of the

leading lights of the Chicago school of law and economics, Posner suggested that “[i]n the time that Gerald Gunther took to write his 818-page biography of Learned Hand . . . he might have written twenty (or probably more) law review articles averaging forty pages, and conceivably the contribution to legal scholarship would have been greater.”<sup>16</sup>

Posner admitted that there were other considerations in taking on the task of a judicial biography. “If Gunther got a kick out of writing the biography that he would not have gotten from writing its weight in articles, as he must have thought when he embarked, this is something to be added into the cost-benefit calculation.”<sup>17</sup>

Of all the considerations that have gone into choosing to write a particular book or article, “getting a kick” has certainly not figured high in my own “cost-benefit calculations,” nor has it for the colleagues with whom I have discussed this matter. There is, of course, the desire to explore and understand a particular issue or life, as well as the satisfaction of doing what one considers a good job, perhaps reinforced by positive reviews, strong sales, or bestowal of prizes. Most of us, however, hope that there will be a contribution to scholarship, a few more bricks in the house of learning. But the gravamen of Posner’s charge is that the enterprise is not worth doing.

We study great men and women to learn more about them, Posner notes, and this usually takes one of four forms—*ideological*, in which the book reinforces certain beliefs; *edifying*, to provide models or antimodels of how we should live our own lives; *scientific*, which attempt to explain why the subject acted as he or she did; and *essential*, in which the writer tries to get at the core being of the subject.<sup>18</sup> All of them, however, fail, because “[t]he principal lesson that I take from the best, the most thorough, the most impartial modern biographies about creative people whether in the arts or sciences is precisely that of the disconnection of achievement from self.” Since judging is, in Posner’s view, a creative process, then

nothing we know about the judge will help us to understand how he or she reached a particular conclusion. “The spark of genius eludes the biographer’s grasp.”<sup>19</sup>

Posner, it should be added, does not want us to throw up our hands in despair and simply ignore judges; rather he suggests alternative genres, such as brief lives, studies that confine themselves to particular momentous years or events, and interpretive essays. Indeed, this is exactly what Posner himself had done in his study of Benjamin Cardozo; rather than attempt a full-scale biography, he wrote a sparkling essay on why Cardozo enjoyed such a high reputation among legal scholars and fellow jurists.<sup>20</sup>

In the discussion, I raised the question of whether “the life affects the lawmaking,” and suggested that “at least in the lives of Brandeis, William O. Douglas, Felix Frankfurter, Earl Warren, Roger Taney, and both Marshalls, it is absolutely impossible to understand their legal work without understanding the lives both before and off the Court. To try to separate their judicial work from their lives, I think, is just impossible.” To my initial amazement, Posner responded that of course you could understand judicial opinions “without knowing anything about [the judges’] lives; you can understand Shakespeare or the *Iliad* without knowing anything about the authors.”<sup>21</sup>

Putting aside for the moment the question of whether any biography can catch the essence of a person’s life, this particular exchange highlights one of the critical differences between lawyer’s history and historian’s history. Earlier in his talk Posner had said that “nothing in a lawyer’s or legal scholar’s training and experience equips him to write biography.” The primary use of judicial biography, he went on to say, is “to illuminate the judicial process,” and by implication, only lawyers or judges had the necessary knowledge of the law to undertake that task, a task, however, for which they were ill-fitted.

In essence, all you really needed to know about any judicial opinion was what it said, the

bottom line of what the law is as a result of that decision. Here one turns to a problem that I and other historians who have gone to law school *after* having taken our history degrees have often noted, the ahistorical outlook of practically the entire law school curriculum.

Law schools, even when they have historians on the faculty, do not require legal history as part of their curricula. They see their job as training lawyers to know what the law is *now*. Clients do not want a disquisition on the historical reasons why they can or cannot do something, especially with the meter ticking along at \$200 or \$300 an hour. They want the bottom line, and much of law school education aims at that line. It is presentist—what is the current law—and if you get some teachers who add a bit of historical information, that's nice but not crucial. Legal history courses are usually electives for those so minded or for third-year students needing a writing course or a way to fill in their schedule until they graduate. When was the last time one saw a history question on the bar exam?

The problem is that we historians do want to know more than just the bottom line, and we believe that it makes an important difference in understanding the opinion. In the constitutional law course I took at the University of Virginia Law School the instructor was analyzing methods of analysis that judges used to determine the law. He referred to Justice Roberts' famous T-square comment in *United States v. Butler* in which he declared that the only duty a judge had in such cases was "to lay the Article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."<sup>22</sup> The professor went on to say this was a perfectly legitimate manner of constitutional exegesis.

My hand shot up and I rather heatedly noted that first of all, Roberts had done exactly the opposite of what he professed to do, since a long line of Commerce Clause and tax precedents easily supported the government

scheme. Moreover, there was nowhere in the opinion any reference to the Depression, or the fact that the Agricultural Adjustment Act had been a creative and well-received effort by the Roosevelt administration to alleviate farmers' problems of over-production and low prices. To my amazement he responded that the Depression had no relevance to the decision, that all that mattered was the result and the analysis used. One can hardly imagine a discussion of *Butler* in a constitutional history course or a constitutional law course taught by a political scientist that would have ignored these external considerations.

Judge Posner is far too sophisticated to assume that the Depression and the government response to it had nothing to do with the Robert's opinion in *Butler*. But in many ways, his attack on the value of judicial biography stems from the same basic reasoning. All a lawyer needs to know is the bottom line—what does the law now say as a result of this particular opinion. The fact that the opinion may have been decided because of a Justice's long-standing personal views (for example, Taney's views on slavery in *Dred Scott* or Brandeis' hostility to chain stores in *Liggett v. Lee*) or because of the necessities of a nation at war (such as the World War II decisions regarding Japanese relocation and the military trial of Nazi saboteurs) or because of growing social pressure for change (such as the civil rights decisions of the Warren Court or the gender cases of the Burger Court) by this line of reasoning is irrelevant. If one takes this view, then Judge Posner has it right—there is no value to judicial biography—or indeed any other history—since in the end it does not add one whit to our knowledge of the bottom line.

As an historian, I, of course, reject this view, because I believe it does matter that we know more about the judicial process than the bottom line. Ours is a nation of laws, and despite Bismarck's famous witticism that one should not inquire too closely into what goes into making sausage or law, it is important that we know how the interaction of various so-

cial, economic, and political developments results in changing the law. One would never, I believe, suggest that one could understand a major piece of legislation merely by reading its provisions. One needs legislative history, a knowledge of the political pressures at work on the bill, the effect that public opinion had in moving the process forward, what pressure groups supported and opposed the bill, and a myriad of other considerations.<sup>23</sup>

Similarly, when a President undertakes a major initiative, such as Nixon's opening to China, no one would be foolish enough to say that all we need to know is that the two countries have now signed an agreement, and the sum total of useful knowledge is encapsulated in the words of that agreement. One would want to know how the China gambit fit into the broader scheme of world affairs that Nixon and Kissinger had developed—indeed, one would want to know quite a bit about Henry Kissinger and his role in these events; one would also want to know how this affected U.S. relations with Taiwan, how the country responded, what political fallout the administration had to contend with, and how America's allies responded.<sup>24</sup>

Why, then, should we be content with just the black-letter, bottom line of a judicial decision when we will not settle for that when dealing with legislative or executive activities? The answer, some would say, is that the President and Congress are the political branches of the government, and that in politics we need to know all of the surrounding information. The Court, on the other hand, deals with the law, and it is only the law that matters.

The last twenty or so years of legal scholarship should have dispelled this simplistic view of how courts function. We know, for example, from Bruce Murphy's study of Brandeis and Frankfurter's extrajudicial activities how much they and other Justices have been involved in the political process.<sup>25</sup> During World War II, Frankfurter, Douglas, and Robert H. Jackson regularly visited the White

House, helping their friend and patron, Franklin D. Roosevelt, draft speeches and even legislation.<sup>26</sup> As Laura Kalman has shown in her biography of Abe Fortas, the extent of Fortas's involvement in politics may have played less of a role in his downfall than the fact of Lyndon Johnson's unpopularity and Fortas's identification with the liberal wing of the Warren Court.<sup>27</sup> Holmes told us over a century ago that the life of the law has been experience, not logic, and ever since the Realists wrote more than seven decades ago we have known that a number of non-legal factors have influenced why and how judges made law.

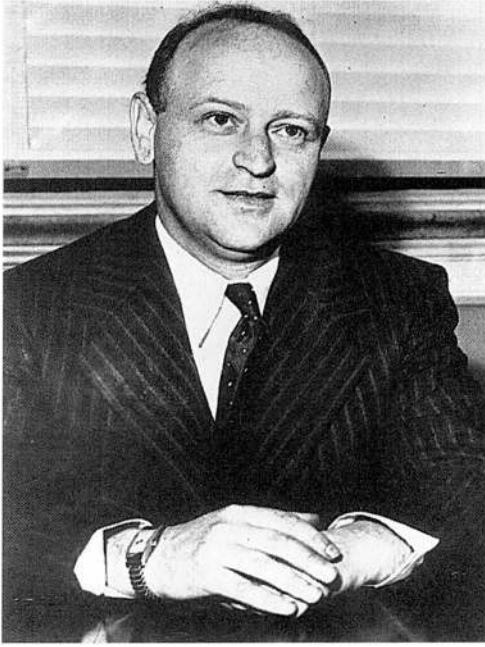
It is beyond cavil that upbringing, life experiences, worldly and personal successes, and failures all figure into how people act. If at times we rise above these considerations, for the most part our lives form a pattern, and it is the job of biographers to seek out that pattern. This brings us to the second and more difficult question—Can a biographer really explain why a Justice acts in a certain way? Judge Posner is far from alone in doubting that this can be done.

\* \* \* \* \*

First, let me admit that in many areas, all the biographer can do is describe. We know, for example, how Holmes and Brandeis worked since we have the historical/anecdotal evidence of their clerks. Holmes worked at a standing desk, since, he claimed, nothing tends toward brevity more than stiffness in the knees, and he had a passion for keeping his opinions no more than two printed pages long. Brandeis' clerks would labor late at night to finish a research assignment, and then show up at five or six in the morning to slip the material under the door of the Justice's study, only to feel the papers pulled through by a hand on the other side. This is marvelous material about how the two men worked, but it tells us little about how they thought.

This, of course, as Judge Posner pointed out, is a complaint about every biography of a





creative person. In the case of the great geniuses in our history, such as a Michelangelo or a Shakespeare or a Mozart, we have gathered a great deal of biographical information about them and have analyzed their art extensively, but we still know little about their creative processes, how they each magnified and transformed their particular art. Even when we talk to a modern writer or artist about how they come up with certain story ideas or artistic concepts, they can often do little but stammer that it "sort of just came" to them or that

**Justice Oliver Wendell Holmes, Jr., defended German immigrant Rosika Schwimmer's pacifism in a high-minded manner when she was refused citizenship for her condemnation of World War I. But Justice Felix Frankfurter, who was born abroad and who, as a college student, witnessed with great excitement the naturalization of his father, saw his patriotic duty differently. When William Schneiderman (above) had his citizenship revoked in 1939 because of his ties to the Communist Party, Frankfurter explained at the Justices' Conference why he supported his government's actions against Schneiderman: "It is well-known that a convert is more zealous than one born to the faith."**

"it sort of danced around in my mind."

Fair enough. We may not learn how the internal mechanism actually functions, but there is a great gulf between saying that we can never unlock the secrets of the creative process and that judicial biography is a waste of time because all that matters is the final product, the printed decision. One can read *Hamlet* or the *Iliad* without knowing anything about Shakespeare or Homer; one can read the Virginia Military Institution case<sup>28</sup> without knowing anything about Ruth Bader Ginsburg.

But I believe that history in general, and judicial biography in particular, can give us a far more rounded understanding not only of particular judges, but of the Supreme Court and the judicial function in the United States. Let me take but a few examples to show how knowledge of the Justices can enlarge our understanding of the past.

In 1940 the Court handed down its decision in *Minersville School District v. Gobotis*, in which an 8-1 majority held that the state could require school children to salute the flag,



even though the act violated the religious beliefs of Jehovah's Witnesses.<sup>29</sup> Three years later, the Court reversed itself completely, and again by an 8-1 vote, held that the required salute violated the First Amendment.<sup>30</sup> What had happened? What would the bottom line readers make of this—the law in 1940 was no longer the law in 1943? If one is to understand what had happened, the significance of these cases, and in fact the law itself, then one has to understand the environment in which the cases were heard and the personal stories of the men who judged those cases.

The question of whether a state could compel school children to salute the American flag had been an issue in twenty states between 1935 and 1940, and had been the subject of major litigation in seven. Prior to *Gobitis* the High Court had four times upheld state court decisions validating compulsory flag salute laws. Jehovah's Witnesses objected to the salute because of their literal reading of Exodus 20:4-5, and equated the flag salute with bowing down to graven images.

Chief Justice Hughes assigned the opinion to Felix Frankfurter, already well-known as an apostle of judicial restraint, and in drafting his opinion he framed the "precise" issue in terms of the courts deferring to legislative wisdom. "To the legislature no less than to courts is committed the guardianship of deeply cherished liberties."<sup>31</sup> Privately, he commented that he believed the opinion would preach "the true democratic faith of not relying on the Court for the impossible task of assuring a . . . tolerant democracy," a task that properly belonged to "the people and their representatives."<sup>32</sup> The bottom line, then, is that the Court believed religious scruples took second place to the state's desire to inculcate patriotic values.

This does not tell us enough, and especially does not explain either the Court's turnaround or Frankfurter's bitter and impassioned dissent in the second case. A naturalized American who always took ideals of citizenship and patriotism very seriously, Frankfurter

had little sympathy with those who, as he saw it, refused to meet their civic obligations. During oral argument of the *Gobitis* case he had passed a note to Frank Murphy questioning whether the framers of the Bill of Rights "would have thought that a requirement to salute the flag violates the protection of 'the free exercise of religion'?"<sup>33</sup>

At about the time of the second flag salute case, the Court heard a case in which the government tried to denaturalize William Schneiderman, a man who was obviously an ideal citizen except for the fact that he sympathized with the Communist Party.<sup>34</sup> At the Conference, Frankfurter explained why he supported the government's efforts to strip Schneiderman of his citizenship. The case, he began, "arouses in me feelings that could not be entertained by anyone else around this table. It is well-known that a convert is more zealous than one born to the faith. None of you has the experience that I have had with reference to American citizenship." He had been in college when his father received his naturalization papers, "and I can assure you that for months preceding, it was a matter of moment in our family life." For Frankfurter, "American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideals summarized as a requirement that they be attached to the principles of the Constitution."<sup>35</sup>

Frankfurter's patriotism, as he noted himself, went further than that of the native-born American who took it as a matter of course. Not for him the high-minded tolerance of the Brahmin Holmes in defending Rosika Schwimmer's pacifism or the intellectual intensity of Brandeis insisting on Anita Whitney's right to utter unpopular ideas.<sup>36</sup> Rather, Frankfurter held an impassioned sense that all who did not feel as strongly about America and its principles were somehow less than loyal, and therefore not deserving of the Constitution's protections. Some scholars, such as Harry Hirsch and Robert Burt, have developed psychological explanations based

in part on Frankfurter's feelings of being an outsider, overly grateful to the nation that took him and his family in, and unwilling to challenge what he saw as its basic creeds.<sup>37</sup> While I have some difficulty with their overall use of psychology, there is no question that one cannot understand why Frankfurter backed the government in all of the World War II cases (including the Japanese relocation) as well as the Cold War cases (especially *Dennis*), without taking this background into account.<sup>38</sup>

But Frankfurter was not the only member of the Court, although perhaps the one whose personal history gives us the clearest indicators of his vote. If we do want to go beyond the bottom line then we have to note that in the time between the two flag salute cases the Court's membership changed significantly. The liberal Wiley Rutledge replaced James F. Byrnes, Jr., and Robert H. Jackson joined the Court when Roosevelt elevated Stone to replace Hughes as Chief Justice. More importantly, three members of the Court who had joined Frankfurter in *Gobitis* abandoned him in the subsequent Jehovah's Witnesses cases—Hugo L. Black, William O. Douglas, and Frank Murphy.

When the Court convened in the fall of 1940, Douglas told Frankfurter that Black was having second thoughts about the *Gobitis* decision. "Has Black been reading the Constitution?" Frankfurter asked sarcastically. "No," Douglas responded, "he has been reading the newspapers." There Black—and everyone else—would have noted the Justice Department's reports that in the weeks following the decision, there had been hundreds of attacks on Witnesses, especially in small towns and rural areas, and the pattern would continue for another two years.<sup>39</sup>

The Witnesses came back before the Court with one case after another, all claiming that the First Amendment's Free Exercise Clause protected them from state intervention in the pursuit of their particular beliefs, gradually winning over a majority of the Court to their claims.<sup>40</sup> In light of the spate of attacks on Wit-

ness members, the apparent shift in Court sentiment, and news of Hitler's "Final Solution" of the Jewish question in Europe, the Court accepted another case dealing with the flag salutes in the October 1942 Term. Both the American Bar Association Committee on the Bill of Rights and the American Civil Liberties Union, a rare tandem, filed *amici* briefs in support of the Witnesses.

Stone, who had been the lone dissenter in the first flag salute case, assigned the opinion to Jackson, who, although he rarely voted for minority rights against a public interest argument, this time joined the liberal bloc. In Jackson's original draft of the opinion, he referred to the attacks on the Witnesses, and deleted these lines at Chief Justice Stone's suggestion because they "might well give the impression that our judgment of the legal question was affected by the disorders which had followed the *Gobitis* decision."<sup>41</sup> Jackson wrote one of the most eloquent opinions of his judicial career, declaring that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>42</sup>

Frankfurter entered an impassioned and embittered dissent. Despite the fact that he belonged to "the most vilified and persecuted minority in history" (one of Frankfurter's rare references to his religion), he shared the Framers' fears that "minorities may disrupt society." Frankfurter evidently had a difficult time framing his dissent, perhaps, as he told Jackson, "because it is credo and not research . . . the expression of it is so recalcitrant."<sup>43</sup> Frankfurter believed his dissent to be an important document (as it most certainly was to him), and it led him to an active extra-judicial campaign to publicize his views. He sent a copy to retired Chief Justice Hughes and suggested to President Roosevelt that a copy be placed in the Hyde Park library. He wrote friends in the press such as Bruce Bliven of

the *New Republic* and Frank Buxton of the *Boston Herald*, claiming that both Brandeis and Learned Hand had agreed with his *Gobitis* opinion.<sup>44</sup>

If we can better understand Frankfurter in light of the convert's zeal resulting from his Americanization process, can we also discover why Stone dissented in the first case, and why Black, Stone, and Murphy came around to his view within a year? With Stone the personal record is not as clear, but we do know that in the late 1930s he began wrestling with the issue of whether individual liberties deserved some form of heightened protection under the Constitution, an idea he first articulated in his famous *Carolene Products* footnote.<sup>45</sup> Black and Douglas also had personal backgrounds that made them susceptible to the Free Exercise claim of the Witnesses, and with them, it is a playing out of their later lives and intellectual development that will help us understand their actions.

\* \* \* \* \*

But Judge Posner's question still haunts us. Now that we know about Frankfurter's zealous patriotism, now that we know about the inner divisions of the Court, does it make any difference? The bottom line remains the same, or does it?

The wartime Witness decisions are the beginning of a long line of cases that will eventually flesh out the promise of free exercise of religion embodied in the First Amendment. While it is certainly legitimate to do a doctrinal analysis of that development, an analysis of the "bottom lines" as it were, I believe we learn more and understand more, including the bottom lines, if we have knowledge of the men and women who pondered these cases and who, sometimes painfully, came to particular conclusions. Just as analyzing why Congress enacted certain legislation or why a President adopted a particular policy helps us to understand that legislation and policy better, so knowing the history of the judges involved, the

public controversies from which the litigation developed, and the public opinion of the time all help us to understand the opinion and the law better.

Moreover, the law is more than just a black letter, more than just a bottom line. Justice Antonin Scalia, who, interestingly, does not believe in the value of legislative history when the Court engages in statutory interpretation, has written eloquently on the importance of the dissent in constitutional law-making. The dissent, he says, serves a critical function in a democratic society and augments, rather than diminishes, the prestige of the Court. "When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the Justices saw this danger clearly, and gave voice, often eloquent voice, to their concern."<sup>46</sup> Scalia pointed out the first Justice Harlan's dissent in *Plessy v. Ferguson* as well as Justice Jackson's dissent in *Korematsu v. United States*<sup>47</sup> as examples of dissenting opinions which have eventually prevailed.

Scalia could, of course, have listed dozens of such instances, especially the many dissents by Holmes and Brandeis in the 1920s, but the point he makes is that the bottom line is not enough, and beyond that, may be wrong. So we have to know more, and if we take someone like Brandeis we can perhaps better understand why his dissents had such an impact. Moreover, I would suggest that *only* if we study Brandeis' life can we reach this understanding.

Born of an immigrant German-Jewish family in Louisville, Brandeis attended the Harvard Law School. After graduating in 1876, he went on to become not only one of the most successful lawyers in the country, but also a leading Progressive reformer and friend and advisor to Robert M. LaFollette and Woodrow Wilson. The roots of Brandeis' judicial philosophy go back well before 1916, when Wilson named him to the Court. He was perhaps

the leading exemplar of so-called “sociological jurisprudence,” and when Holmes wrote that “[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics,” he could well have had Brandeis in mind.<sup>48</sup>

In many ways, the fact-laden dissenting opinions clearly laying out all the information surrounding a case and the reasons for a legislature adopting a particular law all harken back to Brandeis’ own law practice as well as to his ground-breaking brief in the landmark case of *Muller v. Oregon*.<sup>49</sup> Moreover, Brandeis remained a reformer on the Court, and by this I do not mean his financial support of and encouragement to Frankfurter in the 1920s and 1930s. Rather, he believed that just as in re-

form no measure could succeed without the necessary education of the public, so a law that lagged behind the times could never be changed unless the people understood the need for revision. Practically from the time he went on to the Bench until his retirement, he sent out a steady stream of memos suggesting law review articles to educate the public and the profession about why a particular Court decision was wrong, and he had the satisfaction in his own lifetime of seeing many of his dissents adopted, while others, especially on wiretapping and the right of privacy, would become the law of the land in the generation after his death.

If there is one decision that begs to be interpreted through the lens of judicial biography, it is Brandeis’ famous concurrence in



**Justice Louis D. Brandeis’ concurring opinion in *Whitney v. California* (1927) is best understood by examining the Massachusetts Justice’s life and progressive ideals. His concurrence in that First Amendment case laid down the ideological and legal justifications for future free speech decisions. Brandeis is pictured driving his carriage with his wife Alice seated next to him.**

*Whitney v. California*, which has provided the intellectual as well as legal justification for constitutionally protected freedom of speech in our times.<sup>50</sup> Here, as Justice Scalia would have noted, is a wrong opinion, one in which the majority completely ignored the meaning and purpose of the First Amendment's Speech Clause. Because Anita Whitney's attorneys had not raised specific constitutional claims in the lower courts, Brandeis (with whom Holmes agreed) believed he could not dissent; instead he entered a concurrence that completely destroyed the majority's reasoning and provided intellectual and historical justification for expanding the right of Americans to think as they please and to say what they think.

To understand this opinion correctly, I would resort to two very different types of works, neither of which could be described as traditional judicial biography even though that is what they are. The first is the brilliant analysis by Professor Vince Blasi, in which, as he later explained, he decided that if he were to understand what Brandeis meant, he would have to understand the sources from which he wrote. So he literally went and read every one of the various citations in the Brandeis opinion, not just the case cites but the historical and philosophical pieces as well, including the various Greek sources that the Justice used. In doing so Blasi built up an intellectual portrait of a man to whom free thought, requiring rigorous analysis and the unfettered expression of ideas, became a civic obligation.<sup>51</sup>

The other source is Philippa Strum's **Brandeis: Beyond Progressivism**,<sup>52</sup> which is an in-depth examination of some of the issues that had first attracted her to Brandeis, and in which she presents one of the best overall views of Brandeis and his philosophy.<sup>53</sup> The book ties together the various strands of his life, linking his Progressivism, his Zionism, his legal philosophy to his personal philosophy of how a person ought to live and the requirements of citizenship.

She picks up from Blasi, and shows how the *Whitney* opinion is in many ways a sum-

ming up of all that Brandeis believed in, how his views on the role of the individual to the state, the duties of citizenship, the proper role of the state—all of which he had expounded in different fora before—all come together in one magnificent whole.<sup>54</sup>

If one asked Blasi or Strum what the bottom line of *Whitney* is, I think they would look at you with a rather bemused puzzlement. The bottom line, in the way that Judge Posner said we can comprehend a judicial opinion without knowing anything about the author, would be one-dimensional, totally lacking in texture or complexity, and meaningless in terms of understanding the relationship of law to society.

In the end, this is the task that judicial biography can do best, to provide the reader, the student, the scholar with the richness of texture that is the hallmark of law. Nearly a hundred years ago Brandeis summed up the difference between a simple practitioner of the law and a lawyer; the former knew the rules and applied them, while the latter understood not only the law, but all the facts that surround. The law could only be understood if we knew not just the bottom line, but how one got there, what the alternatives were, what choices had to be made, and the men and women who made those choices. I, for one, think Gerald Gunther made the right choice.

## Endnotes

<sup>1</sup> Gerald Gunther, **Learned Hand: The Man and the Judge** (Knopf, 1994); Roger K. Newman, **Hugo Black: A Biography** (Pantheon, 1994).

<sup>2</sup> Tinsley Yarbrough, **Judicial Enigma: The First Justice Harlan** (Oxford University Press, 1995); Laura Kalman, **Abe Fortas: A Biography** (Yale University Press, 1990); Mark V. Tushnet, **Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991** (Oxford University Press, 1997); and John Jeffries, Jr., **Justice Lewis F. Powell, Jr.** (Scribner's, 1994).

<sup>3</sup> See, among many others, G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (Oxford University Press, 1993), and Philippa Strum, **Brandeis: Beyond Progressivism** (University Press of Kansas, 1993).

<sup>4</sup> There have already been several books on Justice Brennan, including Kim Isaac Eisler, **A Justice for All** (Simon &

Schuster, 1993) and W. Wat Hopkins, **Mr. Justice Brennan and Freedom of Expression** (Praeger, 1991). Works on current sitting Justices include Donald E. Boles, **Mr. Justice Rehnquist, Judicial Activist** (Iowa State University Press, 1987); Sue Davis, **Justice Rehnquist and the Constitution** (Princeton University Press, 1989); Nancy Maveety, **Justice Sandra Day O'Connor: Strategist on the Supreme Court** (Rowan & Littlefield, 1996); and Jane Mayer, **Strange Justice: The Selling of Clarence Thomas** (Houghton Mifflin, 1994).

<sup>5</sup> Albert J. Beveridge, **The Life of John Marshall** (4 vols., 1916-1919).

<sup>6</sup> Alpheus T. Mason, **Brandeis: A Free Man's Life** (Viking, 1946); **William Howard Taft: Chief Justice** (Simon & Schuster, 1964); and **Harlan Fiske Stone: Pillar of the Law** (Viking, 1956).

<sup>7</sup> Katharine Graham, **Personal History** (Knopf, 1997).

<sup>8</sup> Stephen J. Field, **Personal Reminiscences of Early Days in California, with Other Sketches** (1893).

<sup>9</sup> David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes** (Harvard University Press, 1973).

<sup>10</sup> The Douglas autobiography consists of three volumes, **Of Men and Mountains** (Harper & Brothers, 1950); **Go East, Young Man: The Early Years** (Random House, 1974); and **The Court Years, 1939-1975** (Random House, 1980).

<sup>11</sup> Mark DeWolfe Howe, **Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870** and **Justice Oliver Wendell Holmes: The Proving Years, 1870-1882** (Harvard University Press, 1957, 1963). In addition, Howe published several volumes and articles of correspondence between Holmes and men such as Frederick Pollock and Harold Laski.

<sup>12</sup> Alexander M. Bickel, **Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work** (Harvard University Press, 1957).

<sup>13</sup> Frankfurter to Brandeis, 20 February 1940; Brandeis to Frankfurter, 21 February 1940, in Melvin I. Urofsky and David W. Levy, eds., "**Half Brother, Half Son**": **The Letters of Louis D. Brandeis to Felix Frankfurter** (University of Oklahoma Press, 1991), 627. My own view is that Frankfurter feared he could not control the independent Mason the way he believed he would be able to influence people he personally chose for the task.

<sup>14</sup> J. Woodford Howard, Jr., "Alpheus T. Mason and the Art of Judicial Biography," 8 *Constitutional Commentary* 41 (1991).

<sup>15</sup> The papers as well as transcripts of the discussions are gathered in "Symposium: National Conference on Judicial Biography," 70 *New York University Law Review* 485 (1995).

<sup>16</sup> Richard A. Posner, "Judicial Biography," 70 *New York University Law Review* 502, 509 (1995).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 503.

<sup>19</sup> *Id.* at 507-08.

<sup>20</sup> Richard A. Posner, **Cardozo: A Study in Reputation** (Chi-

cago: University of Chicago Press, 1990).

<sup>21</sup> "Transcript [of Discussion]," 70 *New York University Law Review* 556, 562, 572 (1995).

<sup>22</sup> *United States v. Butler*, 297 U.S. 1, 62 (1936).

<sup>23</sup> See, for example, Daniel M. Berman, **A Bill Becomes A Law: Congress Enacts Civil Rights Legislation**, 2d ed. (Macmillan, 1966).

<sup>24</sup> Robert Litwak, **Detente and the Nixon Doctrine: American Foreign Policy and the Pursuit of Stability, 1969-1976** (Cambridge University Press, 1984), and Richard C. Thornton, **The Nixon-Kissinger Years: Reshaping America's Foreign Policy** (Paragon House, 1989).

<sup>25</sup> Bruce A. Murphy, **The Brandeis/Frankfurter Connection** (Oxford University Press, 1982).

<sup>26</sup> Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953** (University of South Carolina Press, 1997), 47-48

<sup>27</sup> Kalman, **Fortas**, 329 ff.

<sup>28</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>29</sup> 310 U.S. 586 (1940). The following section is based on my discussion of these cases in **Division and Discord**, 106-12, and the older but still useful David R. Manwaring, **Render unto Caesar: The Flag-Salute Controversy** (University of Chicago Press, 1962), which examines the cases in the lower courts as well as the High Court.

<sup>30</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>31</sup> 310 U.S. at 600.

<sup>32</sup> Quoted in Alpheus T. Mason, **Security Through Freedom: American Political Thought and Practice** (Cornell University Press, 1955), 220.

<sup>33</sup> Sidney Fine, **Frank Murphy: The Washington Years** (University of Michigan Press, 1984), 185.

<sup>34</sup> *Schneiderman v. United States*, 320 U.S. 119 (1943).

<sup>35</sup> "Summary of discussion," Felix Frankfurter Papers, Harvard Law School Library.

<sup>36</sup> *United States v. Schwimmer*, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

<sup>37</sup> H.N. Hirsch, **The Enigma of Felix Frankfurter** (Basic Books, 1981); Robert A. Burt, **Two Jewish Justices: Outcasts in the Promised Land** (University of California Press, 1988).

<sup>38</sup> For a skillful application of psychological theory, see Richard Danzig, "Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking," 36 *Stanford Law Review* 675 (1984).

<sup>39</sup> Fine, **Murphy**, 187.

<sup>40</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Jones v. Opelika*, 316 U.S. 584 (1942); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and *Martin v. Struthers*, 319 U.S. 141 (1943). See Edward F. Waite, "The Debt of Constitutional Law to Jehovah's Witnesses," 28 *Minnesota Law Review* 209 (1944).

<sup>41</sup> Stone to Jackson, 31 March 1943, Harlan Fiske Stone Papers, Library of Congress.

<sup>42</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>43</sup> *Id.* at 653 (Frankfurter, J., dissenting); Frankfurter to Jackson, 4 June 1943, Frankfurter Papers.

<sup>44</sup> Melvin I. Urofsky, **Felix Frankfurter: Judicial Restraint and Individual Liberties** (Twayne, 1991), 57.

<sup>45</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 (1938).

<sup>46</sup> Antonin Scalia, "The Dissenting Opinion," *Journal of Supreme Court History* 33, 35 (1994).

<sup>47</sup> *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

<sup>48</sup> Oliver Wendell Holmes, "The Path of the Law," in **Collected Legal Papers** (Harcourt Brace, 1920), 167, 187; for Brandeis' legal career see Melvin I. Urofsky, **A Mind of One Piece: Brandeis and American Reform** (Scribner's, 1971), ch. ii.

<sup>49</sup> 208 U.S. 412 (1908).

<sup>50</sup> 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

<sup>51</sup> Vincent Blasi, "The First Amendment and the Ideal of Civil Courage: The Brandeis Opinion in *Whitney v. California*," 29 *William and Mary Law Review* 653 (1988).

<sup>52</sup> (University Press of Kansas, 1993).

<sup>53</sup> Nearly a decade earlier she had written a formal biography; Philippa Strum, **Louis D. Brandeis: Justice for the People** (Harvard University Press, 1984).

<sup>54</sup> **Brandeis: Beyond Progressivism**, esp. 125-31.



# Judicial Bookshelf

D. Grier Stephenson, Jr.

Study of the Supreme Court today recognizes two elementary axioms. First, discourse on the Constitution does not proceed very far before encountering judicial decisions. Second, analysis of judicial decisions encompasses the Justices who make them. The first has generally been more openly and widely acknowledged for a longer time than the second. Indeed, it has a long pedigree.

## The Constitution Construed

*Chisholm v. Georgia*<sup>1</sup> is usually remembered as the Supreme Court's first, if ill-fated, excursion into constitutional interpretation. Voting 4 to 1, the Justices held the state of Georgia amenable to the jurisdiction of the newly established national judiciary and suable by a citizen of another state in federal court. Although fully consistent with the text of the second section of Article III, the holding, which ran counter to assurances made by Alexander Hamilton, James Madison, and John Marshall

during the ratification debates, was hostilely received and precipitated ratification of the first of only two amendments to the United States Constitution between adoption of the Bill of Rights and the end of the Civil War, a period of seventy-four years. What is sometimes overlooked, however, is that ratification of the Eleventh Amendment, "far from impairing the logic of that decision, seems rather to confirm it."<sup>2</sup> Thus, even prior to *Marbury v. Madison*,<sup>3</sup> the Court's construction of the document was becoming equated with the document itself. Ever since, the Constitution has been inextricably linked to what the Supreme Court has said about, and done with, the nation's charter. Viewing the Constitution as a juridical document—that is, one subject to construction as law in the context of deciding cases—"invokes a miracle," announced Professor Edward S. Corwin. "It supposes a kind of transubstantiation whereby the Court's opinion of the Constitution becomes the very body and blood of

the Constitution."<sup>4</sup>

There may be no more vivid recent demonstration of this identity between judicial decisions and the Constitution than Thomas Baker's engaging "**The Most Wonderful Work....**"<sup>5</sup> As most readers will recognize, the title derives from the stunning appraisal<sup>6</sup> of the United States Constitution that William Gladstone offered in 1878, between the first and second of what would be four terms as British prime minister. As all readers will discover, Baker's volume consists mainly of opinions from Supreme Court decisions, each selected for the purpose of "educat[ing] the enquiring reader about constitutional values and principles..."<sup>7</sup> And the number of selected decisions exactly equals the number of essays comprising **The Federalist**. One is hardly surprised, then, to read that the book is designed to "harken[] back to a previous era of our constitutional life."<sup>8</sup>

Echoing Gladstone, Baker labels the Constitution "truly . . . an object of wonder," one worthy of study by all citizens, not just academicians, lawyers, and judges, or others who hold or aspire to public office. "There are no high priests or secret rituals in our democratic republic," the author writes. Yet study of the Constitution is not merely desirable but necessary. "Ultimately, it is every citizen's responsibility to understand and to preserve our constitutional form of government."<sup>9</sup> This is language of a vintage (small-r) republican who believes that much more than a scattering of civic virtue is essential to the continued health of the political system.

"**The Most Wonderful Work...**" is therefore a means to an end: "rational discourse" or "a political dialogue engaged in by 'We the People'." Such discourse or dialogue is needed because "[t]oday's popular constitutional rhetoric . . . often is sterile, even mindless, by comparison to that of the Framers." In contrast to the formative period of American history when "constitutional law . . . was understood to be the duty and privilege of every citizen," the subject has become the peculiar

province of "an elitist enterprise" practiced by "Supreme Court Justices and lawyers and constitutional law professors" with much of what they write often "inaccessible and unintelligible to the average citizen."<sup>10</sup> When the Constitution becomes news, Baker argues that commentators and columnists do little to instruct citizens in *how* to think about constitutional issues, being more concerned with telling them *what* to think. What passes for constitutional discourse is reduced to sound bites, slogans, headlines, and fifteen-second summaries. And the picture may even be gloomier: most Americans seem to be blissfully unaware of, or uninterested in, constitutional matters, except in the case of an occasional high-profile, this-really-affects-me, issue. It is this state of affairs that Baker wants to change.

Of course it is impossible to recreate accurately or even to imagine accurately the intellectual climate of the founding era. Most probably the publicists on both the federalist and antifederalist sides in the debate over ratification of the Constitution were more immediately concerned with telling citizens what to think about the proposed plan of government than in instructing them how to think about it. They were political activists, not dwellers of ivory-towers. Still, the political discourse of that time seems considerably more sophisticated when one places it alongside today's.

Whatever the failings of professors, journalists, and the public, Baker generally gives high marks to the Justices of the Supreme Court. They "consistently have done more of the needed civic education in the pages of the **United States Reports**, and have done it far better than either the press or the professorate."<sup>11</sup> Indeed Baker might have said that with the vast possibilities of the Internet at hand, the Justices' opportunity for civic education today surpasses anything the nation hitherto has witnessed. Any home or school connected to an Internet service provider has access, at no additional charge, to the resources of a reasonably complete law library. The country and the Court have come a long way since the early

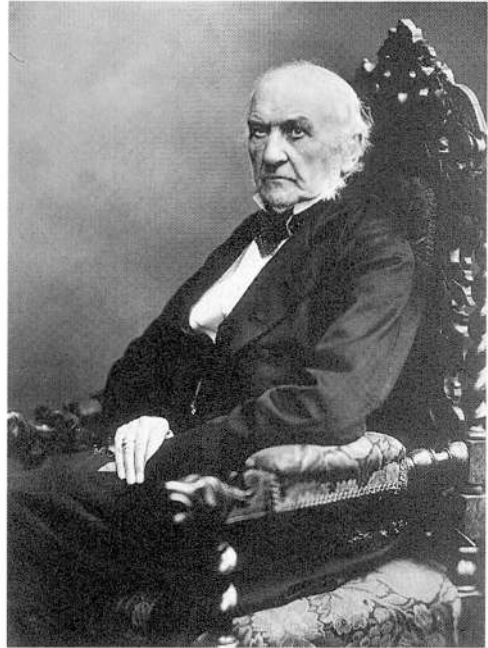
Justices were said to use their grand jury charges on circuit to teach local citizens about the Constitution.<sup>12</sup>

This belief in the value of the Supreme Court's civic function explains the author's editorial decision to include *only* Supreme Court opinions in his quest to elucidate "those important and fundamental principles on which our constitutional republic is based, the shared values of our polity."<sup>13</sup> The result is salutary: a variegated display of the Constitution and American government as perceived by the Supreme Court. The price of that editorial decision is obvious: the exclusion of other, perhaps equally useful, sources.

The eighty-five cases come from all periods of the Court's history, beginning with *Chisholm v. Georgia* (1793) and concluding with *Romer v. Evans*<sup>14</sup> (1996), but the emphasis is decidedly on the modern Bench. However, the collection is not intended to yield a constitutional law casebook. Indeed some casebook staples are noticeably absent.<sup>15</sup> The principal criterion for inclusion seems to have been not the historical or contemporary significance of a particular decision but the relative value of its opinion(s) as a teaching device alongside other worthy candidates competing for a place among the symbolic eighty-five. Neither is the volume a textbook in the usual sense: the rigors of rededication presumably eschew spoonfeeding. Readers will have to dig out most of the truths to be had on their own. The author's preface (or introduction) and the five short essays that precede each of the five chapters total only fifty-eight of the volume's 676 pages of text. Nonetheless, even readers already entirely familiar with all the cases may delight in the insights that the author shares in those contributions. The result is a volume that is rich in civic potential for constitutional neophyte and expert alike.

### The Nineteenth Century Court

Reflection on the second elementary axiom quickly takes one to the importance of judi-



Thomas Baker's new volume on the history of the Constitution as seen through selected Supreme Court decisions is titled "The Most Wonderful Work...". The title is derived from the enthusiastic praise William Gladstone (above) gave the document in 1878, after the first of his four terms as prime minister of Great Britain.

cial biography and its kin, the period study. Without studies on particular Justices, knowledge of the Supreme Court today would be woefully less than it is. The reason for this should be plain. Biography is a window on the Court. The reader perceives not only the description and relation of "the judge's personality, background, and belief system to his conduct on the bench and impact on the law and politics of his time,"<sup>16</sup> as a biographer of Justice Frank Murphy once observed, but insights both into the minds and contributions of other Justices and into the decisionmaking process and other internal workings of the institution itself.

Yet judicial biography as a literary phenomenon largely originated only in the twentieth century. Thomas Carlyle's remark about biography generally was particularly apt for a long time when applied to the Court: "[A] well-written life is almost as rare as a well-spent one. . . . [T]here are certainly many more men

whose history deserves to be recorded, than persons willing and able to record it.”<sup>17</sup> The few examples from the nineteenth century, while containing valuable source material, were, at least as measured by current standards, usually (and hopelessly) even more uncritical than biographies generally from that era of other public figures. As biographer and U.S. Senator Albert Beveridge—himself as charmed by his subject as he was suspicious of his subject’s opponents—observed in the Preface to *The Life of John Marshall* in 1916, “Less is known of Marshall . . . than of any of the great Americans. . . . He appears to us as a gigantic figure looming, indistinctly, out of the mists of the past, . . . seemingly without any of those qualities that make historic personages intelligible to a living world of living men.”<sup>18</sup> As late as 1932, Professor Felix Frankfurter could observe that the “formal remoteness of their labors has largely conspired to consign the Justices to the limbo of impersonality. From this fate only Marshall has been adequately rescued. . . . The Court’s prestige and American history both would be gainers by similar studies of other great judges.”<sup>19</sup>

The presence or absence of biographical criticality aside, any bibliography of the Supreme Court seventy-five years ago would have fared poorly alongside a bibliography of the presidency in terms of the number of published biographies. Biographies of American Presidents soon followed establishment of the presidency itself. And an explanation for this development goes well beyond whatever fascination the reading public might have with the office, or even beyond the obvious fact that the executive is the only branch headed by a single individual. As the first President, George Washington cast a mold for his successors that called on them to fill not merely an administrative office but a political one too, in which the qualities, character, judgment, values, and talents of the occupant of that office mattered.

In contrast, the declaratory theory of law dominant in the nineteenth century obscured

the role of judicial discretion exercised by individual Justices, even if it allowed recognition of the leadership and legal dexterity provided by figures such as Marshall or Chief Justice Roger B. Taney. “Courts are mere instruments of the law, and can will nothing,” Marshall contended.<sup>20</sup> But as the constitutional business of the Court swelled and the impact of its constitutional decisions became ever more apparent across a wide range of public policy after 1890, so did sensitivity to judicial review and the Court’s political role also increase.<sup>21</sup> Pioneers in sociological jurisprudence and then legal realism emphasized the discretion allowed each Justice to pick and choose among competing interpretations and policy outcomes. “[N]ever so much as in our day,” Frankfurter observed in 1932, “. . . has there been such widespread and keen awareness of the essentially political functions exercised by the Supreme Bench. . . . [J]udges *are* the Constitution under which we live and move and have our being.”<sup>22</sup>

There has been no turning back. The Supreme Court has revealed itself as an institution with parallels to the administrative and political dimensions of the presidency, combining its function as the nation’s preeminent legal institution with the necessity of political choice as it decides cases encrusted with some of the most divisive issues of the day. There should be little surprise, then, that scholars since the 1930s have turned to biography and similar studies as additional avenues to understanding the Court. “In law, also, men make a difference”<sup>23</sup> as, one hastens to add, do women. Recently published books continue to illustrate the difference that different Justices make.

**The Chief Justiceship of John Marshall, 1801-1835** by Herbert A. Johnson<sup>24</sup> is the third in the series **Chief Justiceships of the United States Supreme Court**, under Professor Johnson’s general editorship. Students of the Court will recognize Johnson’s long identification with his subject. With George L. Haskins, he was co-author of **Foundations of Power, John Marshall, 1801-15**, the second volume in the

**Oliver Wendell Holmes Devise History of the Supreme Court of the United States.**<sup>25</sup> Timing of the publication of Johnson's most recent book falls close to that of **The Great Chief Justice** by Charles Hobson, noted in this space last year. The two are nicely complementary and should be read together. And the connections go further. Johnson and Hobson, as well as Haskins, are or were editors in the on-going publication of **The Papers of John Marshall**.

Johnson's study of the Marshall Court yields both the expected and the unexpected. The reader finds much about Marshall the man and the judge, illustrating that "[t]o write about Marshall after 1800 is to write about the Supreme Court, and, with only a few exceptions . . . , to write about the Supreme Court in the first third of the nineteenth century is to write about John Marshall."<sup>26</sup> There is the obligatory review of the Marshall Court's projection of federal judicial power and of its jurisprudential handiwork in the realms of constitutional, private, and international law. One also finds the usual emphasis on the Chief Justice's well-deserved reputation for leadership and on the precarious political situations in which the Court found itself from time to time during Marshall's long tenure. But there are some surprises too, particularly in drawing the link between leadership and politics.

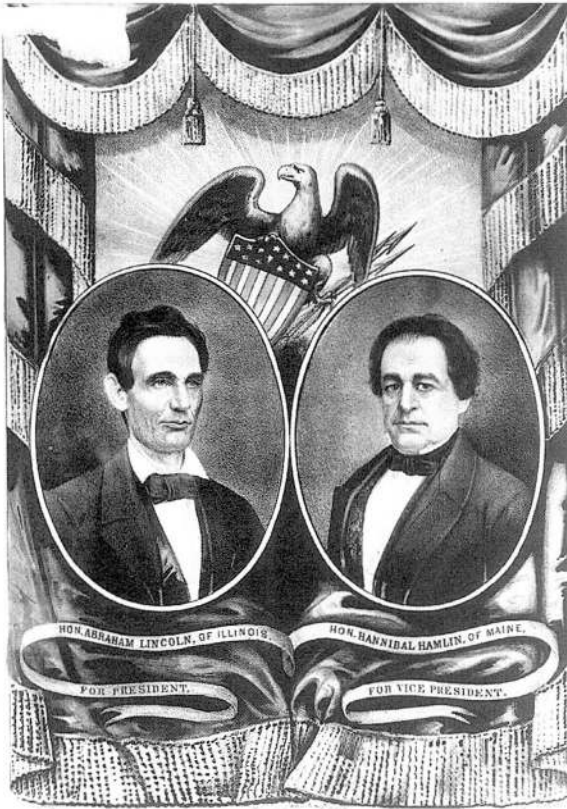
Johnson speculates that introduction of the "opinion of the Court" was a device not merely to allow the Court to speak clearly with one voice but, at least during Thomas Jefferson's presidency, to "protect individual members from identification with unpopular decisions." The device was coupled with a seniority rule for determining who would deliver the opinion, and the Chief Justice, "by virtue of his commission, was senior to all of the associate justices."<sup>27</sup> Thus Johnson lays out the strong possibility "that Chief Justice Marshall delivered an overwhelming number of opinions in the first decade of his chief justiceship not because he wrote, or entirely agreed with, those opinions but rather because it was his respon-

sibility to announce them on decision day. The actual production of the opinions may have been a joint effort of all members of the Court," excepting dissenters.<sup>28</sup>

Similarly, Marshall's political astuteness informed his awareness of the Court's relationship with Congress throughout his chief justiceship. For instance, Marshall was distressed over the threat posed to the Court by the attempt to remove Justice Samuel Chase from the Bench. Concern was so great that he shared in a letter to a colleague his willingness to allow Congress the authority to overturn Supreme Court decisions of which it disapproved in exchange for abandoning impeachment as a method of disciplining jurists who made unpopular rulings.<sup>29</sup> Two decades later, misunderstanding of the number of Justices actually voting to invalidate Kentucky land laws follow-



**Chief Justice John Marshall was so distressed by Congress's attempt to impeach Justice Samuel Chase (pictured) from the Court that he felt it would be better to give Congress the authority to overturn Supreme Court decisions in exchange for taking away its power to impeach Justices for unpopular rulings. The impeachment attempt against Chase in 1805 failed; at his trial before the Senate the charges against him were shown to be politically motivated calumny.**



When Abraham Lincoln and Hannibal Hamlin won the 1860 election, the Supreme Court found itself identified with the losing side because its *Dred Scott* decision had declared illegitimate the organizing principle of the new Republican party: a congressional ban on slavery in the territories.

ing reargument in *Green v. Biddle*<sup>30</sup> plunged the Court deeper into controversy. Not only was the outcome of the case unacceptable in many quarters but it appeared that the 1823 decision was produced by only a minority of the Bench. Congressional critics then introduced bills requiring a vote by a super-majority of the Court before any state or federal statute could be invalidated. The measures fell short of passage, but their failure was partly due to the Court's adoption of a "four-judge rule" dictating "that all constitutional decisions be made by the affirmative vote of four judges of the Court regardless of the lesser number present at argument and decision date."<sup>31</sup> The Court's preemptive step was significant. Passage of a corrective bill in Congress might well have been followed by other Court-curbing proposals then pending, such as repeal of Section 25 of the Judiciary Act of 1789.

#### The Chief Justiceship of John Marshall

is also an important resource for understanding the nature of the Court's business at that time. Data that Johnson presents go well beyond that provided seventy years ago in the classic study by Frankfurter and Landis.<sup>32</sup> Thus one learns precisely the number of opinions filed by each Justice in various legal categories. Moreover, Johnson enriches these data with data and commentary on the business of the circuit courts, the principal federal trial court in Marshall's day, comprised of a Supreme Court Justice sitting as circuit judge and a district judge. The circuit courts not only were the local embodiment of federal judicial power but furnished the bulk of the appellate docket for the Supreme Court.<sup>33</sup> And among the circuit courts, a large number of appeals came from the District of Columbia—at least twenty percent of the total appellate docket in twenty-one of Marshall's thirty-four years. Cases from state judiciaries amounted to much less: in most years

appeals from state supreme courts did not consume more than ten percent of the Court's appellate business.<sup>34</sup>

Johnson's conclusions about Marshall and his Court seem entirely justified. Among many "professional legacies of a life well spent in the service of a beloved country . . . [n]o one achievement predominates." Marshall defined his nation, ensuring "the future constitutional structure of the United States," even though later Courts modified or abandoned some of his rulings. Marshall defined the chief justiceship and left such an imprint on that office that every subsequent Chief has been measured alongside what he accomplished. Finally, Marshall defined constitutional discourse. His "mode of analyzing constitutional issues provided American federal law with a precise vocabulary and a clear view of what the issues would be in defining the nature of the union" all the while leaving room "for future interpretation and construction of his own decisions. . . ."<sup>35</sup>

The Court of Marshall's successor, Roger Brooke Taney, was initially spared much of the political turmoil that had beset the Marshall Bench. Indeed, for two decades, amid various national political storms, the judicial waters remained relatively calm. Compared to what had been and what was to come, it was an "era of good feelings" for the Supreme Court. By one estimate, the Court's prestige had never been higher as the 1850s began.<sup>36</sup> Bitterness over Taney's role in the Bank episode of 1832 had dissipated, as had congressional efforts to curtail the High Court's appellate jurisdiction or otherwise to restrict its power. This situation changed abruptly, however, in March 1857 with decision in the *Dred Scott* case.<sup>37</sup> Aside from tying the hands of Congress in dealing with the most divisive national issue of the day, the Court declared illegitimate the organizing principle of the new Republican party: a congressional ban on slavery in the territories. Upon Abraham Lincoln's victory in the presidential campaign of 1860 followed by secession and war, the Court found itself identified with the

losing side in the election and, for Taney and some of the Associate Justices, of suspect loyalty to the union as well.

The legal events that ensued through early Reconstruction are the subject of David Silver's **Lincoln's Supreme Court**, happily reissued by the University of Illinois Press after its initial publication over four decades ago.<sup>38</sup> Like Johnson's study of the Marshall Court, Silver's vividly demonstrates the difference that individual Justices make for the Court, the Constitution, and the nation. The title is apt for at least two reasons. First, between January 1862 and December 1864, Lincoln was able to place five new faces on the High Court, including Justice Stephen J. Field, who held the new tenth seat, and Chief Justice Salmon P. Chase. Upon Justice John Catron's death at the end of May 1865—just weeks after Lincoln's assassination—Lincoln's appointees amounted to a majority of the Bench. Second, during Lincoln's presidency the Court blocked not a single administration wartime policy.<sup>39</sup>

Yet neither result seem assured for Republicans in 1861 and 1862. "No man ever prayed as I did that Taney might outlive James Buchanan's term, and now I am afraid I have overdone it," jested Senator Benjamin Wade some months before Taney's death in 1864.<sup>40</sup> Everyone knew that as of Lincoln's inauguration on March 4, 1861, the Supreme Court was a veritable time line of history. It included two Justices (Wayne and Taney) named by Andrew Jackson and one (Catron) named by Martin Van Buren. Justices Nelson, Grier, Campbell, and Clifford had been named by John Tyler, James Polk, Franklin Pierce, and James Buchanan, respectively.<sup>41</sup> Republicans were so uncertain of being able to control the Court that creation of the tenth seat, Silver concludes, points to a packed Court "—packed, albeit, to save it, to save the Constitution, and to save the Union." The Court "had to be removed as a factor potentially dangerous to the Union. A Congress and a President that had experienced the [military] debacles of 1862 would not stand idly by to experience disaster at the hands of the Su-



preme Court."<sup>42</sup> Indeed, had the departures of Justices Daniel, McLean, and Campbell not occurred when they did in 1860 and 1861, it seems entirely possible that the Court would have been enlarged even further.<sup>43</sup>

The importance of the Lincoln appointees was underscored on March 10, 1863: the Court decided the *Prize Cases*<sup>44</sup> on the same day that Field was confirmed. At issue was the legality of Lincoln's unilateral blockade of southern ports from April 19 to July 13, 1861, at which point Congress authorized the President to declare that a state of emergency existed. The administration argued, and the Court agreed, that the executive could take steps to suppress an insurrection according to the rules of war without having to acknowledge the Confederacy as an independent nation. The Court thus took a middle position—that the war had the characteristics of both a war between nations and a wholly internal conflict. In Silver's estimation, the decision was pivotal for the nation as well as the Court and is the focal point of his book:

The Supreme Court could not have been called upon to give a more momentous decision in relation to the war. An adverse decision by the Court concerning the legality of blockade ... would reflect upon all acts Lincoln had taken before the assembling of Congress on July 4 and upon Lincoln's concept of executive powers in wartime.<sup>45</sup>

Instead, the decision "reinvigorated a nation that had seen much tragedy and defeat for two long years."<sup>46</sup> A courtroom defeat for the administration would have "shattered the morale of the Union" and, by acknowledging the blockade of southern ports as an act of war under international law, might well have encouraged foreign powers to recognize the Confederacy as a sovereign state.<sup>47</sup> But the administration's victory was by the narrowest of margins: Justices Grier of Pennsylvania and

Wayne of Georgia were joined by all three Lincoln appointees to date, Swayne, Miller, and Davis. Chief Justice Taney and Justices Nelson, Catron, and Clifford dissented.

Among those pleased by the outcome in the *Prize Cases* was Treasury Secretary Salmon P. Chase, whom Lincoln picked as Chief Justice two months after Taney's death and six months after Chase had left the Cabinet. Oddly, the middle ground taken by opinion of the Court on the blockade—written by Justice Grier of the *Dred Scott* majority—would point the way as Chase fashioned his own view on the constitutional status of Reconstruction and post-war federalism. This seems plain from Harold Hyman's compact work in **The Reconstruction Justice of Salmon P. Chase**.<sup>48</sup> The result is probably the closest any book has come to being a strictly *judicial* biography of the sixth Chief Justice even though it explores in depth only a pair of cases: the obscure *In Re Turner*,<sup>49</sup> which Chase decided on circuit in Maryland in 1867, and the landmark *Texas v. White*,<sup>50</sup> decided by the Supreme Court in 1869.

The author places both cases in the context of Chase's entire life and uses both as doorways into his constitutional and political thought. The objective is challenging because of Chase's own complexities. More than most, Chase was driven by both ambition and principle, as another recent biographer of Chase has explained, and it is difficult to discern which pushed harder. "Political goals were never far from his mind. Invariably they were not to be sought for their own sake but rather for the good of the country and for the highest of moral purposes, the freedom and equality of all mankind. Yet these lofty motives masked a thirst for office and power that was deeply ingrained in his character. . . ." <sup>51</sup> As a lawyer in pre-war Ohio, he had been called "the Attorney General for runaway slaves."<sup>52</sup> Before and after his appointment to the Court, he craved the presidency. "As long as the Presidency is not reached, every thing else that he has obtained is as dust and ashes," observed his colleague Justice Davis.<sup>53</sup> Ironically, both *Turner* and



*White* combined to render Chase unacceptable to both parties as a presidential contender, even had his health not failed by 1872.

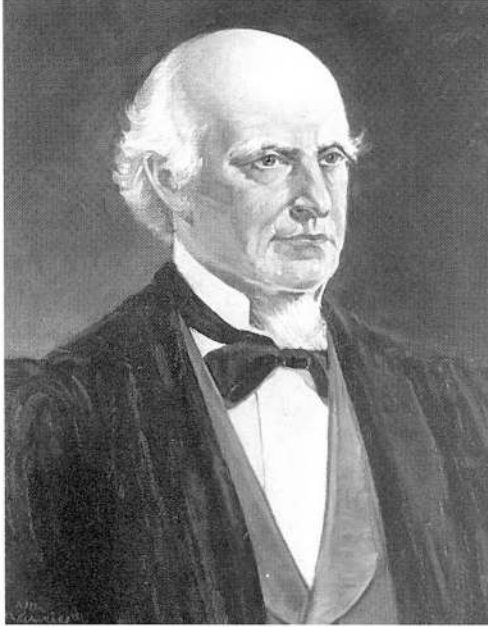
*In Re Turner* involved an attempt by Elizabeth Turner, a young black woman, to be freed from an apprenticeship contract with her former owner, Philemon Hambleton. Maryland law prescribed differential conditions for blacks and whites in such circumstances, with the former possessing fewer rights than the latter. Relying on the Thirteenth Amendment and the Civil Rights Act of 1866 (the Fourteenth Amendment was still a year away from ratification), Chase held for Turner. Congress had assured all citizens “full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,” and the state law violated that principle. Hyman emphasizes “Chase’s deliberately inclusive definition of ‘all persons’ to mean black males and females, among responsible, mature parties to civil contracts, with independent capacity to commit themselves to whatever conditions of labor and wages they wished.”<sup>54</sup> Turner thus clarified “in concrete, workaday terms the ways that the Thirteenth Amendment and the Civil Rights Act had altered federalism.”<sup>55</sup> The recently emancipated population could hereafter seek protection in a federal forum for their rights against state discrimination.

*Texas v. White* was an action by the state to block payment of bonds to White and others who held them. Congress had transferred the bonds to Texas in 1851, payable to the state or bearer and redeemable in 1864. After Texas seceded, the state sold the bonds in 1862 to obtain war supplies. The defense that the bondholders advanced in the Supreme Court was that the Justices lacked jurisdiction because Texas had left the Union and, after the Confederate defeat in 1865, had not been restored as a full-fledged member-state of the Union. At heart the case raised questions about secession, Reconstruction policy, and the nature of the Union. If Texas had legally left the Union, then the actions of its legislature were also legal. If Texas had not seceded, then it was still

a member of the Union and by inference Congress had no authority to impose a provisional government on the people of Texas.

In his opinion for the Court, Chase declared that the state legislature had acted illegally in seceding and therefore in selling the bonds (even though non-war statutes and private contracts remained legal) and that the provisional (Reconstruction) government was the rightful possessor of the bonds. Chase thus simultaneously espoused Lincoln’s theory (that secession was illegal and so had never occurred in law, that the Union was perpetual, and that the rebellion had temporarily suspended Texas’s rights as a member of the Union) and, without passing on the validity of any particular Reconstruction statute, acknowledged Congress’s authority under the Guaranty Clause of the Constitution to maintain provisional governments in the southern states. Although remaining state-centered, federalism had been changed by the war, the Thirteenth Amendment, and the Civil Rights Act because the national government was empowered to redefine “the people of each state to include blacks.”<sup>56</sup>

For Hyman, *Turner* and *White* demonstrate the middle ground that Chase occupied in the debate over the meaning of the North’s victory. Radical Republicans asserted that “losers in a civil war lost everything.” Accordingly, the defeated states and their white citizens had no rights, and Congress would have to remake southern society. The opposing view, espoused by white southerners and many Democrats elsewhere was that the war had been a conflict between two independent nations. Union victory therefore “left nonwar private legal relationships, obligations, and rights undisturbed,”<sup>57</sup> with little new remedial power in Congress. For Chase, the war indeed altered federalism, leaving it “free but still essentially state-centered on ordinary civil relationships and criminal justice yet with the federal rights of the nation’s citizens cloaked in the judicial protections” of the Thirteenth Amendment and civil rights legislation.<sup>58</sup> On the assumption that political support in the North for Recon-



**Had the retirements of Justices John A. Campbell (above), John McLean (opposite, bottom left) and Peter V. Daniel (opposite, upper right) not occurred when they did in 1860 and 1861, Congress may have decided to “pack” the Court by adding an eleventh seat. The earlier creation of a tenth seat to cover the western circuit, which was filled by Californian Stephen J. Field, had been, in a way, also an exercise in packing the Court with a Justice favorable to the Republican agenda in time of war.**

struction would soon wane, Chase’s formula called for “individuals [to protect] their own legal interests and constitutionalized rights through racially equalized access to the law’s protections and through exercise of the ballot.” He exhibited a profound and “almost naive faith in the efficacy of such self-help by free labor”<sup>59</sup>—and, one might add, considerable confidence in the good faith of the federal courts and state governments to make good on the new regime’s promises of equality.

As Lincoln’s Treasury secretary, Chase corresponded regularly with prominent New York attorney David Dudley Field, brother of Stephen J. Field, the President’s fourth appointee to the Supreme Court. Field’s life, particularly his service on the Supreme Court, is the

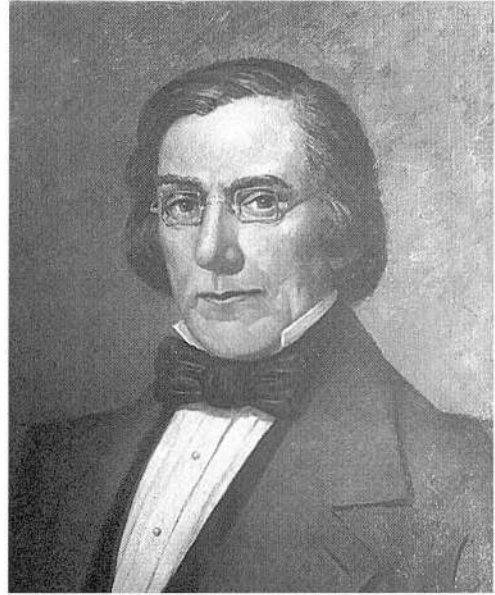
focus of Paul Kens’ **Stephen J. Field**, the first comprehensive book-length study of the headstrong Californian in nearly seventy years.<sup>60</sup> Anyone curious about Chase’s on-going pursuit of the presidency will be intrigued by the attempt by the Field family to place brother Stephen at the head of the Democratic ticket in 1880,<sup>61</sup> only one small episode in a life packed with the sort of adventures and achievements that are denied to most. In his case, confidence and perseverance, assuaged by good fortune, were handsomely rewarded. If there is a nineteenth-century member of the Court who is a fitting subject for a Steven Spielberg motion picture, it is surely Field.

Lincoln’s choice of Field for the new tenth seat derived not merely from the widespread political backing that David Dudley’s brother enjoyed in both California and Washington but from Field’s strong loyalty to the Union. An authentic “forty-niner” (but no miner) and a Buchanan Democrat as late as 1860, Field “represented the first bona fide instance of a presidential crossing of major party lines to fill a Supreme Court vacancy.”<sup>62</sup> Surviving three Chief Justices (Taney, Chase, and Waite), Field sat until 1897 (nine years into Melville W. Fuller’s Chief Justiceship) and claimed the Court’s longevity record until Justice William O. Douglas seized it in 1973. Noting doubts about the authenticity of the story,<sup>63</sup> Kens—presumably believing it too charming to leave out of the body of the book—recounts the tale about Justice Harlan’s effort on behalf of colleagues in 1896 to encourage Field to retire by reminding him of the visit Field himself had paid to Justice Grier in 1870 because of the latter’s mental decline. The story ends as Field bursts forth, “Yes! And a dirtier day’s work I never did in my life!” Less in doubt than this event was Field’s desire to exceed Chief Justice Marshall’s record and Field’s aversion (because of a decade-old grudge he carried against the President) to giving Grover Cleveland the chance to name his successor. As events unfolded, Field retired in December following President William McKinley’s inauguration in March.

Whatever the circumstances that dictated the timing of his departure, Field's long career demonstrates the uncertainty that confronts any president who tries to shape public policy through careful judicial selection. Election to the presidency does not guarantee knowledge of the future. The pressing judicial issues of the mid-1860s were vastly different from those that emerged a decade later and dominated the Court's docket near the end of the century.

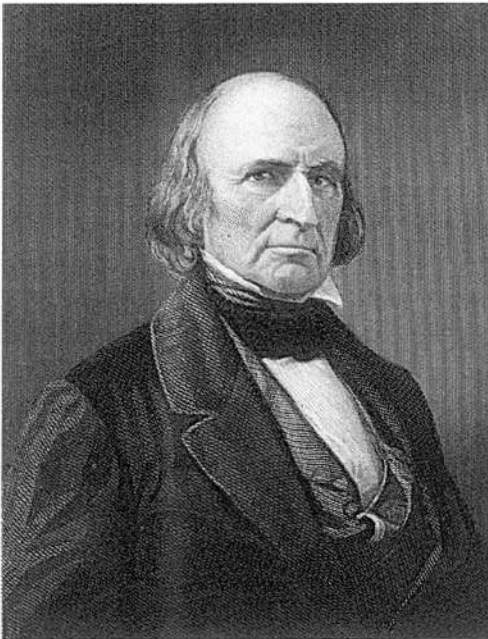
The author uses Field's life as a vehicle to explore the struggle in the United States to define liberty in the last third of the nineteenth century. The struggle set the boundaries of American political and intellectual history for several decades: the views for which Field contended and that prevailed in his day dominated law and political thought in this nation until the 1930s. All of this is territory with which Kens is thoroughly familiar. An earlier volume is effectively a sequel to this one.<sup>64</sup>

Echoing critics from the Progressive era, the traditional account among many historians, legal scholars, and political scientists has been that Field was among a group of Supreme Court Justices who opposed all manner of social re-



forms by grafting laissez-faire economic theory onto the Constitution, imparting meanings to the Due Process and Commerce Clauses never intended by their Framers. Some of Field's contemporaries accused him of harboring a desire to protect entrenched privilege, whether among the railroads or other powerful interests.<sup>65</sup> It was none less than Justice Holmes, dissenting in *Lochner v. New York* eight years after Field's death, who declared that the case had been "decided upon an economic theory which a large part of the country does not entertain."<sup>66</sup> A more recent approach has been to view the important jurisprudential developments in the late nineteenth and early twentieth centuries as a product not of concerted efforts to thwart reform but as an outgrowth of the interactions between lingering Jacksonian notions of liberty and the new realities of expanding corporate power. Kens's study of Field springs from the latter.

Kens believes that Field's "ideas about liberty had roots in Jacksonian Democracy and antebellum free-labor theory." That hardly differentiates Field from countless others who matured intellectually at about the same time, although far fewer could mix that background with experiences like Field's, where he participated in the literal transformation of California



in barely more than a decade after the discovery of gold. These roots probably affected his reaction as “people with the same Jacksonian and free-labor roots split over the meaning of liberty and the proper scope of government power.”<sup>67</sup> Initially, liberty and government power were considered separate parts of a zero-sum game.<sup>68</sup> To enlarge one was necessarily to contract the other. As private economic power became ever more a factor in people’s lives in the second half of the century, some concluded that government power could be employed (expanded) to protect liberty. Others concluded that the greater danger lurked within the excesses of government that only tended to make matters worse by protecting economic privilege. Liberty was best achieved and retained by limiting the power to govern. A similar evolution occurred in free-labor thinking, as an outgrowth of reaction to slavery and indentured service. Both were examples of the heavy hand of government on the individual. Yet some diverged from this strain, considering government power more benignly in light of the heavy hand which economic power could lay upon the individual, too.

Kens’s portrait of Field is that of the radical individualist who perceived government as a threat to, not a guardian of, liberty and then wrote that perception into his constitutional jurisprudence. His dissents in *The Slaughterhouse Cases* and *Munn v. Illinois*<sup>69</sup> are symbolic of a career. They read more like the handiwork of an advocate than a judge. Kens believes that Field seemed guided less by a philosophy and more by an agenda: the latter being to view the Constitution through the lens of his understanding of individual liberty. For the author that makes Field less of a nineteenth-century jurist and more of “a prototype for the [modern] activist judge.”<sup>70</sup> Field was the first Justice “to deliberately use [*sic*] written concurring and dissenting opinions to build a body of legal authority.”<sup>71</sup> By the time of his death in 1899, two years after retirement, “the Court was polishing liberty of contract doctrine into a tool that protected entrepreneurial liberty” in a way

that reflected Field’s values on free labor. “It was moving toward a definition of police power that restricted state authority to enact economic regulation. It was defining the commerce clause in a way that limited Congress’ power to interfere with business. And it had already made itself the final arbiter of the validity of rate regulation.”<sup>72</sup> And Field was closely identified with each of these doctrinal developments even if he was never recognized within the Court as a “leader.” As he perceived the judicial function, he may have had less in common with colleagues such as Morrison R. Waite and Edward Douglass White and more with successors such as William O. Douglas and William J. Brennan, Jr.

### The Twentieth Century Court

The judicial career of Benjamin Nathan Cardozo—first on the New York Court of Appeals (1914-1932) and then on the Supreme Court of the United States (1932-1938)—falls between Field’s and the modern judicial era, and Cardozo is linked to both. First, progressives objected to the jurisprudence of Justices like Field because it erected constitutional barriers to reform. On the Supreme Court, Cardozo was usually aligned with colleagues who voiced restraint, thus giving a green light to social reform and animating successors such as Frankfurter and the second Harlan. Despite Cardozo’s heart attack and stroke in December 1937, and the resulting extreme incapacity that persisted until his death on July 9, 1938, he was nonetheless present for the initial stage of the “constitutional revolution” that is the demarcation in which progressive forces triumphed. His votes in most key New Deal cases make him very much a part of that first stage.

Had he been allowed a longer tenure, one that extended well into the 1940s, would he have been a part of the second stage of that revolution? It was this second stage that witnessed the “new” Court’s exchanging one set of preferred values (liberty against government on



Leading New York attorney David Dudley Field was the brother of Justice Stephen J. Field, but he corresponded frequently with Chief Justice Salmon P. Chase over judicial matters. He and the rest of the Field family conspired to place brother Stephen at the head of the Democratic ticket in 1880, a political goal long sought by his friend Chase as well.

matters of economic regulation) with another (liberty against government on matters involving nonproprietary issues in civil liberties and civil rights). The last opinion he delivered for the Court—in *Palko v. Connecticut*,<sup>73</sup> which argued strongly against applying many of the strictures of the Bill of Rights to the states—suggests that he would not. Probably Cardozo would have aligned himself instead with, and perhaps led, Justices such as Stanley Reed and Frankfurter. (This speculation of course assumes that Frankfurter would have been Roosevelt's choice for a different vacancy).

Second, Justices like Field provided the evidence for legal realists who emphasized the role of a judge's personal predilections in shaping the law. Cardozo hardly counted himself among the thoroughgoing "realists" (or "neo-realists"<sup>74</sup> as he called them in 1932) as that term was understood in the 1920s and 1930s—

indeed he seemed more associated with the "sociological jurisprudence" of Roscoe Pound and was critical of the realist movement for assigning too much importance to legal indeterminacy. Yet, Cardozo's own path-breaking extra-curiam writings—in particular *The Nature of the Judicial Process* (1921)—inspired much of the realist movement that put an indelible imprint on scholarly perception of the art of judging and helped to legitimize the overtly political role of the modern Court.<sup>75</sup>

Cardozo's life and its influence on his judicial career are the subject of *The World of Benjamin Cardozo* by Richard Polenberg, one of the first book-length studies of this significant figure in the last half century.<sup>76</sup> Here is a manageable, well-documented, engaging, pleasing-to-read, and illuminating book that should have a large readership, from scholars of the Court to those with only a general interest in the history of the period and in the intellectual world that Cardozo inhabited and helped to shape. The author is probing but properly respectful of a great mind. Polenberg's reference to a later generation of judges could just as well be applied to his own treatment of Cardozo: "It is rather a mark of Cardozo's stature that modern courts, even when reversing him, have gone out of their way to explain the considerations which led them to adopt different rules."<sup>77</sup>

The book's thesis is suggested by the subtitle: *Personal Values and the Judicial Process*. These personal values derived from Cardozo's upbringing in the economically well-ensconced<sup>78</sup> Sephardic Jewish community of New York City which some of Cardozo's ancestors had joined prior to the American Revolution. (Cardozo may be the only Supreme Court Justice to have been tutored as a child by Horatio Alger, Jr.<sup>79</sup>) The author believes that the choices Cardozo made as a judge "become understandable only when viewed as an expression of a deeply rooted system of personal values"<sup>80</sup> that amounted to "a code of conduct."<sup>81</sup> The determinative role of values in Cardozo's decisions unfolds through Polenberg's examination of cases involving morality, sexuality, social or-



der, religion, and criminality. In a volume that opens with a five-page prologue and concludes with a sixteen-page epilogue, these subjects occupy the bulk of four chapters in a six-chapter book. There are only passing references to other areas of law—areas perhaps less appealing to a contemporary audience—such as torts, contracts, real property, wills and estates, and workers' compensation, where Cardozo's opinions influenced other courts and doubtless affected untold numbers of people. Polenberg's investigation yields discovery of "a middle course between the extremes of toleration and repression. . . . So he took a liberal, facilitative approach to issues of economic welfare, . . . while taking a conservative, even restrictive, stand in cases involving what he regarded as immoral, harmful, or criminal behavior."<sup>82</sup>

Without question, Polenberg makes a valuable contribution to the literature on Cardozo. Whether readers agree that the author's enterprise succeeds fully, however, depends on whether they are prepared to discount two pos-

sible objections. One involves an unavoidable part of writing about Cardozo (but looms large here), and the other concerns the author's methodology.

There is the matter of the missing papers. Without question Cardozo, who never married, was an intensely private person. He discouraged aspiring biographers and displayed displeasure even when complimentary statements about him appeared in print. Down to almost the day of his death, he and those closest to him endeavored mightily to guard his privacy. (Even Chief Justice Hughes seems to have been denied knowledge of the full extent of his associate's last illness and the unlikely prospects for a return to the Bench.) After his death, Judge Irving Lehman, a close friend from the New York Court of Appeals, is supposed to have destroyed all of Cardozo's private papers that had been left to his custody, including some believed to be "very intimate and personal." However, correspondence from Cardozo in the hands of others survived, as have additional



CALIFORNIA GOLD DIGGERS.—A SCENE FROM ACTUAL LIFE AT THE MINES

Paul Kens' new biography of Justice Field describes the exciting early years in California, where Field had gone to seek his fortune in the Gold Rush year of 1849. Instead of prospecting, however, he soon began practicing law and running for office.

documents. "Taken together," writes Polenberg, "they allow a portrait of the man, however incomplete, to emerge."<sup>83</sup> The difficulty of course is that if one is building an argument around the impact of one's upbringing and of one's value system as an adult on decisionmaking, the possibility exists that some of what will probably remain forever unknown might well alter conclusions regarding what is thought to be true. The gap would amount to a lesser drawback for a different kind of study, such as one that focused more on what was done instead of why it was done.

Then there is the matter of selection. Cardozo's desire for privacy stemmed from his "unusual sense of reserve" which, along with "his strongly moralistic outlook," contributed to "some of the more striking aspects of his personality. . . ."<sup>84</sup> Upon leaving Columbia Law School in 1891, he appears in Polenberg's eyes to have been excessively Victorian even by Victorian standards. It is Cardozo's moralism that Polenberg finds such a powerful force in his decisionmaking, especially in the way in which Cardozo employed a "selective reading of both the evidence and the precedents. . . ."<sup>85</sup> And the author makes an excellent argument for its application in those cases he selects for full treatment. Yet selection entails exclusion in biography too. Cardozo wrote opinions in nearly 700 cases, many on subjects either passed over or only briefly noted by the author. Methodologically that is not without risk. One wonders whether the same appraisal of Cardozo would have emerged from more in-depth treatment of some of those subjects too.

Because of Polenberg's emphasis on a judge's values at work, readers will quickly spot the irony. The image that emerges confirms the realists from whom Cardozo professed to distance himself. He "had a genius for making it seem as if the results he reached were logical, inevitable, and legally unassailable."<sup>86</sup>

Justice Hugo L. Black shared some of Cardozo's penchant for privacy, directing the burning of his Court memoranda shortly before his death in 1971. Moreover, both men articu-

lated distinctive (if divergent) theories of judging which provide a useful starting point for any study of the Courts on which they served. Both were exceedingly complex individuals. Yet in other ways the two were strikingly different.

Cardozo's rearing in New York was far removed from Black's in post-Civil War Alabama. Black was largely self-taught; Cardozo enjoyed formal educational opportunities equal to the best of his day. If an author a century later has difficulty comprehending Cardozo's "strongly moralistic outlook and his unusual sense of reserve,"<sup>87</sup> Black's upbringing may present another challenge. Although he did not retire from the Supreme Court until two years after the first American moon landing, Black's formative years must be faraway indeed from the those of most people who write about the Court. Probably few of them grew up in surroundings so impoverished that the principal difference between those who were relatively well off, as Black's family was, and those who were not was the difference between having more or less of very little. Few may have known first hand a community where the social as well as the religious life revolved around the church and where for entertainment one went, as Black did, to the county courthouse or to a political rally.

It is hard to imagine Cardozo's campaigning for a U.S. Senate seat from New York. Black conducted two successful ones and represented Alabama for ten years. Black's nearly thirty-four years of service on the Supreme Court are among the longest, while Cardozo's six are among the briefest. When he retired, Black had sat with almost one-third of the total membership of the Court since 1789. Including both Black and Reed (Cardozo's illness prevented him from actually *sitting* with the latter), Cardozo served with ten. Cardozo was appointed by Herbert Hoover and died during the second term of his successor Roosevelt. Black served the equivalent of eight and a half presidential terms and survived the tenures of five Presidents. "Chief justices come and chief justices go," Black could accurately say on his

eighty-fifth birthday, having out-served four of them.<sup>88</sup> For Cardozo, Chief Justice Hughes preceded him to the Court by two years and did not depart until nearly three years after Cardozo's death.

If Cardozo's career ended at the outset of the constitutional revolution of 1937, Black's, which began less than ten months before Cardozo's death, was a full participant in its initial and successive stages, even if he lived long enough to witness it outrun his jurisprudence. If Cardozo was conciliatory and "instinctively sought to avoid dissension,"<sup>89</sup> Black loved a battle. This, at least, is the picture of Black that emerges from Howard Ball's **Hugo L. Black**.<sup>90</sup> The subtitle captures much of the book's content: "Cold Steel Warrior." This volume is not his first on the only twentieth-century Supreme Court nominee from Alabama: Ball has authored or co-authored two others.<sup>91</sup>

Black "hardly ever acted incautiously,"<sup>92</sup> contends the author. Accordingly, the first chapter opens with an account of the fuss stirred up by Black over the wording of the customary letter to be sent to Justice Owen J. Roberts upon his retirement in 1945. In "herding" his "collection of fleas"<sup>93</sup> or managing his "wild horses,"<sup>94</sup> this storm over the phraseology must have brought Chief Justice Stone nearly to tears. The result, Ball reports, was that Roberts not only was denied the complimentary language that offended Black—specifically, regretting "that our association with you in the daily work of the Court must now come to an end" and "You have made fidelity to principle your guide to decision"—but received no letter at all. As he would on other occasions, Black had prevailed against those (led by Frankfurter) who underestimated either his abilities, tenacity, or both. The stakes may have been small and Black's motives petty, but "Black, on this occasion standing with only one ally, had won a small battle against some tough adversaries."<sup>95</sup>

Black attracted scholarly interest during most of his Court years and has been the subject of a series of books since his death, the

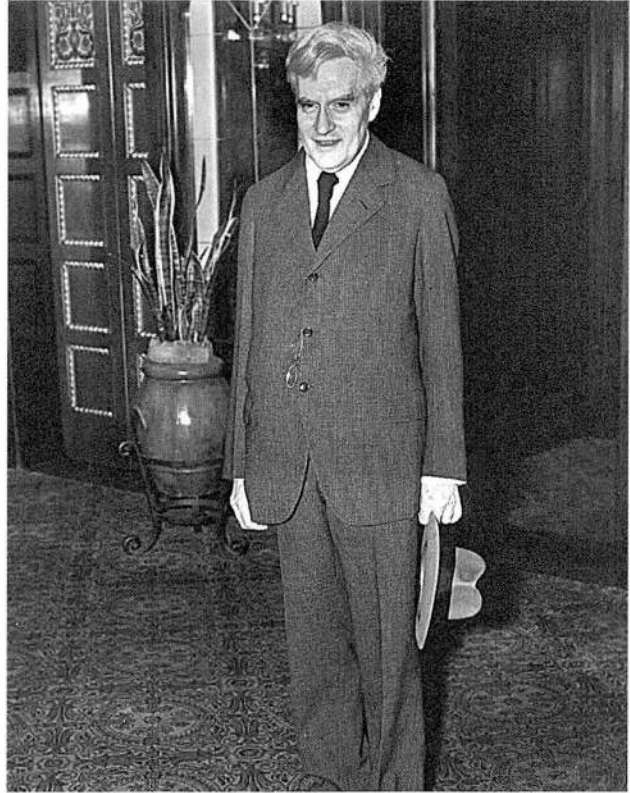
most recent prior to Ball's being Roger K. Newman's in 1994. In space less than half the length of Newman's, Ball attempts "to capture *all* of [Black]. . .," to provide "a clear portrait of a driven and private public person"<sup>96</sup> without "getting into psychoanalysis of the dead."<sup>97</sup> With Black that goal may be elusive for any author, but Ball probably succeeds as well as anyone to date, especially given his weaving into the text of many contemporaneous statements and recollections about Black from those who worked and lived most closely with him. The result is a volume that encourages readers to draw their own conclusions about the Justice.

While Newman's book is organized chronologically, Ball's is only partly so.<sup>98</sup> Chapters two through five carry the reader from Black's Alabama roots through his nomination and confirmation to the Court and the controversy immediately afterward over his membership in the Ku Klux Klan. The tenth and final chapter details the circumstances of his retirement and death, as well as an appraisal of the Justice's career. In between are discrete chapters analyzing Black's views on the role of the Court, federalism and free expression, and the Fourteenth Amendment and equal protection controversies, plus a chapter entitled "Friends, Enemies, and Legal 'Children,'" which contains summaries of Black's relationships with his principal judicial allies and adversaries, and his law clerks. Chapters with a heavy jurisprudential focus contain the right amount of doctrinal and case law background: beginners should not be bewildered, and experts should not be bored. Each of the ten chapters proceeds through a half dozen or more vignettes to illustrate various themes, events, and developments.

For Ball, Black's view of the Constitution embodied "a vision about the future of the American experiment in republicanism." Black's jurisprudence "was both literalist and absolutist in nature," and, win or lose, he "insisted that his judicial opponents grapple with his thoughts and respond to them, and to him." Foremost was his certainty about the "central-



Richard Polenberg's recently published *World of Benjamin Cardozo* focuses on how the Justice's personal value system affected his judging. The author attributes Benjamin Cardozo's strong moral sense to his upbringing in New York's Sephardic Jewish community, which had established itself prior to the American Revolution.



ity of the Bill of Rights and its protection of every person . . . against unlawful actions in any governmental operation. . . . Another significant legacy was his perception of the First Amendment as the foundation for all liberties. . . .<sup>99</sup> Indeed, significant development of the First Amendment occurred during Black's tenure, and he had a major part in the handiwork, carried on after his death by others such as Justice Brennan. Black's starting point, derived from his Alabama years, was that freedom of the mind and freedom of expression released the potential that produced human progress. Coupled with this sense of constitutional purpose was a wariness of "non-elected federal judges exercising their power of judicial review. . . ."<sup>100</sup> Thus Ball's account yields a paradox: one of the most activist of judges had a keen sense of constitutional limits on judicial power. One suspects that Black would have agreed with Chief Justice Marshall's self-evaluation that he had "never sought to enlarge the judicial power beyond

its proper bounds, nor feared to carry it to the fullest extent that duty required."<sup>101</sup>

Justice Black and his pugnaciousness figure prominently in Melvin I. Urofsky's *Division and Discord*,<sup>102</sup> the fourth volume to date in the series *Chief Justiceships of the United States Supreme Court*. Like its companions, this one on the chief justiceships of Stone and Vinson (1941-1953) is a useful addition to the literature of the Court. Whatever the challenges the authors of the other three confronted, however, they were spared one that Urofsky could not avoid. While every Court since 1790 has exhibited some measure of personality conflict and unpleasantness, the years between the Hughes and Warren Courts have the unenviable distinction of being the least collegial and most internally vindictive. The feuding and back-biting are now so well known because the behavior is so well documented: Justices of this period left a remarkable archival record to posterity. And the remarkable thing about that remarkable



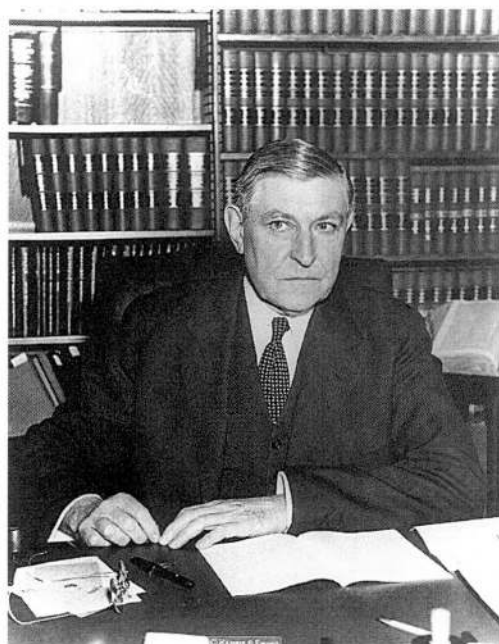
Justice Hugo L. Black (left, with wife Elizabeth) went head to head with Chief Justice Harlan Fiske Stone and Justice Felix Frankfurter over the wording of the customary letter to be sent to Justice Owen J. Roberts (opposite page) on his retirement in 1945. He objected to a phrase regretting "that our association with you in the daily work of the Court must now come to an end" and another complimenting him for having "made fidelity to principle your guide to decision." Ultimately, poor Roberts received no letter at all.

record is that those who compiled it seemed generally unconcerned about how petty and meanspirited much of it would appear.

Frankfurter in particular complicated relationships. "There is an arrogance about [him] that is absent from the others, and this trait had been present well before he went on the bench," the author observes. He "thought that he knew best and, like Woodrow Wilson, tended to personalize differences. It is an unattractive characteristic in any person, but it is disastrous in a small community of nine people."<sup>103</sup> But the blame for the ill-feeling cannot be placed entirely at his feet. "It takes two to make a fight," Cardozo once said about the Court to Judge Learned Hand.<sup>104</sup> The chemistry among Frankfurter, Black, Douglas, and Jackson, to name but four, was not good. Stone's deanship of the law faculty at Columbia had prepared him for this mixture no more than his years as Attorney General or his "apprenticeship" in the Hughes Court. Despite

service in Congress, on an appeals court, and in the cabinet, Vinson, even with his "hearty bonhomie,"<sup>105</sup> could do no better.<sup>106</sup>

The Stone-Vinson years may be curious because of their "division and discord," but Urofsky believes that they are noteworthy because they amounted to a transition or link between the Hughes and Warren eras. A latter-day Rip Van Winkle, falling asleep at the Supreme Court in, say, 1935 and awaking in 1955, would have been amazed at the transformation, and not only because of the nine unfamiliar faces on the Bench. The Court of 1935 was a property-centered institution on the eve of a spectacular clash with the elected branches of government because it thwarted reform. The Court of 1955 processed a docket nearly shorn of property rights disputes and had become centered on civil liberties and civil rights. Moreover, it had just started down a decisional path that would again bring it into conflict with the elected branches—this time because it insti-



gated reform.

Landmark decisions after 1953 would have been doctrinally and politically improbable had the Supreme Court, prior to 1953, not consummated the revolution of 1937. The Bench under Chief Justice Stone could have stopped with the first stage, by adopting a posture of *procedural liberalism*: removing constitutional barriers erected before 1937 to whatever reform measures majoritarian politics might enact. The Stone Court and the Vinson Court did more: both Benches, with varying degrees of enthusiasm, gradually moved toward *programmatic liberalism*. A judicial hands-off for economic regulation would be accompanied by a judicial hands-on in matters such as racial or religious discrimination, to ensure a liberal result. Dwarfing the interpersonal conflicts and constitutional debates that mark the Court during this time was thus something more important: general agreement that the role of the Court had changed fundamentally. Whatever the differences between Black and Frankfurter, for example, “both believed the government had the power to regulate the economy, and above all, both believed that the Supreme Court had the obligation to protect the rights of individuals.”<sup>107</sup> Notwithstanding

differences among them over how far the Court should go in that direction and the impact those differences have had on their successors, no Bench since their day has evaded the responsibility the Stone-Vinson Courts assumed.

Present on the Bench when Stone became Chief Justice, Justices Black, Douglas, Frankfurter, and Jackson were still on the Court when Chief Justice Vinson died in 1953. Jackson would sit for another year, Frankfurter for another nine, and Black and Douglas for an additional eighteen and twenty-two, respectively. It is at least arguable that their fractiousness would have delayed, derailed, or otherwise muted some of the momentous decisions yet to come in the next decade had Vinson died later or had President Eisenhower selected a new Chief in 1953 from the ranks of the side Justices. In short, the “transitional” characteristics of the 1941-1953 period could have merely continued. Instead, the appointment of Earl Warren brought a Chief to the Court who was able to provide the social and managerial, if not the intellectual, leadership absent in his two predecessors. Nearly three decades after his retirement in 1969 and nearly a quarter-century after his death in 1974, the nation continues to contend with the unprecedented adjustments wrought by the Court during his sixteen years at the judicial helm.

Warren was a biographical subject even before he left the Bench with Leo Katcher’s **Earl Warren** and John D. Weaver’s **Warren** coming out in the same year.<sup>108</sup> The former stressed his pre-Court years in California and his quest for the presidency; the latter lent slightly less than half its length to his judicial service. In **Earl Warren**, G. Edward White, who clerked for the Chief Justice in his retirement, portrayed the man through a series of episodes and elements of his life, particularly after 1953.<sup>109</sup> White’s book was followed a year later by one almost twice as long: Bernard Schwartz’s **Super Chief**, a judicial biography in the strict sense of the term in that it begins with his arrival at the Court.<sup>110</sup> It was also one of the first



Only Justice James F. Byrnes, Jr. had a shorter tenure on the Court in this century than Arthur J. Goldberg (pictured with President Johnson), who served two years and ten months before resigning in 1965 to become Ambassador to the United Nations. In the first full-length biography of Goldberg, writer David Stebenne points out that the Justice did serve long enough to employ future Justice Stephen G. Breyer as a law clerk.

to reveal the internal dynamics of Warren's tenure, which yielded so many landmark rulings.

Alongside these and other accounts of Warren comes Ed Cray's *Chief Justice*.<sup>111</sup> If a volume of judicial biography can ever qualify for the hammock or the pool side, Cray has written it. A journalism professor in California, the author has written nearly a dozen books on a variety of subjects from General George Marshall to bawdy songs.<sup>112</sup> Dividing itself almost equally between Warren's California and Washington years, *Chief Justice* is Cray's first book to focus on the Supreme Court. With its brief paragraphs and short sentences its journalistic writing style seems closest to Katcher's. In the quantity of information and number of insights about his subject that Cray shares with the reader, the book may be without parallel. These he gleans not only from the expected manuscript collections, oral histories, and published sources, but from interviews with most of Warren's law clerks, family members, and more than 100 other persons. The result is a friendly and highly readable account of a major figure in modern American history. Cray has found his hero.<sup>113</sup>

If *Chief Justice* has a thesis, it is that Warren was a man of contradictions, one who "grew to meet the demands of each new job."<sup>114</sup>

A bluff, outgoing politician, he appealed to millions—at the same time hiding a private, inner man revealed to only a very few. Not a legal scholar, he nonetheless led a legal revolution.... This former prosecutor fashioned majorities in case after case to protect the rights of the accused. . . . One of the first local officials secretly to amass files on suspected subversives, he later led the high court to a series of decisions that curtailed the Red Scare of the 1950s. . . . He was in many ways old-fashioned in his values, even prudish. Yet this man voted to permit the publication of books and showing of motion pictures that provoked him to say he would kill the man who showed such material to his daughters. . . . With his appointment to the Supreme Court. . . , liberals groaned in dismay. . . . Sixteen years later, conservatives cheered his resignation. . . .<sup>115</sup>

The story Cray tells is the unfolding of those contradictions. The author is at his best in describing Warren's relationships with figures such as Lyndon B. Johnson and Richard

Nixon, and in depicting situations or episodes, such as Warren's quest for the presidency, the 1952 Republican National Convention, his bulldog tenacity in 1953 that would not release Eisenhower from his promise about the "first vacancy" at the Supreme Court, and his overseeing the work of the commission in 1964 to investigate the assassination of President John F. Kennedy. He does very well at capturing the personal qualities that were surely responsible for Warren's success as a Court leader. The book is often less satisfying in its description of judicial decisions. Sufficiently straightforward and workmanlike, the case presentations seem intended to appeal to the general reader. Others will need to look elsewhere for in-depth discussion of some of the major underlying jurisprudential controversies that beset the Court.

With a handful of exceptions, most of the Warren Court's major pronouncements on criminal justice, implementation of school integration, legislative districting, religious freedom, free speech, and privacy followed Frankfurter's retirement and Kennedy's appointment of Arthur J. Goldberg to replace him. Four usually sure votes (Warren, Black, Douglas, and Brennan) for programmatic liberalism became five with Goldberg's arrival.<sup>116</sup> Although his appointment was eventful, his tenure was brief—only about two years, ten months—making his one of the shortest in Court history (but long enough to encompass the clerkship of one current member of the Supreme Court, Justice Stephen G. Breyer). Indeed, in this century, only Justice James F. Byrnes, Jr., had a more fleeting tenure.<sup>117</sup> Goldberg resigned in 1965 after President Johnson persuaded him to succeed Adlai Stevenson as U.S. ambassador to the United Nations, and probably after Goldberg thought he had some assurance from Johnson for reappointment to the Bench once the Vietnam problem had been settled by negotiation. Neither of course happened. After an unsuccessful try for the governorship of New York in 1970, Goldberg returned to law practice and assumed special public duties, includ-

ing an at-large ambassadorship from President Jimmy Carter in 1977-1978, during the remaining twenty years of his life. One can only speculate about the impact that Goldberg would have had on the Court and national politics had he not resigned in 1965. Most directly, would Johnson have picked Abe Fortas or Thurgood Marshall to succeed retiring Justice Tom Clark in 1967?

The well-crafted and thoughtful **Arthur J. Goldberg** by David Stebenne is the first biography of the 94<sup>th</sup> Justice.<sup>118</sup> The amply documented volume—the 382 pages of text are followed by 142 pages of notes—is actually three books in one. There is first the expected portrayal of the man and his work, although Stebenne's emphasis is more on the public than the private aspects of Goldberg's life. But the private side is not altogether neglected. One learns, for instance, that as a teenager in the 1920s, Goldberg worked as a vendor at Chicago's Wrigley Field, dispensing coffee from a large urn that was strapped to his back and that in pre-Prohibition days had been used to dispense beer.<sup>119</sup> Stebenne fully verifies Willard Wirtz's assessment of the man: "perpetual energy in constant motion leading to endless achievement."<sup>120</sup>

Second, the book is labor history. Prior to 1962, the bulk of Goldberg's public career had been involved with labor law and policy, most immediately as secretary of labor in the Kennedy administration. So Stebenne's account of Goldberg is set within a history of organized labor in the United States, especially after the New Deal. Both the Goldberg story and the labor story make his positions in high-profile Supreme Court cases entirely understandable, even though Goldberg's judicial service occupies only a small part of the volume—mainly covered in a single chapter of thirty-six pages.

Finally, at a higher level of generality, Stebenne tells Goldberg's and labor's stories as part of "the rise and decline of a certain social bargain, one that for all its problems remains central to the political economy of this



society and all the other highly industrialized market systems."<sup>121</sup> So the book is also intellectual and political history. With Goldberg's help, this "bargain" emerged among organized labor, management, and the federal government after World War II. Most union leaders agreed to give up further efforts to wrest control of basic business decisions from management, to demand wage increases that were linked to increased profits and productivity (in place of a guaranteed wage), and to support the Truman administration and the Democratic party on containment and other anti-communist policies. Corporations agreed to accept unions, to accept labor's gains from the 1930s and early 1940s, to provide fringe benefits, and "to pursue investment and output policies that helped promote high employment for union workers." For New Dealers, this program "signaled a sea change in the intellectual content of . . . liberalism."<sup>122</sup> Stebenne then demonstrates the not entirely positive consequences this bargain entailed for labor especially after the demise of the Cold War brought an end to any need for containment. Goldberg "like so many other New Deal liberals, had erred in assuming so confidently that [the prosperity wrought by the bargain] would endure and expand indefinitely during his own lifetime."<sup>123</sup>

Policies therefore have consequences, sometimes unintended. Whether those policies arrive in the form of a labor agreement, statute, or judicial decision, citizens are more likely to understand them by also understanding the people who make them. With courts as with other political institutions, that reality places a heavy responsibility on the art of biography.

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**THE BOOKS SURVEYED IN THIS  
ARTICLE ARE LISTED  
ALPHABETICALLY BY AUTHOR  
BELOW**

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## Endnotes

- <sup>1</sup> 2 U.S. (2 Dallas) 419 (1793).
- <sup>2</sup> Edward S. Corwin, "Establishment of Judicial Review," in Richard Loss, ed., **Corwin on the Constitution: Volume Two; The Judiciary** (1987), pp. 71-72. This chapter originally appeared as an article in two parts: 9 *Michigan Law Review* 102-25 (1910), and 9 *Michigan Law Review* 283-316 (1911).
- <sup>3</sup> 5 U.S. (1 Cranch) 137 (1803).
- <sup>4</sup> Edward S. Corwin, quoted in Alpheus Thomas Mason and Donald Grier Stephenson, Jr., **American Constitutional Law: Introductory Essays and Selected Cases**, 8<sup>th</sup> ed. (1987), p. 3.
- <sup>5</sup> Thomas E. Baker, "**The Most Wonderful Work...: Our Constitution Interpreted**" (1996) (hereafter cited as Baker).
- <sup>6</sup> "As the British Constitution is the most subtle organism which has proceeded from the womb and the long gestation of progressive history, so the American Constitution is, so far as I can see, the most wonderful work ever struck off at a given time by the brain and purpose of man." William E. Gladstone, "Kin Beyond Sea," 127 *The North American Review* 179, 185 (1878).
- <sup>7</sup> Baker, p. xiii.
- <sup>8</sup> *Id.*, p. xi.
- <sup>9</sup> *Id.*, p. viii.
- <sup>10</sup> *Id.*, pp. ix-x.
- <sup>11</sup> *Id.*, p. xiii.
- <sup>12</sup> Charles Warren, 1 **The Supreme Court in United States History**, rev. ed. (1926), pp. 58-59.
- <sup>13</sup> Baker, p. xiii.
- <sup>14</sup> 517 U.S. 620 (1996).
- <sup>15</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheaton) 1 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264 (1821); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518 (1819); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Peters) 420 (1837); *Munn v. Illinois*, 94 U.S. 113 (1877); and *Wickard v. Filburn*, 317 U.S. 111 (1942), to name but six.
- <sup>16</sup> J. Woodford Howard, Jr., "Judicial Biography and the Behavioral Persuasion," 65 *American Political Science Review* 704, 704-5 (1971).
- <sup>17</sup> Thomas Carlyle, "Jean Paul Friedrich Richter," in 1 **Critical and Miscellaneous Essays** (1897), p. 3.
- <sup>18</sup> Albert J. Beveridge, 1 **The Life of John Marshall** (1916), p. v.
- <sup>19</sup> Felix Frankfurter, ed., **Mr. Justice Brandeis** (1932), p. vi. The operative word seems to be Frankfurter's assessment of "adequately." He could have mentioned, but did not, important works such as **The Life of Oliver Ellsworth** by William Garrott Brown (1905) and Carl Brent Swisher's nearly brand new **Stephen J. Field: Craftsman of the Law** (1930).
- <sup>20</sup> *Osborn v. Bank*, 22 U.S. (9 Wheaton) 738, 866 (1824).
- <sup>21</sup> Robert Lowry Clinton, **Marbury v. Madison and Judicial Review** (1989), pp. 116-27.
- <sup>22</sup> Felix Frankfurter, ed., **Mr. Justice Brandeis**, p. v (emphasis in the original).
- <sup>23</sup> Felix Frankfurter, **Mr. Justice Holmes and the Supreme Court** (1939), p. 9.
- <sup>24</sup> Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801-1835** (1997) (hereafter cited as Johnson).
- <sup>25</sup> Published in 1981. Ten volumes in the **Holmes Devise** series have appeared to date.
- <sup>26</sup> The observation was made by the author in connection with Hobson's **The Great Chief Justice**. See "The Judicial Bookshelf," *Journal of Supreme Court History*, vol. II (1997), p. 151.
- <sup>27</sup> Johnson, p. 100.
- <sup>28</sup> *Id.*, p. 102.
- <sup>29</sup> William H. Rehnquist, **Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson** (1992), p. 126.
- <sup>30</sup> 21 U.S. (8 Wheaton) 1 (1823).
- <sup>31</sup> Johnson, p. 105.
- <sup>32</sup> Felix Frankfurter and James M. Landis, **The Business of the Supreme Court** (1928). Their concern and focus were of course different from Johnson's. See especially pages 1-55 and 299-307.
- <sup>33</sup> See especially the graphs in Appendix A and Appendix B, in Johnson, following page 263.
- <sup>34</sup> See especially Figure 4 in *id.*, p. 114.
- <sup>35</sup> *Id.*, pp. 261-262.
- <sup>36</sup> Warren, 2 **The Supreme Court in United States History**, p. 206.
- <sup>37</sup> 60 U.S. (19 Howard) 393 (1857).
- <sup>38</sup> David M. Silver, **Lincoln's Supreme Court** (1998; reissue of 1956 edition) (hereafter cited as Silver).
- <sup>39</sup> Sitting as circuit judge, Chief Justice Taney did try to thwart military detentions in areas where the civil courts were functioning. See *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (CCMd., 1861). The U.S. military and the Lincoln administration ignored the order. Silver concludes that *Ex parte Milligan* [71 U.S. (4 Wallace) 2 (1866)] was a vindication of Taney's position in *Merryman*. See Silver, pp. 223-236. *Milligan* "demonstrates that Taney was not really wrong when he challenged Lincoln's arbitrary arrests. Rather, he was indiscreet and untimely." Silver, p. 228.
- <sup>40</sup> Quoted in John G. Nicolay and John Hay, 9 **Abraham Lincoln: A History** (1886), p. 386.
- <sup>41</sup> The ninth seat had remained vacant since the death in May 1860 of Justice Daniel, also a Van Buren appointee.
- <sup>42</sup> Silver, pp. 93, 88.
- <sup>43</sup> *Id.*, p. 118.
- <sup>44</sup> 67 U.S. (2 Black) 635 (1863).
- <sup>45</sup> Silver, pp. 105-106.

- <sup>46</sup> *Id.*, p. 116.
- <sup>47</sup> *Id.*, p. 106.
- <sup>48</sup> Harold M. Hyman, **The Reconstruction Justice of Salmon P. Chase: In Re Turner and Texas v. White** (1997) (hereafter cited as Hyman).
- <sup>49</sup> 24 Fed. Cas. 337 (No. 14, 247) (CCMd., 1867).
- <sup>50</sup> 74 U.S. (7 Wallace) 700 (1869).
- <sup>51</sup> John Niven, **Salmon P. Chase** (1995), p. 5. No more than a fifth of Niven's study is given over to Chase's Court years.
- <sup>52</sup> Quoted in Robert Shnayerson, **The Illustrated History of the Supreme Court of the United States** (1986), p. 123.
- <sup>53</sup> Quoted in Charles Fairman, **History of the Supreme Court of the United States; Volume VI, Reconstruction and Reunion, 1864-1888, Part One** (1971), p. 1465.
- <sup>54</sup> Hyman, p. 129.
- <sup>55</sup> *Id.*, p. 131.
- <sup>56</sup> *Id.*, pp. 148-149.
- <sup>57</sup> *Id.*, p. 101.
- <sup>58</sup> *Id.*, p. 104.
- <sup>59</sup> *Id.*, p. 156.
- <sup>60</sup> Paul Kens, **Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age** (1997) (hereafter cited as Kens). See the reference to Swisher's book, in note 19. Swisher's biography of Field appeared just before the values that Field represented were being pushed aside.
- <sup>61</sup> Kens, pp. 169-196.
- <sup>62</sup> Henry J. Abraham, **Justices and Presidents**, 3d ed. (1992), p. 121.
- <sup>63</sup> An endnote reveals the author's belief that Charles Alan Wright's analysis of the tale proves it to be "inaccurate." Kens, p. 338, n. 103. See Wright, "Authenticity of 'A Dirtier Day's Work' Quote In Question," 13 *Supreme Court Historical Society Quarterly* 6-7 (Winter 1990).
- <sup>64</sup> Paul Kens, **Judicial Power and Reform Politics: The Anatomy of Lochner v. New York** (1990).
- <sup>65</sup> Kens, p. 275.
- <sup>66</sup> 198 U.S. 45, 75 (1905). The five-Justice majority in *Lochner* included Justice David Brewer (Field's nephew).
- <sup>67</sup> Kens, p. 7-8.
- <sup>68</sup> William M. Wiecek, **Liberty Under Law: The Supreme Court in American Life** (1988), p. 17.
- <sup>69</sup> 83 U.S. (16 Wallace) 36 (1873); 94 U.S. 113 (1877).
- <sup>70</sup> Kens, p. 284.
- <sup>71</sup> *Id.*, p. 10.
- <sup>72</sup> *Id.*, p. 265.
- <sup>73</sup> 302 U.S. 319 (1937).
- <sup>74</sup> Cardozo, "Jurisprudence," in Margaret E. Hall, ed., **Selected Writings of Benjamin Nathan Cardozo** (1947), pp. 10-11. This essay consists of a lengthy address Cardozo delivered in January 1932 to the New York State Bar Association.
- <sup>75</sup> One should be as careful with labels in scholarship as in judging, as Cardozo himself admonished: "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).
- <sup>76</sup> Richard Polenberg, **The World of Benjamin Cardozo: Personal Values and the Judicial Process** (1997) (hereafter cited as Polenberg).
- <sup>77</sup> *Id.*, p. 248.
- <sup>78</sup> *Id.*, p. 14.
- <sup>79</sup> *Id.*, p. 23-24.
- <sup>80</sup> *Id.*, p. xii.
- <sup>81</sup> *Id.*, p. 247.
- <sup>82</sup> *Id.*, p. 248.
- <sup>83</sup> *Id.*, p. 5.
- <sup>84</sup> *Id.*, p. 43.
- <sup>85</sup> *Id.*, p. 247.
- <sup>86</sup> *Id.*
- <sup>87</sup> *Id.*, p. 43.
- <sup>88</sup> The context of the statement was a comment on leadership. Black continued, "Some have more influence than others. Some . . . have more influence because they are better lawyers, some because they have more ability to influence other people." *Baltimore Sun*, Feb. 28, 1971, p. 1.
- <sup>89</sup> Polenberg, p. 171.
- <sup>90</sup> Howard Ball, **Hugo L. Black: Cold Steel Warrior** (1996) (hereafter cited as Ball).
- <sup>91</sup> **The Vison and the Dream of Justice Hugo L. Black** (1975); with Phillip J. Cooper, **Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution** (1992).
- <sup>92</sup> Ball, p. 244.
- <sup>93</sup> Quoted in Melvin I. Urofsky, "Conflict Among the Brethren," 1988 *Duke Law Journal* 71, 89 (1988).
- <sup>94</sup> Alpheus Thomas Mason, **Harlan Fiske Stone** (1956), p. 580.
- <sup>95</sup> Ball, pp. 13, 15.
- <sup>96</sup> *Id.*, p. 3 (emphasis in the original).
- <sup>97</sup> *Id.*, p. 246.
- <sup>98</sup> Immediately following the table of contents is a two-page chronology of Black's life. No biography should be without such a useful device.
- <sup>99</sup> Ball, p. 248.
- <sup>100</sup> *Id.*, p. 249.
- <sup>101</sup> Quoted in Beveridge, 4 **The Life of John Marshall** (1919), p. 522.
- <sup>102</sup> Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953** (1997) (hereafter cited as Urofsky).
- <sup>103</sup> *Id.*, p. 35.
- <sup>104</sup> Quoted in Polenberg, p. 3.
- <sup>105</sup> Bernard Schwartz, **A History of the Supreme Court** (1993), p. 253.



<sup>106</sup> Of course the Court's internal troubles did not go unnoticed in the press at the time. For example, upon Stone's death there were reports, apparently incorrect, in the newspapers that Black and Douglas had informed President Truman that they would resign if Jackson, who was on leave at Nuremberg, were named Chief. Believing what he read in the papers, Jackson castigated Black in a telegram to the President and sent copies to members of Congress and the media. Nonetheless, the press of the period was generally respectful of the Court and tended to print far less than reporters probably knew. With the absence of reticence as the rule in today's media, one should ponder the consequences should similar scorpion-like behavior ever again become routine.

<sup>107</sup> Urofsky, p. 263.

<sup>108</sup> Leo Katcher, **Earl Warren: A Political Biography** (1967); John D. Weaver, **Warren: The Man, the Court, the Era** (1967). Weaver's is well-documented with notes; Katcher's is not.

<sup>109</sup> G. Edward White, **Earl Warren: A Public Life** (1982).

<sup>110</sup> Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court—A Judicial Biography** (1983). In Schwartz's perspective, the possessive pronoun in the subtitle is the key word. Justice Brennan was apparently the first to call Warren "Super Chief." One supposes that the reference comes from the name of the Sante Fe Railroad's celebrated first-class streamliner, "The

Super Chief" (train numbers seventeen and eighteen), that operated between Chicago and Los Angeles in under forty hours. *Official Guide of the Railways* (Dec. 1964), pp. 672-673.

<sup>111</sup> Ed Cray, **Chief Justice: A Biography of Earl Warren** (1997) (hereafter cited as Cray).

<sup>112</sup> Ed Cray, **General of the Army George C. Marshall: Soldier and Statesman** (1990); **The Erotic Muse: American Bawdy Songs**, 2d ed. (1992).

<sup>113</sup> The author's apparent fondness for his subject may explain the gratuitous comments about the present Chief Justice that seem entirely out of place. Cray, p. 529.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*, pp. 9-10.

<sup>116</sup> After Goldberg's resignation in 1965, that fifth vote was typically supplied for four years by his replacement, Justice Abe Fortas.

<sup>117</sup> In the nineteenth century, there seem to be but two—Robert Trimble and Howell E. Jackson—who served fewer months.

<sup>118</sup> David L. Stebenne, **Arthur J. Goldberg: New Deal Liberal** (1996) (hereafter cited as Stebenne).

<sup>119</sup> *Id.*, p. 5.

<sup>120</sup> Quoted in a statement by Justice Stephen Breyer on the book's dust jacket.

<sup>121</sup> Stebenne, p. vii.

<sup>122</sup> *Id.*, p. 76.

<sup>123</sup> *Id.*, p. 382.

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## Corrections

We apologize for the following errors in the first volume of  
the 1998 **Journal of Supreme Court History**:

On page 120, the Justice identified as Charles Whittaker is in fact Sherman Minton.

On page 156, the Justice sitting on the far left is Willis Van Devanter.

On page 166, Herbert A. Johnson's correct title is  
Hollings Professor of Law at the University of South Carolina.

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