

Introduction

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With this issue of the **Journal of Supreme Court History** begins publication of the **Journal** on a thrice-yearly basis. All of us at the Society, and especially the Board of Editors, welcome the opportunity to provide our members with more material on the Court's history, as well as to offer a larger venue to scholars working in this field.

The Supreme Court of the United States is truly a unique institution, and in order to appreciate that uniqueness we need to look at the constitutional courts of other countries. That is one reason we have been inviting distinguished jurists from other lands to contribute essays about their national courts. We are very honored this month to feature the Honorable Haim H. Cohn's article on the first fifty years of Israel's Supreme Court.

We also welcome the return of Professor Jill Norgren, whose article on the Cherokee cases won the Society's 1994 Hughes-Gossett award. Professor Norgren has been at work on the first full-length biography of one of the truly important figures in American legal history, Belva Lockwood. After lobbying Congress to force the federal courts to accept women bar members, Lockwood became the first woman admitted to practice before the Supreme Court in 1879. Twenty months later, she argued her first case before the Justices—distinguishing herself as the first woman to make an oral argument in the Supreme Court.

Another pioneer was Lucile Lomen, who was hired in 1944 to clerk for Justice William O. Douglas. We are pleased that David Danelski, another Hughes-Gossett winner, has taken the time from his work on a biography of Douglas to give us this piece on the first woman to clerk at the Supreme Court.

The Cherokee cases continue to draw scholarly interest, and as an editor I am always amazed at how certain key issues have so many facets, so many avenues from which I can explore them. Lyndsay G. Robertson found a "lost opinion" in the dispute involving Andrew Jackson, the state of Georgia, the Cherokee Indians, and the Supreme Court. R. Kent Newmyer, the award-winning author of a biography of Joseph Story, is currently at work on Chief Justice John Marshall's life, and he brings us to the Cherokee cases through a new vantage point, that of the internal workings of the Court.

"Two Asian Laundry Cases," by David E. Bernstein, sheds light on how one ethnic group tried to fight discrimination in the latter nineteenth century, while the winner of this year's Hughes-

Gossett student award is Patricia L. Franz, who examines another of the great early nineteenth-century battles between states and the Bank of the United States.

The **Journal** would not be complete without the “Judicial Bookshelf,” and as always, we are in debt to Grier Stephenson for helping us to make sense out of the great welter of books that appear on the Court.

The First Fifty Years of the Supreme Court of Israel

Haim H. Cohn

The Supreme Court of Israel is the successor to the Supreme Court of British Mandatory Palestine. It retained its jurisdiction but changed its composition. In Palestine, the Supreme Court was composed of a (flexible) number of British judges, one of whom was the Chief Justice; and one Justice of each the Muslim, Christian and Jewish communities. They were appointed by the High Commissioner for Palestine upon instructions from the British Secretary of State for the Colonies, and officiated during their pleasure (British judges were from time to time transferred from one colony or dominion to another). They sat in courts of three, with the Chief Justice or the Senior (Puisne) British Judge presiding. Generally speaking, the British judges were learned, experienced, unbiased and incorruptible—albeit mostly imbued with some grain of superciliousness towards native law, customs and people.

The question of how Justices of the new Supreme Court of Israel were to be appointed was originally solved by having the Minister of Justice nominate them, and the Provisional government (which had assumed the powers of the High Commissioner) appoint them. It was decided that the first Court should be composed of five Justices: there were a good many qualified candidates from among whom the government chose three prominent attorneys (Moshe Smoira, who became President of the Court, as the Chief Justice was to be designated,

Menachem Dunkelblum, and Isaac Olshan), one rabbinical law expert (Simha Assaf), and one former judge of a Palestinian district court (Shneur Zalman Heshin). Of the attorneys, two had been presidents of the Jewish Bar Association in Palestine. It was decided from the outset, in good old Jewish tradition, that they would always sit in courts of three, with the President or the senior Justice presiding; seniority was to be determined according to the date of appointment. It was never considered to have the Court sit *en banc* (as in the United

States): already then the expected workload—including the residuum from the mandatory Court—rendered a division of labor advisable. It was not until 1957 that the President or his Deputy were empowered to enlarge the composition of the Court in any given case to a larger, odd number of judges, a power that subsequent Presidents exercised abundantly, and the present President (Aharon Barak) more often than any of his predecessors.

The appointment of Supreme Court Justices by the Executive (and the appointment of judges of lower courts by the Minister of Justice) encountered heavy misgivings. It was feared that the appointment of judges by the Executive branch of the government would adversely affect judicial independence and involve a serious flaw in the democratic separation of powers. Another mode of appointment had therefore to be found, and as no precedent or model from other democracies appeared to us commendable (for reasons I need not go into here), we set out to construct a system of our own. The starting point for our considerations was that each of the three branches of government had, indeed, some legitimate interest in the selection of judges, as had the Bar. So we proposed a committee of nine to be established: the Minister of Justice (presiding) and one other Cabinet minister; two members of the Legislature (Knesset); two members of the Bar to be nominated by the Bar Council; and the President and two Justices of the Supreme Court, the Justices to be elected biannually by the full Bench. As for the members of parliament, the idea was that they should come from the opposition, the government coalition being already represented by the ministers, and the opposition also having a legitimate interest of its own; but elections in the Knesset for membership in the Committee being by secret vote, it turned out that the majority carried its own candidates from coalition parties. In order to avoid judicial appointments motivated by political interests, the majority of the Committee is professional, the assumption being that jurists and lawyers will make their selections on profes-

sional merits only. The Committee submits its nominations to the President of the State who makes the appointments accordingly, without exercising any discretion on his part. Candidates are proposed to the Committee either by the Minister of Justice or by the President of the Supreme Court, and while all candidatures and proceedings must be kept secret, any nomination decided upon by the Committee will, by a recently established rule, be officially published in time before its submission to the President, so as to enable objectors to move the Committee to review the nomination.

This system, in force now for forty two years, has generally worked very well. There were relatively few judicial appointments (to lower courts only) which proved misguided and unfortunate. As judges are appointed for life, with an obligatory retirement age of seventy, the only way to get rid of them is by disciplinary process: a judge who “performs his judicial duties improperly,” or who “conducts himself in public in a manner unbecoming judicial status,” is liable to be brought by the Minister of Justice before a disciplinary tribunal presided over by a Justice of the Supreme Court. On finding the charge proven, the tribunal may advise the President of the State to depose the judge from office, but it may also content itself with imposing some lighter sanctions, such as temporary suspension or transfer to another court. In cases in which judicial appointment was obtained by fraudulent means, or where the judge is physically or mentally incapacitated, his term of office may be terminated by the Nominations Committee. No Justice of the Supreme Court has ever been subjected to any disciplinary process.

Justices of the Supreme Court are now appointed mostly from the ranks of district judges; but the law allows also for the appointment of attorneys of long standing, as well as of “eminent jurists.” This latter qualification was originally added in the vain hope that some of the great Jewish jurists from England or the United States might be persuaded to join the Supreme Court of Israel (it was not until 1964



The Justices of the Supreme Court of Israel paid their respects to Zalman Shazar, the President of the state, on his 80th birthday party in 1969. The President is on the far left and the author, Justice Haim H. Cohn, is on the far right.

that the law was amended to require judges to be citizens of Israel). Meanwhile some eminent Israeli law professors were appointed to the Court under this title.

The Supreme Court of Israel is distinguished from most of its counterparts in the world by the plurality of legal backgrounds. Of the first Justices, Moishe Smoira obtained his legal education in Germany, Menachem Dunkelblum in Austria, Isaac Olshan in England, Simha Assaf in Russia, and Shneur Zalman Cheshin in the United States. In subsequent courts, German and English trained Justices became preponderant; and of the succeeding Presidents, Simon Agranat was educated in the United States, Joel Sussman in Germany, Moshe Landau in England, Itzhak Kahan in Poland, Meir Shamgar in Palestine, and Aharon Barak in Israel. The current Court presents a rather non-pluralistic picture: of the fourteen Justices now in office, ten have received their legal training in Israel. This reflects the coming of age of a new generation. But the

different outlooks and orientations by which the earlier courts excelled certainly played some role in widening judicial horizons and in bolstering openness and the exchange of different values and concepts.

The desirable composition of the Supreme Court is, of course, a matter of grave public concern. In the press and in parliament time and again misgivings have been voiced to the effect that the composition of the Court does not truly reflect the composition of the populace, as if all major segments of the population were entitled to be represented on the Bench. While the declared policy of the Nominations Committee has so far always been to appoint judges with regard solely to their professional qualifications, the fact is that in the course of the years usages have sprung up to engage in some sort of affirmative action in favor of oriental Jews (Sephardim), women, or the Orthodox. Now the Sephardim claim that their "representation" (at present two out of fourteen) is not big enough in view of the fact that they



The Justices of the Supreme Court of Israel (from left to right): Justice Porat, Chief Justice Landau, Justice Cohn, Justice Kahan, Justice Shampar, Justice Elon, and Justice Bekhor, visited the Knesset in 1979. (Note the tapestries based on a painting by Marc Chagall in the background.) Although less so today, the Justices of the Supreme Court of Israel have traditionally received their legal training from a variety of countries, including Germany, Austria, England, Russia, the United States, Poland, Palestine, and Israel.

amount to almost one-half of the total population; in the same vein, women's organizations complain that the number of female Justices (three out of fourteen) is wholly disproportionate to their being one half of the population; and orthodox circles and some of their rabbis and parliamentarians bitterly and acrimoniously deplore their underrepresentation (two out of fourteen). A much more justified complaint is that of the big Arab (Muslim) minority that none of the Arab district judges or of the many Arab attorneys has so far been elevated to the Supreme Court. This is now to be remedied, an Arab judge having just been nominated for appointment. The reply forthcoming to protests of this kind has always been that among the available candidates none had as yet reached the stature and acumen required from a Justice of the Supreme Court, and there is no doubt that this reply was given in perfect good faith. But the people who want to see more and more of their own peers on the Bench do not care so much about stature and acumen. The parliamentary members of the Nominations Committee are prone, by virtue of their office, to

lend their ears to this kind of populist demand and they find, more often than not, a willing ear among ministers and even attorneys. Still, it is a matter of record that the Nominations Committees have so far succeeded in withstanding outside pressures and in transacting their business faithfully and independently.

I regard any such demand for partisan representation on the Bench to be entirely misconceived. Unlike parliaments, which are elected by popular vote in order to represent all the various strata of society, the Court is not supposed to "represent" those strata from which the Justices originate or any stratum, but to uphold the rule of law toward everybody without any distinction whatsoever. It is true that every judge brings along his or her individual load of convictions and predilections, but then the art of administering Justice lies in the facility to keep aloof from any such private notions and to muster maximal objectivity. I am glad to report that our Supreme Court Justices have always excelled as practitioners of that art.

The independence of judges is declared in

a constitutional (“basic”) law as follows: “there is no rule over a judge in the performance of judicial duties save only the rule of law.” To fortify such independence from the ruling Executive, judicial salaries and pensions are determined by a permanent parliamentary committee. Soon after the establishment of the Court, the newly appointed Justices protested against the rank they had been accorded in the echelon of dignitaries of the State. After prolonged discussions it was eventually agreed that the President of the Court should rank immediately following the Speaker of the Knesset (who follows the Prime Minister), and the Justices following the Cabinet ministers and preceding members of the Knesset. The Justices who led this crusade strongly believed that judicial independence presupposed high judicial rank; their fight was not for personal honors but for institutional status.

This kind of insistence on formal recognition of high judicial status reflects a desire—or perhaps an ambition—on the part of the first Justices to imitate the British Law Lords. At that time, the common law of England was still the backbone of the Israeli legal system, and the Justices aspired to bring the application in Israel of the common law to a perfection comparable only to that achieved by the great English judges. Not that they intended to perpetuate the traditional English version of common law; they envisaged the creation of a particularly Israeli branch of common law, mainly orientated, according to the majority, upon English (and perhaps American) precedents, or, according to some, upon ancient Jewish legal tradition, or, according to others, upon European continental concepts. They knew that in the event there would have to ensue an amalgamation of the different approaches, and they looked forward to creating a system that would absorb and reflect the best of all worlds.

During their relatively short tenures (only Isaac Olshan, who became the President of the second Court, held office until reaching retirement age), the first Justices laid the cornerstone to judicial law-making. Lacking until the present

day a formal bill of rights, they started to declare and implement human rights and liberties, such as the right of every accused person to a fair trial, the presumption of innocence, the equality of all before the law, the paramount importance of the welfare of the child, and the supremacy of truth over consistency. It was in the second court that a landmark decision was given (by Agranat J.) establishing freedom of expression and freedom of the press, which was followed by a long line of decisions by which virtually all human rights on the books were given the force of law. Recently enacted “Basic Laws” on Human Dignity and Human Liberty, and on the Freedom of Occupation, are in essence legislative restatements of the law long settled by the Court.

There is one area in which the Court has throughout been walking down a perilous path, and that is in matters pertaining to freedom of—or from—religion.

Even before the establishment of the state a promise was made to the orthodox parties that the “status quo” persisting in Palestine in religious matters would be maintained in the future state. Although this promise was certainly not legally binding either on the Legislature or on the Executive of the new State, they all faithfully kept it—the “status quo” itself coming to be haloed as if it, too, were a divine commandment. The Court never deigned to divest the “status quo” of its aureole. The survival and proliferation of the “status quo” is mainly due to the fact that it received from time to time piecemeal statutory sanction, as there is in Israel no constitutional impediment (as there is in the United States) to legislate for religious purposes. The Court upholds such legislation as a matter of course, and, in any event the Court had no power to invalidate legislative acts. It has, however, laid down that only the Knesset may enact laws for religious purposes; subsidiary legislators, such as ministers or local authorities, require for any such enactment explicit authorization in a statute passed by the Knesset. Such authorizations have been generously forthcoming, so that the

Court could no longer interfere.

In a number of cases administrative action was contested on the ground that its true purpose was the promotion of religious observances (for instance, the refusal of the authorities to grant licenses for the importation of non-kosher meat). The Court interfered and ordered the licenses to be granted, so long as the administrative action was not specifically authorized by law. In some such cases, the Court had to decide between the authorities who maintained that their intent and purpose had been purely economic, and the aggrieved party who claimed that it had been manifestly religious.

Some recent cases aroused heated public controversy. For instance, when the Minister of Transport had issued an order closing a busy Jerusalem thoroughfare for traffic on the Sabbath, and the court was called upon to set this order aside (which in the event it refrained from doing); or where the Court was petitioned to recognize the validity of non-orthodox conversions to Judaism (which it did, for the time being, only in respect to conversions conducted outside Israel); or where the question arose of "Who is a Jew;" or where the participation of women in religious councils or in public prayers was in dispute. In some such cases the Court seemed to recoil from taking responsibility in determining a charged public issue. It tried (in vain) to refer the matter of "Who is a Jew" back to the Cabinet for administrative decision; and the matter of non-orthodox conversions it referred to the Knesset for legislation (where efforts are for several years now under way to find some consensual compromise). The final majority decision of the Court that for purposes of registration in government registers, a person was to be registered as Jewish if he or she in good faith declared to be Jewish, was shortly afterward superseded by an amendment to the Law of Return which introduced a statutory definition of "Jew," whether for registration or any other purpose.

As far as the public is concerned, the Court finds itself in a dilemma: whenever it decides

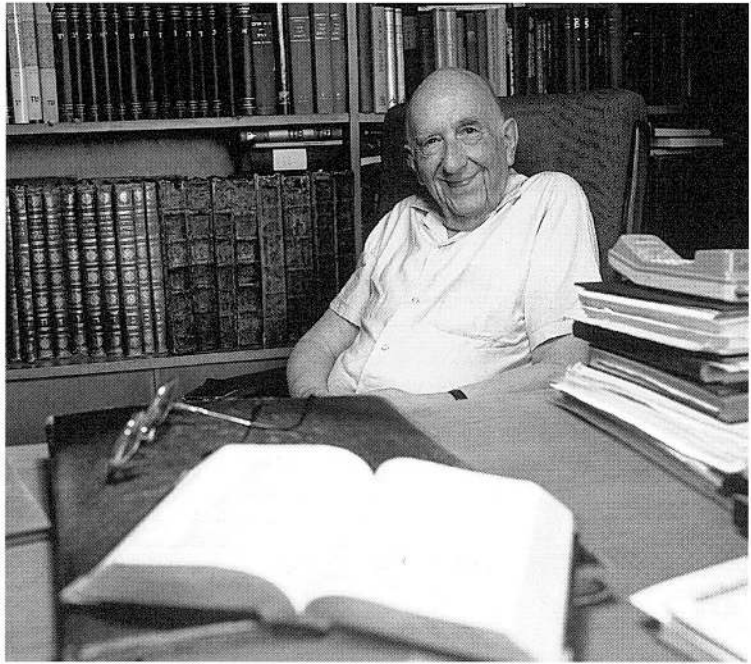
contrary to orthodox expectations, it is accused of secular and antireligious tendencies; and when it decides contrary to secular or non-orthodox expectations, it is accused of regressiveness and illiberality. Neither enhances the prestige of the Court. That both these accusations are in fact unfounded, the Court decides each particular case on its merits according to law, appears to be of no avail. It seems regrettable that the Court has not as yet succeeded in appeasing religious strife or at least in making some pacifying impact on the exacerbating conflict between the religious and the non-religious parts of the population.

Let me now turn to matters of jurisdiction.

The jurisdiction of the Supreme Court is twofold: on the one hand, it is the Court of Appeals of last resort in all civil and criminal cases; on the other hand, it sits as the "High Court of Justice" and exercises original jurisdiction of an equitable nature. The appellate jurisdiction needs no further comment, it does not differ in nature or scope from that of any ultimate court of appeals. Appeals as of right lie from judgments of the district courts sitting as first instance; where they sat on appeal from magistrates' courts, special leave is required to appeal further to the Supreme Court (but applications for leave to appeal may be, and usually are, heard as if leave had been given and they were appeals).

The High Court exercises jurisdiction "in such matters as are not within the jurisdiction of any other court and are necessary to be decided for the administration of justice." This wide definition is not an Israeli feat; the jurisdiction of the High Court of Justice was so defined already in the Palestine Order in Council of 1922. In the course of the years, this jurisdiction was judicially and legislatively further defined. It was held early that it was an equitable jurisdiction, to be exercised only in favor of a petitioner who came to the court with "clean hands" and had acted equitably himself. The main problem was—and still is—what are "matters necessary to be decided" in order that justice be done?

Justices of the Supreme Court of Israel are appointed by the President for life, with an obligatory retirement age of seventy. The author, formerly the Deputy President of the Court and now retired, is shown here in his study.



The scope of those matters has undergone quite a few changes in the Court's history. Notably, as to *locus standi*, earlier courts were very strict in requiring the subject-matter of a petition to be one in which the petitioner could show an immediate and tangible personal interest; later courts were, and the present Court is, more easily accessible and admitted petitions which disclosed blatant instances of illegality or injustice even where the personal interest of the petitioner was remote or totally merged in the public interest. Still, human rights organizations and other such public bodies generally have, *ex abundante cautela*, a directly aggrieved party join them as petitioner, in order to forestall formal objection by adamant respondents.

Much of the controversy over the nature of "matters to be decided" centered on the issue of justiciability. While earlier courts had consistently held certain matters to be not justiciable, later courts (and the present Court) have so widened the limits of justiciability as to encompass virtually all breaches of law or justice as well as "extremely unreasonable" exercises of administrative discretion, whoever the defaulting authority may be (except the

President of the State who enjoys immunity from legal process, and except judges who are not "authorities" in this context). For instance; whereas formerly any parliamentary proceeding was held to be not justiciable, nowadays the Court deems it necessary for the proper administration of justice to intervene, by declaratory order, whenever a parliamentary organ violates the law, including its own rules of procedure, where no other sanction or remedy is available. It is significant that the petitioners in these matters are mostly members of parliament: it would appear that they welcome the Court's "activism." Or, in matters of a political nature, as where the Prime Minister refrained from exercising his statutory power to dismiss or suspend a minister, the former courts would not have interfered, but a later court held the discretionary refusal of the Prime Minister to be "extremely unreasonable" and ordered him to dismiss or suspend the minister.

Such examples could be multiplied. Suffice it to note that these liberal tendencies have brought, and are steadfastly continuing to bring, into Court an overflow of petitions from all sorts of public-minded individuals and societies, many of them purporting to be them-

selves aggrieved parties. The question whether, and to what extent, the Court should adopt the “activist” position and grant a remedy whenever good cause is shown, or whether it should exercise “judicial restraint” and confine its jurisdiction to matters to be defined as properly justiciable, has for some time been—and still is—highly controversial and the subject of much agitated discussion. The President of the Court, Aharon Barak, a fervent activist, has been the target of vile and vehement attacks in Parliament and in the press, his attackers including many of those who had not hesitated themselves to first reap the fruits of judicial activism. Within the Court itself, there were from time to time dissenting opinions by Justices who would prefer restraint to activism; but eventually the activist lead of the President always carried the decisive majority. But while the immediate result of such activism is a very substantial enlargement of the benefits of judicial redress, some critics were heard to say that the virulent attacks on the Court and its President and the possibly ensuing loss of popular prestige are too high a price to pay.

Apart from its general jurisdiction and “without prejudice” thereto, the law confers upon the High Court special jurisdiction in the following matters:

1) **Habeas Corpus:** A person alleging that he is wrongfully detained or imprisoned, may petition the Court for his release, and the Court will order his release unless lawful cause is shown for his being kept in custody. This was, of course, the first of the prerogative writs in the English courts, and as such occupied first place among the writs which the Palestinian High Court was authorized to issue. In the Israeli Court, opportunities to exercise jurisdiction of habeas corpus arose mostly in cases of kidnapping of children: where one parent (or a stranger) wrongfully usurps custody of a child (and normally brings him or her clandestinely to Israel from abroad), the parent entitled to custody may petition the Court to restore the *status quo ante*. Where the custody rights are contested, the Court will refer the parties back

to the competent court in Israel or abroad. A number of habeas corpus petitions came before the Court on the part of persons claiming that they were wrongfully and forcibly hospitalized as mental patients. Arrests and continuous detentions by military authorities, mainly of Palestinian Arabs, have time and again come before the Court: in the vast majority of cases the Court would not interfere, the discretion vested by law in the military commanders from upholding public security being well nigh absolute.

2) **Mandamus:** A person alleging that any of his rights or interests are being, or are threatened to be, violated, contrary to law, by any authority or person in the exercise, or purported exercise, of any power conferred upon them by law, may petition the Court for an order directing such authority or person to act in a manner consonant with law or to abstain from any act which is unlawful or in excess of their powers. This kind of jurisdiction is in many countries exercised by a hierarchy of administrative tribunals: it encompasses the whole public administration, and provides the main workload to the Court. The number of petitions with which the Court has to deal under this title is enormous, much higher than in the corresponding jurisdiction in England (with a population more than tenfold that of Israel). The steady increase of this kind of petition appears to be due, on the one hand, to the lowering of civil service standards, which may, at least in part, be attributable to a widespread tendency to disregard the rule of law where matters of high politics or public security are concerned; and, on the other hand, to the easy accessibility of a liberal and citizen-minded Court.

The Court intervenes not only where an authority acted, or abstained from acting, in contravention of law, or where it exceeded its powers or refused exercising them, but also, as already mentioned above, where the discretion they exercised within their legal powers was so “extremely unreasonable” as to warrant the assumption that the legislature never intended to empower them to that extent. This

“extreme unreasonableness” has now become a much favored cause of action. As neither extremity nor unreasonableness are definable in advance, petitioners can only conjecture the Court’s attitude. But in those cases in which the Court eventually found a discretionary decision “extremely unreasonable,” nobody—except perhaps the actor himself—could reasonably disagree. In the majority of cases, the alleged unreasonableness is found not to be “extreme” enough to warrant the Court’s intervention.

Another favored cause of action is wrongful discrimination. There is in all wrongful discrimination cases an element of unreasonableness, and in extreme cases of discrimination the unreasonableness may well be extreme. Where discrimination is reasonable, that is, justifiable in law or common sense, it is not wrongful, and the Court will not intervene. Where, for instance, a petitioner claimed to have been discriminated against by the refusal of a license given to others, the refusal was upheld if the grants to the others had been proven unlawful. But where an authority discriminates between applicants because of sex, religion, language, ethnic origin, or political or other convictions, the Court always intervenes—not so much because the discrimination is unreasonable (as it may well be), but because it is unlawful; and in most cases the unlawfulness stems from precedents created by the Court itself which have become common law.

While the jurisdiction of Israeli courts is in no way extra-territorial, the Court has, since 1967, consistently assumed jurisdiction over Israeli official organs and authorities, which perform their functions under Israeli law in foreign countries, including in particular the occupied territories. The rationale is that diplomats or army personnel sent abroad on official duty remain subject to the jurisdiction of the High Court in all matters pertaining to the performance of any such duty. This ruling brought to the Court a flow of petitions from residents of the occupied territories against

military authorities charged with their administration. In some cases, orders of military commanders were set aside, mostly because they had exceeded their powers; but in the majority of cases the petitions failed, as the military powers under the Defense (Emergency) Regulations, enacted by the British in 1945 which remained in force in Israel and Jordan (and hence in the West Bank), are exceedingly and drastically extensive, and the court was diffident to assume responsibility for the public security which the Military and its reputed experts claimed to have rendered their actions necessary. I am afraid that this kind of diffidence prevented the court from intervening also in cases in which it could and should have intervened. The resulting disappointment with the Court on the part of many people in the occupied territories is as regrettable as it is understandable.

3) **Quo Warranto**: This is the jurisdiction to review appointments and elections to public office. It is very rarely exercised: normally appointments are made and elections conducted in accordance with law. Where any irregularities are proven, the Court will set aside the appointment or invalidate the elections in whole or in part, and prohibit the appointee or electee from acting as such. This jurisdiction has also successfully been invoked in cases where an appointee, or a candidate for appointment, did not possess the prescribed or necessary qualifications or had by his misconduct disqualified himself.

4) **Prohibitio and Certiorari**: This is the jurisdiction to prevent “inferior tribunals” from exceeding their jurisdiction. By writ of *prohibitio*, the Court prohibits such tribunals from entertaining or continuing any proceedings not within their jurisdiction; and by writ of *certiorari*, the Court quashes judgments given by any such tribunals in excess of their jurisdiction. “Inferior tribunals” are courts with limited judicial powers, such as religious courts, military courts, labor courts and the like, not including lower civil courts whose alleged excesses of jurisdiction may be cured by way

of appeal. Here the Court does not sit in its appellate capacity; it does not go into the merits of the case before the tribunal or of its judgment. Its sole function is to keep those tribunals within their respective jurisdictional limits.

The High Court jurisdiction in respect of religious courts is conditioned upon the plea of want of jurisdiction having been raised before the religious court "at first opportunity." If no such plea was raised, the parties are presumed to have accepted and submitted to the religious court's jurisdiction. Consequently, the writ of *certiorari* is available in respect to judgments of religious courts only in cases where the party alleging excess of jurisdiction had no previous opportunity to protest; for instance, in *ex parte* proceedings. This requirement of a "first opportunity" plea has not caused much hardship or difficulty, as a party not wishing to litigate before the religious court will naturally voice its protest before proceedings have started.

The limits of jurisdiction of any such tribunal are normally defined in the statute by which the tribunal was established, and the question of excess of jurisdiction is normally a question of statutory interpretation. But the Court has, since the early fifties until the present, set aside proceedings and decisions for want of jurisdiction, although the express statutory limits had not been transgressed: it held the non-compliance with established principles of natural justice to amount to an excess of jurisdiction. The *ratio decidendi* was that the legislature must be presumed not to vest any jurisdiction in a tribunal unless that jurisdiction is exercised in consonance with natural justice. Or, it is said that statutory jurisdiction is not only defined but also made conditional; jurisdiction may be exceeded not only by overstepping its defined limits, but also by breaking its condition-precedent. In short, the power of exercising jurisdiction is subject always to the duty to do justice. The terms "justice" and "natural justice" are not here to be interpreted in any substantive sense; what they denote here

is solely procedural justice. The old tradition of Jewish as well as English "natural justice" is that no judge shall have any direct or indirect personal interest in the matter before him; that no decision be made unless all parties involved had the opportunity of a fair hearing; that no decision be rendered without a preceding fair trial; and that all men and women are equal before the court. The violation of any of these fundamental rules is regarded not only as an excess, but, worse, as an abuse of jurisdiction.

Similarly, it was held that the legislature must be presumed to vest jurisdiction in tribunals always within the framework of general law. Thus, a religious court holding itself not to be bound by general or any specific secular law but by its own religious law only, exceeds its jurisdiction: the (statutory) applicability of religious law by religious courts must always be subject to the paramount applicability of the law of the land. A recent ruling, for instance, that obligated rabbinical courts to divide marital property according to secular law (which accords equal shares to both spouses) and not according to rabbinical law (which discriminates against the wife), has vehemently agitated the minds of the orthodox who insist on the jurisdiction of rabbinical courts to remain unimpaired by secular law. Or, where a religious court, according to religious law, disqualified women from giving testimony or from guardianship over their minor children, the Court held that it had exceeded its jurisdiction; the Equality of Women Act of 1950 provided that women are fully qualified for any legal act. Bearing in mind that the whole jurisdiction of these tribunals rests upon secular statutory law, it would appear that by disregarding such laws they undermine their own jurisdiction. But, as far as rabbinical courts are concerned, any excess of jurisdiction can, by statutory provision, be cured if all parties involved are of age and have voluntarily submitted to the jurisdiction on the understanding that only rabbinical law would be applied.

5) **Appeals:** The High Court, not, curiously



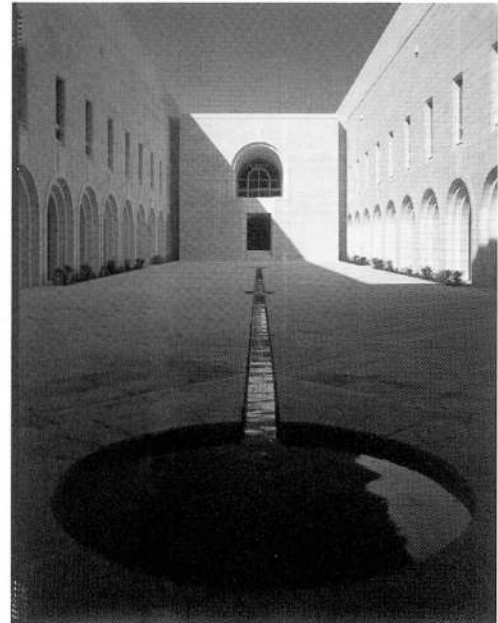
The new Supreme Court of Israel (interior of its largest courtroom is at left and exterior is below) in Jerusalem was built in 1993 with funds raised primarily from the London House of Rothschild. The old Court was housed for forty years in an erstwhile Russian monastery built in the middle of the nine-teenth century, to which the British added a new wing to serve as courtroom.

enough, the Court of Appeals, exercises in some special cases also appellate jurisdiction. It hears appeals from disciplinary tribunals of the Bar and of the medical profession. The legislative intention was perhaps to assure that advocates and physicians should not be heard unless they came to the Court with “clean hands,” whereas other appellants must always be heard *ex debito justitiae*. In practice, however, there is no noticeable difference between the various appeals, in whatever capacity the Court is sitting.

Recent efforts to conclude the amalgamation of eleven existing “Basic Laws,” and two or three more still awaiting enactment, into a Constitution (as contemplated in a resolution of the Knesset of 1950), have given rise to much discussion as to whether the Supreme Court should be vested with jurisdiction as a constitutional court, empowered to review legislation for its constitutionality. No decision has as yet been taken: many advocate the establishment of a separate court composed not only of jurists; others (mainly judges) propose that every civil court should have the power to declare a law unconstitutional, such declaration being, of course, subject to appeal.

As far as the present situation is con-

cerned, two recent “Basic Laws,” one on Freedom of Occupation and one on the Dignity and Liberty of Man, provide, *inter alia*, that no law may in future be enacted infringing upon any right therein laid down, unless such a law is “consonant with the values of a Jewish democracy, is made for a beneficial purpose, and does not exceed in scope what is required for the



attainment of such purpose.” The Court has already held that this provision empowers all courts of general jurisdiction to review legislation passed after the commencement of those Basic Laws and to declare any law that falls short of the standards there laid down, to be invalid. But in the first, and as yet the only, case which came before the Supreme Court on appeal from a district court ruling that declared some such law to be invalid, the court reversed that ruling and found that law to be up to standards. The Court went at great length into the question whether the Knesset could act as a Constituent Assembly, and answered that question, by a majority, in the affirmative.

In important and difficult cases like this, in which the composition of the Court is now normally enlarged to seven, nine, or as many as eleven Justices, it is only natural that opinions of the Justices are divided. Unanimous judgments are the rule in routine cases heard by courts of three, though even there the rule has its occasional exceptions. One of the Justices, Moshe Silberg, once remarked that too often the Court is not a court of Justice but a court of Justices. But it goes without saying that the majority opinion always prevails: dissenting opinions carry the weight and prestige of their authors and are also fully reported. An ancient Jewish legal text already speaks of the chance that some day in the future the reasoning of the minority may commend itself to a ruling majority. The first Minister of Justice proposed at the time to introduce the European rule that courts speak only unisonally, the operative majority opinion to be the only one to be proclaimed and published, so as to avoid confusion and uncertainty among the lay public. Fortunately enough, this proposal did not find support. Dissenting opinions not only amount to an implementation by the judge of his judicial oath to do justice to the best of his own conscience, but also, in my own long experience, play an important role in placating litigants and, more particularly, criminal defendants, who lost their cases by majority opinion. Each Justice may give a separate concur-

ring or dissenting opinion, and our Justices make very ample use of this privilege. The result is that our Law Reports (of the Supreme Court only) comprise every year now five volumes of about 900 pages each, and these contain only the more important judgments. While modern technology may help a good deal in digesting, recording and classifying these decisions, the burden on lawyers and students who are expected or required to peruse them remains enormous.

Mainly with a view to enabling dissenting Justices to persuade a majority, the law empowers the President of the Court (or a Justice appointed by him) to order a “Further Hearing” before an enlarged Court. All Justices who sat in the first hearing are part of the panel of the Further Hearing, so that the issues come virtually to be decided by the Justices added to form the enlarged Court. Such Further Hearing may be held only if the case is of novelty, complexity, or general importance. While the law was formerly interpreted to the effect that Further Hearings could be held only where the first hearings were before courts of three, now the Court opened its doors to Further Hearings even where the first hearings had already been held in enlarged courts.

The judicial profligacy, and the enlargement of the Court in special cases, appear to be some of the causes of delays of justice. The researches and consultations that go into hundreds of pages of opinion-writing are a heavy encumbrance on judicial time. And the enlargement of the composition of the Court in the many “more important” cases renders the Justices, time and again, unavailable for current court business. Litigants rightly complain of the fact that appeals have, more often than not, to wait for years to be heard and for many more months to be decided. Even High Court petitions which in the past were dispatched speedily, now often share the fate of seemingly non-urgent matters.

A Commission presided over by one of the Justices, Theodor Orr, has now recommended the establishment of separate courts

of appeals to relieve the Supreme Court of its appellate functions, except perhaps in cases in which the constitutionality of a law is at issue. It also recommended separate administrative courts to relieve the High Court of its original jurisdiction and change it into a court of administrative appeals. These proposals are now under discussion with a view to legislation, but they have encountered heavy opposition, mainly from the Bar. The argument is that the increasing burden on the lower Courts outweighs any lightening of the burden on the Supreme Court; that judges of lower courts are not normally equipped to deal with cases of great complexity or constitutional importance; and that the appointment of a large number of additional judges will be hampered both by budgetary fetters and by the scarcity of first-class personnel.

Let me conclude with some remarks on externalities.

The Courts of Palestine in Jerusalem were housed in an erstwhile Russian monastery built in the middle of the nineteenth century. The British added a new wing to the building to accommodate the Supreme Court. When the State of Israel was established, it was first pro-

posed that Jerusalem should be the seat of the Legislature, Tel-Aviv the seat of government (Executive), and Haifa the seat of the Supreme Court. But the first Justices, headed by the impendent President (Smoira), objected strongly, and some would not accept appointment unless the Supreme Court remained seated in Jerusalem. So the old monastery in the "Russian Compound" became, and for almost forty years remained, the home of the Supreme Court of Israel. Although old-fashioned, not very functional, and ultimately wholly inadequate, we elder Justices who in our youths had appeared as counsel in these holy halls, were emotionally tied to the building and did not cherish the idea of moving elsewhere. But the younger generation rightly prevailed. Due to the active and persistent initiative of a past President, Meir Shamgar, funds were raised (mostly from the London House of Rothschild) and plans developed for the erection of a new, functional, and spacious building, which has for more than ten years now graced and beautified the new city of Jerusalem. At long last, the Supreme Court of Israel now dwells in a splendid edifice of its own.

Before It Was Merely Difficult: Belva Lockwood's Life in Law and Politics

Jill Norgren

On December 2, 1880, the widely-read Washington, D.C., newspaper, *The Evening Star*, announced that for the first time a woman lawyer had “an opportunity to argue a cause in the U.S. Supreme Court.” No banner headline accompanied the thirty-six line notice but, in keeping with its historic nature, the oral argument made by Belva A. Lockwood prompted attention. This contrasted sharply with the prior year when the same newspaper, known for its reporting of civic affairs, barely remarked upon the admission of Lockwood as the first female member of the bar of the Supreme Court of the United States stating only, “For the first time in the history of this court a woman’s name now stands on the roll of its practitioners.”¹

The brevity of this announcement hid the dramatic story of the woman who had struggled for a decade, first, to join men in the study of law, and later, in its practice. At the time of her admission to the U.S. Supreme Court bar Lockwood was the head of a small Washington, D.C., law office. She had been licensed to practice law in the courts of the District of Columbia in 1873, winning the right shortly after the pioneering African-American woman attorney, Charlotte E. Ray.² Lockwood had established a general practice, taking and arguing cases in the Law (Civil), Criminal, and Equity divisions of the Supreme Court of the District of Columbia.

Although these accomplishments were story enough, Lockwood’s career merited particular attention because she had, virtually single-handedly, contested the federal courts and then Congress for five years in order to win the “bill of rights” that gained women law-

yers admittance to the U.S. Supreme Court. She insistently claimed the right of women to pursue professional careers at a time when most Americans were certain that middle-class women properly belonged at home. She became a lawyer because she believed that attorneys had

great power to shape public policy *and* because she believed that women should have equal opportunity to participate in governance. She fought the exclusion of women from the federal bar as a lawyer and an activist. Lockwood was an early and adamant woman suffragist whose activism led to a lifetime of personally confounding the social axioms of nineteenth-century America. Her life provides a bold and visible example of pluck, persistence, and achievement. She not only desegregated the profession of law, but also changed the face of American politics when she ran for the United States presidency in 1884 and 1888.

Journey Into Law and Politics

Lockwood was born Belva Ann Bennett in Royalton, Niagara County, New York, in 1830. Her farm family background endowed her neither with advantage nor a tradition of rebellion. As a teenager she resembled numerous country girls who provided an extra pair of hands at home while teaching numbers and letters at the local schoolhouse. Widowed, with a child, at age twenty two, she entered a local seminary and a year later its affiliated college (now Syracuse University), eventually becoming a teacher and school principal. She described herself in an 1867 survey of college alumni as “an earnest, zealous laborer in the cause of Education, Sabbath School and Missionary work and an indefatigable advocate of the Temperance Cause...”³

At thirty-six, Belva Bennett McNall moved herself and her sixteen-year-old daughter to Washington, D.C. Later in life she explained the move and her motives in several different articles and interviews. In her 1888 self-portrait, “My Efforts To Become A Lawyer,” written for *Lippincott’s Monthly Magazine*, she said, “I sold out my school property in Owego, and came to Washington, for no other purpose than to see what was being done at this great political centre, —this seething pot, —to learn something of the practical workings of the machinery of government, and to see

what the great men and women of the country felt and thought.” After visiting her parents and exploring the possibility of teaching in the area of Illinois to which they had moved, she returned to Washington and “accepted a position in a young ladies’ school with barely enough salary for my maintenance, but with all the time after one o’clock P.M. to myself. This was satisfactory, as it gave me ample time for investigation; and during the five months that I spent in this school I listened to the debates in Congress and the arguments in the United States Supreme Court, investigated the local government of the District, [and] visited her public buildings ...”⁴

The *Lippincott’s* sketch reveals Lockwood’s early fascination with law and lawmaking. “In my college course I had studied and had become deeply interested in the Constitution of the United States, the law of nations, political economy, and other things that had given me an insight into political life. I had early conceived a passion for reading the biographies of great men, and had discovered that in almost every instance law has been the stepping-stone to greatness. Born a woman, with all of a woman’s feelings and intuitions, I had all of the ambitions of a man, forgetting the gulf between the rights and privileges of the sexes.”⁵

In 1869, newly married to dentist and Baptist minister Ezekiel Lockwood, she decided to act on her ambition to become a lawyer. She had “wearied with the monotony of teaching” and believed that law “offered more diversity, more facilities for improvement, better pay, and a chance to rise in the world.” She did not, she later told an “Old Home Week” audience, “stop to consider that I was a woman.” By this year Lockwood was also an established leader of the Washington, D.C., suffrage movement and a spokeswoman and lobbyist for the cause of woman’s equal employment. She may not have stopped to consider that she was a woman but she knew well that only a bare handful of women attorneys in the United States in 1869 had credentialed themselves, most by reading

law with a husband, relative, or family friend. The lack of a legal mentor was a handicap but one she hoped to overcome by applying for admission to one of the several small law schools that were opening in these post-bellum years (most for part-time, night study by government employees).⁶

Lockwood first applied to become a student at the new Columbian Law School in D.C. but was refused admission because of her sex. Shortly thereafter, along with several other women, she matriculated at a second recently incorporated institution, the National University Law School, founded by men believed to be sympathetic to women's interest in legal careers. A subsequent letter to President Grant from Lockwood recounts the "manifest injustice" experienced by the fifteen women matriculates:

Sept. 3, 1873

Dear Sir:

I wish to address you, not as President of the United States, but as President (at least nominally) of an Institution known as the National Law University of Washington, D.C. Its circulars contain your name, the Diplomas it has granted contain (I believe) your signature.

Sometime in February 1871 I was invited to enter this Institution as a student by the acting Professor W. B. Wedgewood, and to use my influence to induce other ladies to join, with the assurance, that if faithful to the recitations, we should receive diplomas at the same time with a class of young men

Happy to avail myself of a privilege which I had been long seeking, in connection with Mrs. S.P. Edson (now deceased) we persuaded fifteen women to join the Class. We went regularly to the recitations, and for two or three times were admitted to the lectures, when this means of knowledge was denied us, without any explanation being given. Gradually, as is usually the case with College Classes where severe study is required, the members dropped off, and only two, Miss Lydia S. Hall (now Mrs.

Graffam) and myself completed the Course. We continued faithfully, patiently, and with the deepest interest so long as the recitations were continued; studying through the long hot days of Summer

Judge our disappointment when diplomas were refused us on the ground that we had not studied long enough. We were then told if we would wait until September we should receive the requisite diplomas. Not allowed to practice the profession for which I had prepared myself for want of proper credentials, I was forced to accept an offer as traveling correspondent for the *Golden Age* in the South I again applied to Prof. Wedgewood for the long promised diploma, which he not only refused me, but refused when I proposed to study longer to admit me either to recitations or lectures.

Having received a liberal education, and graduated in a College composed mostly of young men in the State of New York as far back as 1857 ... I cannot appreciate or understand this (to me) manifest injustice.

I am not only wounded in my feelings, but actually deprived of an honest means of livelihood, without any assignable cause.

As this Institution bears your name, I am anxious to know if this proceeding meets your approval.

Yours Respectfully,

Belva A. Lockwood⁷

Grant had been spared details offered later in the *Lippincott's* article: The recitations had been sex segregated, "a compromise between prejudice and progress" and the degrees withheld because of a "growl by the young men, some of them declaring openly that they would not graduate with women."⁸ For Lockwood, who had only recently endured the death of the daughter born to her and Ezekiel, the action was "a heavy blow to my aspirations, as the diploma would have been the entering wedge into the court and saved me the weary contest which followed."⁹ Since she lacked the diploma, her name was not included in the list

of male graduates whose membership in the D.C. Bar was moved as a group before the District Supreme Court. Lockwood and Lydia Hall, a clerk at the Treasury Department,¹⁰ had no choice but to apply individually, which they did in the spring of 1872. The D.C. court deferred action by ordering that a special examination committee be constituted.

Lockwood endured days of questioning by this special bar committee but the examiners took no final action on her application. Her colleague Lydia Hall abandoned the fight. Lockwood later singled out members of the bar as the culprits rather than local justices: "Judge Cartter ... one year before ... knowing that some women in the District were preparing for admission to the bar, had asked that the rule of court be so amended as to strike out the word "male," and it had been done [but] the age of progress that had to some extent softened and liberalized the judges of the District Supreme Court had not touched the old-time conservatism of the bar."¹¹ "Desperate enough for any adventure," Lockwood went south to work for the *Golden Age* and on behalf of the presidential campaign of Horace Greeley, a somewhat curious decision given Greeley's less than whole-hearted support of women's rights. Upon

her return to Washington, she attempted to enroll at the Georgetown College Law School, failed, but was permitted to attend lectures at Howard University. Although Lockwood never spoke about it, Charlotte Ray had entered Howard Law School, completed the course of study, and successfully applied to the D.C. bar with her male classmates in March of 1872.¹² Had Lockwood attended Howard, she might never have had to endure "the weary contest."

And, still, that contest continued into the winter and summer of 1873, although certain local justices of the peace, and Judge William Snell of the Police Court, had notified her that she would be recognized in their courts, as attorney, in the trial of any case. Finally, Lockwood took the step (above) of writing to President Ulysses S. Grant. According to her record of events, she sent an additional communication to the President the same day. It was brusque in tone, insistent in its demand:

September 3, 1873

Sir, -

You are, or you are not, President of the National University Law School. If you are its President, I desire to say to you that I have

Belva Lockwood was known in Washington as a successful woman attorney. She adopted the tricycle as an efficient means of getting around the capital. An 1882 *Washington Post* column mused: "In sunshine or in storm may her familiar form be seen flying up the Avenue on her three-footed nag, her cargo a bag of briefs for the D.C. Superior Court or a batch of original invalids for the Pension Office."



passed through the curriculum of study in this school, and am entitled to, and demand, my diploma. If you are not its President, then I ask that you take your name from its papers, and not hold out to the world to be what you are not.

Yours Respectfully,

Belva A. Lockwood¹³

Grant did not answer, but two weeks later the university chancellor presented Lockwood with her diploma. On September 24, 1873, she was admitted to the District of Columbia bar, the second woman attorney in the capital, and one of the very few in the nation, to be licensed to practice law.

Washington Activist and Career Woman

Belva Lockwood had been a resident of Washington for seven years when she was admitted to the D.C. bar. She had used these years to prepare for a legal career and to launch herself as an activist in the cause of women's rights and, slightly later, international peace and arbitration. Vocation and avocation were strongly related. In speeches and memorials to Congress that drew upon her study of law, she openly joined the issues of equal citizenship, suffrage, and employment rights. Higher education, she believed, was essential to a wise use of the franchise, and to human development through meaningful work. Professional knowledge and standing could, and were, in her view, used to influence public policy. She regarded law as capable of bringing about social change and of offering "a stepping stone to greatness." She desired both and benefitted from becoming an attorney and a national activist just as Washington, D.C., and the nation, moved into an era of "law talk."

Lockwood came to the issue of women's rights by practical need, temperament, and intellectual judgment. She was bright, inquisitive, and confident. A widowed parent when

other young women had barely cast off their hair ribbons, she remained self-supporting until her death at the age of eighty six. The 1848 women's rights meeting at Seneca Falls, New York, took place the year she turned eighteen. Lockwood's later writings and speeches suggest that she was in complete accord with the Declaration of Sentiments issued by that assembly. When she was widowed at twenty-two, she did not remain where she was, hoping for a new husband-helpmate. Instead, she sold her property and went back to school. At age sixty five she used these words to describe this social and physical journey: "... without thinking of the very limited state of my exchequer, I had one supreme object ... and this was, to so thoroughly educate myself that I might ever thereafter respectably support myself and daughter, and educate the latter."¹⁴ Her involvement in the women's rights movement prior to her arrival in Washington in 1866 is not well documented. While a teacher in rural New York State, however, she did complain repeatedly, and publicly, about the lower salaries paid to women. As a principal, she introduced innovative curricula such as young women taking more rigorous physical exercise and a broader range of required subjects.

Lockwood first met Susan B. Anthony in the late 1850s at School Association meetings although she first *heard* Anthony in 1854, while a college student. She recounts in her *Lippincott's* article that she "slipped away one evening without the knowledge of the faculty, to hear Susan deliver one of her progressive lectures on the 'wrongs of woman.' She was at this time just commencing to argue the necessity for the enlargement of the sphere of labor for woman, and advocated her employment in shoe-shops, dry-goods stores, and printing-offices, all of which seemed startling heresy to the public of that time."¹⁵

Lockwood arrived in Washington interested in national politics and quickly became deeply engaged by issues of domestic and foreign policy. Late in 1867, she joined with several other activists in the work of the newly

THE NEW PENSION LAW.

See if You Come Under It.

Soldiers and Sailors

1. Must have an honorable discharge.
2. Service of ninety days.
3. A disability not due to vicious habits. It need not have originated in the service.

Widows.

1. Your husband must have served ninety days and been honorably discharged.
 2. Proof of husband's death.
 3. Widow is without other means of support than her daily labor.
 4. That she was married before June 27, 1890.
- Rate of pension under this law for widow \$8 per month, and \$2 for every minor child.

Minor Children.

1. The father should have served ninety days and been honorably discharged.
2. Proof of father's death.
3. That the child was under sixteen years of age at date of application, the pension ceasing at the age of sixteen years, unless the child is insane, idiotic, or permanently helpless, when it will continue during lifetime. A child's pension is \$2 per month if the mother is pensioned, otherwise her pension goes to the children equally.

Mother or Father.

1. That soldier died of wound or injury or disease, which, under prior laws, would have given him a pension. It must have been incurred in the service.
 2. That he left no wife or children.
 3. That the mother or father is at present dependent on her or his own manual labor, or the contributions of others not legally bound to support her or him. The rate is \$12 per month.
- "Procrastination is the thief of time."
Put in your claims at once.

BELVA A. LOCKWOOD & CO.,

Attorneys and Solicitors,

619 F Street, N. W., Washington, D. C.

Lockwood's staff processed thousands of Civil War veterans' pension claims between the early 1870s and the 1890s. She herself appeared numerous times before the Court of Claims to argue pensioners' and land claims. At left is a solicitation directed to veterans and their families urging them to contact Lockwood's firm to see if they qualify for the \$12 a month disability pension.

founded District of Columbia Universal Franchise Association (U.F.A.), a group committed to the idea that suffrage was a right of citizenship without regard to race or sex. Initially, the group met quietly and without notoriety. When Lockwood persuaded its members to move to the Union League Building, where a

dozen other societies gathered weekly, the press took notice, "reporting every meeting, distorting and ridiculing everything that was said and done."¹⁶ The disorder that followed required that the group hire a doorkeeper and a police officer. When the national woman suffrage movement split over strategy following the in-

clusion of the word “male” in the Fourteenth Amendment, Lockwood and her colleagues at the U.F.A. followed Stanton and Anthony in 1869 into the National Woman Suffrage Association where Lockwood became a frequent speaker.

Lockwood showed a particular talent and zest for political lobbying. She not only involved herself in the usual petition work on behalf of temperance and suffrage but, after the formation of the Universal Franchise Association, regularly went before committees of Congress to argue against sex discrimination. Her own experiences, first as a teacher and later as she sought to enter the field of law, gave Lockwood’s feminism an economic focus lacking in the advocacy of many of her suffrage colleagues. In the late 1860s, for example, she took up the cause of unequal pay for female government workers and helped to draft the language for, and win passage of, the 1870 Arnell proposal, “A bill to do justice to the female employees of the Government.” The legislation, introduced by Tennessee representative S.M. Arnell on March 21, 1870 (H.R. 1571), and passed in July of 1870 as part of a large appropriations bill (H.R. 974), established the right of women to compete for government clerkships on the basis of merit, at salaries equal to men.

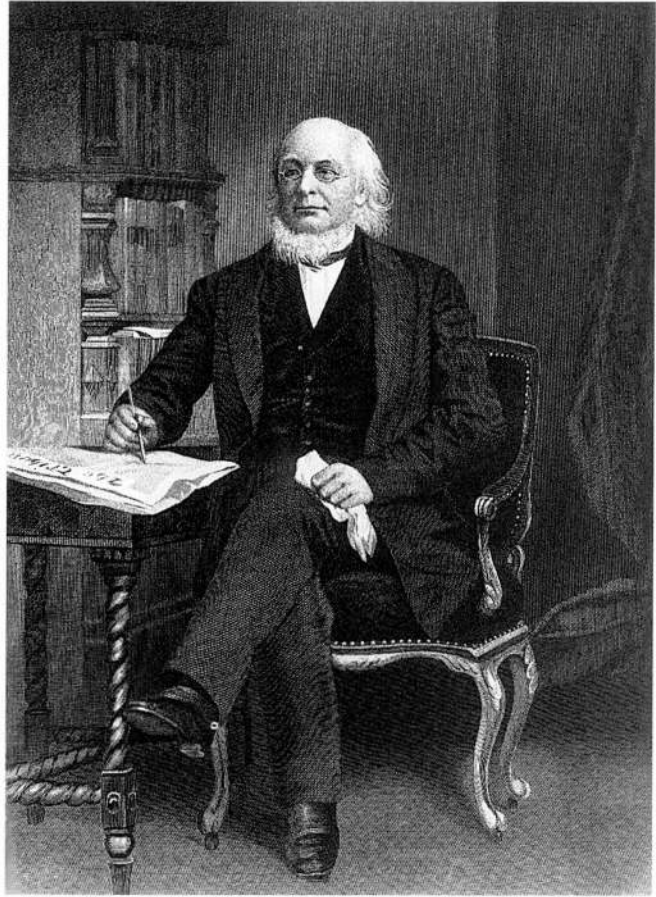
While Lockwood lobbied the government “to do justice” to its employees, she could rely upon no one but herself to build a clientele for her fledgling law practice. Success required that she find men and women willing to hire a woman attorney, and judges at least tolerant of courtroom appearances by a woman. Lockwood succeeded on both counts at a time when religious belief, social mores, and the law itself maintained that women were driven by emotion, not intellect, that female reproductive capacity was diminished by thinking (and vice versa), and that a married woman “merged” with her husband. Indeed, in the months of her “weary contest” before the D.C. bar, U. S. Supreme Court Justice Joseph P. Bradley had delivered his now-famous cultural

argument opposing the presence of women in public life in general, and the practice of law, in particular:

... the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.¹⁷

In this context it is all the more impressive that, without the springboard of a socially prominent family, or prior longtime residence in Washington, Lockwood built a solo practitioner law firm that survived for forty years.

Very little has been written about Lockwood’s law practice, or those of other women attorneys of the 1870s and 1880s. Trade journals such as Myra Bradwell’s *Chicago Legal News* and the letters of the Equity Club provide general information and some details.¹⁸ But they raise as many questions as they answer. And Lockwood herself, in her several autobiographical articles and in the many interviews given to members of the press, including Nellie Bly, related surprisingly little. She apparently left neither personal or professional diaries, nor office account books and, unlike her Washington colleague, attorney Albert G. Riddle, she did not attempt a legal or political memoir.¹⁹ Fortunately, however, a rich, if scattered, record of a portion of her legal work exists in court docket books and legal case files. The following discussion draws upon my survey of the docket books for the several divisions of the Supreme Court of the District of



In 1872 Lockwood went south to work for the *Golden Age* and on behalf of the presidential campaign of Horace Greeley (right), a somewhat curious decision given Greeley's less than whole-hearted support of women's rights.

Columbia and United States appeals courts and Court of Claims from the year of her admission to each of their bars (1873; 1879) through 1916.

Portrait of a Legal Career

When Lockwood was admitted to the District bar in September of 1873, at least one member of the legal establishment, District of Columbia Judge Arthur MacArthur, remarked that he did not believe that women lawyers "will be a success." Lockwood proved him wrong. She built a practice that brought her regularly before the civil, criminal, and equity courts of the District and, occasionally, into various state courts where sex discrimination did not prevent her from obtaining a license. She developed a specialization in pension and

land claims. The staff of her law office processed thousands of Civil War veterans' pension claims between the early 1870s and the 1890s, and Lockwood appeared repeatedly at the United States Court of Claims on behalf of these, and other, claims petitioners. She participated in litigation before United States district courts and, less often, offered motions at the Supreme Court of the United States. She authored dozens of briefs. Lockwood presented oral argument at the U.S. Supreme Court in 1880, in the case of *Kaiser v. Stickney*, and again in 1906, in *U. S. v. Cherokee Nation*.²⁰

Lockwood brought her surviving daughter, Lura, and a young niece into this business. She refers to them in one letter as "my two young clerks"²¹; in her interview with Nellie Bly, she says, "... my daughter is a skilled lawyer. She takes charge in my absence ... My

over, the docket books also demonstrate that despite sex discrimination, once in court, Lockwood had her share of wins and perhaps no more than her share of defeats. While repeatedly the victim of discrimination, Lockwood used persistence, intelligence, and propriety—for she was ever the decorous, modestly attired woman of her time—to overcome and to succeed. She was the original “New Woman.”

Lockwood won general respect for her legal accomplishments. Unlike the brutal social and political lampoons prompted by her work on behalf of women’s rights, or her introduction of the tricycle as a mode of local transportation for working women, very few cartoons belittled her work as an attorney. Her professional life, moreover, inspired other women, several of whom lived in, or came to Washington, and were mentored by her.²³ She earned a living from her law practice but also relied upon her good sense as a business woman for additional income. She made investments in property, rented rooms in the twenty-room house that she purchased, lent money at interest and, beginning in 1884, cultivated another career as a lyceum speaker. It is not yet possible to give an exact picture of her gross yearly income. In her 1888 interview with Bly, Lockwood said, “I never make less than \$3,000 a year.”²⁴ It is not clear whether she is referring to earnings from her legal practice or to the whole of her livelihood, but it is certain that, together, these enterprises provided financial well-being. (By comparison, a judge of the D.C. Supreme Court at this time was earning \$4,000.)

And yet, Judge MacArthur’s prediction that women lawyers would not be successful was not entirely incorrect. Despite the full and public careers of pioneering attorneys such as Lockwood, only a small number of women entered the profession in the remaining decades of the nineteenth century. Historian Virginia G. Drachman has written that it was not until the 1930s—sixty years after Lockwood’s career began—that “women [lawyers] had

achieved modest professional success and recognized the limits of their progress, a pattern that barely changed until the mid-1970s.”²⁵ It is against this background that Belva Lockwood’s achievements must be understood as the singular accomplishments of an extraordinary woman who by intellect and force of will forged her way in circumstances so hostile that few other women could or would follow.

Lockwood did not let the views of men like MacArthur dampen her spirit or aspirations. Her friends, she wrote, had confidence in her ability and, in anticipation of her admission to the bar, she had solicited legal business and had “her hands full of work.” Wise in the ways of public relations, she later observed that “the attention that had been called to me in the novel contest I had made not only gave me a wide advertising, but drew towards me a great deal of substantial sympathy in the way of work.”²⁶ Among the business Lockwood had “booked” prior to bar admission were a large number of government claims, in which she had been recognized as the attorney of record by the heads of the Departments.

Once admitted to practice before the local courts of the District of Columbia, Lockwood settled into a practice that resembled the work of male colleagues with small practices. For the first two years, she appeared in the Law and Equity divisions but not on the criminal side. In the first twelve months of licensed practice, she appeared nearly exclusively as plaintiff’s attorney, a pattern that maintained itself to a lesser degree for a dozen years, from 1873 to 1885. In these first twelve years of her practice in the Law division, she appeared in a dozen cases each of “on account,” “appeal,” and “certiorari.” There were nine “note” actions and another nine that involved “damages.” She also handled seven “ejectment” proceedings, and several “replevin” actions. She argued one case each of “seduction,” “breach of marriage contract,” and “damages for conspiracy.” Several of her clients in this 1873-1885 period used her services in at least two



Respected local attorney Albert G. Riddle, a professor at Howard Law School and Corporation Counsel for the District of Columbia, motioned to admit Lockwood to the U.S. Supreme Court bar in 1879. A former Ohio Congressman and a champion of women's suffrage, Riddle also moved the admission of women attorneys Laura DeForce Gordon and Carrie Burnham Kilgore, neither of whom lived in Washington, D.C.

Law division actions. Her professional profile in this courtroom is one of a repeat player, appearing frequently enough to be well-known, along with men like Leon Tobriner, R. Ross Perry, and John Rideout, to the justices of the court.

At the time that Lockwood entered into law, the District of Columbia had an active Equity division responsible for a large number of causes: "for release," "divorce," "creditor's bill," "injunction," "specific performance," "to annul a deed," "for rent," "to enforce a mechanics lien," "confirmation of probate proceedings," "for account and appointment of new trustee," and "for sale of infants real estate." Lockwood handled actions in each of these categories with the exception of a mechanics lien. Between 1873 and 1885 she was listed as attorney in ninety-six Equity court proceedings, and seventy-five in the same pe-

riod in the Law division. Half of her equity work involved divorce actions. As a woman attorney, she attracted female clients, and represented wives as complainants against defendant-husbands far more frequently than men. When she represented men in divorce actions, the men were always complainants, never defendants. After divorce actions, her most frequent equity work involved injunction proceedings, lunacy proceedings, and actions requesting the partition of land.

The post-bellum emphasis on gentility and the proper—private—sphere of women made the thought of women working in the criminal courts particularly egregious, even loathsome. If courts in general represented a male world, criminal court was the stage upon which played all of society's morally repugnant dramas from which women were to be shielded. Lockwood could have refused criminal cases. Yet, despite her religious rectitude and middle-class aspirations, criminal court cases and criminal court argument were as acceptable to her as any other kind of legal work.²⁷

In fact, once Lockwood began arguing criminal cases in 1875, this side of her courtroom practice was as active as that involving the Law division.²⁸ She frequently took larceny and robbery cases to trial. Between 1875 and 1885 fourteen of Lockwood's clients were charged with violent behaviors ranging from "personal violence upon a member of police forced" to infanticide. Less frequently, she defended individuals charged with making false claims against the United States, perjury, forgery, keeping a gaming house, or cruelty to animals. A number of her clients were women charged with some form of larceny, burglary, or assault. Other women clients were answering a charge of operating an unlicensed bar.

Lockwood represented sixty-nine defendants in court in these first ten years of criminal practice. She won "not guilty" decisions in fifteen jury trials and submitted guilty pleas in nine. Thirty-one of her clients were judged guilty as charged, while five others were found to be guilty of a lesser charge. An entry of *nolle*

prosequi decisions ended four cases. She won retrials for several clients, among them Louisa Wallace, whose dramatic first trial for infanticide occurred in 1878. Retried months later, Wallace was sentenced to be hanged, and saved only at the last moment by a conditional pardon.²⁹

Similar examination of the records of local male attorneys is necessary before any conclusion can be reached as to whether Lockwood's identity as a woman lawyer was a disability before judges and juries. Ultimately, we may learn that as a trial attorney she was more, or less, talented than the men of Washington's local legal community. Perhaps, no difference will be evident. Whatever the answer, it is already clear that any slights, meddling, or prejudice Lockwood encountered because of her sex were not sufficient to deny her credibility in court.

Lockwood argued most of her local law, equity, and criminal cases between 1873 and 1885. She did not quit the law, but in 1884 she took on an even more public persona that drew her away from Washington and courts of law. Late in the summer of that year Belva Lockwood accepted the nomination of the small Equal Rights Party to be its presidential candidate. She became the first American woman to run a full presidential campaign and used the publicity of the campaign to launch herself onto the paid lecture circuit and, later still, to become a leading activist in the movement on behalf of international peace and arbitration.

There is no evidence that the notoriety of her campaign helped Lockwood secure legal clients in Washington, D.C. Quite to the contrary, the number of cases she shepherded through her usual courtroom haunts dropped after 1884 and her local practice, as indicated by cases entered in the docket books, was never again as robust. After 1890, on several occasions, in letters to close friends, she wrote that business was slow. In these times, she relied on rents, her pension as Ezekiel's widow, and occasional lecture fees. During many of these years, Lockwood also supported her widowed

mother and, later, the orphaned son who survived her daughter, Lura.

Lockwood built a general legal practice but specialized in claims against the government, in particular, veterans' pension claims. The grim statistics of the Civil War had created an enormous pool of clients. (By the 1890s, the U.S. Pension Office annually sent checks to nearly a million veterans and their dependents.)³⁰ Lockwood capitalized on her firm's location in the nation's capital. Her office was only a short walk from the old and new quarters of the Pension Bureau and she regularly delivered armloads of pension applications. Her firm's business never rivaled that of pension claims baron George Lemon, who represented tens of thousands of petitioners, but she did report processing several thousand claims from the mid-1870s to the 1890s and, most likely, generated one to two thousand dollars in fees each year from this specialization.³¹ When Lockwood undertook the 1884 campaign, she knew that she could advertise her claims business while "on the road." Whatever the effects of her candidacy on her local practice, the opportunity for extensive travel was a boon to her national pension claims work as letters to her daughter repeatedly confirm.

The Supreme Court of the United States: A Male Bastion No More

Belva Lockwood was forty-nine years-old when she was admitted to the bar of the Supreme Court of the United States in 1879. She was the very model of a proper and ambitious attorney. The High Court Justices undoubtedly would have thought her a perfect candidate had she not been a woman. Her motives for applying for bar membership were professional: In 1874 she had been engaged by a client, Charlotte Van Cort, to file a case against the government for the use and infringement of a patent. Lockwood anticipated the need to argue the cause before the U.S. Court of Claims and, in April of 1874, asked Washington attorney A.A. Hosmer to move her admission to the

Claims Court bar. Lockwood was not prepared for the justices' flat refusal to admit her as she was a member of the District of Columbia bar who was also well known in federal government Departments doing business with the Court of Claims. Although she was weary of such struggle, Lockwood again refused to back down. In a lonely and often discouraging five-year contest, she not only won bar membership for herself at the Claims Court and U.S. Supreme Court but also the right of all qualified women attorneys to become a member of any federal court bar.

The confrontation began when, in a written opinion rejecting her application, Court of Claims Judge Charles Nott asserted that "admission to the bar constitutes an office. Its exercise is neither an ordinary avocation nor a natural right. It is an artificial employment, created not to give idle persons occupation, nor needy persons subsistence, but to aid in the administration of public justice."³² Nott went on to argue that the common law of marriage might make it impossible "to hold a woman to the full responsibility of an attorney," and concluded by maintaining, "The position which this court assumes is that under the Constitution and laws of the United States a court is without power to grant such an application, and that a woman is without legal capacity to take the office of attorney."³³ Lockwood writes of this decision, "[I] was crestfallen but not crushed. [I] had already filed Mrs. Van Cort's case in the Clerk's Office—had been promised a large fee and did not mean to be defeated. [I] took her testimony in the case . . . prepared with great care an elaborate brief, and asked leave for [my] client to read it to the Court. This, they had no power to deny, as it is the privilege of every applicant to plead his own case, and sat by Mrs. Van Cort until the hearing was completed."³⁴

Lockwood should have been prepared for the Nott decision both because of the general opposition to women professionals in the United States at that time, and because of the U.S. Supreme Court decision only the year be-

fore in *Bradwell v. Illinois*.³⁵ In that case, the Justices maintained that the privilege of earning a livelihood as an attorney was not a right that a state need grant to women under the Privileges and Immunities Clause of the Fourteenth Amendment. While Lockwood correctly maintained that the *Bradwell* decision had no precedential value as it applied only to states, and she had applied for admission to the bar of a federal court, *Bradwell* had created a new symbolic, if not legal, hurdle for women attorneys.

Her application put the Claims Court justices in a difficult position. On the one hand the Supreme Court of the District of Columbia, a court constituted under federal law, now licensed women attorneys. On the other hand, the majority and concurring opinions in *Bradwell* offered no particular inducement to do so. Uncertain, chagrined perhaps about the effects of the Claims Court decision on a hometown colleague, Judge Nott waffled in his concluding statement: "It is to be understood that the decision of this court does not rest upon those grounds which would make its judgment final. We do not, in legal effect, pass upon the individual application before us, but refuse to act upon it for want of jurisdiction. Our decision is not necessarily final, and there is express authority for saying that if we err, the Supreme Court can review our error and give relief to the applicant by mandamus."³⁶

At the time of the Court of Claims action, Lockwood was forty-three years old, an increasingly seasoned activist married to an increasingly frail man in his seventies. She supported an extended family, and had practical as well as philosophical reasons to fight the Nott decision. She believed unequivocally that women should have the equal opportunity of earning a living and knew that denial of federal court licensing would significantly affect the growth of her practice. Thus, as soon as Nott delivered the court's decision in May of 1874, Lockwood turned to Congress, lobbying for legislation "[T]hat no woman otherwise qualified, shall be debarred from practice be-

Written for the SUNDAY JOURNAL, and inscribed to the eminent comedian Mr. DE WOLF HOPPER.

July
1888

BELVA, DEAR, BELVA, DEAR!

Words and Music by M. H. ROSENFELD,

Author of the "THE KENTUCKY GALLOP,"
"THE RED BANDANA," and other popular works.

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The musical score consists of three systems of music. Each system includes a vocal line and a piano accompaniment. The first system is an instrumental introduction. The second system contains the first two lines of lyrics. The third system contains the final two lines of lyrics. The lyrics are as follows:

1. We'll not vote for Ben nor Groves, Bel - va, dear, Bel - va, dear, For our choice is you and "Love," Bel - va, dear, Bel - va, dear, We en -
 2. When our votes for you are cast, Bel - va, dear, Bel - va, dear, Will you tax the bus - iness, rust? Bel - va, dear, Bel - va, dear, Will you
 3. For our be - liefs we ex - pect Bel - va, dear, Bel - va, dear, "Home pro - duc - tions" you'll pro - lect, Bel - va, dear, Bel - va, dear, And a

dorse your views in full, For we know you're sound on soul, With a hoo - band's hair to pull, Bel - va, dear, Bel - va, dear, With a
 place a tar - iff high, On the ho - sle - ry we buy - We a - wait your calm re - ply, Bel - va, dear, Bel - va, dear, We a -
 hoo - band's pouch - et - see, They'll do "port of an - try" by, While we sum - ber peace - ful - ly, Bel - va, dear, Bel - va, dear, While we

In 1884 Lockwood became the first woman to carry out an organized campaign for the presidency—on a ticket of the Equal Rights Party. "Who'd prefer a man to you?" were some of the lyrics of "Belva, Dear, Belva, Dear!" a satirical song written in 1888 when she ran for the presidency for a second time.

fore any United States Court on account of sex or coverture." Neither house took action beyond referring her petition to committee, where it languished for the remainder of 1874 and all of 1875. Undeterred, she reshaped her strategy. Lockwood and her supporters knew that the Rules of the U. S. Supreme Court permitted an attorney to apply for permission to practice at that court after practicing in a state, or the District of Columbia Supreme Court for three years. By late September of 1876 she had met that requirement. She reasoned that success with the Justices of the Supreme Court would end resistance to her candidacy in all of the federal courts. Proceeding with her plan,

she presented her credentials to them. Former Ohio Congressman, woman suffrage supporter, and respected local attorney Albert G. Riddle moved her admission.

Lockwood again met with defeat. Speaking for his colleagues on November 6, 1876, Chief Justice Morrison R. Waite announced: "By the uniform practice of the Court from its organization to the present time, and by the fair construction of its rules, none but men are permitted to practice before it as attorneys and counselors. This is in accordance with immemorial usage in England, and the law and practice in all the States, until within a recent period, and that the Court does not feel called

upon to make a change until such a change is required by statute or a more extended practice in the highest courts of the States."³⁷ Presumably, in inviting legislative intervention, the Justices felt secure in the knowledge that Congress had not acted on Lockwood's 1874 petition and that while she was now a veteran lobbyist, she might be too preoccupied nursing her terminally ill husband and maintaining the support of her family to convince Congress that English precedent should not govern American practice.

The Justices were wrong. Lockwood returned to Congress and over the course of the next two years continued stubbornly to plead the case of women attorneys' right to equal treatment.³⁸ She succeeded in February of 1879 when the more-reluctant Senate, finally following the earlier lead of the House of Representatives, approved the historic "Act to relieve certain legal disabilities of women." With one sentence, Congress delivered the legislative fiat invited by Chief Justice Waite: "That any woman who shall have been a member of the bar of the highest court of any State or Territory or of the Supreme Court of the District of Columbia, for the space of three years, and who shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States."³⁹

Lockwood later wrote with candor about the days before the final Senate vote: "I grew anxious, almost desperate, —called out everybody who was opposed to the bill, and begged that it might be permitted to come up on its merits, and that a fair vote might be had on it in the Senate. I have been interested in many bills in Congress, and have often appeared before committees of Senate and House; but this was by far the strongest lobbying that I ever performed. Nothing was too daring for me to attempt. I addressed Senators as though they were old familiar friends . . ."⁴⁰ The victory was significant: Despite the Nott and Waite rulings

Lockwood, virtually alone, using tenacity and political savvy, had pushed a reluctant Congress to enact a concrete measure supporting women's equal rights.

The Justices of the Supreme Court now had no choice but to admit her. On March 3, 1879, Riddle again moved her admission to the bar. It was approved and Belva Lockwood became the first woman licensed to practice law before the Supreme Court of the United States.⁴¹ Several days later, the justices of the Court of Claims capitulated and she was admitted to the bar of that court. Twenty months later, the case of *Kaiser v. Stickney* presented Lockwood with the opportunity to become the first woman member of the high court bar to participate in oral argument.⁴² *Kaiser* involved the validity of a trust-deed used to secure a bank note and came on appeal from the District of Columbia Supreme Court (General Term). Lockwood had been participating in the case as co-counsel with local attorney Mike L. Woods. When the case reached the U.S. Supreme Court, Woods began argument on November 30, 1880. According to Court documents, Woods continued to argue the case on December 1, joined by "Mrs. Belva A. Lockwood."⁴³ Her speech was not recorded but papers filed with the Court show that Lockwood, despite her opposition to the married women's property laws of her day, attempted to set aside the deed in question on the grounds that a married woman alone had signed it. The Court ruled against Lockwood's clients, saying that they both had signed the deed, and that it was valid.

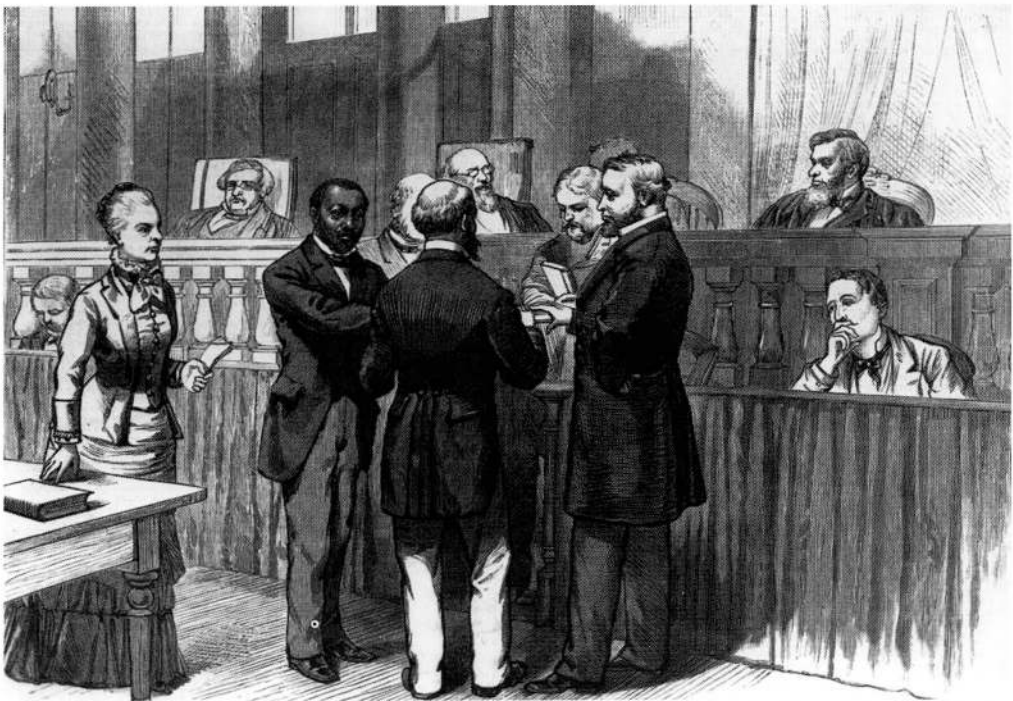
In the years after *Kaiser*, it was not unusual for Lockwood to appear at the Court to argue motions. She also participated as co-counsel in a small number of cases that went on appeal to the Court. Late in her life, in 1906, she represented certain eastern and emigrant Cherokees in their multi-million dollar claims against the United States government (discussed below). Lockwood no doubt hoped for more Supreme Court cases both for the prestige, and the fees, that they would bring to her.

The nature of her local and pension claims practice made such representation unlikely. In fact, only a few Washington attorneys made frequent appearances at the Court. Those who did, however, came often. In the same year that Lockwood argued *Kaiser*, prominent local attorneys Enoch Totten and Samuel Shellabarger each had seventeen cases or filings listed in the Court's **Rough Docket Book**. Many of Totten's cases were on appeal from the Court of Claims. It is possible to speculate that Lockwood, although also expert in claims law, found her sex a barrier to the cultivation of certain types of claims clients whereas men like Totten did not. Lockwood, however, was silent on the matter.

Lockwood had sought bar membership not only for the good that it might bring to her law practice but also to establish a law of equal opportunity. Yet, even after winning the right to practice in the federal courts, Lockwood did not have the last word. In 1894, she brought an

original action—“for leave to file a petition for a mandamus”—at the U.S. Supreme Court in which she argued that the state of Virginia violated her constitutional rights by refusing to grant her a license to practice in its courts. Her decision to act was very much in character and she was, undoubtedly, encouraged by her previous successes in overcoming adverse law. *Bradwell* had not been reversed but a number of states now licensed women attorneys.

As in the 1870s, Lockwood was motivated primarily by the desire to conduct business and, presumably, gave little or no thought to the possibility of a legal decision that would diminish women's legal position. She had prevailed before. Strategically, however, she erred badly. Chief Justice Melville W. Fuller not only ruled that the state of Virginia did not violate the law when it refused to license Lockwood as an attorney, but also declared that a state need not consider women “persons” under the law.⁴⁴



Once she became a member herself, Lockwood (left) motioned in 1880 for Samuel R. Lowery, the first Southern African-American attorney admitted to the Supreme Court bar. Lockwood would also move the admission of Alice A. Minick in 1897.

tional action and proposed a federal amendment that read, "The right of citizens of the United States to vote shall not be denied or abridged on account of sex." Still other women and men sought to win the vote for women through reform of state law. Lockwood argued that men and women held equal rights and believed the original U.S. Constitution granted suffrage to women citizens. However, always more of a realist than a theoretician, in the course of the next forty years, she also called for changes in state and federal laws, while remaining committed to the earlier practice of asserting the right to political citizenship through direct action. As shown by her fight for bar admission, the idea of direct action suited her beliefs, personality, and ambitions. Lockwood demonstrated this once again when she agreed to be the presidential candidate of the Equal Rights Party in 1884 (and, again, in 1888).

While Lockwood maintained a public image of respectability, she pioneered—with Victoria Woodhull, Elizabeth Cady Stanton, and others—the radical idea of far-reaching political ambition on the part of women. When most of the members of the N.W.S.A, of which Lockwood was a member and local leader, elected to remain within the mainstream of American party politics, she plunged into third party activism with her two candidacies. She nurtured factionalism even as she spoke against it. She had no abiding commitment to the major parties, which, she believed, repeatedly had ignored opportunities to support women's rights. She had rebelled even before her own third party campaigns. In 1872, she supported Victoria Woodhull and spoke on behalf of her presidential candidacy. When that campaign ran to tatters, at the same time that Lockwood was being put off in obtaining a license to practice law in the District of Columbia, she transferred her support to Liberal Republican candidate Horace Greeley.

How Lockwood came to be the candidate of the Equal Rights Party in late August of 1884 may never be completely clear. She was pub-

licly nominated by attorney Clara Foltz and Marietta L.B. Stow of the small California Equal Rights Party. Stow was announced as the vice-presidential candidate. These East and West coast women knew one another through suffrage and professional work. Stow and Lockwood are said to have met while presenting a request for legislation to members of Congress.⁴⁶ Stow had promoted the idea of women candidates for political office in California for some years—largely for "publicity rather than in expectation of success."⁴⁷ In 1882 Stow had announced herself as Independent Candidate for Governor of California, saying that "being Governor was prelude to the Presidency."⁴⁸

Clara Foltz maintained that the Lockwood nomination was a joke, and was surprised at the immediate interest of the press. In a years-later recollection, Foltz wrote that Marietta Stow appeared at her law office one day, to offer appreciation for a recent public lecture. The visitor, according to this account, then said, "Clara Foltz, I nominate you for President of the United States," to which the attorney replied, "Oh no, don't nominate me, nominate Belva Lockwood."⁴⁹ Foltz's account of the nomination avoids any mention of a letter written by Lockwood a week or so prior to the nomination. This August 10, 1884, communication was sent to Stow as editor of the *Woman's Herald of Industry* and casts events in a slightly different light as it, together with the rapidity of her acceptance, is suggestive of (implicit) self-nomination by Lockwood. The letter reads:

The August number of your valuable paper is before me. It has so much the true ring of justice and right in it Why not nominate women for important places? Is not Victoria Empress of India? Have we not among our country-women persons of as much talent and ability? Is not history full of precedents of women rulers? The appointment of Phoebe

Cousins as assistant marshal of St. Louis is a step in the right direction If women in the states are not permitted to vote, there is no law against their being voted for, and if elected, filling the highest office in the gift of the people. Two of the present [minor] political parties who have candidates in the field believe in woman suffrage. It would have been well had some of the candidates been women. There is no use attempting to avoid the inevitable. The Republican party, claiming to be the party of progress, has little else but insult for women, when they appear before its 'conventions' and ask for recognition. Note, for instance, the resolution on woman suffrage presented to their convention on the 5th of June. [Lockwood had attended that convention in Chicago and had "besought the resolutions committee in vain to adopt a plank in their platform giving some recognition to women"]. It is quite time that we had our own party; our own platform, and our own nominees. We shall never have equal rights until we take them, nor respect until we command it. Act up to your convictions of justice and right, and you cannot go far wrong.⁵⁰

Telling her 1903 account of the nomination, Lockwood said that Stow circulated the August 10 letter with comments of her own. "Fired by the situation, and believing that I had some grit, the women had called a convention and had nominated me for the presidency, with Marietta L.B. Stow as a running mate." Foltz does not say whether she had been shown this letter. If she had, it might explain why she offered Lockwood's name. Lockwood, with perhaps her own lack of candor, completes her account by writing, "I was taken utterly by surprise"

Whatever the precise facts of the nomina-

tion, an exchange of letters followed, the first of which, on September 3, 1884, "To Marietta L. Stow, Pres. and Eliza C. Webb, Sec. and members of the National Equal Rights Party!" contained Lockwood's acceptance:

Mesdames,

Having been duly notified of your action in Convention assembled of Aug. 23rd 1884 in nominating me as the candidate for the high position of Chief Magistrate of the United States as the choice of the Equal Rights Party; although feeling unworthy and incompetent to fill so high a place, I am constrained to accept the nomination so generously and enthusiastically tendered by the only political party who really and trully (sic) represent the interests of our whole people North, South, East and West, because I believe that with your unanimous and cordial support, and the fairness and justice of our cause; we shall not only be able to carry the election, but to guide the Ship of State safely into port.⁵¹

With this letter and an attached ten-point platform, subsequently expanded and reworded, Lockwood initiated the first full campaign for the United States presidency carried out by a woman. She set out to appeal to a broad cross section of Americans with a platform that embraced far more than a demand for equal rights. While she did call for women to be recognized as voters, for "equal and exact justice to every class of our citizens, without distinction of color, sex, or nationality," a national temperance policy, and a uniform system of laws, especially the laws relating to marriage, divorce, and property, her platform also proposed tariff, currency, and land policy. Her final statements favoring equal rights for women were temperate and general. Gone was her initial language condemning the "wholesale monopoly of the country by male voters," as well



as her pledge, if elected, “to appoint a reasonable number of women as District Attorneys, Marshals and Judges of the United States Courts and ... some competent woman to any vacancy that might occur on the United States Supreme Bench.”⁵² Addressing other major issues of the day, she backed “true” civil service reform, argued for increased pension benefits for disabled soldiers, and urged that “the dangers of a solid South or a solid North shall be averted by a strict regard to the interests of every section of the country.”

At the age of 82, Lockwood successfully cleared socialite Mary E. Gage of lunacy charges after she had been committed to a mental asylum for threatening to kill prominent Washington banker Charles J. Bell (above). Gage had been duped by Constance Gracie (right), a society hostess who led her to believe that Bell was trying to snub the Gage family. When Gracie’s husband Archibald subsequently perished with the Titanic, she married the dubious Count de Urbina who ran off with her fortune. Lockwood was later visited by one of the physicians she had engaged as an expert witness who described the trial as “one of the most important cases ever tried in the District of Columbia, especially as it tended to prove what paranoia was.”

Lockwood’s presidential campaign drew praise and criticism. Her efforts, like those of other minor party candidates, were lampooned in cartoons, and in song, but also garnered respectful treatment from some members of the press. Most surprisingly, her colleagues in the National Woman Suffrage Association attacked her candidacy. Unlike Lockwood, the N.W.S.A. leadership continued to believe that woman suffrage would be won through alliance with major political parties. Susan B. Anthony had counseled support for the 1884 Republican presidential nominee, James G. Blaine, and believed Lockwood’s candidacy to be imprudent.⁵³ Less surprisingly, women of all political points of view thought public campaigning by a woman improper and likely to harm the good name of “woman.”

Lockwood succeeded in organizing electoral tickets in Maryland, New Hampshire, New York, Michigan, Illinois, California, Indiana and Oregon. National and local newspapers as well as state suffrage publications



covered her campaign appearances and made her name known throughout much of the country. She received several thousand votes in the final balloting.⁵⁴ Even within the world of minor political parties, the count was not high and yet Lockwood was not displeased. Her candidacy had given Americans the opportunity to see and read about a woman political candidate, and challenged American society to move beyond cartoons and to accept women as serious and equal participants in lawmaking. What Clara Foltz described as having started as a joke, in fact, laid important groundwork that helped future women candidates gain acceptance.⁵⁵

Lockwood's 1884 campaign and her smaller effort in 1888 served the cause of women but they also served the interests of the candidate. She took up the life of travel that she had long sought and which, in fact, she did not give up until her early eighties. Letters home confirm that she was successful in soliciting pension claims. She also capitalized on her candidacy by venturing onto the national lecture circuit. She signed with the well-known Chicago based Slayton Lyceum Bureau. Her travels were far flung: In the autumn and winter of 1885-86, she recorded a tour that included Marseilles, Illinois; Corning, Iowa; Denver, Colorado; Winnebago, Minnesota—back through Illinois and Ohio speaking almost daily, and later working her way east and north by lecturing in Pennsylvania and central New York, where she barely stopped for Christmas, and then back into Ohio, again speaking in Wisconsin, Illinois, Iowa, and Nebraska. On March 11, 1886, still on the circuit, she spoke in Kansas and perhaps headed back to Washington. A month later H.L. Slayton sent her this revealing business letter [apparently after she had complained about the financial arrangements]:

Dear, Mrs. Belva Lockwood

"...You have lectured more nights in 13

months than any 5 on our list and more than any other 3 in U.S. in that time and you have made more money than any 4 on our list. So you can see we are not getting rich so very fast. In fact its (sic) about all we can do to come out even at the end of each season. You should follow up your advantage in the lecture field for two more seasons then you will have pretty well covered the ground. ... I don't think you will devote very much of your time to law practice in future. You are wanted for wider fields of usefulness. I quit the law 12 years ago and do not regret it.

Of course I regard the law as one of the most noble and honored of the professions or life pursuits, but it is crowded with those who can do nothing else With regard to next season you want and of course need the same careful and vigilant effort as in the past. The old contract has been quite as much to your advantage as ours. It enables us to fill nearly if not every night. Now to encourage and assist you to pay up what is due us under present contract. I will continue the old contract another season and you pay us ... 35 per cent of net profits. All expenses as now to be paid out of gross receipts. This is very liberal really more so than I can afford but I make it that you may sooner be able to pay us the money we so much need to pay debts Please answer at your earliest convenience.

Yours sincerely,

H.L. Slayton⁵⁶

Lockwood was paid an average speaking fee of \$30 to \$40, with an occasional \$100. Her repertoire generally included five or six talks on topics that included "Women and the Law," "The Political Situation," "The Tendency of Parties," "Social and Political Life In Washington," and "Is Marriage a Failure? No Sir!" Slayton may have argued that she made a fair living but judged by the fees commanded by notable authors and raconteurs such as "Mark Twain," who earned hundreds of dol-

lars for an appearance, or a man with credentials more like hers, such as the well-known Civil War correspondent and book author, Albert Richardson—who reported making \$100 lecture fees in Albany and Providence, and \$75 in Bangor and Concord—the payments made to Lockwood were modest.⁵⁷ Touring, however, suited her and she continued to lecture even after her notoriety dimmed.

At the close of the 1888 campaign, Lockwood was nearly sixty but the pace of her vocational and reform activities did not slacken. In fact, her commitment to social and political change expanded as she turned her energies more fully to the cause of international peace and the use of arbitration to prevent war. She became a leader of the Philadelphia-based Universal Peace Union (U.P.U.) and a member of the commission of the International Peace Bureau (I.P.B.), representing the United States Branch, located in Bern, Switzerland. Through a corpus of writings—speeches, tracts, and articles for the organ of the U.P.U., the *Peacemaker*, and an extensive international and national correspondence—Lockwood contributed to the development of a theoretical analysis of conflict and dispute resolution.

She had a passion for the struggle for peace and gained a great deal from her work—friendships, notice, travel, and political satisfaction. And even as Europe plunged into war, she did not give up. She continued to speak against war and did not yield to the pressure put on peace women to abandon their cause in the name of patriotism. In 1916, at the age of eighty, Lockwood joined twenty other peace friends in agitating against the participation of local schoolchildren in a World War I Preparedness Parade. She believed that the children did not understand the purpose of the parade, or the meaning of war.⁵⁸ Closer to home, she was dismayed that the orphaned grandson she had raised, who had joined the National Guard against her principles and wishes, was pleased to be sent with his unit for duty on the United States-Mexican border.

Career's End

After the campaign of 1888, Lockwood continued her search for a women's rights community with whom she could share a broader base of ideas and strategies. She had been stung by the criticism of the N.W.S.A. leadership and discouraged by their politics. She grouched that they never thought beyond petitioning. In 1902 she readily supported her longtime friend Clara Colby, the editor of *The Woman's Tribune*, and the Reverend Olympia Brown, when they revived the defunct Federal Suffrage Association (F.S.A.).⁵⁹ Colby and Brown insisted that women should, at least, be permitted to vote in federal elections, and lobbied members of Congress for suffrage legislation, maintaining that "... the spirit if not the language of the Constitution of the United States requires that the federal officers, particularly the members of the House of Representatives, should be elected by the 'people,' and we believe that women are people and as such are entitled to a voice in those elections."⁶⁰

Lockwood assisted Colby and Brown in obtaining new congressional hearings for a federal suffrage bill at least as early as 1906—well after the National Woman Suffrage Association had abandoned the idea of federal suffrage legislation in favor of constitutional amendment. Colby and Lockwood were particular friends who, in letters, gossiped about members of Congress and exchanged political advice. Colby, for example, wrote that they might rely upon Burton French as a true friend of the cause, "as he is not one of the representatives who says 'introduced by request'."⁶¹ Lockwood's commitment to F.S.A. politics again created raw relations with "the Nationals" (NWSA). In March of 1910 she complained to Colby, "The Nat. Woman Suffrage Assoc. is to meet here [D.C.] Apr. 14 ... with the Old Machine in charge. I have not been invited to speak, or even attend the Convention According to the irony of fate, I am called to North Carolina & North Georgia [as part of the settlement of a case] so I shall

see none of it, and no hearts will be broken, but I am sorry for this collision of current events.”⁶²

The internal politics of suffrage reflected considerable differences in social and political analysis, and more than a pinch of ego. But beyond the notices of pique and discord, Lockwood and Colby’s letters, poignant and sober, contemplate an outcome that haunted these lifelong advocates of woman suffrage. Colby speaks of it frankly in a letter only months before Lockwood’s death: “I think it would be a dreadful thing—historically—for the amendment to pass before our Federal Suffrage bill, as it would stamp on the history of the U.S. for evermore that women had no rights originally in this Republic and that men had to give them their citizen’s rights.”⁶³

“A Hotly Contested Case”

When Lockwood wrote to Clara Colby in March of 1910 that the settlement of a case called her to North Carolina and north Georgia, she was not referring to just *any* case. At the age of eighty, she was overseeing the distribution to her Cherokee clients of a multi-million dollar court award. In 1906, the Supreme Court had affirmed a decades-old claim against the United States for money due under several treaties of removal, relocation, and compensation. The decision in *United States v. Cherokee Nation*, a complex, multi-party case, approved a settlement of \$1,111,284 plus interest.⁶⁴ Lockwood represented, through power of attorney, a large number of Cherokee in the eastern part of the United States, as well as some later emigrant Cherokee. In litigation, these individuals—approximately six thousand according to Chief Justice Fuller’s opinion—were styled the Eastern and Emigrant Cherokees.⁶⁵

Cherokee Nation was the last case in which Lockwood participated in full oral argument. Three days were allotted for presentations. Louis Pradt, assistant U.S. attorney general, represented the United States government

which was appealing the Court of Claims award. No less than nine attorneys represented the interests of two contending Cherokee parties while Lockwood, without co-counsel, briefed and argued the case for her clients.⁶⁶ A lesser figure might have been intimidated but Lockwood entered the Court with more than thirty years of experience as a claims attorney and many visits to the Court to argue motions. She was thoroughly familiar with the long and torturous history of these claims, having first litigated on behalf of certain Cherokee as early as 1875, and having worked steadily in the 1880s and 1890s for the “Old Settler” or “Western Cherokee.”⁶⁷ There can be no question that she had a great deal at stake in this 1906 case. She was seventy-six years of age, relished the prospect of the public notice, and needed the sizeable contingency fees as a financial cushion for her old age. Lockwood wrote of the appeal, “[it is] a very hotly contested case, and is I think the last great Cherokee case that will ever come before the [Supreme] Court.”⁶⁸

Lockwood made her oral presentation to the Court on January 17 and 18 and won respectful notices from the local press. *The Sun* reported that “Mrs. Lockwood ... spoke with great rapidity, but with clearness, and her arguments were followed closely by the Justices on the bench, several of them interrupting her to ask questions upon different points she made.”⁶⁹ She followed the outline of her brief and maintained that, although her clients had remained in the east, or emigrated later, and owed no allegiance to the Cherokee Nation, they had rights as communal owners of the lands east of the Mississippi at the time of the signing of the fateful 1835 treaty of removal. She further argued that “one-fourth part of the whole sum recovered be set apart for them [her clients] as their distributive share.”⁷⁰ She later wrote, “My speech before the Supreme Court has been highly complimented by the Judges. It covered North Carolina & the interest.”⁷¹ When the Supreme Court upheld—with only small modification—the earlier decree of the Court of Claims, her clients shared in the multi-

million dollar settlement and Lockwood won the coveted public notice and the much-needed legal fees.⁷²

And still she worked. The distribution of the award kept Lockwood busy for several years as did other cases at the Court of Claims. In 1909, aged seventy-nine, she made a two hour oral presentation at that court. In this decade, she also traveled extensively in Europe as a representative of the Universal Peace Union and the International Bureau of Peace, and lobbied, when in D.C., on behalf of the federal suffrage bill. She was an active member of the National Council of Women and the new American Woman's Republic.⁷³

In 1912 Lockwood was again, and for the last time as a lawyer, in the limelight. She was engaged to represent Mrs. Mary E. Gage in lunacy proceedings that followed accusations Gage had threatened to kill prominent Washington banker Charles J. Bell. The case provided the press with a sensational tale of an *arriviste* family who thought Bell wished to



keep them—and their “handsome daughter”—from “the Capital’s 400.”⁷⁴ On Bell’s complaint, Mary Gage had been arrested and examined



Through power of attorney, Lockwood (top) represented a large number of Cherokee in the eastern part of the United States, as well as some later emigrant Cherokee. Now over eighty, it would be her last, most lucrative, and most publicized case before the Supreme Court of the United States. The Court’s 1906 decision approved a settlement of \$1,111,284 plus interest to the beleaguered Cherokees, most of whom had been forced to relocate westward after passage of the Indian Removal Act of 1835. (Pictured above is the 1838 Cherokee Trail of Tears.)

by government doctors who found her to be of “unsound mind.” They committed her to St. Elizabeth’s Hospital for the Insane pending a hearing. After a bad start with another attorney, Lockwood came onto the case and prepared for a hearing before an old friend, Judge Barnard, and a local jury. On the appointed day, the now eighty-two year-old lawyer guided her client through testimony in which Gage said that she had been duped by a local socialite, Mrs. Archibald Gracie, into believing Bell “opposed” her. She admitted that “she was mistaken in centering upon the banker” and that she now harbored no resentment against him.

Six weeks after her arrest the jury, deliberating only twenty minutes, pronounced Mary Gage sound of mind. Loud applause greeted the verdict with “fashionable women” rushing to the defendant’s side.⁷⁵ Lockwood was later visited by one of the physicians she had engaged as an expert witness who described the trial as “one of the most important cases ever tried in the District of Columbia, especially as it tended to prove what paranoia was.”⁷⁶ Lockwood took delight in the victory against all “the legal, medical, and moneyed talent of the District ... among them all of the District experts, 3 bankers, 3 lawyers, the Sup. of the Govt Hospital for the Insane, and the Bishop of Washington.”⁷⁷ She thought “it should be reported.”

Belva Lockwood began her life in law at a time when women were thought to be incapable of the physical and mental rigors of a legal career. She refused to accept the legal restraints and social mores that expressed this view of women and insisted upon the right, in her career and in politics, to be judged on her achievements and credentials, not her sex. As a lawyer, lobbyist, reform activist, and presidential candidate, she was unwilling to leave lawmaking only to men. Her extraordinary effort to gain admission to the Supreme Court bar opened the highest court to a previously unrepresented group. By 1900, twenty other women attorneys had followed Lockwood to the Supreme Court bar. Her success resulted in

all federal courts accepting women attorneys thereby giving them greater opportunity to compete as professionals. Perhaps, more importantly, this opening eventually allowed women attorneys to play a critical role in the development of legal doctrine including areas of particular concern to women.

Lockwood cared a great deal about her place in history. She gave interviews and authored a number of articles about her legal career and political candidacies. Late in life, she sent copious notes to a family member who began, but did not publish, a biography. Yet, after the obligatory obituaries in May of 1917, little was reported or remembered of her life, a life of brio and flinty resolve. The extraordinary recent growth in the number of women attorneys in the United States and the consequent increase in female state and federal judges was made possible by women such as Lockwood. In fact, Belva Lockwood warrants a lead position in the thin, strong line that stretches back to before it was merely difficult.

Endnotes

¹ Lockwood was sworn in on March 3, 1879. “Washington News and Gossip,” *The Evening Star* (March 4, 1879) (item announces reconvening of the Court and that Lockwood and J. Hall Sypher were admitted to practice), p. 1, col. 2.

² Ray was admitted April 23, 1872; Lockwood September 24, 1873. Washington, D.C. National Archives, **Index to Attorneys, Supreme Court of the District of Columbia, volume I: 1863-1928**. See also, Supreme Court of the District of Columbia, **General Term Docket Minutes**, volume 2 (National Archives, RG 21).

³ Syracuse University Library, Special Collections, Belva A. Lockwood Papers.

⁴ Belva A. Lockwood, “My Efforts To Become A Lawyer,” *Lippincott’s Monthly Magazine* (Feb. 1888), pp. 215, 221.

⁵ *Id.*, p. 221.

⁶ Virginia G. Drachman, **Sisters in Law** (Cambridge: Harvard U. Press, 1998), p. 119.

⁷ Lockwood to Grant, January 3, 1873. The Historical Society of Pennsylvania, Dreer Autograph Collection, Volume 159, Misc. Mss.

⁸ *Lippincott’s, op.cit.*, p. 223.

⁹ *Id.*, p.223.

¹⁰ Lydia Hall benefitted from the “liberal thought of Secre-

tary of the Treasury Salmon P. Chase" who permitted—atypically—women to be appointed clerkships in the treasury. "Mrs. Lockwood Tells of Suffrage Move's Growth." *The Woman's National Daily*, n.d. Swarthmore College Peace Collection, Lockwood Papers.

¹¹ *Lippincott's*, *op. cit.*, p. 223.

¹² Supreme Court of the District of Columbia, 2 **Minutes: General Term** (Oct. 11, 1871–December 30, 1876), p. 53. Ray's class was admitted on March 2, 1872.

¹³ *Lippincott's*, *op. cit.*, pp. 224.

¹⁴ Syracuse University Library, Special Collections, Belva A. Lockwood Papers. "Belva Lockwood's College Days," p.1.

¹⁵ *Lippincott's*, *op. cit.*, p. 218-19.

¹⁶ "Mrs. Lockwood Tells of Suffrage Movement's Growth," *op. cit.*

¹⁷ *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873), concurring opinion.

¹⁸ See Jane M. Friedman, **America's First Woman Lawyer: The Biography of Myra Bradwell** (Buffalo: Prometheus Books, 1993); Virginia G. Drachman, **Women Lawyers and the Origins of Professional Identity in America: The Letters of the Equity Club, 1887 to 1890** (Ann Arbor: U. Michigan Pr., 1993); and the several articles of Barbara Babcock analyzing the career of California attorney Clara Foltz.

¹⁹ A. G. Riddle, **Fifty-Five Years of Lawyer Life, 1840-1895**. Western Reserve Historical Society, A.G. Riddle Papers.

²⁰ *Kaiser v. Stickney*, 131 U.S. clxxxvii Appx (1880). Appendix of "Omitted Cases in the Reports of the Decisions of the Supreme Court." (1889). *U.S. v. Cherokee Nation*, 202 U.S. 101 (1906).

²¹ Virginia Drachman, **Women Lawyers**, *op. cit.* p. 56.

²² "Women's Part in Politics: Mrs. Belva Lockwood Talks About Herself to Nellie Bly," **The World** (August 12, 1888), p. 13.

²³ *E.g.*, Emma Gillett and Marilla Ricker.

²⁴ "Women's Part in Politics," *op. cit.*, p. 13.

²⁵ Drachman, **Sisters In Law**, *op. cit.*, p. 1.

²⁶ *Lippincott's*, *op. cit.*, p. 224.

²⁷ Lockwood is listed as the sole attorney of record in 80% of her criminal cases.

²⁸ Lockwood handled sixty-nine cases in Criminal Court from 1875-1885, while she is listed in seventy-five cases in the Law docket books for the years 1873-1885. She may have appeared on behalf of clients in the precinct police courts but the available records are very incomplete and rarely include the name of the attorney.

²⁹ Supreme Court of the District of Columbia, Criminal Case Nos. 12.529 and 12.845. Under the conditional pardon, Wallace was sentenced to ten years imprisonment.

³⁰ Patrick J. Kelly, **Creating A National Home: Building The Veteran's Welfare State, 1860-1900** (Cambridge: Harvard U. Press, 1997), p. 29.

³¹ The bulk of her pension work occurred from the mid-

1870s through the mid-1890s, about twenty years. Using the conservative figure of 2,000 claims cases, at \$10 per filing (as fixed by federal law), the law firm would have received \$20,000 over twenty years, or \$1,000 per year. Complicated pension appeals would have increased her income.

³² 9 Ct. Cl. 346, 351 (1873).

³³ *Id.*, pp. 353, 356.

³⁴ Swarthmore College, Peace Collection, Lockwood Papers, "Mrs. Lockwood and the late Associate Justice Knott. . .", pp. 2-3.

³⁵ 83 U.S. 130 (1873).

³⁶ 9 Ct. Cl. 346, 356 (1873).

³⁷ Supreme Court of the United States, **Minutes**, Nov. 6, 1876.

³⁸ For a detailed account of the many readings and debates in the House and the Senate of Lockwood's bill "to relieve the legal disabilities of women," see Madeleine B. Stern, **We the Women** (Artemis: 1962, 1974), p. 219.

³⁹ "An act to relieve certain legal disabilities of women," 20 **Stat. At Large** 292.

⁴⁰ *Lippincott's Monthly Magazine*, *op. cit.*, p. 229.

⁴¹ Six years later, Laura DeForce Gordon was admitted to the Supreme Court bar, followed by Ada M. Bittenbender in 1888. Between 1890 and 1900, eighteen other women attorneys were so licensed. Chief Justice Waite could not have been opposed completely to the idea of women professionals as, according to Lockwood, he employed Dr. Caroline B. Winslow as his family physician. Belva A. Lockwood, "The Present Phase of the Women Question," 5 *The Cosmopolitan Magazine* (March-October 1888), p. 469.

⁴² 131 U.S. clxxxvii Appx. (1880; 1889)

⁴³ U.S. Supreme Court, 56 **Rough Minutes**, December 1, 1880.

⁴⁴ *In re Lockwood*, 154 U.S. 116 (1894). Lockwood applied, Chief Justice Fuller stated, "for leave to file a petition for a mandamus requiring the Supreme Court of Appeals of Virginia to admit her to practice law in that court." In contrast, Lockwood's friend and colleague, Marilla Ricker, succeeded, in 1894, in winning bar admission in New Hampshire after State Supreme Court Chief Justice Charles Doe, using the principle of adequate remedies, argued that women could not be kept out: "The law regulating the admission of attorneys is a part of the law of procedure; and our common law allows such procedure as justice and convenience require . . ." John Phillip Reid, **Chief Justice: The Judicial World of Charles Doe** (Cambridge: Harvard U. Pr., 1967), p. 284.

⁴⁵ Walker argued that a woman suffrage amendment to the constitution would be a "tautology." Mary Walker, **Crowning Constitution or Constitutional Argument** (1871).

⁴⁶ Reda Davis, **Woman's Republic: The Life of Marietta Stow** (California: Pt. Pinos Editions, 1980), p. 176.

⁴⁷ *Id.*, p. 164.

⁴⁸ Davis, *op. cit.*, p. 169.

⁴⁹ Clara Foltz, "The New American Woman," *Women Lawyer's Journal* (January 1918), pp. 27-28. While Foltz repeatedly refers to the nomination as a joke, she and Stow were able to raise sufficient funds to bring Lockwood to California and to mail information about the candidacy to towns and cities throughout the United States. A number of prominent California woman suffrage activists, including several long associated with Susan B. Anthony, lent their names to the nominating convention.

⁵⁰ Belva A. Lockwood, "How I Ran For The Presidency," *17 National Magazine* (March 1903), p. 729.

⁵¹ "Letter of Acceptance." Miriam K. Holden Papers, Manuscripts Division, Department of Rare Books and Special Collections, Princeton University Library.

⁵² *Id.*

⁵³ Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joselyn Gage, *IV History of Woman Suffrage* (New York: Arno and *The New York Times* reprint, 1969), p.xviii.

⁵⁴ After the election, Lockwood petitioned Congress that votes for her be counted. She reported the results of the balloting as: New Hampshire, 379; New York, 1336; Michigan, 374; Illinois, 1008; Maryland, 318; and California, 734. She claimed that a large vote in Pennsylvania was not counted, simply dumped into the waste basket as false votes. She also claimed the electoral vote of Indiana, stating that its delegates voted for her after disagreeing about the major party candidates. *National Magazine*, *op. cit.*, p. 733.

⁵⁵ For example, only two years later, May Treat received six thousand votes as candidate for San Francisco School Director. Davis, *op. cit.*, pp. 193-94.

⁵⁶ Reprinted in Julia Hull Winner, *Belva A. Lockwood* (Niagara County Historical Society, NY. Number 19 of the Occasional Contributions, 1969), pp. 74-75.

⁵⁷ George Cooper, *Lost Love* (New York: Pantheon, 1994), p. 92.

⁵⁸ Belva Lockwood to Clara Colby, July 7, 1916. State Historical Society of Wisconsin, Archives Division, Clara B. Colby Papers.

⁵⁹ Also referred to as the Federal Woman's Equality Association.

⁶⁰ June 11, 1908. Swarthmore College, Peace Collection, Lockwood Papers, News clippings file.

⁶¹ Colby to Lockwood, December 26, 1907, State Historical Society of Wisconsin, Archives Division, Clara B. Colby Papers.

⁶² Belva A. Lockwood to Clara Colby, March 24, 1910. State Historical Society of Wisconsin, Archives Division, Clara B. Colby Papers.

⁶³ Colby to Lockwood, July 17, 1916. State Historical Society of Wisconsin, Archives Division, Clara B. Colby Papers. Colby's letter of December 18, 1915, also in this

collection, gives an excellent sense of the prevailing personal and organizational rivalries, and of the daily politics, as the "amendment" women and the "federal suffrage" women lobbied members of Congress.

⁶⁴ *United States v. Cherokee Nation*, 202 U.S. 101 (1906). Interest was at five percent per annum from the date of wrongful taking, June 1838, to the date of payment.

⁶⁵ *Id.* at 131-32.

⁶⁶ James Taylor had been an associate, helping to organize the Eastern and Emigrant Cherokee as a class of litigants. His heirs sued Lockwood over the division of the attorney fees.

⁶⁷ Popular articles describing Lockwood's career have overlooked her legal representation of various Cherokee in the 1870s and 1880s. The earliest case appears to be *The Cherokee Indians - Eastern Band v. The Western Band of Cherokee Indians*, Equity Case, Supreme Court of the District of Columbia, Equity, # 4627 (1875). Lockwood most probably obtained Cherokee clients through her acquaintance with Cherokee James Taylor and attorney J.J. Newell. I will be describing this lengthy chapter in her career in a separate article.

⁶⁸ Belva A. Lockwood to John M. Taylor Esq'r, April 3, 1905. Special Collections Department, William R. Perkins Library, Duke University.

⁶⁹ "Woman to Highest Court," *The Sun* (January 18, 1906).

⁷⁰ *See Cherokee*, 202 U.S. at 132.

⁷¹ Belva Lockwood to John M. Taylor, Esq'r, May 7, 1906. Duke University, Special Collections, James Taylor Papers.

⁷² The Justices did reject Lockwood's argument that her clients were entitled to one-fourth of the whole sum recovered and ruled that they receive *per capita* payment. *U.S. v. Cherokee*, 202 U.S. at 132.

⁷³ The latter organization had a Caucasians-only membership policy. Lockwood's involvement as the group's attorney general suggests that she accepted some aspects of the nativist and racist arguments increasingly apparent in these years within the women's rights movement in the United States.

⁷⁴ "U.S. Marshals Seek Mrs. Gracie," *Washington Herald*, April 13, 1912.

⁷⁵ "Jury Declares Mrs. Gage Is Sane," *Washington Herald* (April 23, 1912). Lockwood subsequently appeared with Gage in Police Court where the charge of making threats was heard and her client freed. Lockwood was aided in some of the questioning during the many days of the trial by attorneys Richard Evans and Issac Hitt.

⁷⁶ Swarthmore College, Peace Collection, Lockwood Papers, "In the matter of the Mary Gage case," (1912).

⁷⁷ *Id.*

Lucile Lomen: The First Woman to Clerk at the Supreme Court

David J. Danelski

Lucile Lomen was a twenty-three-year-old law student at the University of Washington when Justice William O. Douglas chose her as his law clerk in 1944.¹

Born in Nome, Alaska, on August 21, 1920, she decided to become a lawyer while she was still in grade school. She attributed her interest in law to her grandfather, Gudbran J. Lomen, a Republican lawyer who had been appointed to the Alaska Territorial Court by Calvin Coolidge in 1925 and reappointed by Herbert Hoover in 1930. Her father, who owned the local newspaper, the *Nome Gold Digger*, had not gone to college.

Graduating from Queen Anne High School in Seattle in 1937, she accepted a one-year tuition scholarship from Whitman College, a small liberal arts college in Walla Walla, Washington, from which Justice Douglas had graduated 17 years earlier. Like Douglas, she was an outstanding student at Whitman. Elected to Phi Beta Kappa, she graduated with honors in 1941.

Pursuing her ambition to become a lawyer, Lomen went to the University of Washington Law School. She did not consider Harvard, for in 1941 the Harvard Law School did not admit women. The University of Washington Law School had admitted women from the time it opened its doors in 1899. In 1941, there were three women enrolled in the law school, including Lomen.

She was an outstanding law student—first in her class, law review editor, vice-president of the law review board, and recipient of a prize for the best student essay on constitutional law, which the law review published. While achieving those honors, she worked as a part-time secretary in the dean's office at the law school.

During Lomen's first semester, the United States entered World War II. She remembered clearly the consternation of her fellow law students on December 8, 1941, and their eagerness to enlist. Many finished the school year, but only a small number of them returned the

following autumn. In 1941, there were eighty-four law students at the University of Washington; in 1943 there were thirty-five, eight of whom were women.

The war also affected recruitment of Supreme Court law clerks. Concerned about finding a first-rate law clerk for the 1944 Term, Justice Douglas began canvassing law school deans before Christmas in 1943. He first wrote to Dean Judson F. Falknor of the University of Washington because Falknor had supplied him with four of his last five clerks. He told the dean that he was aware that the choices would be limited because of the war, but nonetheless he wanted to stay with his "practice of taking men from Ninth Circuit law schools." Although Douglas used the word "men" in his letter, that did not mean he would not consider a woman. Nine months earlier, he had told Falknor he might take a woman if she "is absolutely first-rate."

Dean Falknor could confidently recommend Lomen, but still he thought he had a problem: no woman had ever been chosen for a clerkship at the Supreme Court. Two years earlier he had finessed the problem by recommending a very able male student a couple of ranks below the top student, who was a woman. The male student was Vern Countryman, who turned out to be one of Justice Douglas's most successful law clerks. Now this option was not available to Dean Falknor, for Lomen was the only student in her class who qualified for a clerkship. So his choice was either to recommend her or to recommend no one.

Dean Falknor called Lomen into his office and discussed the matter with her. He told her that he wanted to recommend her. "The only fly in the ointment," he said, "is your sex." In her case, however, he thought that might not be a bar because of her Whitman connection. "The fact that you went to Whitman," he said, "makes it easier because the justice can check with Whitman people he knows."

Dean Falknor wrote Justice Douglas on December 20, saying that he and his colleagues recommended Lucile Lomen without hesita-

tion. "In our opinion," he wrote, "she is absolutely first-rate in every respect." He described her outstanding academic record at Whitman College and pointed out that in addition to her excellent record, she had been also very active in student activities. He then gave the names of three persons at Whitman who could give "an accurate appraisal of her intellectual activities"—Professor Chester C. Maxey, Dean William R. Davis, and S.B.L. Penrose, Whitman's retired president. Praising her sterling academic accomplishments in the law school, Falknor mentioned that she had worked in his office as a part-time secretary. "I have never had anyone working for me," he continued, "who has been more courteous, cooperative, and conscientious. She comes from a very fine family [and] is a young woman of the highest character and refinement. She has a pleasing appearance and an extraordinarily pleasant personality. I know that you would like her, and my colleagues and I believe that she has the capacity to do an excellent job for you."

Dean Falknor's recommendation of Lomen impressed Justice Douglas, who did exactly what Falknor thought he would do. He checked with one of the Whitman scholars named in his letter. Douglas knew all three men quite well. Penrose was president of Whitman when Douglas was there, and Douglas had taken a philosophy course with him. Davis, an English professor with whom Douglas had taken seven courses, had been his advisor and father confessor. Maxey, a highly respected, tough-minded political scientist, was a close friend and fraternity brother. Douglas chose Maxey to appraise Lomen for the clerkship. "This job of being a law clerk is a pretty mean one," Douglas wrote to Maxey on December 27. "It entails tremendously long hours and is very exacting. As you can imagine, fumbles are costly."

Professor Maxey strongly supported Lomen for the clerkship. On January 10, Douglas sent an excerpt from Maxey's letter to Vern Countryman, his clerk for the 1942 Term, asking for his observations. "Beyond that,"

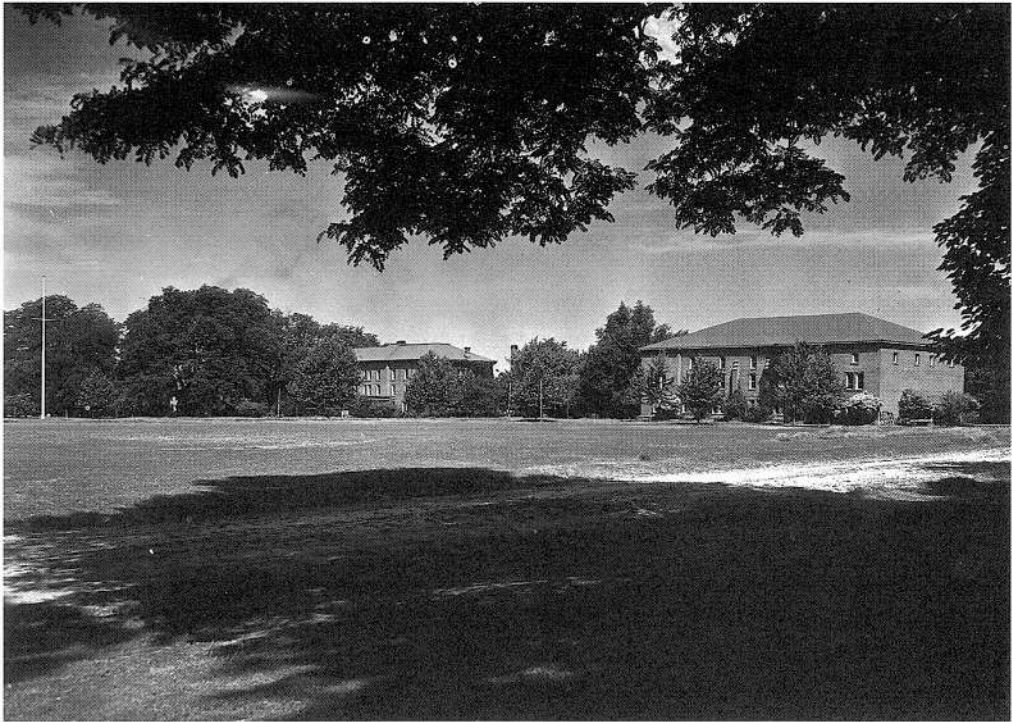
Douglas wrote, stating the nub of his concern, “I wonder if you would give me your reaction as to how you think a girl would fare as a law clerk in these surroundings which you know so well.”

Countryman, who was in training at an Army Air Force base in North Carolina, responded immediately. He told Justice Douglas that he had known Lomen quite well at the University of Washington. “She is a very intelligent woman,” he wrote, “and she is an indefatigable worker. She appears to be a very healthy young woman, with stamina enough to keep on working long and busy hours.” Responding specifically to Douglas’s main concern, Countryman continued: “As to how a girl would fare on the job, I can’t see that sex would make any difference except on the point of maintaining contact with other offices. On that score, she would not be able to keep as well informed as to what your brethren were doing

as a man could, unless, of course, your brethren also employed female clerks. But I doubt if that point is of any importance—certainly not enough to warrant choosing a man instead, unless you are satisfied that the man is absolutely first-rate because I am sure that Lomen is just that.”

Justice Douglas received Countryman’s reply on January 14. On January 29, he wrote Dean Falknor saying he would take Lucile Lomen as his clerk for the following term. Lomen, said Douglas, should “plan to report for work by the third week of September so as to get broken in before sessions of the Court actually start.” Dean Falknor responded that Lomen was very pleased to receive the clerkship.

On August 24, Lomen wrote Justice Douglas saying that she would report for duty on September 11. “I deeply appreciate the opportunity of serving as your law clerk,” she wrote,



William O. Douglas graduated from Whitman College (above), a small liberal arts college in Walla Walla, Washington, seventeen years before Lucile Lomen did in 1941. When Dean Judson F. Falknor of the University of Washington Law School told him that Lomen was the best candidate at the law school that year, Douglas asked former teachers at Whitman to appraise her abilities.



"This job of being a law clerk is a pretty mean one," Justice Douglas wrote to Chester R. Maxey (below), a highly respected, tough-minded political scientist at Whitman College, who was also a close friend and fraternity brother. Maxey highly endorsed Lomen (above), who became the first female law clerk to a Supreme Court Justice in 1944. Absent feedback from Douglas, Lomen would later seek Maxey's opinion on how she was faring in her clerkship. His reply: if Douglas has not let you know he is dissatisfied, "[y]ou are doing all right."

"and I am highly honored to become a member of your staff." At the time, Douglas was at his cabin near Lostine, Oregon, and had not planned to return to Washington until the first week of October.

Lomen arrived in Washington, D.C., the Friday before Labor Day, 1944. For a young woman who had never been east of Spokane, war-time Washington seemed overwhelming. She said the city was as David Brinkley described it in *Washington Goes to War*. She checked into the YWCA on 17th and K Streets, where she planned to stay only until she found suitable quarters near the Court, but such quarters were so difficult to find that she received special permission to stay at the YWCA for the period of her clerkship.

Bright and early the day after Labor Day, she took a streetcar to the Court. When she ar-

rived at Justice Douglas's chambers, no one was there. Learning that Justice Douglas's secretary, Edith Waters, and law clerk, Eugene A. Beyer, Jr., would not be in until 11 o'clock, she began to look around the Court. Encountering a small group of women being given a tour of the building, she quietly joined them without introducing herself. Near the end of the tour, the Court guide showed the women two impressive circular staircases that ended in a dome. Pointing to the dome, he said, "This will remind Miss Lomen of an igloo." She was astonished. "He not only knew who I was," she later recalled, "but he knew I was from Alaska and the whole business." This was her first lesson about the Court—it was a small, self-contained world in which there were few secrets.

During Lomen's first three weeks at the Court, Justice Douglas was still in Oregon. In that period, she learned her duties as a law clerk and began writing certiorari memos. She also became acclimated to life at the Court. Edith Waters introduced the other secretaries, and Lomen became a part of their social group. She would be a bridge between them and the law clerks. She recalled that the clerks accepted her "pretty well." So did the Chief Justice and Jus-



tices. Yet she sensed differences with the clerks. She thought it had to do mostly with age, legal education, and geography. Soon after she arrived at the Court, a fellow clerk asked where she was from. She answered Seattle, and he said, "Oh, you'll like it here. We have another westerner. [Byron] Kabot's from Wisconsin." In relating the story, she said: "I nearly died. But, indeed, Kabot and I, of the whole ten, thought differently ... than the way the other eight thought. They were all east-coast fellas [and] Kabot ... was hired from [Chicago]. So everybody but me had been educated ... at [Chicago,] Harvard, Yale, and Columbia. I was [also] younger.... I never knew if my problem was because I was a woman or because I was younger, or what."

Lomen met Justice Douglas one morning during the first week of October. She was working on certiorari petitions when he came into Chambers. He said how do you do, apologized for not putting her on the payroll earlier, said he had to get to work, walked into his office, and closed the door—all in less than a minute. She soon learned that this was typical Douglas office behavior. He did not say good morning when he arrived or goodnight when he left. She remembered him as being rather "distant" and "cool" in Chambers. He was "all business"; there were no pleasantries, no small talk, just work. At first, she did not know what to make of him and finally concluded that he was shy. Shy herself, she understood.

Determined to succeed, she tried to work as quickly as he did, which was impossible, for, as she later said, she had never known anyone who could do legal research as fast as he could. She did her best to keep up. She said that she had never worked so hard in her life. She worked sixteen hours a day, and often she remained at the Court all night to complete assignments. She would catch a few hours sleep on a leather couch in the office and awaken when the cleaning crew came in at 5:00 a.m. The only real sleep she got was on weekends; she would go to bed at 9:00 p.m. on Saturdays and sleep until noon on Sundays. She took respon-



Lomen remembered Justice Douglas as cool and distant in Chambers. He was "all business"; there were no pleasantries, no small talk, just work. Yet on the six occasions he invited her to his house for social occasions she found him jovial and warm.

sibility for the correctness of every statement of law and fact in Justice Douglas's opinions. She went over the content of his opinions with him, and sometimes disagreed with him. Carol Agger Fortas urged her to stand up to Douglas at such times. Lomen said she did, but she not could remember winning any arguments. That did not bother her, for she said that he was there to decide cases and she was there to help him.

What did bother her was Justice Douglas's failure to tell her how she was doing. Although he never criticized her work, he never praised it either. Concerned, she wrote to her professor at Whitman, Chester Maxey, stating the problem and asking for his views. Maxey wrote back saying that if Douglas had been dissatisfied, he would have told her in no uncertain terms. Since that had not occurred, he said: "You are doing all right."

Sometime in the fall of 1944, the Douglasses invited Lomen to a small dinner party at their home in Silver Spring, Maryland. The invita-

tion was one of approximately six she received to visit the Douglasses. Douglas at home, she learned, was quite different from Douglas at the office. At home, he was “a delightful fellow.” He was relaxed, warm, and jovial. Five other guests attended the party: Lyndon Johnson, Richard Neuberger, Anna Roosevelt Boettinger, and Commander and Mrs. Stanley Donogh. Except for Johnson, they had all lived in the Northwest—Neuberger in Portland and the others in the Seattle area. The Donoghs were visiting and staying with Mrs. Boettinger at the White House. Lomen felt uncomfortable with the guests. It was not only because they were older but also because they were all Democrats and, as she put it, she “was not of their persuasion.” They assumed that she was also a Democrat, and, in an effort to bring her into their conversation, one of them asked her about Democratic politics in Seattle. Tightly holding an Old Fashion that Douglas had mixed for her, she managed to blurt out that she had been too busy in law school to pay much attention to local politics. Though she felt out of place, she said that she had “enjoyed Douglas” and thought the evening was fascinating. She recalled especially how gracefully the men and women separated after dinner, the men retiring to the library to smoke cigars and talk politics and the women convening in the living room to talk about other things. At the office a couple of days later, Douglas was again in his work mode—all business.

Lomen remembered at least one occasion on which Justice Douglas was very sociable in his office. When her parents and grandparents visited her at the Court, Douglas warmly greeted them and said: “Come to tea on Sunday.” Lomen appreciated the gesture, which she said was “gracious,” especially since she had not told Douglas that her parents and grandparents were coming to Washington.

The 1944 Term went by quickly. In spring, Justice Douglas offered to help Lomen find a job. She thanked him and said that she already had two job offers—one from the Justice Department and another in Seattle. She turned

down the former and returned to Washington State, where she took a job at the state attorney general’s office. This pleased Justice Douglas, for his standard advice to law clerks was: “Go back to your roots.”

In the fall of 1945, Justice Douglas sent Lomen an inscribed photo. She responded with a chatty, handwritten letter, which she concluded by saying: “I recognize the incomparable value of last year’s experience and I am grateful to you for the opportunity which you gave me. I certainly hope to be a better lawyer because of it.”

After three years at the Washington State attorney general’s office, Lomen sought a position in the legal department of the General Electric Company. Justice Douglas recommended her “without any qualification whatsoever.” She wanted Justice Douglas’s help because one of the executives had serious doubts about hiring a woman for the position. “She has a fine mind and a firm foundation in the law,” Douglas wrote. “She has great capacity for work, is thorough, reliable and dependable in every respect.” Lomen got the position.

She worked at General Electric from 1948 to 1983, holding important positions in the company in the northwest and finishing her career at corporate headquarters in the east. After she retired, Lomen returned to Seattle, where she died on June 21, 1996, at the age of seventy-five.

Shortly before her death, Lucile Lomen reflected on the significance of her Supreme Court clerkship. She said that newspaper articles in 1944 about her as the first woman to clerk at the Court were embarrassing. “You know,” she tried to explain, “there was nothing unusual about it. I mean it was unusual that I was a woman [law clerk], but I was just a lawyer, and that is all I wanted to be.” Her year at the Court, she acknowledged, was not easy, but she said that it was “very rewarding.” She then added: “I would not have given up the experience for anything.”²²

Endnotes

¹Lomen's full name was Helen Lucile Lomen. Fairly early in her life, she dropped the Helen. At the Court she was known as Miss Lomen.

² Principal sources for this sketch were the William O. Douglas Papers, Library of Congress, containers 362, 411, 1117, and 1120; oral history interviews by Marilyn Sparks, May 20, 1991, G. Thomas Edwards, October 12, 1994, and the author, January 3, 1994. Transcripts of the Sparks and Edwards interviews are at the Northwest and Whitman College Archives, Penrose Memorial Library, Whitman College.

Justice Henry Baldwin's "Lost Opinion" in *Worcester v. Georgia*

Lyndsay G. Robertson

*Worcester v. Georgia*¹ ranks among the most significant decisions rendered by the early nineteenth century Supreme Court of the United States. Looking to the decision's political fallout, Charles Warren, writing in 1922, credited *Worcester* with provoking "the most serious crisis in the history of the Court,"² and subsequent scholars have not strayed far from that characterization. The case also, of course, played a fundamental role in the establishment of a legal regime recognizing the sovereign rights of native peoples in the United States.

The claim in *Worcester* arose from Georgia's assertion of legislative authority over the Cherokee Nation, the lands of which fell largely within Georgia's claimed boundaries. The Court's holding this assertion invalid invited a confrontation between the Court and the state, with the federal executive—Andrew Jackson—initially inclined to favor the latter. As is well recounted elsewhere, confrontation was avoided thanks to an executive turnabout precipitated by the perceived greater threat posed by the contemporaneous acts of South Carolina Nullifiers.³ The case thus played an important role in the road to secession and disunion and in the establishment of the institutional authority of the Supreme Court.

The importance of the opinion to the sovereign rights of native peoples is also well-known. *Worcester* established a bright line rule disallowing state interference in tribal affairs. Although this rule has been modified somewhat over time, it still provides a benchmark against which such action is measured.

The Court's opinion in *Worcester v. Geor-*

gia was authored by Chief Justice John Marshall and joined by Justices Joseph Story, Smith Thompson, and Gabriel Duvall. Two other opinions were delivered in the case. Justice John McLean issued an almost certainly politically motivated centrist concurrence, in which he sided with the majority on the ultimate issue—that the Georgia acts violated the

laws, treaties, and constitution of the United States—effectively invited Georgia expansionists to press on, opining that “if a contingency shall occur, which shall render the Indians who reside in a state, incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them the aegis of its laws.”⁷⁴ Justice Henry Baldwin dissented. His opinion, however, “was not delivered to the reporter,”⁷⁵ Richard Peters, Jr., and our understanding of his basis for dissent has been dependent on Peters’ summarization. Baldwin, Peters reported, dissented on the ground that, in his view, “the record was not properly returned upon the writ of error; and ought to have been returned by the state court, and not by the clerk of that court. As to the merits,” Peters noted, Baldwin’s opinion “remained the same as was expressed by him in the case of *The Cherokee Nation v. The State of Georgia*, at the last term.”⁷⁶ Baldwin’s views on the matter thus have remained largely unknown, effectively vanished from the scholarly record.

A full transcription of Justice Baldwin’s heretofore “lost” opinion follows this introduction. To the best of my knowledge, this marks the dissent’s first publication since 1832. It is my hope that the reappearance of this text will encourage scholars to search for other seemingly lost opinions and that the text of the dissent, read in conjunction with the story of its somewhat unorthodox journey into print, will help further to illuminate both the rather different world in which early constitutional decisions were rendered and the politics surrounding the Court’s opinion in *Worcester v. Georgia*. Baldwin himself emerges from the story somewhat more complicated than presently thought. Even more importantly, the story of the opinion’s deliberate withholding underscores the lengths to which the Justices—even the dissenting Justice—were prepared to go to ensure that *Worcester* was respected as the law of the land.

Who was Associate Justice Henry

Baldwin? In recent years, this has been a question few could answer, and what clues did emerge were almost uniformly discouraging of further research. Thirty years ago, tasked to write Baldwin’s biographical sketch for **The Justices of the United States Supreme Court 1789-1969**, Professor Frank Otto Gatell determined that Baldwin’s “historiographical anonymity [was] almost complete.”⁷⁷ In 1983, David Currie recognized Baldwin, “who,” he advised, “was mad,” as “also worthy of mention” in his tongue-in-cheek “preliminary” search for the “most insignificant Justice.”⁷⁸ Judge Frank Easterbrook, in a follow-up piece, concluded that Baldwin, “a long-surviving Justice who alternated between periods of sullen quietude, sometimes delivering oral opinions but refusing to allow the Reporters to publish them, and bilious but absurd writings,” produced work “of no conceivable significance, and he had no effect on colleagues or on the course of decisions....”⁷⁹ Perhaps the most flattering modern eulogium was that penned in 1993 by Robert D. Ilisevich: “Baldwin was remembered as a political maverick, a controversial and disruptive jurist, an indifferent businessman, and an unyielding champion of the Constitution and the federal system.”⁸⁰ G. Edward White has suggested that Baldwin’s lack of “any historical reputation” results not from any lack of intrinsic interestingness, but from his “incoherence as a jurist.”⁸¹ For example, White pronounces the central thesis of Baldwin’s one theoretical work, **A General View of the Origin and Nature of the Constitution and Government of the United States**, “virtually unintelligible.”⁸² Surviving correspondence of Baldwin’s Court colleagues indicates that they considered at least some of his opinions scarcely better; Joseph Story, for example, characterized certain Baldwin opinions as “so utterly wrong in principle and authority, that I am sure he cannot be sane....”⁸³

Baldwin’s *Worcester* dissent—and in particular the circumstances of its withholding—suggest that such sentiments may not be entirely fair. Appreciating these circumstances requires an understanding of his political heri-

tage. President Andrew Jackson's second Supreme Court appointment, Baldwin was born in Connecticut in 1770 and educated at Yale and Litchfield, then read law under Alexander Dallas in Philadelphia. In 1801 Baldwin joined the Pittsburgh bar, helping to organize western Pennsylvania for the Jeffersonians. An aspiring investor and perceived friend to the manufacturing interest, he was elected to the United States House of Representatives in 1816 and served until 1822, chairing the Committee on Domestic Manufactures. When Andrew Jackson's 1818 military activities in Florida were questioned in Congress Baldwin rose to his defense, a show of support that led to political alliance. In the 1828 presidential race Baldwin campaigned for Jackson in western Pennsylvania in the expectation that he would be rewarded with an offer of the position of Secretary of the Treasury. This ambition was evidently frustrated by friends of Vice President John C. Calhoun, who favored Baldwin's fellow Pennsylvanian, Samuel D. Ingham. After Justice Bushrod Washington died on November 26, 1829, Jackson, disillusioned with Calhoun, offered Baldwin a Supreme Court appointment, which he accepted. Baldwin's nomination was warmly received in the Senate—he was opposed by the votes of only two Senators, those from Calhoun's South Carolina—and his new colleagues on the Court evidently looked forward to his arrival.

Baldwin first took his seat at the opening of the January 1830 Term, as did Jackson's first Supreme Court appointee, John McLean of Ohio. His tenure began well—"my association with the Judges is of the most pleasant kind," he wrote, a week into the job—but such good feelings were not to last. Baldwin authored six of the fifty-six opinions reported that Term, three resolving land claims,¹⁴ two involving commercial disputes,¹⁵ and one settling a wrongful seizure claim.¹⁶ A foretaste of things to come, he also dissented, in whole or in part, in three cases, two without opinion.¹⁷

Things began to break down during Baldwin's second Term, which opened in Janu-

ary 1831. Baldwin's opinions—and relations with the other Justices—became more heated and confrontational. Of the forty cases reported that Term, Baldwin authored majority opinions in four, all arising from disputes over land titles,¹⁸ filed a separate concurrence in one—*Cherokee Nation v. Georgia*, the precursor to *Worcester*—and, according to the **Reports**, dissented in five, two by written opinion.¹⁹ Peters, however, suggests in his private correspondence that Baldwin was far more contentious. According to Peters, Baldwin "dissented in at least two thirds of the cases" decided that Term; presumably, he either failed to file an opinion or changed his mind after conference.²⁰ He may have had legitimate philosophical grounds for disagreeing so frequently with the majority. In one of his written dissents, *Ex Parte Crane*,²¹ Baldwin brazenly flouted his Jacksonian bias and Jeffersonian roots, complaining about the "consequences of the most alarming kind" that would follow from the Court's "extension of its powers."²² Peters, however, suspected something more alarming was at work. Baldwin had begun to exhibit personal eccentricities. "He sits in his room for three or four hours in the dark," Peters observed, "jumps up and runs down into the judges' consulting room in his stocking feet, and remains in that condition while they are deliberating." "I have heard in one day not less than five persons say ... 'he is crazy.'"²³ Whatever the case, Baldwin had by the end of the Term evidently tired of life on the Court. Sometime prior to recess he gave Jackson "notice of his intention to resign," citing the "unwarrantable extension of its powers by the Court."²⁴ Administration forces persuaded him to change his mind.

In November 1831, two months prior to the opening of the Court's 1832 Term, Chief Justice Marshall optimistically expressed to Associate Justice Joseph Story his hope that the coming Term would "exhibit dispositions [from Baldwin] more resembling those in the [1830Term] than in the last."²⁵ Regrettably, it was not to be. Of the fifty-four opinions re-

ported that Term, Baldwin authored only one majority opinion: *U.S. v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832). Baldwin dissented—according to the Reports—in seven cases, and in four of these, including *Worcester*, drafted opinions he refused to deliver to Peters.²⁶ On circuit the following December, Baldwin was “seized ... with a fit of derangement” while presiding over the Third Circuit in Philadelphia.²⁷ He was still “out of his wits” in January, although Daniel Webster reported him “under medical treatment and ... somewhat calm.”²⁸ Because of “indisposition,” he missed the entire 1833 Term.²⁹

What of the *Worcester* dissent and the circumstances of its withholding? Based on the above, it might reasonably be concluded that Baldwin withheld his dissent from Peters out of spite or simply to be difficult. The record suggests otherwise. When the opinions were delivered in Court on March 3, 1832, many newspapers, including Francis Preston Blair's *Washington Globe*, the Jackson administration's chief press organ, undertook to publish the opinions in their entirety. On March 14, as part of a campaign to discredit the *Worcester* majority opinion, *The Globe* published Johnson's anti-Cherokee concurrence in *Cherokee Nation v. Georgia* and promised to follow with Baldwin's *Worcester* dissent and “the several opinions of the Chief Justice, including that delivered in [*Johnson v. M'Intosh*], upon the same question.”³⁰ Marshall's *Worcester* opinion appeared in *The Globe* on March 22. On March 25 and March 26, Blair carried McLean's concurrence. Baldwin's dissent—again, it is worth remembering, the lone dissent in the case, delivered by a Jackson appointee in the most significant challenge to the Jackson administration ever posed by the Supreme Court—had still not appeared in print. Baldwin refused to give it up, and for reasons other than obstinacy or antipathy toward Richard Peters. On March 28, twenty-five days after the opinion's delivery, the logjam finally broke and Baldwin's purpose was made known. According to *The Globe*:

We have at length received the dissenting opinion of Judge Baldwin, in the case of Worcester against the State of Georgia. On a previous application, *the Judge declined furnishing a copy, being unwilling that his opinion should go to the public simultaneously with that of the Court, lest it might be open to the imputation of having a tendency to impair the weight of the decision and mandate in Georgia.* He preferred to remain in the attitude in which he had been placed by the representation in the public papers, that his dissent from the opinion of the Court was on a question of mere formality in the writ or record, and that the decision of the Court was virtually unanimous, until the time should arrive when the publication could have no effect on the course to be taken by the authorities of Georgia. As that course must have been already taken, there can be no objection to the publication, and the public have a right to know the opinions of all the Judges on the interesting questions which arose in that case. Judge Baldwin stated in open Court, that, although his dissent on the first question which arose in the argument, rendered it unnecessary for him to give an opinion in relation to the other questions in the cause, yet he thought proper to declare that he adhered to his opinion delivered last Term in the case of the Cherokee nation against the State of Georgia, and, of course, dissented from the judgment now given.³¹

Perhaps, for all his contentiousness and eccentricity, Henry Baldwin did have the interest of the Court at heart. By failing to publish his dissenting opinions, Baldwin may have hoped to help preserve the Court's facade of unity at a time when that unity was dissolving, and in the face of his own deep-seated disagree-

ment with the Court's prevailing doctrine and direction. This seems to have been his principal aim in withholding for a time his dissenting opinion in *Worcester v. Georgia*, the case that during Baldwin's tenure most threatened the Court.

The *Washington Globe* published Baldwin's *Worcester* dissent in full in its editions of March 28 and 29. There follows a full transcription of this text as it appeared in *The Globe*. As a reading of the opinion makes clear, and as Peters and Blair correctly summarized, Baldwin based his dissent on his conclusion that the Court lacked jurisdiction, as the record had been returned by the Georgia court clerk, and not by the court itself. By far the greater part of the dissent—regrettably prolix, although occasionally insightful—is given to stating and restating that position; indeed, the dissent probably contains the fullest existing contemporaneous explanation of the requirements of the writ of error procedure. The oral argument on this point was rather limited, and both the majority and concurring opinions spent far less time on this point than Baldwin did, both circumstances—but most pointedly the former—caused Baldwin to despair that had more attention been paid to the jurisdiction issue “[i]t would not then have been left to a single Judge to search for the laws, the rules, the practice and precedents of the Court for a guide,” and his dissent might have rested on more than “faith, or knowledge, the result of my unassisted investigation....”³² Other features are worthy of note. Despite his determination that the case failed on jurisdictional grounds, Baldwin recognized the importance of the argument being made on the merits. “[*Worcester's*] case,” he noted, “is rested solely on the Treaties between the United States and Cherokees, the Laws of Congress with reference to them, and the intercourse with the Indians, and the legislative acts and proceedings of Georgia, which, he contends, show the Cherokees to be a State or Nation, which this Court is bound to judicially know as such—to have and possess a jurisdiction over the lands

they occupy, of an authority which supersedes and annuls that of Georgia. So solemn a subject was never presented for the consideration of any Judicial Tribunal, and none so serious can ever recur.”³³ As to “the national existence of the Indian tribes, according to the Constitution, the power of Congress over the territory of the United States, [and] that of Georgia within her limits by her own right and the compact of 1802,” Baldwin indeed remarks near the end of the dissent that his opinion “has been expressed on a former occasion, and is yet retained.”³⁴ Of greater interest, however, he opens his discussion of this topic by alluding supportively to the view set forth by Jackson in his December 1828 message to Congress requesting the passage of a Removal Act: that a new state may not be admitted by Congress within the bounds of an existing state without the latter's consent.³⁵ This may have been his true belief; it may as well have been a nod to Jackson, on whose patronage he might well still depend were he to retire from the Court as threatened at the end of the previous Term. The same thought may have governed his inclusion of footnote one, in which he asserted that although he knew when he wrote his opinion that the Court would find for *Worcester* and *Butler*, he did not know the grounds for that decision; lack of knowledge of the majority's rationale excused his failure to assail that rationale more directly.³⁶ Somewhat gratuitously, he took the opportunity the dissent provided to jab at Peters, commenting on “the very imperfect, and sometimes, at least, fallible reports of [the Court's] most solemn and unanimous judgments....”³⁷ He also teased critics by rather lightly alluding to his apparent mental instability, stating at one point that he must “act on the dictates of [his] judgment, tho others may think it has become bewildered by the illusions of summer dreams, or the conceits of fancy.”³⁸ Lastly, it is worthy of note that Baldwin closed by taking care to disclaim any responsibility for the fallout from the majority's opinion: “If the fiat of this Court shall be received in Georgia in the beams of peace and carry on its wings

the healing of the nation, I shall not rejoice the less at the blessings.— But if it shall be the mountain storm which shakes foundations, my voice has not added to the fury of the blast. Whether it shall pass my head unhurt, or lay it low; whether as a self supported oak, riven by the tempest, or rooted the firmer the ruder it blows, I am at peace within, with a mind convinced and judgment fixed, and an approving conscience. The consequences are not mine. They will be met without self reproach.”³⁹

The dissent follows.

Opinion of Mr. Justice Baldwin

The Writ of Error in this case was issued by this Court, under its seal, signed by the Clerk, and allowed by one of the Judges; no return is made by the Court or Judge to whom it is directed; but a Paper, purporting to be a Transcript of the Record and proceedings in the case referred to in the Writ, certified by the Clerk of the Court under its seal, without any other attestation, is returned with the Writ, and forms the only subject of our consideration. The first question it presents, is, whether the Record of the State Court is properly before us; in other words, whether we have judicial knowledge, that the acts, doings and proceedings recited in this paper, are the solemn judgment of a State Court, so known and certified to us, that we are authorized to take cognizance of it under the 25th section of the judiciary act, and affirm or reverse it, as to us may seem right.

There is, in my opinion, no power conferred on this Court, which ought to be exercised with more caution, than that which authorises it to revise the decision of State Courts; more especially of those which have been rendered in the administration of its criminal jurisprudence. We cannot close our eyes to the fact, that the power is denied by many, and viewed with extreme jealousy and watchfulness, let it be exercised with whatever caution and strict conformity to the Constitution and Laws which confer it, and in a case however plainly within their provision. “No tribu-

nal can approach such a question, without a deep sense of its importance, and of the awful responsibility involved in its decision.”—4 Wh. 400, *McCulloch vs. Maryland*. In another case, this Court say: — “In the argument, we have been admonished of the jealousy with which the States of this Union view the revising power entrusted by the Constitution and Laws of the United States, to this tribunal. To observations of this character, the answer uniformly given has been, that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us.”—5 Pet. 259, *Fisher vs. Cockerill*.

This is an unvaried rule when parties and their counsel appear before us, and contest the merits of the case. Though their appearance cures all defects in the process of the Court by which they are commanded to appear before it, and the contestation of the merits is a submission, not only to its jurisdiction to hear and determine the matters in controversy, but an admission that the subject matter of contest is legally under the judicial inspection of the judicial eye. Our path is but straight and narrow, on a mere question of right between man and man. But the judicial power of this nation is now invoked to its highest and most solemn exercise, in the administration of the supreme Laws of the land—called on to bring within its powerful arm the penal law of a State of this Union, without and against its consent, and to annul it by a judgment, declaring its jurisdiction to be limited by the line of Indian occupation, and its legislative power not to exist within it, and its exercise an usurpation forbidden and void, by the Constitution and Laws of the United States. The path is narrow indeed wherein this Court must tread. Georgia has all the inherent power which can exist in any State of this Union, and neither she or her people have delegated more to this Government than every other has done. Georgia has *more power* within her limits than any other State. By the compact with the United States, she ceded to them all her Territory, West of her present boundary, — and the United States ceded to

Georgia, whatever claim, right, or title, they then had, to the jurisdiction or soil, of any lands to the East of it and South of other States. — 1, Laws 490.

The jurisdiction and power, thus ceded by the United States to Georgia, invested her with all which could belong to either Government, within her boundaries as designated by the solemn act of mutual cession. Georgia then had the power to pass the law in question, unless it is repugnant to some supreme law; or unless there exists within these [] some third power or sovereignty paramount over the other two combined. The existence and supremacy of such third power, is the question on which this great controversy depends. The plaintiff in error claims under its wings, protection and exemption from the legislative power, and denies the jurisdiction of Georgia over the place where the alleged offence was committed. He does not ask the interposition of this Court, under the provisions of the second section of the fourth Article of the Constitution, nor have his Counsel deemed its bearing on his constitutional rights worthy of even an effort at argument. Neither he or they have referred us to any other article or clause of the Supreme Law—to any act of Congress or of the Government, which exempts him from the jurisdiction of the State, or protects him from the law in question, within it, by any personal right guaranteed to him by either. His case is rested solely on the Treaties between the United States and Cherokees, the Laws of Congress with reference to them, and the intercourse with the Indians, and the Legislative acts and proceedings of Georgia, which, he contends, show the Cherokees to be a State or Nation, which this Court is bound to judicially know as such—to have and possess a jurisdiction over the lands they occupy, of an authority which supersedes and annuls that of Georgia. So solemn a subject was never presented for the consideration of any Judicial Tribunal, and none so serious can ever recur. Hitherto, the people of the United States have believed, that, within the bounds of this Union, there exists only twenty-four

States; that they were free, sovereign and independent within their limits; and they have, as yet, to learn, by the impending judgment of this court, that there now exist, have existed, and are to exist as many Indian States, or nations, as can present themselves before us with the same pretensions as the Cherokee or any other of those who are named and considered in and by the constitution as *Indian tribes*. The Cherokees have not as yet been deemed to be an old State within the jurisdiction of Georgia. The United States, by the solemn and mutual act of cession and compact with Georgia, ceded to her all the territory, soil and jurisdiction, now occupied by the Cherokees, and thus declared it to be within her jurisdiction. — The first clause of the third section of the fourth article of the Constitution ordains: “New States may be *admitted* by the Congress into this Union, *but no new State shall be formed or erected within the jurisdiction of any other State.*”

The Constitution recognizes in all its provisions, the existence of the States which formed it. It neither limits or attempts to confine them to boundaries narrower than their charters defined. The old and new Congress, have accepted cessions of territory at their extremest verge. Can it then be that there were existing within these boundaries, Indian States and nations, before its adoption; that the States by whose concessions of power it was formed, did not possess a jurisdiction commensurate with their charters? Virginia had her Courts on the Mississippi: under the confederation was this an usurpation on the jurisdiction of Indian tribes, and was it intended that their sovereignty should be deemed in the eye of the supreme law, and the judicial eye of this supreme tribunal, supreme over the free, sovereign and independent States, which declared and achieved their independence, and formed this Union? Did the sovereignty of the crown disappear, and was that of the Sachem and warrior enacted by the revolution? There was no Indian sovereignty when the power of the King prevailed. Did it first arise during the confederation, and become supreme under the



Constitution; and had the sovereign States less power and more limited jurisdiction, than the monarch whose supremacy they renounced and whose armies they subdued and led captive? Or, is it pretended that under this Constitution, *any or all of the departments of this Government* have power to form or erect a new State within the jurisdiction of an old one; a compo-

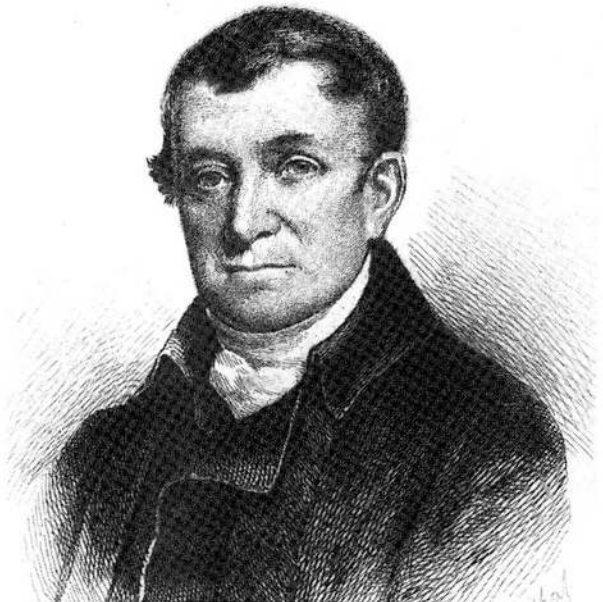
nent member of the league of the revolution and this Union?

If I have mind to comprehend the questions on which our decision must depend they are these or one of them: for both being negated, the plaintiff has no standing in court. If these considerations have not presented an antagonist, worthy of an intellectual contest, and the succeeding clause of the same section and article of the Constitution does not throw one across the path of the counsel, and within the consideration of the Court, it becomes impossible to conceive how or by what rule or law, our judgment can be rendered for the plaintiff.

“The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property, belonging to the United States; and *nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.*”

This clause of the Constitution presents another serious question: Is it to be now so construed, as to annihilate the legislative rights of Georgia, within the Cherokee occupation? or that the power of regulation thus conferred on Congress, and expressly prohibiting its prejudice to the claims of any State, thus ex-

Justice Henry Baldwin (right) intentionally withheld his dissent in *Worcester v. Georgia* from the reporter, Richard Peters, Jr. (above), in order to let the Court give the appearance of unanimity. His views on the matter thus have remained largely unknown, effectively vanished from the scholarly record, and our understanding of his basis for dissent has been dependent on Peters' summarization. The author's recent discovery of Baldwin's dissent uncovers the Justice's complex thinking on the case.



pressly recognized, and exempted from the plenary power delegated to Congress, shall be now so considered, to authorize a recognition of Indian claims of sovereignty, paramount to those of Georgia? or that Congress, by the power thus *restrained*, can, by Laws or Treaties, form, erect, or so constitutionally recognize its existence as to make their obligation a part of the supreme law of the land and a guide to the judgment of this Court? Such are the grave matters brought under our consideration in this case by an *ex-parte* argument, wherein we are called on to act by powerful appeals to the head and the heart, without a voice heard in opposition. These questions necessarily arise and must be disposed of before we can declare the laws of Georgia void. As this can only be done on process strictly according to law, and by our judicial supervision of the record of a State Court, I must be convinced beyond a doubt, that this most solemn supervision of State jurisdiction and legislation, has been begun clearly within, and on that direct and narrow path prescribed for us by the laws which confer the power.

What then is the course thus prescribed by law, and by what law? That power is tremendous, which sets at nought the penal laws of a State of this Union. It must be clearly given; its execution may require more than the power of this Court. It ought to be exercised in a manner strictly according to the authority conferred, and so to appear, “for when conferred, the Court will never, we trust, shrink from its exercise,” 5 P. 259. In correcting the errors of inferior Courts, in confining them within the supreme law of the land as expounded by this tribunal, in annulling or affirming their practice and their judgments, a Court of the last resort should be eagle eyed to see that their own proceedings should conform to the direct and narrow path, which it coerces others to follow. They commence by a writ of error, which is defined to be “a commission, by which the judges of one Court are authorized to examine a record upon which a judgment was given in another Court, and on such examination, to

affirm or reverse the same according to law. 6 Wh. 409, *Cohen vs. Virginia*. The effect of the writ of error is to being the record into Court, and submit the judgment of the inferior tribunal to re-examination. It acts only on the record; it removes it into the supervising tribunal. — 410. The citation is simply notice to the opposite party, that the record is transferred into another Court, where he may appear or decline to appear as his judgment or inclination may determine. It is not a suit nor has it the effect of process. — 411. The writ of error is the process which removes the record to this Court. It must bear test of the Chief Justice, be under the seal of the Court and signed by the Clerk thereof,” 1 Story 67, 257, 2 Dall. 401. “Its object is to cite the parties to this Court, to bring up the record, and it is the act of the Court, 8 Wh. 320, 13 Wh. 303, 4 S.P. Its form is that which has been adopted and used in Courts of common law for centuries, and in the States from their organization. Its command is “if judgment be therein given, that then under your seal you distinctly and openly send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ.” The language of this writ cannot be mistaken. It is directed to the Judges of the State Court; the order is to them, to send the record under their seal, so that the return must be made by them. This command of the writ is its essence, it is the means and the process, 3 Wh. 304, by which the appellate jurisdiction of this Court is directed to be exercised, by the 25th and 22d sections of the judiciary act, the words of which are “upon a writ of error whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record.” 1 Story 60. If the question is asked, by whom the record shall be so annexed and returned, the writ answers, by the Judges: if how, under their seal distinctly and openly: if in what form it shall be so annexed and returned, the answer is to be found in every return to a writ of error in the Courts of the Common Law and the States, from the Court of Kings Bench

in the one of the Supreme, and of Courts of Common Pleas or other Courts to whom a writ of error lies, in the other, and in every return to a Certiorari to a Justice of the Peace in both. And if a doubt can arise whether the rules and practice, the forms and mode of proceeding thus adopted and acted on through all time and in all Courts acting on the principles and according to the course of the Common law, is to be considered as a rule in the Federal Courts, until altered by Law, or the Courts in the exercise of their legal authority, the answer will be found in 1 Story 67, 256; 3 Wh. 221, 4 Wh. 115, 7 Wh. 45, 5 Cr. 222; 10 Wh. 56; 1 Pit 613.

The forms of writs have always been deemed in themselves the very evidence of the law, and taken by the greatest judges as safe guides to their judgment. "The Writs in the Register are the Body, and, as it were, the Text, of which our Books for 400 years are but expositions, the foundation, the principles," 8 Coke, preface—"for upon these fundamentals the whole Law doth depend." F. N. B. preface. If they are of themselves authority, how much is that authority strengthened by universal adoption, sanction, and usage. The same remarks apply equally to the forms to the returns of writs. They respond to the command of the writs and are signed by those to whom they are directed—the Sheriff or the Judges, as the case may be. It would be an useless affectation of learning to quote Books, Cases, Precedents, or Forms, in support of these principles. It is enough to assert, without the fear of contradiction, that in the whole body of the common law, English or American, there cannot be found an exception. A writ of error never issued from any Court to a Clerk of an inferior Court, or any one but the Judges thereof; a Court of Error never adjudicated on a record returned to them by a Clerk of the Court to whom it was directed, or on a transcript authenticated by him alone. The Clerk has the custody but not the control over the records of the Court; he dare not remove them, and he cannot authenticate a transcript. High and supreme as is the authority of the King's Bench,

in which the King is presumed to be always present to render all its judgments; delicate as the House of Lords are in questioning the King's legal infallibility, by directing a writ of error to a Court in which he presides without an allowance *expetiali gratia*, on a petition of right, (which is the only origin I could ever discover for an allowance of a writ of error, by a Judge of a Court of error in this country,) they do not recognize the seal of the King's own Court, or the attestation of its Clerk, as proving the correctness of the transcript of his proceedings therein on a writ of error, directing the Judges to return the record. The Chief Justice carries the original roll, and the transcript to the House of Lords; they are compared, and if found correct, he leaves the transcript and takes back the original. — 4 Coke, 21. D. Com. D. 293. 301. 2. Par. L. 2. The form of the return he makes to the writ of error may be seen in Sho. Par. Cas. 127, Rex vs. Wolcott, a criminal case on writ of error from the House of Lords, so of the Court of Common Pleas, on a writ of error from K. B. Lut. 850, 3 Black. Com. pp. 375. So of the K. B. to a writ of error from the Exchequer Chamber, Lut. 866. This return authenticates the record or the transcript; the name of the Clerk never appears in a common law record, and in a Court of common law inspecting the record of an inferior Court, the last thing thought of would be the attestation of a Clerk to the schedule identified by and accompanied by the return of the Chief Justice of the Court to whom it is directed. When the Chief Justice of a Court makes a return to a writ of error, the schedule annexed is taken for the record or transcript; all which it contains is before the Court of Error; so are all the precedents; the whole record is verity. The authentication of a record by the attestation of a Clerk is unknown to the Common Law, and is not *recognized by the Judiciary Act or any law of Congress*. The mode of authentication, so as to make them evidence on trials or to the Court, is not a matter of mere practice; it is a question of evidence, to be settled by the principles of law, which transcends the rules of

Court. An exemplification of a patent recorded in the office of the Secretary of State of Georgia, under the seal of the State, was held by this Court to be as high evidence as the original, though there was a rule of the Circuit Court, that no exemplification should be received until the original patent was proved to have been lost or destroyed, or the non-production thereof is legally accounted for or explained, on the ground that it was not competent for the Court to exclude it by its own rule. — *Pattieson vs. Hinn*, 5 Pit 233, 43. The 22d section requires that an authenticated transcript of the record shall be annexed to and returned with the writ of error. The authority of any rule of this Court, then, must yield to this law, (according to the principle of *Pattieson vs. Hinn*,) the proviso to the 17th section of the Judiciary Act — 1 Story 60, and the common law rules of evidence. It is an universal principle in the construction of statutes, that where words are used which have a fixed, legal, and definite meaning, by the rules of law they shall be deemed to have been used by the legislature with a reference to such well known and received acceptation unless a contrary intention appears in the law itself, or by necessary implication. Authenticated then means, as transcripts had ever been and then were, by all Superior Courts—authenticated by the return and signature, or seal of the Judges or presiding Judge of the Court, to whom the writ of error was directed, and “annexed and returned therewith,” means attached thereto as a schedule which was the transcript called for. It is done by the Judges, who alone have the control of the record, and could be done in no other way, but by direction of an Act of Congress, or (for the sake of argument,) at least an explicit and definite rule of this Court, expressly dispensing with the mode of authentication, which has been in use for ages, and was evidently referred to in the 22d Section, and substituting therefor the attestation of the Clerk, under the seal of the Court. It is unnecessary to examine how far such a rule would come within the power of this Court, under the 17th Section, authorizing “all the Courts of the

United States to make all necessary rules, for the orderly conducting the business of the Courts,” as explained in 7 Cr. 34 — 10 Wh. 22, 56, 64—for no such rule exists. The 11th rule adopted in 1797, is “that the Clerk of the Court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the case, under his hand and the seal of the Court, 1 Pit. pref. VII— Construing this rule as an act of Congress, it would not be taken to alter the rules of the common law, further than its words or legal import extended, and would leave them applicable to the return of the Judges, and the annexation of the transcript to the writ by them— “a fortiori” —when these rules are so evidently embodied in the 22d Section. Taking the 1st Section of the fourth article of the Constitution, the law of 1790, the 22d Section of the Judiciary Act, and this 11th rule as laws in *pari materia*, there is no difficulty. In 1789, Congress had not executed their constitutional powers to prescribe the mode of proving judicial records—hence in the 22d section, the word “authenticated” only is used, applicable to the common law mode of authentication, until Congress should legislate on the subject, and prospectively after they should have prescribed the mode of authentication. As the law of the succeeding Session, 1st Story 93, required the certificate of the presiding Judge to be superadded to the attestation of the Clerk and the seal of the Court, the rule of the Court was probably adopted to meet the difficulty, and the word *may* seems evidently to denote that such was the intention of the Court, in adopting it. The return of the Judge to the writ of error, annexing thereto, and at its *head*, a transcript of the record as a schedule, being considered as tantamount to his certificate, at the *foot* of the attestation of the Clerk. The rule too, superadds to the requisites of the common law, that the seal of the Court should be affixed; thus distinctly referring to the law of 1790, and conforming, substantially, to all its provisions. —To impute a different meaning to this rule, would be to make this Court declare, that in the

execution of their power, they would judicially revise, inspect with judicial eyes, and act on a paper purporting to be the transcript of a record, when the evidence of its authenticity was so utterly defective, that none of the Judges would permit it to be read in evidence in a Circuit Court, to show the acts and proceeding of the tribunal from which it professed to emanate. In a civil suit, brought on a judgment of the Superior Court of the County of Gwinnett, in and for the State of Georgia, certified precisely as this is, such a paper could not be shown to a Jury, in any Circuit or District Court of the United States, as even *prima facie* evidence, that a judgment had been rendered. On a plea of *nul tiel* record, any Court not sitting in Georgia, State or Federal, would render judgment for the Defendant, on a transcript so attested. Yet, that this Court, in the exercise of its highest jurisdiction, will consider this paper, when attested by the same Clerk, and under the same seal, in a criminal case, as the record of the same Court, as its judgment on those great constitutional questions which agitate the country, alarm the friends of the Union, and the advocates for the supremacy of its supreme law, as expounded by this high tribunal, under its awful responsibility, is a principle which I am bound to presume, has never received the deliberate sanction of this Court: still more strongly so, that it never intended to embody and promulgate such a principle, in the rule of 1797. In my humble judgment, it admits of no such construction. I cannot inspect it here judicially, when there is no appearance which can cure irregularity, waive error, or by express or implied consent, authorize me to solemnly consider here, a paper which I should be bound to reject elsewhere, directing a trial or giving judgment on a plea. When parties appear, and, by consent, state a case, or consider a record as before this Court, without enquiring into the mode of its removal or authentication, it is not the duty of a Judge to look with an eagle eye, to find some apology for declining the exercise of a jurisdiction, to which all parties have submitted. Yet, when it appears that its record is not

legally before them, no Court of error can revise the judgment of an inferior Court. No Judge ever searches a record, to find out that the citizenship of the parties is not averred; but, when he judicially knows it, his power over the cause ceases—it is *coram non judice*. It will be dismissed, even in this Court, and other causes, in the like predicament, will be stricken from the docket. 3 Dall. 382-4.

If there was ever a case which called for the application of this rule it is this, though the proceeding is *ex parte*. If we render judgment, it is open to no revision hereafter; beyond this tribunal the Constitution has placed no sentinel or guard, to protect the rights of parties under the supreme law of the land, from lawless violation. The process which annuls even the *ex parte* judgments of this tribunal, will subject the elements of this Government to a dreadful test. It is here, that the supreme power of the nation has placed the precious casket, which contains that magic, mystic band, and which unites twenty-four sovereign and independent States, in one harmonious Union, which, from the wrecks of disjointed confederacy, writhing under the agonising and convulsive throes of a mighty revolution, left the people free; but, not knowing what freedom was, or how its blessings could be enjoyed—a nominal nation, on whom a kind and benevolent Providence has bestowed its blessings, in the fulness of benignant bounty, but would have bestowed them in vain, had not this Government arose, the noblest work of man, constructed by a patriotism as pure as poor mortality admits, and in all the plenitude of wisdom and justice, that belongs to finite beings—a Government which, unseen and unfelt, save here where its machinery is visible, operates (if the expression can be applied to the work of man) like a Providence, its existence not known by its physical action, but felt as the deepest moral conviction, known and hailed, only by the blessings it diffuses. Yet the Government is strong in all its movements; directed in any of its departments; confined to the direct and narrow path, prescribed by a supreme

BORN TO COMMAND.

OF VETO MEMORY.



KING ANDREW THE FIRST.

When Andrew Jackson's 1818 military activities in Florida were questioned in Congress, Baldwin rose to his defense—a show of support that led to political alliance. In the 1828 presidential race Baldwin campaigned for Jackson (left) in western Pennsylvania in the expectation that he would be rewarded with an offer of the position of Secretary of the Treasury. This ambition was evidently frustrated by friends of Vice President John C. Calhoun, who favored Baldwin's fellow Pennsylvanian, Samuel D. Ingham. After Justice Bushrod Washington (below) died on November 26, 1829, Jackson, disillusioned with Calhoun, offered Baldwin a Supreme Court appointment, which he accepted.

law which all must obey. Public confidence has attended, and public good has flowed without stint. In its foreign action, this takes no part; but, in its domestic movements, in asserting and enforcing the supremacy and majesty of the law, by its exposition and due administration, this tribunal is the depository of the confidence and judicial power of the nation—the well tested tie, which, whilever retained, will preserve it as it began, "*E pluribus unum.*" When I reflect on the extent of the judicial power, the subjects of its application, the mode and effects of its operation, and its vital bearing on all the most precious institutions of the country, I tremble at the awful responsibility of its individual members. Bound not to transcend the limits of the Constitution and laws and have been their expositors; but under every obligation, not to take the breath of any man, as the law of the land, while sitting here by a power which forbids any tribunal to correct the errors

of an honest judgment: I cannot approach a case like this without awe and dread, whether concurring or dissenting, supported by the high authority of my brethren, or compelled to act



in obedience to what my poor judgment dictates to me as one higher.

This Court is now called on to declare by its solemn judgment, the legitimate existence of the Cherokees as a State or Nation, within the bounds of this Union—who are no parties to its Constitution or laws: that this Government has solemnly recognized their national character, by Treaties and laws which leave them the power of Sovereignty over the Territory they occupy, within which no laws can operate, except by their own enactment, or conventional between that nation and this. And if the Cherokees are such a nation, no one can easily number those which will arise into being, or be deemed to have always been, and yet to be existing, and that, by a judicial fiat of this Court. *In the contemplation of the future prospects of the country:* with such a scene before us, as unborn, unknown nations, rushing forward to claim the interposition of our high powers to force them among the General and State Governments, as nations without the jurisdiction and laws of both, sovereign and supreme, except in the disposal of their lands, and the exclusive right of trade and intercourse within the boundaries of a State, unless shorn of their power by a Treaty as other nations may be, I will act with all the caution which such occasion demands, when called on to exercise the judicial power of the Constitution, by annulling the law of a Sovereign State of this Union, and to arrest by the judicial arm the administration of its criminal jurisprudence, under laws deemed necessary for the peace of the State.

I must first examine the process and the alleged record, which are the only warrant and authority by which this Court can attach its high powers to State legislation, and force it to submit to the law which all must obey. If they do not confer on me the panoply of the law, the deed must be done without my interposition, however strongly any case may present an appeal to feelings foreign from judicial. I will not, for I dare not enquire into their validity, unless by the warrant of law, clearly given and

strictly pursued, none other can authorize me to judicially declare a State law to be nullity. To my mind the only questions open, are, is the law of the State repugnant to the Constitution, laws or treaties of the United States; has the court to whom our writ of error is directed, enforced such law by a judgment violating the rights of the plaintiff in error, secured to him by any law supreme over State legislation, and has this court legal and authentic evidence of the existence of such judgment and its terms annexed to and returned with our writ? Is the transcript of their record and proceedings so authenticated according to the acts of Congress, that in the language of this court in *Craig vs. Missouri*, 4 Peters 428: "We can inspect it as a record with judicial eyes." The plaintiff in error must satisfy the court on all these questions most clearly, before, in the words of the writ of error and in the spirit of the laws, "the record and proceedings being inspected, it may adjudge what of right and according to the laws and custom of the United States ought to be done;" and I will add, as had been done in all ages in the land and courts of our ancestors, according to the laws and customs of England, as I find them adopted and embodied in those of the United States, forming the only rule and guide by which to tread the narrow path prescribed. If these are not a warrant and do not give an authority for a judgment of reversal, and a mandate of discharge, I cannot find it in any rule of even this court. In rendering a judgment by default, all courts are bound to, and do see, that all preliminary process is regular and all rules complied with strictly. The plaintiff's judgment will be set aside if not strictly regular in all respects; from this rule inferior courts never depart in the most trifling cases within their jurisdiction. How emphatic then is our duty, before rendering judgment against the State of Georgia, which if pronounced on the principles so ably contended for, will establish within her boundaries an Indian sovereignty which sets at nought her Legislative power, or if given to any extent which would avail the plaintiff, must annul what Geor-

gia deems an important part of her criminal jurisprudence, and strongly if not vitally affects her jurisdiction over a great portion of that territory which she deems to be exclusively within it.¹

In proceeding in such a case to such a termination, nothing is form, all is substance, and no power can reverse our judgment for irregularity or error hereafter discovered. Its operation is now no judgment by default for money or dues—after our adjournment, the record of our proceedings is no longer changeable in our breasts, but becomes irreversible among the rolls incorporated into the supreme law of the land, by its judicial exposition, according to the meaning and in the spirit of the constitution and judiciary act. These are the laws of the United States which give us the power to annul State laws, by adjudicating on the records of State Courts brought before us by writ of error, the custom of the United States is its common law brought here by our ancestors, which prescribes the mode, the process, the rules and principles, by which that power must, and can only be exercised. If a legal injury has been inflicted on the plaintiff, it can be redressed by this Court on this writ, only by the application of the Tourniquet the Trepan, and the knife to the legislation of Georgia. She does not submit to the operation, she denies, perhaps defies our jurisdiction. We cannot draw to ourselves the supervision of her laws, by a lilliputian cord; it must be made by supreme law, and attached according to custom, to its judicial records, which must be drawn to our judicial inspection, authenticated by the rules of both the written and unwritten law, or our decision upon it becomes inoperative. No silent practice can silence the law, or make that a record which is a paper unknown to the law. I cannot pull by such a cord as that a very thread which snaps by its own extension. In this case, the plaintiff brings into Court a paper which is the only warrant by which we can operate on the law complained of. In my most deliberate judgment, it wants that authentication which the law requires before it can be made the sub-

ject of the judicial cognizance of this Court. It is confessedly inadmissible on a trial before a jury, or a plea to an inferior Court, sitting on a question of mere debt or damage. It cannot vie in authenticity with the transcript of *the acts and proceedings of the Legislature of a State in its legislative and judicial character attested by the Secretary of State, and certified by the Governor under its great seal*, which only a few days since this Court refused to hear or see in a legal argument on the existence of a legislative usage. It cannot be necessary to enquire whether this paper is under the inspection of the judicial eye, as the record of a foreign law or a foreign judgment, and if not so admissible for any purpose in any other Court, or in this even for legal information, my judgment is clear and decided that in this case, it is not the subject matter, the record, the authenticated transcript, the warrant, the basis of, or for the exercise of that tremendous jurisdiction, which by the effect of our judgment, either converts Indian Tribes into States or Nations, or annuls State legislation within its chartered limits, in obedience to some power of sovereignty, before which the authority of its laws must disappear. I am, therefore, constrained to say, that the record of the Court below is not judicially before this Court, and I feel myself bound not to inspect with judicial eyes the paper annexed to the Writ of Error, being neither a record nor an authenticated transcript of one, and feel myself forbidden to make it the subject of my judicial consideration for judicial effect on the laws of a State of this Union, one of its component parts. In taking this stand, I cannot enquire into the other questions presented in the argument of this case: my judgment tells me it would be extra-judicial to enquire whether there is error in the judgment of the State Court, and that in coming to this conclusion, I act in obedience to the law. The great learning and talents of the eminent advocates of the plaintiff, have furnished me with no authority of law, to which it can be surrendered; the decisions of this tribunal have furnished none as yet. Left then free to follow the con-

victions of mind, resulting from the most anxious deliberation and diligent research in the law, I must say, in the words of one of its sages and oracles, —

“For these and the rest of my reports, I have, as much as I could, avoided obscurity, ambiguity, jeopardy and novelty. 1. Obscurity; for that is like unto darkness, wherein a man, for want of light, can hardly, with all his industry, discern. 2. Ambiguity; when there is light enough, but there be so many winding and intricate ways, as a man, for want of direction, shall be much perplexed and entangled to find out the right way. 3. Jeopardy; either in publishing any thing that might rather stir up strife and controversies in this troublesome world, than establish quiet and repose between man and man; —for a commentary should not be like the sun, that raiseth up thicker and greater mists and fogs than it can disperse; or in bringing the reader, by any means, into the least question of suit or danger at all. 4. Novelty: for I have ever holden all new or private interpretations or opinions which have no ground or warrant out of the reason or rule of our books or former precedents, to be dangerous, and not worthy of any observation; for *‘periculasum existimo quod banorum rirorum non comprobatur exemplo.’*” — 7 Coke, *preface* ix.

There is something within which tells me “there is a place where truth, which is the foundation of justice, should not be hidden and unknown. Neither is she pleased, when once she is found out, revealed, to be called into argument and question again, as if she were not verity indeed; for her place being between the head and the heart, doth participate of them both—of the head for judgment, and the heart for simplicity.” —[10 *C’s pref.* 1,2.] In that place there is a monitor which reminds me of a maxim of the law: “*Pesus judicio quam rim injuste facere;*” and my high duties compel me not to forget another: “*Par in parim imperium non habet.*” Thus supported—“*Sloantiquasoids*” —stop a second time at the threshold of Cherokee sovereignty, knowing, judicially, no State

or Nation within the bounds of this Union, not recognized by its Constitution, and subject to its delegated legislation. But, however strong this support may be deemed, it becomes a duty, on my part, after having called for an argument on this preliminary question, to notice the brief one which was addressed. It is due, also, to this Court, to notice its precedents, referred to, as establishing a rule at variance with the one on which I have felt compelled to act. The learned Counsel did not contend, that the paper before us could be judicially inspected by this Court, in accordance with the rules and principles of the common law. They relied on the 11th rule, and the practice and decisions of this Court thereon, in the two cases cited by them.

The first was, *Hunter vs. Martin*, reported in 1 Wh. 307, 61, as one in point, in a civil—the second was, *Brown vs. Maryland*, 12 Wh. 419, 36, in a criminal case. It was not expected that counsel would look for evidence of the law in the precedents and practice of this Court, beyond the very imperfect, and sometimes, at least, fallible reports of its most solemn and unanimous judgments; but it was my duty to trace the rivulets of the law to their fountain, for there might be something there found, to which I could yield my opinion—something to control the reason and to bind the faith, in a case like this. Among the rolls there is found the record of a cause between the lessee of Martin devisee of *Fairfax vs. Hunter*, reported in 7 Ci. 603, in 1813; and on comparing this record with the one in the case reported in 1 Wh. in 1816, it appears to be the same case, twice brought under the consideration of this Court, In the first, it came up on a writ of error, issued under the seal, and by the Clerk of this Court, without the allowance of one of its Judges, and a citation, signed by the President of the Court of Appeals of Virginia, with an assignment of errors accompanying it. This was strictly according to the 25th and 22d sections of the Judiciary Act. On the back of the writ of error is this endorsement: “I herewith send the record and process in the suit, in the

within writ mentioned, as by the same writ I am commanded. Wm. Fleming, President of the Court of Appeals, in and for the Commonwealth of Virginia." Annexed thereto was a schedule, beginning— "Pleas at the Capitol, in the City of Richmond, on Monday, the 23d of April, 1810, before the honorable Judges of the Court of Appeals of the Commonwealth of Virginia. Be it remembered, that heretofore, to wit:" This was according to the laws and custom of England, as well as, in my single judgment, the laws and customs of the United States. This was the respect paid to the regular process of this Court, by the highest Judicial tribunal of an ancient, proud, and powerful commonwealth—nay, more, so they obeyed "the writ, as therein they were commanded." This is a precedent worthy of all example. My fervent prayer is, "*Esto perpetua*;"—and the hope is most confidently indulged, that no State Court will, everhereafter, feel its dignity or the rights of the State impaired or diminished, by thus returning, for the Judicial inspection of this tribunal, their records and proceedings, annexed to the writ of this Court, issued and directed pursuant to the Constitution and the laws of the land, as in it "they are commanded." No State Court need feel itself degraded by so returning their records, as the highest Court of Virginia has returned hers, in the first case of Hunter and Martin.

But the scene was changed in the second. The writ of error did not *issue from or by the authority of this Court, or the Circuit Court, under the 9th section of the law of 1792.* — 1 Story, 260. The writ went to the Court of Appeals *without a seal*, under the signature of one of the Associate Judges of this Court; it was presented by one of the most distinguished members of the bar, as the attorney of Martin, and he moved the Court to certify the record according to the precept of the writ. The Court denied the motion and directed that no entry should be made thereof in its orders. This fact appears among the records of this Court by the affidavit of B.W. Leigh, sworn to before a Judge of the General Court of Virginia, whose

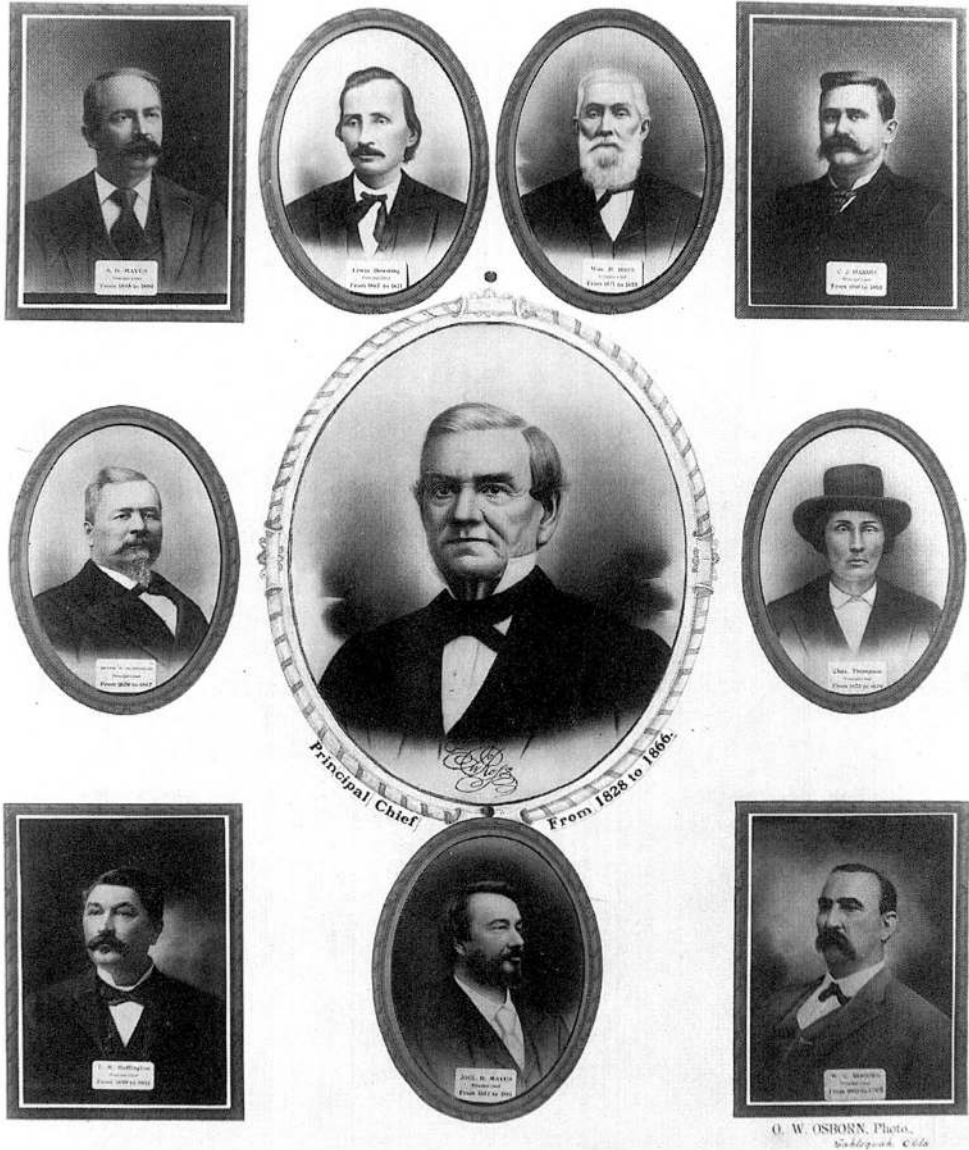
official character was certified by the Governor under the great seal appended. The Clerk of the Court made no return to the writ of error, and certified no proceedings of the Court had under it. This is, then, no precedent for this case. The Court which directed no entry to be made of a motion to certify the record according to the precept of the writ, could not do it "*as therein commanded*," and no further proceedings were had on this subject in this Court on this self called writ of error. That part of the case requires no further notice; the proceedings on the mandate will be referred to hereafter. Thus the precedent of Hunter and Martin is in the first case directly against the plaintiff, and to the writ of error in the second, there was no return by Judge or Clerk, this Court could inspect nothing but the refusal to notice the writ of error as proved by the affidavit of Mr Leigh; they could know it in no other way. What would have been the legal effect of the judgment of this Court on such a writ of error and such a return? The answer is obvious: see Brown against Maryland; the writ of error was issued by *one of the Judges of this Court without the seal or that of the Circuit Court.* The record was returned and the case argued on both sides without objection, or, so far as appears by the report, the point not being noticed at the bar or from the bench. McCulloch vs. Maryland, referred to by the Court, was on a case stated for the opinion of this Court, "all errors being mutually released." — 4 Wh. 319, 20, and as appears in the record. In the United States vs. Simms, 1 Cr. 252, this Court entertained jurisdiction of a case brought before it by a writ of error to remove the record of an *indictment* in the Circuit Court of this District and affirmed the judgment after argument on both sides. In the United States vs. Moor, 3 Cr. 159, 172, they decided that they had no jurisdiction. On being reminded of the case of Simms, the Chief Justice remarked, the question was made in that case as to the jurisdiction. It passed *sub silentio*, and the Court does not consider itself bound by that case, 172, and it was not mentioned in the opinion of the

Court. — In *Duroseau vs. U.S.*, they observe under these laws, this Court has taken jurisdiction of a cause brought by a writ of error from Tennessee. It is true the question was not moved, and consequently still remains open. — 6 Cr. 317. Thus the second case of *Hunter vs. Martin*, and the cases of *Brown and McCulloch vs. Maryland*, are disposed of as precedents of a return to a writ of error issued by this Court under its seal and the twenty-second and twenty-fifth sections. They are no evidence of any legitimated, sanctioned, or even noticed practice, still less of law. It is utterly useless to examine the question whether a State Court is bound to obey an order to return their record to this Court for its judicial inspection, on a paper purporting to be a writ of error, signed by a Judge of this Court without a public seal, or whether this Court has jurisdiction in such a case. Though such may have been a loose and *sub silentio* practice, in cases where the defendant in error appeared and his counsel argued the merits, it is utterly without any authority in law, and contrary to its best settled principles. It is time that such practice was stopped, or it may tend much to weaken the respect due to the legitimate acts of this Court, and no proceeding ought to be permitted in its name, or on its authority, unless pursuant to and in strict conformity to the laws which authorize them to act. This is not submitting the silent practice of this Court to the test of an individual opinion. In the case referred to by the Court as *an approved one of jurisdiction under the twenty-fifth section*, it was contended “That the amount of judgment was not sufficient to ground an appeal or writ of error to this Court. This is a new question. Thirty-five years has this Court been adjudicating under the twenty-fifth section of the judiciary act of 1789, and familiarly known to have passed in judgment on cases of very small amount without having before had its attention called to the construction of the twenty-fifth section now contended for. Nevertheless, if the received construction has been erroneously adopted without examination, it is not too late to cor-

rect it now.” — *Buell vs. Van Ness*, 8 Wh. 321, 2. I pass for the present from the practice to the decisions of this Court. So important do this Court deem the *mode* of removing a cause from a District to a Circuit Court, that though it may be done by writ of error or appeal, they have adjudged that it cannot be done by a writ of *certiorari*, as there is no law to warrant the removal of a record from a District to a Circuit Court by such a writ. — That the District Court ought to have refused obedience to its command, and that either party might have proceeded in that Court after a transcript of its record had, in obedience to the writ, been removed to the Circuit Court, *in the same manner as if the record had not been removed.* *Patterson vs. United States*, 2 Wh. 225, 6. Though the record is actually removed by a writ of *certiorari*, a regular common law writ, and the 14th section of the judiciary act authorises all the Courts of the United States to issue all writs, necessary for the exercise of their jurisdiction, 1 Story 59, — Agreeably to the principles and usages of law, its operation is a nullity unless the parties acquiesce by appearance and action in the Circuit Court without objection. Such being the settled rule of law in the Federal Courts between which there can be no conflict of hostile jurisdiction, how much more strictly ought it to be observed in a case like this? How far the act of 1792 would, by the principles of this decision, authorise a Circuit Court to issue a writ of error to a State Court, as was done in *Buell vs. Van Ness*, 8 Wh. 312, does not arise on this case or those cited as precedents, and is not a subject of enquiry now. It is enough for this case to know the settled rule to be, that in exercising the revising power intrusted by the constitution and laws of the United States, we must follow the legal path prescribed for us, 5 Pit. 259. An important rule laid down in a case important in its bearing on the point now under consideration, and to which the attention of the Plaintiff’s counsel was especially requested as the last reported case on the subject. In a cause of this magnitude, heard on an *ex parte* argument, if

counsel do not feel themselves as standing in this Court, not only in the attitude of advocates of their clients, but as “*amici acriæ*,” desirous of examining every principle which bears on the power and jurisdiction of the Court, to render a judgment fraught with the consequences which must attend this; it becomes the imperious duty of a Judge who doubts either to call for a preliminary argument which may remove his doubts, or refer him to some sources of information for the means of forming a correct opinion. In *ex parte Crane* reported in 4 Peters 190, 200, without even a passing notice of the occurrence, such call was made, not supported by the Court and denied in being renewed; repeated in *New York and New Jersey*, 1 Peters, 286, with as little effect, and noticed in the report very incorrectly, both cases involving principles and questions as important as ever arose in this Court, none of which were believed to have been settled. When in this case, without argument or notice of this point, we were called on to exercise our highest jurisdiction over the highest Court of a State of the Union, I was forced to surrender my judgment on faith, or assert publicly my judicial rights, regardless of censure when acting in conscious rectitude; anxious to elicit by the aid of the counsel, the light, the truth, and the law of the case and sincerely desirous that the judgment of the Court in this great case should be rendered only after every point was considered, it was my duty to persevere till a direction was given that counsel, *in the course of their argument*, should embrace the question of whether there was a record judicially before us. It was my desire that this question should have been considered first and distinctly according to what seemed to be the settled course of the Court as laid down in 1 Cr. 91, 3 Cr. 172, 5 Cr. 221, 9 Wh. 816, 10 Wh. 20. It would not then have been left to a single Judge to search for the laws, the rules, the practice and precedents of the Court for a guide. A reference to these sources of knowledge, made under the direction of the Court, would have made their final decision, at least not less satisfactory. Left with

no other alternative but to render my judgment on faith, or knowledge, the result of my unassisted investigation, though I stand alone in this court on most important questions of power and jurisdiction, it must not be understood that I rest in the pride of opinion merely, or dissent without the strongest internal conviction, that my opinion is founded on and supported by the law. The occurrence, in the early part of the argument, called for these remarks as an explanation, not an apology. *Fisher vs. Cockerell* came up on a writ of error to the Court of Appeals of Kentucky with this certificate under its seal: “I, Jacob Swigert, Clerk of the Court of Appeals for the State aforesaid, do hereby certify that the foregoing seventy-two pages contain a transcript of the record and proceedings therein mentioned.” The attestation and seal to the transcript in the present case gives it no more authenticity as a record, than that of Swigert; if the contents of the one are judicially before us, so was the other; if all which this contains is matter of judicial inspection, so was that; if the return in this case makes it the record of the Court below, for the purposes of a writ of error, so did that; and if a record, it is absolute verity. — 5 Peters 241. A transcript appended to the writ of error by the Chief Justice of the Court to whom it was directed, by his return becomes the record on which the Court of error passes its judgment, and it can exclude no part of it from its consideration, if it bears on the assignment of errors which always ought to accompany it according to the directions of the twenty-second section. If the transcript certified by the Clerk, under its seal, is taken by this Court as a substitute for the schedule returned by the Chief Justice, it must have its full legal effect in our consideration; if not so taken, then it is no record for our judicial inspection. In *Fisher vs. Cockerell*, the transcript so certified contained the certificate of the Clerk of the Circuit Court of the State, that a patent to the plaintiff was read in evidence and a copy of the patent, founded on rights derived *from Virginia, was set forth. But the Court observe the title of the plaintiff was not made a*



Baldwin noted in his dissent that the case for the Cherokees "is rested solely on the Treaties between the United States and Cherokees, the Laws of Congress with reference to them, and the intercourse with the Indians, and the legislative acts and proceedings of Georgia, which . . . show the Cherokees to be a State or Nation, which this Court is bound to judicially know as such — to have and possess a jurisdiction over the lands they occupy, of an authority which supersedes and annuls that of Georgia. So solemn a subject was never presented for the consideration of any Judicial Tribunal, and none so serious can ever recur." Above is a montage of Cherokee Indian Chiefs, with John Ross, the tribe's leader in 1832, when the case was decided, at center.

part of the record by a bill of exception, or "in any other manner." "Can this Court notice it? Can it be considered as part of the record." In cases at common law, the course of the Court has been uniform, "not to consider any paper as part of the record, which is not made so by

the pleadings, or by some opinion of the Court, referring to it. This rule is common to all Courts, exercising appellate jurisdiction according to the course of the common law." The record then, to the Union C.C., does not show that the case is protected by the compact be-

tween Virginia and Kentucky. 5 Peters, 254. The transcript of the record of the Court of Appeals, contained an assignment of errors in the record of the C.C., presenting the question arising under the compact between Virginia and Kentucky, most distinctly: and an elaborate opinion of the Judges, in rendering a judgment on the effect of the compact on the rights of the parties, and was returned by the clerk of the Court of Appeals, under its seal, and his signature, in the transcript of the record in the case, in which the writ of error was directed. Yet the Court considered neither the patent, the *assignment of errors*, or the *opinion of the court as forming part of the record*, and dismissed the suit for want of jurisdiction. My dissent was in these words: "I am compelled to dissent from the opinion of the Court for the following reasons: — The certificate of the Clerk of the Court of Appeals attached to the record, is in these words— (Copy) "And I feel bound on the preliminary question of jurisdiction to consider all that is so contained to be a part of the record in this suit, so far at least as to give power to this Court to examine whether the judgment of the Court of Appeals is erroneous or not: On a motion to dismiss this cause for want of jurisdiction, the only question which arises is, whether it comes "prima facie," within the 25th Section of the Judiciary Act. This must be decided on an inspection of the *whole record*, and if it does appear that it presents any of the cases therein provided for, the motion must be refused. When the record comes to be judicially examined, this Court may be of the opinion that though question did not arise which brings their power into action, yet it did not come up in a shape, or is not so stated in the record of the Court of Appeals, that this Court can affirm or reverse it for the specific cause assigned. If the question appears in *any part* of the record, it is enough in my opinion for jurisdiction. The manner in which it appears, seems to me only to be examined after jurisdiction is entertained." It appears by the record that the Plaintiff read in evidence on the trial of the case, a patent from Kentucky, is-

sued on warrants entered in 1784, and the patent is set forth verbatim. As the State of Kentucky had no existence in 1784-85, when these warrants were entered and surveyed, we cannot be judicially ignorant that these acts, as well as the issuing the warrants, and the title founded on them, were under the laws of Virginia. As the compact between the two States is a part of the Constitution of Kentucky, we cannot be ignorant of its existence, and that it relates to lands held in Kentucky under the laws of Virginia:" — 5 Peters 259, 60. The Court stated the seventh article in their opinion, and observe, "This is the article the violation of which is alleged by the Plaintiff in error; to being his case within its protection, he must show that the title he asserts is derived from the laws of Virginia prior to the separation of the two States. If the title be not so derived, the compact does not extend to it, and the Plaintiff alleges no other error, 25, 3. In the case at bar, the fact that the title of the Plaintiff in error was derived from the laws of Virginia, a fact without which, the case cannot be brought within the compact, does not appear in the record, for we cannot consider a *mere assignment of errors in an appellate court as a part of the record unless it be made so by a legislative act*. The question whether the acts of Kentucky in favor of occupying claimants, were or were not in contravention of the compact with Virginia, does not appear to have arisen and consequently the case is not brought within the 25th section of the judicial act. The *writ of error is dismissed, the court having no jurisdiction*," 259. — Such was the solemn judgment of this court at last Term. It settled no silent practice as to receiving or acting on transcripts of the records and proceedings of the highest Courts of a State under the 25th Section; but it was a most deliberate decision on the faith and credit it gave to transcripts, or a paper, as part of the record which is not made so by a bill of exceptions, by the pleadings, or by some opinions of the Court referring to it. So far as the attestation of the Clerk and seal of the Court of Appeals could make the whole

paper a record for judicial inspection, with a judicial eye, it complied with the 11th rule. If it was an authenticated transcript, according to the 22d section, the Court were bound to take it as the record of the suit, as absolute verity, against which no averment could be permitted to a Court or Jury; and, according to the 25th section, to affirm or reverse the judgment of the Court of Appeals, as to them may seem right, according to the laws and customs of the United States. If the paper had been returned by the Judges of the court of appeals, attached under their seals to the writ of error, this Court could not have listened to an allegation of counsel, that the patent, the assignment of errors, and the opinion of the Court, was no part of their record. No Court of Error, proceeding according to the course of law, ever held that they would not judicially notice an assignment of errors in an inferior court, on a question of jurisdiction over its record. These parts could have been considered as no part of a record on a motion to dismiss only, by viewing a paper attested only by the seal of the court, and the name of the clerk as a creature of the 11th rule, and not as an authenticated transcript, according to the act of Congress, or a record at common law. If this court could not examine its contents judicially, and if it was not lawful warrant and authority on, and by which to act at all, to affirm or reverse, nay even to inspect, the judgment of a State court for 1350 dollars, and the suit was dismissed *on motion*, how can they establish Indian sovereignty in Georgia and annul her laws by any power which this paper confers, and what other course is left to a judge who dissents in both cases, than to follow safer, and in his opinion, more consistent guides? These cases have made a strong impression on my mind, which my most deliberate reflections have neither removed nor weakened—and they have confirmed and strengthened my opinion of the danger and uncertainty attending the reception of transcripts authenticated only by the clerk and seal of inferior courts. I must look elsewhere for the law which I am bound to obey, and act on the dictates of

my judgment, the others may think it has become bewildered by the illusions of summer dreams, or the conceits of fancy. In recurring to the case of Martin and Hunter, it appears that the judgment of the Court of Appeals was reversed and the judgment of the District Court of Winchester was affirmed by this Court. — 7 Cr. 628. And it appears by the record that “it is further ordered that the said cause be remanded to the said Court of Appeals, with direction to enter judgment for the appellant, Philip Martin.” A mandate accordingly issued commanding the Court of Appeals to do it. This was not in the nature of a writ of error; it partook of none of its qualities; it ordered an act to be done by the Court of Appeals, by an entry on their own record; had it been obeyed, the *cause was no longer before this Court, no return of any record or proceedings was required as the foundation of any further judicial action*. The writ of error which brought the case a second time before this Court, was not founded on the *judgment of the Court of Appeals*, reversing that of the District Court; it was founded on their refusal to obey the *mandate of this Court directed to them in 1813*, and so declared and considered in the opinion of this Court. — 1, Wh. 323 to 362. No proceeding or record of the Court of Appeals was returned by the clerk save this refusal. Nothing more was before this Court, or could be the subject matter of its judicial inspection or consideration. Its whole action *commenced on a writ of error issued by no Court or under the seal of any*, and indeed by a reversal of the judgment of the Court of Appeals of Virginia, rendered on the mandate, (their refusal to enter judgment,) and a second *affirmance* of the judgment of the District Court held at Winchester.

From its beginning to its termination, it was without any analogy to the proceedings on a writ of error, or any other Judicial action, according to the course of the common law. Its whole history presents no precedent, of a superior Court correcting the disobedience of an inferior one to its mandate by a *writ of error*; of its considering the *refusal to obey the denial*

of jurisdiction to a Court of the last resort, and the declaration of an Inferior Court, that the solemn judgment of the highest Judicial tribunal of a nation, “*was a proceeding, coram non judice, in relation to that Court,*” was a *final judgment, to be reversed for error*. And no Court of high and supervising power, ever contented themselves with a *reversal* of the *refusal* of an inferior one to obey its mandate, by doing the act commanded. But there are countless precedents of a different remedy for the party injured, and a *higher and more efficient vindication of the power of the Court and the majesty of the laws*. *Hunter vs. Martin* then, being a case *sui generis*, can be no precedent for any other civil case, *certainly not for a criminal one*. The plaintiff, or his counsel, would hardly be content that the action and jurisdiction of the Court, in this case, should be limited to the extent within which it was exercised in *Hunter and Martin*. The solemn judgment and final process of this Court would be no beam of dawning light on the lonely path, or the bursting of morning in the cell of the martyr; it would not open the gates of the Penitentiary and set the prisoner free; he would still remain a captive, abiding in darkness, in solitary light, or laboring with felons, without something more than a reversal of the judgment *now reversed*, or a reversal of the *refusal* of the Superior Court of Georgia to obey the mandate now issued. But, waiving all these considerations, and viewing *Hunter and Martin* as a case at common law, it amounts to nothing as a precedent. The objections made by Mr. Tucker to the Court entertaining jurisdiction were: 1. “At common law, the writ of error must be returned by the Court itself: *it is imperfect in this case, and, therefore, we have a right to a certiorari, or writ of diminution. But there is no error, the Court of Appeals have done nothing, and therefore there is no error in their proceedings*. It is a mere omission to do what they ought to have done, and no judgment can be rendered here to reverse what they have not done.” — 1 Wh. 315, 16. I can perceive no bearing of these objections on the question of whether the Court

ought to return *their record and proceedings*. Their refusal to proceed and render a judgment in favor of *Martin*, in obedience to the mandate, was returned by their Clerk to the very teeth of this Court. I will not say that this was according “to the laws and customs of England or the United States,” but must declare it to be no precedent to be followed in any case. So seems to me to be the decision of this Court, considered by the laws and customs of either. The refusal was no final judgment, or process, or proceeding, in notice of, or enforcing one; and the reasons assigned by the learned counsel would seem to have suggested very conclusive reasons for proceeding no further on the writ of error. The opinion delivered at this Term, in *Bayless, Zachary, and Turner*, is conclusive on this point. But as a proceeding of a peculiar character, founded on a construction of the 25th and 22d sections, to meet the *exigency of a case till then unknown to the law*, its correctness is not questioned, though it can have no application to the present case. The objections to the want of a return by the Court were wholly foreign to that now resting on my mind, and the manner in which they were disposed of by the learned Judge, in page 361, shews that the *question presented was not decided*, and the *ones decided were not presented*, by the objection, which was, that *the Court had not returned the writ of error, and the defendant in error had a right to a certiorari or writ of diminution*, to which the answer of the Court was “That the record, in this case, is duly certified by the Clerk of the Court of Appeals and returned with the writ of error;” there was no record to return except the mandate of this Court, and the refusal to obey it. It is thus manifest that no fixed or settled rule can be extracted from the precedents, practice, or adjudications of this Court, on this point, even in civil cases; and it never appears to have come under its Judicial consideration, directly or collaterally, in a criminal one; they have been decided, “*sub silentio*” — and this is the first case of the reversal of the judgment of a State Court in a criminal case, without an appearance. The

point has never been made. The question, therefore, is an open one; and there is no color of authority for saying, that it has, till this time, been closed, by any adjudication of this or any other Court. When a question arises, for the first time in this Court, in a case of infinite importance, in which only one party appears, and that question presenting a serious difficulty to further proceeding, without removing it, and is, *at common law, an admitted bar to the exercise of appellate jurisdiction*; unless the counsel for the plaintiff shall have made it appear, that the *law which regulates this Court in proceedings on writs of error, is different from all others*. The direct and narrow path is plain, and I must tread it. In *Cohens v. Georgia* that path is plain. It has been travelled for ages by all Judges, and cannot end in error. It is dangerous to try a new one; for one knows not where it will end, or how soon the judgment may become bewildered in following all its ramifications. The trodden path is the safe one. In adjudicating on State records under the 25th section, this Court has always met with difficulties in civil cases, in deciding what is the record of the inferior Court, what part of the transcript certified by the Clerk of the inferior Court is a record, and what not; what facts, papers or opinions of the Judges are cognizable before us, and how they must appear or become a part of what we may inspect with judicial eyes. Vid. *Fisher vs. Cockerell*, and the cases cited. But all doubts and difficulties will be ended by enforcing and following the precedent in *Hunter vs. Martin*, 7 Cr., and *Cohens vs. Virginia* in 6 Wh. The return of the Judge will authenticate the schedule annexed as a transcript, within all the rules of the Constitution, the acts of Congress, and the custom of England and the United States. The whole transcript becomes the record of a Court for our revision, and our judgment will be rendered on all the matter contained in it bearing on the errors assigned. Taken as importing verity, it will be a safe guide to action in the whole extent of jurisdiction; and the course of the Court, being from the *issuing of the writ to the final man-*

date the course of the law, they will become identified, *commanding common respect, or sharing a common fate*. But I tremble for the consequences of a course of proceeding, which, in my humble opinion, leaves a wide space between the practice of the Court and the law of the land, and so considering that now pursued, I do not consider myself at liberty to examine the remaining questions in the case. So far as it respects the national existence of the Indian tribes, according to the Constitution, the power of Congress over the territory of the United States, that of Georgia within her limits by her own right and the compact of 1802, it has been expressed on a former occasion, and is yet retained. In allowing the writs of error in these cases, it was in the full expectation that the validity of the laws of Georgia, would have been subjected to the test of the second section of the fourth Article of the Constitution: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Had it been then believed that this provision of the supreme law, would not have been deemed worthy of notice, either in the argument of Counsel or in the opinion of the Court, I should have withheld my allowance, leaving it to some other Judge to have made it. For the sole purpose of trying the question of Indian sovereignty, I refused to allow a writ in the name of all the defendants, because they did not aver in their plea in the Court below, that *they were citizens of the United States, or of any of the States*. The plaintiffs made this averment, and I felt bound to permit them *to assert their constitutional rights in this Court*; they were at liberty to rest their case on any other ground; but it has been wholly unexpected to find that wholly omitted as unworthy of notice in the decision of this all important cause. The judgment is pronounced, the mandate has gone forth, in words of power which bid a State obey; the act is irrevocable and the deed is done. Come good, come ill, I desire neither praise nor censure; my judgment directed me to the plain and narrow path prescribed by law; my duty has guided me in it; I have come to a point

where there was a barrier which both forbid me to pass; I have obeyed the impulse; and having taken neither scot or lot of this matter, wash my hands of it now and hereafter. If the fiat of this Court shall be received in Georgia in the beams of peace and carry on its wings the healing of the nation, I shall not rejoice the less at the blessings. — But if it shall be the mountain storm which shakes foundations, my voice has not added to the fury of the blast. Whether it shall pass my head unhurt, or lay it low; whether as a self supported oak, riven by the tempest, or rooted the firmer the ruder it blows, I am at peace within, with a mind convinced and judgment fixed, and an approving conscience. The consequences are not mine. They will be met without self reproach.

In again standing alone on the question of Indian sovereignty, my attitude has not been assumed in the consciousness of my own strength, or the confidence resulting from my own reason and reflections: not from a wish to adopt, or act on any new opinions, rules, principles or maxims of the law, but in obedience to old and settled ones. If I am wrong, it is because I cannot understand them; if right, it is not by following any light of my own invention, but by tracing the ancient path illuminated by lamps which never flicker and are not yet extinguished. To me it is the path in which it is, has been, and ever will be, my delight to proceed in my judicial labors, impelled by an ambition not easily satisfied or attained to the fulness of desire; not that my opinions should be respected by the authority of my name, but only so far as they may be found to contain the spirit of the Constitution and the statutes, and the results of the judgments of those who have preceded me here and elsewhere, as the law of the land according to their plain language, legal meaning and just interpretation. As one of the expounders and administrators of the supreme law, I am not without the impulse of high ambition; but its highest aspirations are, as a Judge, to be considered now, and remembered hereafter, only as one “Qui consulta patrum qui leges et juraque servat.”

Endnotes

¹ 31 U.S. (6 Pet.) 515 (1832).

² Charles Warren, 1 *The Supreme Court in United States History* 729 (1922).

³ See e.g., Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (1996); Edwin A. Miles, “After John Marshall’s Decision: Worcester v. Georgia and the Nullification Crisis,” 39 *J. Southern Hist.* 519 (1973).

⁴ 31 U.S. (6 Pet.) at 594. McLean was a perennial presidential candidate and no doubt sought to appeal to both pro- and anti-removal factions. After the *Worcester* opinion was issued, McLean inserted himself into the political debate, communicating to Cherokee delegates an offer to broker a removal treaty. The doctrine he advanced in his concurrence he himself pressed in circuit court opinions, but it has never been followed by the Supreme Court.

⁵ 31 U.S. (6 Pet.) at 596.

⁶ *Id.*

⁷ Frank Otto Gatell, “Henry Baldwin,” in *The Justices of the United States Supreme Court 1789-1969*, at 580 (Leon Friedman and Fred L. Israel, eds., 1969).

⁸ David P. Currie, “The Most Insignificant Justice: A Preliminary Inquiry,” *U. Chi. L. Rev.* 466, 480 (1983).

⁹ Frank H. Easterbrook, “The Most Insignificant Justice: Further Evidence,” 50 *U. Chi. L. Rev.* 481, 487 (1983).

¹⁰ Robert D. Ilisevich, “Henry Baldwin,” in *The Supreme Court Justices: Illustrated Biographies, 1789-1995*, at 110 (Clare Cushman, ed., 1995). Gatell, in contrast, concludes his sketch: “Biographers and memorialists of ‘second-string’ judges often begin their concluding sections with disclaimers about the limitations of their man, but then proceed to extol certain aspects of his career. In Baldwin’s case, the limitations, self-imposed and otherwise, were too numerous and too pervasive to allow for a happy peroration.” Gatell, *supra* note 8, at 580.

¹¹ G. Edward White, *The Marshall Court and Cultural Change, 1815-35*, at 301 (1988).

¹² *Id.*

¹³ *Id.* at 298 (quoting Letter from J. Story to J. Hopkinson) (May 9, 1833)(Joseph Hopkinson Papers on file with the Historical Society of Pennsylvania).

¹⁴ See *Willison v. Watkins*, 28 U.S. (3 Pet.) 43 (1830); *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280 (1830); and *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466 (1830).

¹⁵ See *Bartle v. Nutt*, 29 U.S. (4 Pet.) 184 (1830); *Bank of U.S. v. Tyler*, 29 U.S. (4 Pet.) 366 (1830).

¹⁶ See *Conrad v. Nicoll*, 29 U.S. (4 Pet.) 291 (1830).

¹⁷ See *Patapsco Ins. Co. v. Coulter*, 28 U.S. (3 Pet.) 222, 241 (1830); *Society for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet*, 29 U.S. (4 Pet.) 480, 500 (1830); *Van Ness v. City of Washington*, 29 U.S. (4 Pet.) 232, 286 (1830).

¹⁸ See *Henderson v. Griffin*, 30 U.S. (5 Pet.) 151 (1831); *Taylor v. Thomson’s Lessee*, 30 U.S. (5 Pet.) 358 (1831);

Hinde v. Vattier's Lessee, 30 U.S. (5 Pet.) 398 (1831); *Peyton v. Stith*, 30 U.S. (5 Pet.) 485 (1831).

¹⁹ See *Ex Parte Crane*, 30 U.S. (5 Pet.) 190, 200 (1831); *U.S. v. Robertson*, 30 U.S. (5 Pet.) 641, 665 (1831); *Clarke's Lessee v. Courtney*, 30 U.S. (5 Pet.) 319, 357 (1831); *Sheppard v. Taylor*, 30 U.S. (5 Pet.) 675, 717 (1831); *Smith v. Union Bank of Georgetown*, 30 U.S. (5 Pet.) 518, 528 (1831). Baldwin also dissented from the Court's decision to adopt a rule, Rule 37. 30 U.S. (5 Pet.) 724 (1831).

²⁰ White, **The Marshall Court and Cultural Change, 1815-35**, at 408 (quoting Letter from R. Peters, Jr. to J. Hopkinson (Mar. 16, 1831)(Joseph Hopkinson Papers)).

²¹ 30 U.S. (5 Pet.) 190, 200 (1831).

²² *Id.* at 223.

²³ White, **The Marshall Court and Cultural Change, 1815-35**, at 302. In fairness, Peters was not the most competent of reporters, and Baldwin, a procedural technocrat (at least in his own estimation), had by the end of the 1831 Term developed what would prove a life-long dislike for Peters.

²⁴ *Id.* at 298 (quoting **The Autobiography of Martin Van Buren**, at 578 (J. Fitzpatrick, ed. 1920)).

²⁵ *Id.* at 298 (quoting Letter from J. Marshall to J. Story (Oct. 12, 1831)(in Proc. Mass. Hist. Soc. 14:347)).

²⁶ In *Green v. Neal's Lessee*, 31 U.S. (6 Pet.) 291, 301 (1832), *Leland v. Wilkinson*, 31 U.S. (6 Pet.) 317, 322 (1832), and *Hughes v. Trustees of Town of Clarksville*, 31 U.S. (6 Pet.) 369, 387 (1832), Baldwin dissented without written opinion.

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 596 (1832), *Crane v. Morris's Lessee*, 31 U.S. (6 Pet.) 598, 621 (1832), *Kelly v. Jackson*, 31 U.S. (6 Pet.) 622, 633 (1832), and *Lindsey v. Miller's Lessee*, 31 U.S. (6 Pet.) 666, 679 (1832), Baldwin dissented, in writing, but declined to furnish a copy to Peters.

²⁷ White, **The Marshall Court and Cultural Change, 1815-35**, at 299 (quoting Letter from Henry Etting to L. Woodbury (Dec. 22, 1832)(Levi Woodbury Papers on file with the Library of Congress)).

²⁸ *Id.*(quoting Letter from P.C. Brooks to E. Everett (Jan.

3, 1833)(Edward Everett Papers on file with Massachusetts Historical Society) and Letter from D. Webster to W. Dutton (Jan. 4, 1833)(Daniel Webster Papers on file with Dartmouth College Library)).

²⁹ 32 U.S. (7 Pet.) at iii (1833).

³⁰ [Wash.] *Globe*, Mar. 14, 1832.

³¹ *Id.*, Mar. 28, 1832 (*emphasis added*).

³² See *infra* p. 39.

³³ See *infra* p. 16.

³⁴ See *infra* p. 48.

³⁵ See *infra* p. 16.

³⁶ See *infra* p. 30 note 1.

³⁷ See *infra* pp. 33-34. See also *infra* p. 39 (call for argument "noticed in the report very incorrectly"). Peters, it should be noted, warmly reciprocated, complaining in a letter to Story after reading Baldwin's dissent in the *Globe* that "[s]uch an opinion I do not hesitate to say was never put forth by anyone in so high a judicial station. It is full of misquotations from the Laws of the U.S. from the Reports of the decisions of the court, and from the rules of court.... If I was not connected with the Court," Peters fumed, "I would devote myself to expose this and the other dissenting opinions of this Judge." Peters singled out—"[b]ut why refer to this only?"—Baldwin's representation that in *Leland v. Wilkinson*, 31 U.S. (6 Pet.) 317 (1832), the Court "'refused to see or hear' 'the transcript of the acts and proceedings of the Legislature of a State in its legislative and Judicial character attested by the Secretary of State and certified by the Governor under its great seal,' 'in a legal argument on the existence of a legislative usage,'" an argument Peters evidently believed had never occurred. Letter from R. Peters, Jr. to J. Story (Mar. 29, 1832)(Joseph Story Papers on file with the Massachusetts Historical Society).

³⁸ See *infra* p.44.

³⁹ See *infra* p. 49.

Endnote to Baldwin's dissent

¹ When this opinion was drawn, that of the court was known, but not its reasons or extent.

Chief Justice John Marshall's Last Campaign: Georgia, Jackson, and the Cherokee Cases

R. Kent Newmyer

Looking at the unusual stability of the Supreme Court from 1811 to 1823 and the durability of such decisions as *Martin v. Hunter* (1816), *McCulloch v. Maryland* (1819), *Cohens v. Virginia* (1821), and *Gibbons v. Ogden* (1824) historians have dubbed these years the “golden age.”¹ And who is to argue—except perhaps Chief Justice John Marshall himself. Judging by his personal correspondence over the years, there never was a period when the Court was secure from its enemies or when the great principles of the Constitution were established once for all. In the wake of *McCulloch*, however, this wary caution turned increasingly to outright pessimism. By 1827, Marshall was inclined to think that both the Court and the Constitution were in an irreversible downward spiral. The ever threatening subversive force, as he saw it, was localism and states’ rights thinking as embodied in the newly emergent democratic political culture. This evil combination, which gained momentum throughout the 1820s, climaxed with the victory of Andrew Jackson over John Quincy Adams in 1828. Whether the Jacksonian Democrats were truly egalitarian is a point of scholarly dispute, but the party talked democracy with a passion and celebrated political parties (for the first time in American history) as a good and necessary thing. On top of this, the party resuscitated the states’ rights, small government philosophy of Jefferson and with this, a deep suspicion of Marshallian jurisprudence. When Marshall turned out to vote for his friend Adams in 1828—reputedly the first time he had voted in a presidential election since becoming Chief Justice—he did so because he feared for the Constitution and the Court.² Those fears were realized when Jacksonian Justices introduced states’ rights ideology into the Court’s deliberations.

It was, then, with a growing sense of despair in the early 1830s that Marshall pondered the course of his own action as leader of a divided and contentious group of Justices who



While John Marshall was confronting states' rights for the last time on the Court in *Cherokee Nation v. Georgia*, South Carolina was heading for nullification. As this cartoon shows, the state wanted out of the crumbling "Union Pie." But Georgia's contempt for the Union and the Supreme Court surpassed even South Carolina's.

no longer thought alike or lived together in harmony. One thing he did to neutralize states' rights opposition was to concede to the states what was, by his constitutional reckoning, theirs as a matter of principle. Thus in *Providence Bank v. Billings* (1830) and after the first arguments in the *Charles River Bridge Case*, he refused to extend the reach of the contract clause by implication. In *Willson v. Blackbird Creek Marshall Co.* (1827) he refused to expand federal commerce power which he might have done according to *Gibbons v. Ogden* (1824). In the crucial area of slavery and the slave trade—witness his opinions in *Mimi Queen v. Hepburn* (1813) and *The Antelope* (1825)—he adhered to a noninterventionist fed-

eralism which, following the intent of the Framers, left the states in control of the institution. In the same year, in *Steamboat Thomas Jefferson*, the Court refused to extend federal admiralty jurisdiction to the inland system of rivers and lakes, leaving state jurisdiction in place. States were also on the receiving end of his holding in *Barron v. Baltimore* (1833) that the federal Bill of Rights did not apply to the states.³

Marshall never explained what lay behind the Court's new-found restraint in matters regarding state power. But presumably he did what he always had done: which was to follow the intent of the Constitution as best he could and assess his judicial options by looking real-

istically at the Court's institutional makeup and its political vulnerabilities. His strategy during the final years, to put it another way, was to preserve the great nationalist principles affirmed in cases like *McCulloch* and *Gibbons* rather than risk retaliation by expanding them. Marshall's view of federalism (again following that of the Framers and ratifiers) was flexible enough to permit such doctrinal adjustments without sacrificing principles.

When those principles were attacked, however, Marshall did not retreat. Such was the case in *Cohens v. Virginia* (1821), which answered his Virginia critics in a sweeping defense of the Court's federal question jurisdiction over state courts and state legislatures. He also refused to retreat in the area of contractual sanctity, even if it meant dissenting on a constitutional issue, as he did in *Ogden v. Saunders* (1827).⁴ This same principled resolve also characterized his response to Georgia (and the Jackson administration) in the Cherokee Indians cases. The Court finally lost this war. But Marshall fought doggedly and brilliantly. In the process he revealed his mastery of judicial politics as well as his commitment to objective adjudication and the rule of law.

When the Cherokees turned to the Supreme Court in 1831, in their desperate effort to prevent Georgia from confiscating their lands, they precipitated the first full-blown constitutional rights litigation in American constitutional history. The Indian cases were also Marshall's final confrontation with the forces of states' rights that had dogged his court for thirty years. The Court's enemies, moreover, were on a roll not only in Georgia but elsewhere in the country. In Congress the movement to destroy the appellate jurisdiction of the Court (by repealing section 25 of the Judiciary Act of 1789) was alive and well. At the same time, South Carolina was moving rapidly toward nullification, employing Calhoun's Union busting, anticourt theory to do so. Calhoun put the matter bluntly in September 1831, writing to Virgil Maxcy: "The question is in truth between the people & the Supreme Court. We contend, that the great con-

servative principle of our system is in the people of the states, as parties to the Constitutional compact, and our opponents that it is in the Supreme Court. This is the sum total of the whole difference...."

Georgia's hatred of the Court was even more deep-seated than South Carolina's, and was more long-lasting. Georgia's opposition went back to *Chisholm v. Georgia* (1792) in which the Court upheld the right of private citizens to sue the state—a ruling that Georgia ignored and that was soon overturned by the Eleventh Amendment. The Marshall Court's treatment of Georgia in *Fletcher v. Peck* (1810) was also fresh in mind in the 1830s. In that case, Marshall voided a state law that repealed an earlier land grant statute, even though the grant was rooted in fraud and corruption. Now in 1831, the Marshall Court stood in the way of Georgia's claim to Cherokee lands that lay within her borders. And what was worse for the Court, the new states' rights Democratic administration was committed to removing the southeastern tribes west of the Mississippi. Georgia had found a champion in President Jackson; the President found an opportunity to make good on his states rights' political platform. From the Cherokee's point of view, and Marshall's as well, it was a match made in hell.

For both personal and institutional reasons, the challenge could not have come at a worse time for Marshall. He was seventy-four years old in 1831, and already fighting the bladder stone affliction that would finally kill him. He was operated on in the fall of 1831 by Dr. Physick of Philadelphia (without the benefit of anesthesia!) and was still in a weakened condition when the Court heard the second Cherokee case in 1832. The death of his beloved wife in December 1831—between the first and second Indian cases—added further to his woes. On the Court things looked equally gloomy. By his own reckoning, the Justices were in the throes of a revolution that threatened to diminish significantly his and the Court's authority. To be sure, the Court had never been monolithic, even in its "golden age." Nor had Marshall

as Chief Justice ever run rough-shod his colleagues, as Jefferson and other court critics claimed. But there had been a remarkable institutional coherence that was now in decline. The appearance of new Justices (beginning in 1823), along with the growing independence of old ones (like William Johnson), introduced a new spirit of personal divisiveness and doctrinal uncertainty. Jackson's appointment of John McLean in 1829 and Henry Baldwin in 1830 further fragmented the Justices and dissipated Marshall's authority. He was, for example, barely able to hold a majority in the important case of *Craig v. Missouri* (1830), although the issue of paper money and the Contract Clause appeared to have been definitively settled.

Marshall correctly viewed *Craig* as an omen of things to come. One year after it was decided, the Justices, without so much as informing him, abandoned the tradition of communal living that had been a key feature of the Marshall Court's mode of operation. For years the Justices had shared a common boarding-house during their short stay in Washington. The informality of the arrangement suited Marshall's easy-going leadership style perfectly, and contributed significantly to the Court's unity. Now divisiveness was the order of the day. Indeed, after the fractious 1830 Term, he predicted that the Justices might actually end up institutionalizing seriatim opinions or, even worse, subvert the Court's jurisdiction under Section 25 of the Judiciary Act of 1789. Neither of these contingencies transpired. But Marshall was convinced, nonetheless, that the "revolutionary spirit which displayed itself in our circle" was endemic. As he saw it, the Court, which was supposed to save the Constitution from politics, had itself become politicized.⁷

The pending Indian cases—laden as they were with states' rights politics and coming in the midst of the Court's internal struggles—seemed perfectly designed to make matters worse for Marshall. It didn't help, either, that his personal views of Native Americans were conflicted. As with slavery he was torn between

a humane concern for their rights as human beings, and a realistic recognition of the cultural obstacles to the realization of those rights. Judging from Virginia history, which is what Marshall did, the obstacles were formidable. Except for a brief early interlude when there was some mutual respect between the colonists and Native Americans, the story in Virginia was largely one of deception and aggression on the part of a relentlessly advancing Anglo-civilization marked by bloody frontier warfare in which whites and reds alike shared in the barbarities. Marshall came of age in this hostile environment. In June 1755, three months before he was born, Indians massacred nine families in the nearby county of Frederick. Indians and frontiersmen continued fighting during his youthful days in Fauquier county. Frontier security was still a live issue for Virginians at the time of ratification in 1788—witness the Federalists' argument that only a strong national government could suppress Indian incursions.

Not surprisingly, Marshall grew up thinking of Indians as "savage," warlike, and expert "with the tomahawk and the scalping knife"—words he used to describe them in his biography of Washington.⁸ When allied with Great Britain, France, and Spain, as they were at various times in Marshall's life, he saw them as enemies of the new nation. At the same time (especially when it became clear that ultimate victory would go to the better armed and more numerous Americans), he saw Indians as victims in need of protection from the white man's rapacity. As a member of the Virginia House of Delegates in 1784, he even supported a law introduced by Patrick Henry designed to encourage intermarriage between whites and Indians. The Indian assimilation bill failed, as Marshall noted later, because the prejudices of Virginia "operate too powerfully."⁹ Three years later in *Hannah v. Davis*, he argued, victoriously as it turned out, that Virginia statute law prohibited the enslavement of Indians.¹⁰

Marshall's fullest personal statement on the Indians, which preceded the first Cherokee

CHEROKEE PHOENIX. 7

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The Cherokee tribe's newspaper, Cherokee Phoenix, featured articles in both English and Cherokee. Sequoyah, the Cherokee linguist, had developed a syllabary for writing the Cherokee language, which was an important step in the development of the legal institutions of the Cherokees, since it allowed the tribe to publish laws in its native tongue. The Adams administration had encouraged the Cherokees to develop a written language and a constitution.

case by three years, came in response to Joseph Story's speech on the "History and Influence of the Puritans," a copy of which Story sent him. Story's point (which he mistakenly found embedded in Puritan policy) was that the Indians, by right of prior discovery and principles of public law and Christian morality, were entitled to the land they occupied. Marshall cared deeply for Story and admired the Puritans, but he did not agree with his friend's natural law argument. Indeed, as we shall see shortly, he had already repudiated that position in Johnson v. McIntosh (1823). He was, however, prompted to say that a fundamental change in

Indian policy was in order. In explaining his position to Story, he noted again that the Indians had been "a fierce and dangerous enemy, whose love of war made them sometimes the aggressors, whose numbers and habits then made them formidable, and whose cruel system of warfare seemed to justify every endeavour to remove them to a distance from civilized settlements." But now that the Indians were doomed to extinction, public safety and morality were no longer at odds. The time had come for the American people "to give full indulgence to those principles of humanity and justice which ought always to govern our conduct to-

wards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. That time however is unquestionably arrived; and every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence, impresses a deep stain on the American character. I often think with indignation on our disreputable conduct (as I think it) in the affair of the Creeks of Georgia; and I look with some alarm on the course now pursuing in the North West."¹¹

Magnanimity and justice were in short supply, as Marshall well knew. Georgia had begun the forceful removal of the Creeks in 1824 and by 1828 was moving against the 17,000 Cherokees whose ancestral lands occupied the northwest corner of the state. The legal right of the Cherokees to their land seemed fully secured by a series of treaties with the federal government, the most important of which were the Treaty of Hopewell (1785) and the Treaty of Holston (1791). These treaties, in addition to several federal statutes, had encouraged the Indians to give up their native traditions in favor of American "civilization." Under the leadership of a mixed blood elite, Georgia's Cherokees did just that. With the encouragement of the Adams administration, they developed domestic agriculture, a written language, and a constitution. Ironically, it was this very progress of Americanization, along with perennial land greed and the discovery of gold on Indian land, that prompted Georgia to move against the Cherokees. Two state laws, the first passed on December 20, 1828, nine days before Marshall wrote to Story about the Indians, and a second on December 19, 1829, set the state in direct defiance of the federal treaty of 1791 and ultimately of the Marshall Court. According to Charles Warren, the clash with Georgia was "the most serious crisis in the history of the Court."¹²

Marshall blamed Georgia, Andrew Jackson, and states' rights constitutional theorists for the crisis and in the final analysis he had a point. But neither he nor the Court were innocent bystanders in the events which led to the final

confrontation. Relevant to Georgia's precipitating move against the Cherokees in 1828 and against the Creeks earlier, for example, was Marshall's opinion for the Court in *Johnson v. McIntosh* (1823). This decision was the Court's first major statement on Indian land ownership. At issue was the title to a vast tract of land lying in the state of Illinois between the Illinois and Wabash rivers, which had been sold to private individuals by Indians tribes northwest of the Ohio river in 1773 and 1775. The central inquiry, as Marshall put it, was "confined to the power of Indians to give, and private individuals to receive, a title, which can be sustained in the courts of this country." And that issue turned on the question of whether Indians could in fact legally own land in the first place—and if so how.¹³

Marshall signaled the direction of his thinking in his opening statement when he declared it to be the undisputed "right of society to prescribe those rules by which property may be acquired and preserved." It followed that the legal title to Indian lands depended "entirely on the law of the nation in which they lie" and "not simply those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations...." Concepts of natural justice, in Marshall's reasoning, gave way to positive law, which followed in the conqueror's foot steps. Simply put: discovery bestowed title and was consummated by possession. Marshall did concede that Native Americans were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . ." But the bottom line remained: namely, that the "rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." The principle that the "history of America, from its discovery

to the present day, proves”—and Marshall gave a fourteen-page account of this history—was that the Indians had no innate rights to the land that American law was bound to recognize. Applying the principle to the case at hand, the Court ruled that the Illinois tribes occupied but did not legally have title to the disputed land in 1773 and 1775. And what they did not own they could not sell.¹⁴

There is no way of knowing whether or to what extent Marshall's harshly realistic opinion in *McIntosh* encouraged Georgians who were bent on destroying the Cherokees and stealing their land. A careful reading would suggest that he did not intend that result. In one place, for example, he referred hopefully to the “general rule, that the conquered shall not be wantonly oppressed.” He even looked forward to the day (as he did back in 1784) when Indians would be assimilated with whites — where as “new subjects” they would be governed as “equitably as the old” and where “confidence in their security should gradually banish the painful sense of being separated from their ancient connections.” In the following paragraph, however, he observed with equal assurance that “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.” In any case, the harsh ruling in *McIntosh* remained: Indian law in the United States would be based on the force of arms, the power of the state, and ultimately on the opinion of white Americans who were convinced that they had a God-given right to claim the continent for themselves and their version of civilization. Law, it seemed, comported fully with the inclinations of the Jacksonian Democrats and the racist reviews of the American electorate. The combination boded ill for the Cherokees.¹⁵

Just how threatening it was became clear when Georgians, backed by state law, swarmed into Cherokee territory in search of gold and land. For a brief moment it appeared that President Adams would call out federal troops to resist the intrusion, but Jackson's election ended that possibility. When the new President announced in his inaugural address of 1829 that he favored the removal of the Indians beyond the Mississippi, and when the Jacksonian majority in Congress answered with the Indian removal act of 1830, it became clear that the Marshall Court was the last best hope for the Indians. It was apparent, too, that the pending litigation was destined to be a major political and legal showdown between the states' rights party of President Jackson and the Court of Chief Justice Marshall. Supporting the Cherokees (and ultimately the Court) was an impressive array of legal talent. The leading counsel for the Cherokees was William Wirt, one of the outstanding lawyers of his age. As Attorney General in the Monroe administration, Wirt had issued an opinion in 1824 denying that the Cherokees were a sovereign nation, but by 1829 he was a sincere convert to the Cherokee cause. He was also an avowed opponent of Jackson. His arguments in the two Cherokee cases did much to shape Marshall's opinion. Joining Wirt was John Sergeant of Philadelphia who, as in-house counsel for Nicholas Biddle's Bank, was already at sword's point with the Jacksonians. Wirt and Sergeant were supported informally by an impressive informal coalition of lawyers that included Webster, Henry Clay, and James Kent. Not coincidentally, Wirt, Sergeant, Clay, and Webster would all enter the lists against Jackson in the election of 1832: Webster and Clay as contending candidates for the National Republican Party, Wirt as presidential candidate for the Antimasonic Party, and Sergeant as vice presidential candidate on the Clay ticket.

Also supporting the Indians was the ubiquitous Justice Joseph Story. In addition to being Marshall's right-hand man on the Court, Story was also Dane Professor of law at the newly revitalized Harvard Law School, whose

goal was to train a cadre of elite nationalist lawyers to counteract the newly emergent professional politicians who preached states' rights. He was also already well along in this three-volume **Commentaries on the Constitution**, which aimed to refute Virginia and South Carolina constitutional theory once and for all. It was not accidental that Story's passionate speech in defense of the rights of Indians should have appeared in September 1828, by which time Jackson's presidential campaign was in full swing against Story's friend John Quincy Adams.¹⁶

Thus it was—as Marshall fully appreciated—that law and politics were intertwined from the beginning of the Cherokee litigation. The question—given his oft-stated position that the Supreme Court ought to stick to law and avoid politics—was whether they could now be separated. Wirt's and Sergeant's argument in *Cherokee Nation v. Georgia* (1831) supplied Marshall with the legal ammunition to resolve the dilemma. Wirt had in fact written Marshall "*in Confidence*" in June 1830 seeking advice on the jurisdictional problems facing the Indians—a request that Marshall politely turned down. Wirt's litigation strategy, worked out in close consultation with John Ross, the principal chief of the Cherokees, began to unfold on December 27, 1830, when he served notice to the governor and attorney general of Georgia that a motion in equity would be filed, asking the Supreme Court to enjoin the state of Georgia from enforcing its laws against the Cherokees. The main point of the bill, which Wirt and Sergeant would press on before the Court, was that "the Cherokee Nation of Indians" was "a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate or State, other than their own." And further, that their character as "a sovereign and independent state" as well as the title to their territory, had "been repeatedly recognized, and still stands recognized by the United States, in the various treaties subsisting between their nation and the United States." The Cherokee lands may have

been, as Wirt put it, granted to them by "the Great Spirit, who is the common father of the human family." But what counted more, they were also protected against the incursions of Georgia by federal treaties, which were the supreme law of the land.¹⁷

The strategy was clever. Contending that the Cherokees were a foreign nation as well as a sovereign state, if the Court bought the argument, would mean that the case would come under original jurisdiction, which meant that Georgia would be hard pressed to stall the litigation. It also meant that the Court could render a decision in time to figure in the presidential campaign of 1832. And, in truth, the case involved President Jackson as much as it did Georgia. If the Cherokees' title was guaranteed by treaty, then the president was obliged by his oath of office to uphold their rights against Georgia. A refusal to do so (not an unforeseen possibility) would make a splendid campaign issue for Henry Clay, William Wirt, or Daniel Webster, all of whom were anxious to challenge states' rights in the name of humanitarian principles and in the process prove that Andrew Jackson was a law-defying tyrant. As Wirt framed the question, the issue was (as it had been in *Marbury v. Madison*) executive power versus the rule of law.

Wirt's argument, designed to put Jackson on the spot, also placed Marshall and the Court in an extremely precarious position. Just hearing the case summoned forth fresh memories in Georgia of her long-standing opposition to the Court. True to her tradition of resistance, Georgia again refused to appear before the Court (as it would also do in *Worcester v. Georgia*, which came up under section 25 of the Judiciary Act). State authorities also showed their contempt of federal judicial authority in 1831, when they executed a Cherokee Indian by the name of Corn Tassel in direct defiance of a writ of habeas corpus issued by the Supreme Court and signed personally by Marshall. The message was unmistakable: a decision by the Court in favor of the Cherokees would be treated with contempt. There were other problems, too. A

ringing nationalist decision in 1831 might further divide the Court and possibly even strengthen the nullificationists in South Carolina. In addition, there was the *McIntosh* precedent to be dealt with—or avoided. After ruling decisively that the Indians held title to their land by occupancy only, it would be difficult for the Court to declare them to be a foreign nation with the same sovereign rights as Great Britain, Spain, or France. Or so it appeared.

One point was indisputable: If the Cherokees were going to get their day in Court and if the Court was going to avoid humiliation at the hands of Georgia and the administration, the Chief Justice would have to do some deft maneuvering and creative thinking. He did both in *Cherokee Nation* (1831) and *Worcester v. Georgia* (1832) (and the two cases should be considered in tandem because that is the way Marshall conceived them). The Chief Justice's rather chaotic opinion denying jurisdiction in the first of those cases was not auspicious. But it was also clear from his opening personal statement of sympathy for the Cherokees that something was in the wind. "If the courts were permitted to indulge their sympathies," he observed, "a case better calculated to excite them can scarcely be imagined. A people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands, by successive treaties, each of which contain a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence." To admit personal prejudice in favor of one of the litigants in the case was unusual to say the least. To say that the Cherokees claimed under "successive treaties, each of which contain a solemn guarantee" was even more remarkable. Here Marshall was addressing the merits of the controversy; and, indeed, he appeared to settle it decisively. Having spoken on the merits of the case, he went on to

proclaim that he was *not* speaking on the merits of the case. He could not do so, he said, because the Court had no authority to hear the case under original jurisdiction, since the Cherokees were neither a state in the Union (which Wirt conceded) nor a foreign state (where he put his money).

The jurisdictional conundrum facing both Wirt and the Chief Justice was that the Indians were constitutionally *sui generis*. In his search for a workable doctrinal solution, Marshall, as so often was the case, started with the facts. The main fact was that the Framers did not view Indian tribes as states of the union or as foreign nations. Still a tribe could be "state," that is to say, "a distinct political society, separated from others, capable of managing its own affairs and governing itself . . ." More to the point, the Cherokees as a political entity could negotiate treaties with the United States, which the Court was obliged to enforce. Marshall conceded that there were some anomalies. For example, the Cherokees "acknowledge themselves, in their treaties, to be under the protection of the United States; they admit, that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper . . ." Clearly the Indians were not behaving or being treated as sovereign states or foreign nations. That disability was even more glaring in light of Article I, section 8, clause 3 of the Constitution, which granted power to congress to regulate commerce "with the Indian tribes." This grant of power to Congress put the Indians in a subjugated opposition that cast doubt on their capacity to negotiate Article II treaties.

The conclusion was unavoidable. The Indians were not seen by the Framers either as sovereign foreign states or states of the Union. So what then were they? What legal category described distinct political societies with the power of self government and the right to make treaties that have the force of supreme law but who, in those same treaties, were recognized as "dependent" on the United States and whose

Taken as an isolated statement of doctrine, *Cherokee Nation* appeared to be a significant defeat for the Cherokees, for the Court, and for Marshall as well. But in fact, this truncated opinion was a bridge to *Worcester v. Georgia* (1832). In that decision the Court, with an unusual show of unity, gave the Cherokees one last chance for survival, Marshall one last opportunity to answer his states' rights critics, and the American people a chance to depose "King Andrew." The link connecting the two cases was Marshall's "domestic dependent nation" concept set forth in the first case. Like the fictitious notion of corporate citizenship, which he devised for jurisdictional purposes in *BUS v. Deveaux* (1809), or the "original package" doctrine in *Brown v. Maryland* (1827), this concept was characteristic of Marshall's forays into uncharted constitutional territory. Faced with textual vagueness and the lack of precedent, he fashioned doctrine from the facts of history, in this case the record of Anglo-Indian relations from settlement through the Revolution. If Marshall's "domestic dependent nations" doctrine was full of ambiguity, so also was the historical record. From the beginning, Native Americans were simultaneously respected and feared, admired for their nobility and denigrated as savages, respected as self-governing political entities with the authority to negotiate with England, and then treated as hapless and helpless victims. Marshall refused to tidy up history or doctrine. Indian tribes looked upon themselves, and had been consistently denominated, as nations; but no one, least of all the Framers, spoke of them as foreign states. They had been truly independent, but by 1831 the force of American arms and numbers had made them dependent and vulnerable. Marshall's "domestic dependent nations" concept recognized the reality of this dependency. At the same time, it acknowledged the power of the Cherokees to negotiate treaties with the United States government. The Cherokees may have been dependent, but the title to their land was protected by treaties, which by Article VI of the Constitution were the supreme law of the land.

Marshall had done what he was famous for doing: reducing complex problems into simple and seemingly irrefutable propositions. As he put it, the Cherokee cause boiled down to "a mere question of right." As such it "might perhaps be decided by this court in a proper case with proper parties."²² Never mind that he expounded law on a case not yet before the Court. Forget the fact that the opinion itself lacked the sweeping power of sustained argument. For the Cherokees, Marshall's cobbled opinion was a reprieve. For the Chief Justice and the Court it was a chance to soften the harshness of *McIntosh* and perhaps even put the Court and its law on the side of morality. To make the moral point, Marshall not only encouraged Thompson and Story to dissent (an act of considerable discretionary authority) but urged Thompson to enter his dissent in writing (which he did with Story's silent concurrence).

In short, Marshall pressed to the outer limits of his authority as Chief Justice (if not beyond) to keep the Cherokee cause alive. Wirt, Sergeant, and the Cherokees clearly got the message. While they were pondering how to get Georgia's Indian law before the Court in a proper case, as Marshall had suggested they do, the problem was solved for them by two divinely stubborn New England missionaries who insisted on preaching to the Cherokees. Georgia arrested them for residing in Cherokee territory in violation of the state law of December 22, 1830. Upon refusing to leave, they were tried in the Superior Court of Gwinnett County, found guilty, and sentenced to four years at hard labor. Rather than accept the pardon from the governor and leave, they retained Wirt, who appealed the decision of the Gwinnett County Court (as the highest state court with jurisdiction in the case) via a writ of error to the Supreme Court. On the merits they contended that the state law under which Worcester and Butler were convicted violated Cherokee property rights as guaranteed by federal treaty.

Circumstances made *Worcester v. Georgia* Marshall's ordeal by fire. It was also one of the

Court's most dramatic moments, as the aging Chief read his opinion to a hushed audience in a voice that was barely audible. The words he spoke, however, were forceful and uncompromising, but this time they were supported by all his colleagues except McLean (whose concurrence did not in fact deviate significantly from Marshall's majority opinion) and Baldwin (who dissented briefly and unpersuasively). It was one of his longest and most thoroughly researched opinions. Without a doubt, he relished the work at hand. "This cause," he noted at the outset, "in every point of view in which it can be placed, is of the deepest interest." Before the bar of the Court, though not represented by counsel, "is a State, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States." Worcester, the plaintiff, stands condemned to four years of hard labor in the state penitentiary under a state law which "he alleges to be repugnant to the Constitution, laws, and treaties of the United States." In sum, "the legislative power of the State, the controlling power of the Constitution and the laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered." At stake just as surely was the reputation of the Court as it confronted a state that refused to acknowledge its jurisdiction and was certain to defy its decision, backed by a president who was in turn supported by the Democratic majority in Congress.²³

Marshall opened the main part of his opinion with a reaffirmation of the Court's appellate powers under Section 25 of the Judiciary Act of 1789, the section that had been the target of states' rights animus in Virginia and South Carolina and that the state of Georgia now openly rejected. Marshall's reasoning was unanswerable. Worcester was imprisoned under a state law that he averred correctly to be in direct violation of federal treaties with the Cherokees. The highest court of Georgia with final jurisdic-

tion in the matter (in this case the county court for Gwinnett County) ruled against Worcester's claims under federal treaty law. The case came precisely within the meaning of Section 25. As required by federal statute, the Court had issued the writ of error to the Gwinnett County Court. The clerk of that Court, upon receipt of the writ (and apparently not mindful of the states' determination to stonewall the litigation), had forwarded the records of the trial court as required by law. The Court, Marshall protested (as was his wont to do in controversial cases), had no choice but to do its duty, "however unpleasant" it was. That duty, he explained (covering his tracks in *Cherokee Nation*), did not include massaging the docket. As he put it, presumably with a straight face: "Those who fill the judicial department have no discretion in selecting the subjects to be brought before them."²⁴

The substantive question in *Worcester*, which Marshall now addressed, was whether Georgia's laws declaring sovereignty over the Cherokees violated federal treaties with the Indians guaranteeing them possession. His first point reaffirmed the reasoning in *McIntosh*: that legal principles had to be rooted in historical reality; that the history of Indian-White relations was the story of conquest and dominance; that discovery backed by force divested the Indians of any and all innate, claims to their homeland; and finally, that the Indians were at the mercy of sovereign power, first that of England and then of the United States.²⁵ Read in the light of *McIntosh*, the "domestic, dependent nations" concept in *Cherokee Nation* seemed to boil down simply to dependency, and with that, the inevitable extermination of the Cherokees with the Court's compliance.

Such, however, was not the case. What Marshall attempted to do—with more than a touch of paternalism and noblesse oblige—was to make the concepts of sovereignty and dependency work for the Cherokees rather than against them. The key to the conversion was his reading of the "domestic dependent na-



tions” concept advanced in *Cherokee Nation*. Demeaning it was, but it got Marshall to his main point: that the Cherokees were capable of establishing treaty relations with the United States that were recognized by the Constitution and binding on Georgia. To bolster his point, he cited Vattel’s **Law of Nations**, which conveniently defined treaties between nations as moral contracts of a binding nature. His main authority, however, was not Vattel but colonial history (concerning which, as Washington’s biographer, he was somewhat of an expert). Building on the foundation laid in *McIntosh*, that the English sovereign had sole authority to deal with the Indians, he chronicled the actual history of English-Indian relations. What he recounted was not just a story of conquest and dominance but rather an effort on the part of the Crown to treat the Indians with respect as befitted the fact that they were self-governing communities empowered like other nations to shape their own destiny. It was true, Marshall admitted, that royal charters granted land “from the Atlantic to the South Sea.” Though they conveyed title to the land with the right to sell and often specified the right of colonies to

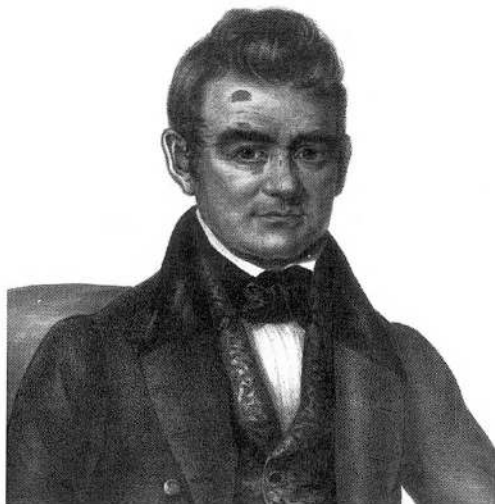
wage war against the natives, these charters did not, however, annihilate Indian rights. As Marshall put it succinctly: “... these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest.” Nowhere was the power given or attempted on the part of the crown to interfere in the internal affairs of the Indians—or at least no farther “than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.” The dispositive point was that the Indians were treated as self-governing nations by the English with the power to negotiate binding treaties—a point that he made by copious citations from English policy statements on the eve of the Revolution.²⁶

What appears at first glance in Marshall’s opinion to be a tedious recital of the historical record is a carefully crafted argument establishing a set of principles which defined relations between the Indians and the United States from the Revolution to the Constitution and beyond. The first principle was normative; the second legal and constitutional. The normative principle, both humane and practical, was that the best way to ensure peace on the fron-



tier is to respect the self-governing nature of Indian nations and to guarantee their collective rights, including the right to the territory they occupy. Such in fact was the specific guarantee given to the Cherokees was against the claims of Georgia in the Treaty of Holston 1790, the seventh article of which solemnly guaranteed "to the Cherokee all their lands not hereby ceded." The same guarantee, moreover, was recognized in several acts of Congress passed to regulate trade and intercourse with the Indians. "All these acts, and especially that of 1802, which is still in force manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the land within those boundaries, which is not only acknowledged, but guaranteed by the United States." Particularly relevant to the situation of the Cherokees was the Act of 1819, which "avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect his object by civilizing and converting them from hunters into agriculturists."²⁷

The legal principle, first adumbrated as an *obiter dictum* in *Cherokee Nation*, was now stated as the law of the land: "The Indian nations had always been considered as distinct, independent political communities. . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." Nor did it matter, continued Marshall, citing *Vattel* again, that the terms of the treaty were such as



William Wirt (opposite, top) and John Sergeant (opposite, bottom) argued before the Supreme Court in 1831 that the Cherokee Nation was a sovereign state, and had been repeatedly recognized as such in federal treaties, which were the supreme law of the land. Wirt worked out this litigating strategy in close consultation with John Ross (above), the principal chief of the Cherokees.

to acknowledge the dependency of the Cherokees. It is "the settled doctrine of the law of nations . . . that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection."

"A weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State." It followed, and the Court ruled, that the laws passed by Georgia in 1828, which claimed sovereignty over Cherokee lands guaranteed by federal treaties, and confirmed in numerous federal statutes, were null and void as repugnant to the Constitution. So, too, was the decision of the Superior Court for the County of Gwinnett, which condemned Samuel Worcester to four years of hard labor.²⁸

The reaction to the Court's decision was impassioned and predictable. Jackson's opponents (especially those in New England) viewed it as a substantive victory for the Cherokees and a moral triumph for the Court. The Jacksonians, especially the radical states' rights

wing of the party, condemned the decision as but another example of judicial tyranny. More threateningly, Georgia denounced the Court and proceeded to ignore its decision entirely. In defying the Court, Georgians assumed that Jackson stood behind them. Historians over the years went along with the assumption, quoting the President's immortal words: "John Marshall has made his decision, now let him enforce it." As it turns out these famous words were never spoken. This leads us to wonder whether the President who moved so forcefully against Union-busting in South Carolina would have countenanced it in Georgia. Jackson did not agree with the Marshall Court's nationalist jurisprudence, to be sure, and was pledged to undo some of it. But, like the Chief Justice, he was also a nationalist. And, unlike Jefferson, he bore no personal animus against Marshall and in fact had considerable admiration for him. But, in any case, the President's commitment to the rule of law was never put to the test. Due to a glitch in federal statute law governing the appeals process, the Court's formal reversal order to the Gwinnett County Court was never issued. Technically, Georgia did not have to defy the Court, and Jackson did not have to take a public stand on the matter.

Still, the fact remains that the Jackson administration worked in various ways to subvert the decision and put the Court in its place. The President was on record, as we have seen, favoring removal of all eastern Indians beyond the Mississippi. Congress supported him with the Indian Removal Act of 1830, which laid down general terms governing the negotiation of Indian removal. In light of this policy, Jackson could have hardly come out in favor of the *Worcester* decision. Being silent, when he should have upheld the law of the land, said it all. There were other problems, too. Despite the favorable decision of the Court, the Cherokees themselves were divided on the question of whether (and how) to counteract the continued incursions of Georgians into their land in defiance of *Worcester*. A sizeable number, particularly those who resisted the policy of as-

similation (and who distrusted the mixed breed elite who presided over the process), were tantalized by the possibility that migration west might lead to the revitalization of traditional Cherokee culture. Probably more important was the realization among elite Cherokees that a decision of the Court was meaningless without executive willingness to use federal force to back it up. That possibility, uncertain at best, became even more unlikely when it became clear that pressure on Jackson to intervene against Georgia might detract from his willingness to use force to suppress nullification in South Carolina. The Court's decision was further undercut by several of the Cherokees' lawyers who were secretly working for Jackson and removal (which did not stop them from sending the Indians exorbitant fee bills). Several stalwart supporters of the Indians, including Worcester, also advised that a favorable treaty of removal might be preferable to pointless resistance. In December 1835, the Treaty of New Echota was signed, by which the Cherokee's surrendered their land in Georgia in return for happy hunting grounds beyond the Mississippi. On their way there, several thousand men, women, and children died. When the remaining group arrived, as some had predicted, they found themselves at odds with other Indians tribes already in possession of the land. From the Cherokee's point of view, Marshall's opinion for the Court, like the treaties they were now constitutionally entitled to negotiate, was worth no more than the paper it was written on.²⁹

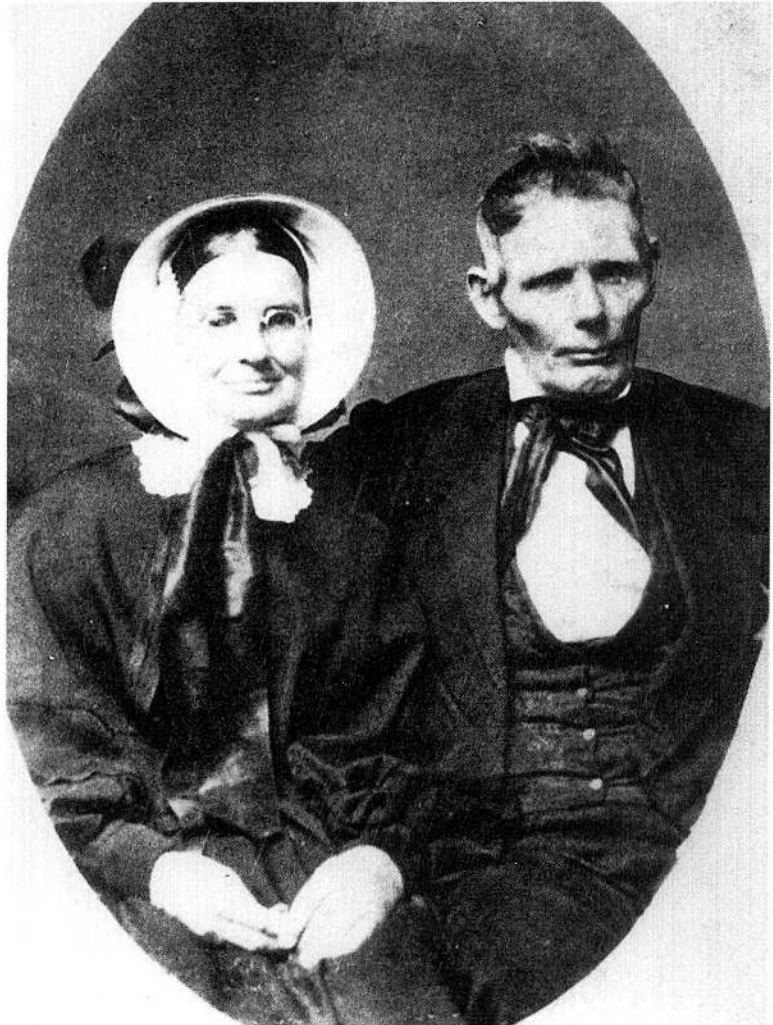
For those who want to assess the nature of Marshall's leadership and the nature of his judging, and the role of his court in history, however, the opinion is revealing. What it seems at first glance to demonstrate is precisely what contemporary critics like Thomas Jefferson always maintained: that Marshall was essentially a political judge with a genius for intrigue and manipulation. In fact, after the decision in *Worcester*, rumors circulated that "judges Marshall, Thompson and Story, and Messrs. Clay, Webster, Sergeant and Everett, had held a

caucus, at which it was determined that the Cherokee case should be decided 'solely upon political grounds!'" Clay, Webster, and Everett, of course, denied such a meeting in a letter dated Washington, April 10, 1832.³⁰ They probably told the literal truth. But given Marshall's discretionary powers as Chief Justice and his authority and well-honed working relationship with leading members of the Supreme Court bar, he did not have to resort to political caucusing to shape the business of the Court. In the Cherokee litigation, as we have seen, he did just that: by inviting counsel for the Cherokees to try again, by assuring them that justice and the Court were on the side of the Indians, and even more remarkably, by advancing the legal grounds on which the Cherokees might prevail

over Georgia.

Finally, there is compelling circumstantial evidence that Marshall managed the litigation process along so as to make Jackson's Indian policy, especially as it applied to the Cherokees, an issue in the presidential election of 1832. His encouragement of the dissenters, his suggestion to Thompson to write out his dissent and have it printed, fits into this scenario. So, too, does the fact that he wanted Jackson defeated so that he might resign from the Court with the knowledge that his successor (possibly Justice Story) might be of a Marshallian persuasion. The problem with Marshall's plan and Story's aspirations was that the American people did *not* do their moral duty, as Story had hoped they would. Instead, they ignored the

Reverend Samuel A. Worcester and his second wife, Ermina Nash Worcester, were New England missionaries who came to Georgia to evangelize the Cherokees. Worcester stubbornly refused to accept a pardon from the governor of Georgia when he was sentenced to four years of hard labor for residing in Cherokee territory in violation of state law. Instead, he appealed his case via writ of error up to the Supreme Court.



plight of the Cherokees and elected Old Hickory to a second term and left the Court to fend for itself. Given Marshall's deep conservative hostility to democratic government, it is surprising that he really thought they might actually do anything different. Perhaps he didn't.

In any case, Marshall was determined that the Court should do *its* constitutional duty. As he saw it, this was to develop itself into a legal institution and its law into a consistent body of principles that adhered to the intent of the Framers. Although it may not seem so in light of his bold maneuvering, Marshall's substantive rulings in the Cherokee cases were generally true to that standard. One is struck by the coherence and doctrinal interconnectedness—not just of the two Indian cases but of those cases with *McIntosh*. By refusing to apply natural law to Indian rights in that case, by emphasizing sovereignty instead, he pushed doctrinal development in the direction of positive law rights based on federal treaty power, the main point developed in *Worcester*. The domestic, dependent nations doctrine in *Cherokee Nation* not only tied all three cases together but aptly illustrates Marshall's approach to interpretation when the language of the Constitution was not self-explanatory. It could, of course, be argued that he simply made up that doctrine in order to get where he wanted to go: that is, to put the Constitution on the side of the Cherokees and put Georgia and states' rights theorists in their place. No doubt, too, he was personally gratified to soften the impact of *McIntosh*, and harmonize the law of the land with his personal feelings about Native Americans.

But Marshall did not simply make up the law in the Indian cases, if by that we mean fabricate it out of whole cloth. What he did instead was to apply common law reasoning to constitutional adjudication. In both of the Cherokee cases, and in *McIntosh* as well, he was guided and restrained by historical experience: "the actual state of things," the examples that "our history furnishes," the "history of the day."³¹

Long usage informed constitutional adjudication just as it traditionally informed the common law. This is not to deny the intellectual creativity of Marshall's judging. It is to argue that Marshall's opinions in the Indian cases were reasoned law not raw politics. Certainly his Cherokee opinions fit consistently into the system of constitutional adjudication he had fashioned as Chief Justice. From *Marbury* on, he used the power of his position as head of the Court boldly and expansively, and always with an eye to presenting the Court to its enemies and its friends alike as a unified institution dedicated to the rule of law. His rulings in the Indian cases, like other of his constitutional opinions (with the possible exception of his dissent in *Ogden v. Saunders*, 1827) were positivist in nature. Marshall preferred the realities of sovereignty and power, leaving natural law calculations and metaphysical speculation to philosophers and theorists. As Chief Justice he remained the down-to-earth common lawyer that he had been.

Which brings us to the final aspect of the Cherokee cases—one is tempted to say, their central aspect. This was Marshall's conviction that the Supreme Court was *the* preeminent republican institution, one essential to the survival of a republic moving fast toward popular democracy. Jacksonian America, in Marshall's view, pitted the disinterested rule of law (of which the Court was the only remaining repository) against the new political party system designed to enthrone self-interest. His and the Court's great enemies were state politicians steeped in self-interest backed by Presidents who had surrendered republican *noblesse oblige* for partisan popularity and political power. In this light, the Cherokee cases were Marshall's last campaign in the long war for republican principles. He was pessimistic about the outcome, and, in fact, his assessment was correct. Georgia flaunted the Court and President Jackson left it twisting in the breeze. When the American electorate reelected Old Hickory for a second term, they put their imprimatur on the dual defeat.

Still, the aging Chief Justice went out fighting in the Cherokee cases. If he took liberties to get the issues before the Court (shades of *Marbury*), he dealt with them as matters of law once they got there. He carried a badly divided Court with him (with the exception of Baldwin whose madness made him largely irrelevant). He managed one last time to reaffirm the appellate authority of the Court under Section 25, while that key provision was under assault in both Congress and the states. Finally, in an age where racism, land greed, and cultural arrogance mingled to destroy an innocent people, the Chief Justice managed to put the Court on the side of rationality and justice. True, his opinion in *Worcester*, in its ramshackle functionalism and work-a-day style, was a far cry from his sweeping constitutional state papers in cases like *McCulloch* and *Gibbons*. And sadly, it did not help the Cherokees in their struggle to survive as a people. It did, however, reaffirm the Court's position as a legal institution and perhaps a republican one as well. More than any other of the Marshall Court's decisions, *Worcester* joined law and morality. He presided over the entire process while he was gravely ill and crushed by the death of his wife, while the Court he loved was disintegrating before his eyes, and while his enemies were everywhere ascendent. In his final battle in "the campaign of history," the old soldier of republicanism went down valiantly. Given the odds against him, it may well have been his finest moment.

Endnotes

¹ Wheaton 304 (1816); 4 Wheaton 316 (1819); 6 Wheaton 264 (1821); 9 Wheaton 1 (1824).

² Albert Beveridge, *The Life of John Marshall* (Boston and New York, 1919) IV, 462-466, explores Marshall's abstinence from politics as Chief Justice and his decision to vote in 1828.

³ *Providence Bank v. Billings* 4 Peters 516 (1830); *Willson v. Blackbird Creek Marsh Co.* 2 Peters 245 (1829); *Steamboat Thomas Jefferson* 10 Wheaton 48 (1825); *Mimi Queen v. Hepburn* 7 Cranch 290 (1813);

The Antelope 10 Wheaton 66 (1825); *Barron v. Baltimore* 7 Peters 243 (1833).

⁴ 12 Wheaton 213 (1827).

⁵ Calhoun to Maxcy, 1 September 1831, Galloway, Maxcy, Marko Papers, Library of Congress.

⁶ *Chisholm v. Georgia* 2 Dallas 419 (1792); *Fletcher v. Peck* 6 Cranch 87 (1810).

⁷ *Craig v. Missouri* 4 Peters 410 (1830). Marshall discuss the "revolution" on the Court in Marshall to Story, 15 October 1830, Story Papers, Mass. Hist. Society. Also see Marshall to Story, 3 May 1831, Marshall Papers, Library of Congress.

⁸ Marshall, *The Life of George Washington*, 2d ed. (Philadelphia 1805) I, 279. Also see Marshall to Augustine Davis, 13 November 1793, *Papers of John Marshall* (Chapel Hill, N.C.), II 231-238.

⁹ Marshall to James Monroe, 2 December 1784, *Id.* I, 131.

¹⁰ *Id.* I, 218-221.

¹¹ Story's speech is reprinted in William W. Story, ed., *Miscellaneous Writings of Joseph Story* (Boston 1852) 408-474. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). Marshall to Story, 29 October 1828, Story Papers, Mass. Hist. Soc.

¹² For developments among the Cherokees in the 1820s see William G. McLoughlin, *Cherokee Renaissance in the New Republic* (Princeton, 1986). The constitutional and legal issues surrounding the Cherokee cases and the Marshall Court are treated definitively in G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York and London, 1988) chap. 10. Charles Warren refers to the Cherokee cases the "most serious crisis" in *The Supreme Court in United States History* (Boston, 1926) I, 729.

¹³ *Johnson v. McIntosh* 8 Wheaton 54 at 572.

¹⁴ *Id.* at 572-73, 574-88,

¹⁵ *Id.* at 589-90.

¹⁶ For Story's conservative activities see R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, 1985), especially chapter 5.

¹⁷ *Cherokee Nation v. Georgia* 5 Peters 1 (1831) at 3.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 16-20.

²⁰ *Id.* at 17, 25, 28, 21.

²¹ *BUS v. Deveaux* 5 Cranch 61 (1809); *Brown v. Maryland* 12 Wheaton 419 (1827)

²² *Cherokee Nation v. Georgia* 5 Peters 515 at 536.

²³ *Worcester v. Georgia* 6 Peters 515 at 536.

²⁴ *Id.* at 541.

²⁵ *Id.* at 543-47.

²⁶ *Id.* at 546-48.

²⁷ *Id.* at 556-57.

²⁸ *Id.* at 559-61.

²⁹ The full story of the Cherokees is movingly recounted in

Thurman Wilkins, **Cherokee Tragedy: The Story of the Ridge Family and the Decimation of a People** (New York, 1970).

³⁰ See *Niles' Register*, 28 April 1832, at 155.

³¹ 6 Peters at 546, 547, 551.

Two Asian Laundry Cases

David E. Bernstein*

In *Yick Wo v. Hopkins*,¹ the Supreme Court held that a facially neutral laundry licensing regulation was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment because the regulation was only enforced against Chinese laundrymen. Even casual students of American constitutional history are likely to be aware that *Yick Wo* arose out of one of many legal challenges launched by Chinese laundrymen against San Francisco ordinances that were intended to drive the Chinese out of the laundry business.

Very few people, on the other hand, know that *Yick Wo* did not end government harassment of Asian-owned laundries, nor did it end litigation over discriminatory laundry laws before the U.S. Supreme Court. Montana continued its long-term legislative campaign against Chinese laundries, culminating in the 1912 Supreme Court case of *Quong Wing v. Kirkendall*.² Over a decade after *Yick Wo* was decided, meanwhile, San Francisco authorities began to discriminate against the growing number of Japanese-owned laundries, leading to the 1902 Supreme Court case of *Tsukamoto v. Lackman*.³

This article discusses *Quong Wing* and *Tsukamoto* in their respective historical contexts. The history of these cases demonstrates the persistence of Asian immigrants in fighting for their constitutional rights, through both lawsuits and civil disobedience. These cases demonstrate that even after *Yick Wo*, Asian immigrant entrepreneurs who went into the laundry business were by no means assured that courts

would protect their right to earn a living from hostile local governments.

Quong Wing v. Kirkendall

In the 1860s, migrants, including Chinese, began to settle Montana. By 1870, 1,943 Chinese resided in Montana, ten percent of the territory's population.⁴ Several dozen of the Montana Chinese opened laundries. Running

a laundry appealed to impoverished Chinese immigrants because it did not require much knowledge of English or a large capital investment—a shack with a stove and a sufficient water supply usually sufficed.⁵ Also, owning a business was a status symbol in the American Chinese community and in the immigrant's home village, to which the laundry owner generally planned to return.⁶ Finally, the laundry business was attractive because the Chinese hoped it would not raise the competitive ire of whites; few white women and even fewer men wanted to work as launderers, a profession considered arduous and unpleasant.

Unfortunately for the Chinese laundrymen, despite the usefulness of their profession, and the fact that they had few white competitors, anti-Chinese forces refused to leave them in peace. As in other Western locales, Chinese laundrymen in Montana quickly became a target of rabble-rousers, demagogues, hooligans, and racists. Anti-Chinese activists charged that the Chinese crowded out widows and other single women from working as launderers, forcing them to turn to prostitution.⁷ A Helena newspaper complained that “[i]t is hard enough now for a white woman to make a living in the few, branches of honest livelihood that are open to them and these avenues of competence are being rapidly filled up with Chinamen, who actually wrest the wash-tub from them, and invade those provinces of labor belonging to women.”⁸

This propaganda was based on mostly fictitious premises, serving as a pretext for pre-existing anti-Chinese sentiment. The women of frontier Helena, like the men, were overwhelmingly unattached and interested in making a fast buck, not always through legitimate means. Because of the shortage of women on the frontier, and white men's refusal to do “women's work,” laundering was sufficiently lucrative that a few women took in laundry before the Chinese arrived, only to be displaced by Chinese working for more reasonable rates.⁹ However, the picture drawn by Sinophobes of many virtuous young women and poor wid-

ows being forced out of the laundry trade in Helena in 1866 “just does not fit.”¹⁰

Nevertheless, on January 27, 1866, a Helena committee placed a notice in the local newspaper complaining about “Mongolian Hordes” driving white women out of the laundry business.¹¹ The committee called on the community to boycott all Chinese launderers.¹² The newspaper in which the advertisement appeared editorialized that the committee had its support “against the almond-eyed citizens of the John [a diminutive form of the pejorative, ‘John Chinaman’] persuasion.”¹³

Several Chinese laundrymen responded with a plea of their own:

GOOD CHINAMEN

This is to certify that we, the undersigned, are good Chinamen and have lived in California and other parts of the United States, and that we have at all times been willing to abide by all the laws of the United States, and the States and Territories in which we have lived. And are now willing to deport ourselves as good law abiding citizens of Montana Territory, and ask but that protection that the liberal and good government of this country permits us to enjoy. We pay all our taxes and assessments, and only ask that the good people of Montana may let us earn an honest living by the sweat of our brow.¹⁴

Apparently, the proposed boycott never got off the ground,¹⁵ assumingly because the Chinese performed an extremely useful service in frontier, mostly bachelor Helena. As for Helena women, the vast majority of them—especially those with families—were grateful that the Chinese relieved them of the need to do laundry.¹⁶ As Shover points out, “[l]aundry—attended by weekly lifting, carrying, scrubbing, bleaching, starching, hanging, dampening and pressing with five and ten

pound irons heated year round on blazing stoves—was the most despised job in women's sphere."¹⁷

Anti-Chinese forces in Montana soon turned to the legislature for assistance in riding the state of Chinese laundrymen. Beginning in 1869, Montana passed a series of licensing acts that imposed a quarterly tax of \$15.00 on all men, but not women, engaged in the laundry business.¹⁸ The tax averaged fully twenty-five percent of the gross earnings of a Chinese laundryman.¹⁹ Although the Chinese were not specifically mentioned in the law, "[t]he intent of the law was obviously discriminatory."²⁰ This law eventually ceased to be enforced, perhaps because of an adverse legal ruling, and the laundries were no longer subject to a license fee.²¹

Populist agitation against Chinese laundrymen in Montana continued over the next few decades. Whites organized boycotts of the Chinese in Butte, Montana, in the mid-1880s and early 1890s.²² A Chinese man who attempted to open a laundry in Great Falls, Montana, in 1893, was arrested, jailed, smuggled out of town at night, and threatened with death if he dared to return. *The Great Falls Tribune* insisted that "as long as the stars and stripes float over Great Falls no pig-tailed saffron will be allowed to call this city his home."²³

By the 1890s, many Chinese in Montana who had been working in the mines were forced out by a combination of violence and hostile legislation.²⁴ Some Chinese left Montana, but others moved to urban areas and opened businesses. Chinese men quickly became a dominant presence in the laundry business in many Montana cities. In Butte in 1890, for example, Chinese men owned at least four laundries. By 1895 this grew to eighteen, against eleven white-owned laundries.²⁵ The growing number of Chinese laundries led to the following attack in a union-sponsored magazine:

Our laundries do not receive the support they are entitled to. One hundred and twenty five Chinamen come in

direct competition with them. The filthy, nasty habits of the Chinese, especially when sprinkling clothes, should be alone sufficient to prevent John Chinamen from being given the work that belongs to our men and women.²⁶

The success of Chinese laundries led to calls for new restrictive legislation. In 1894, Butte passed a law requiring all men in the laundry industry to pay a \$5 per quarter license fee.²⁷ A Montana statute promulgated in 1895 required every male engaged in the hand laundry business to pay a license fee of ten dollars per quarter; if the owner had one or more employees, the license fee rose to twenty-five dollars.²⁸ The law exempted steam laundries, which were all owned and operated by whites,²⁹ along with female-operated hand laundries, which were also all white-owned.³⁰ In fact, the law applied exclusively, or nearly so, to Chinese laundrymen.

Sam Toi, a laundryman who had one "helper," challenged the law, and emerged victorious at the district court level. The state then appealed to the Montana Supreme Court.³¹ *Yick Wo* seemed to require that the law be declared unconstitutional, as it only applied to the Chinese. The court, however, reversed, finding that the fact that the law in practice applied only to Chinese laundrymen was "purely fortuitous."³² After all, said the court, on its face the law "applies to all male laundrymen, of every condition and nationality."³³ The discriminatory intent of the law, meanwhile, was irrelevant under *Soon Hing v. Crowley*,³⁴ a laundry case decided by the Supreme Court a year before *Yick Wo*.

Despite the adverse *Toi* decision, the Chinese continued to fight the tax law. The following year, the Montana Supreme Court once again upheld the statute in *State v. Camp Sing*.³⁵ After a rather confused discussion, the court concluded that "the unconstitutionality of the law in question is not so apparent as to justify this court in declaring the license law void."³⁶

While the Montana Supreme Court proved unsympathetic to the Chinese laundrymen, they emerged victorious in federal district court.³⁷ Yot Sang, a Chinese laundryman in Helena, Montana, with one employee, was arrested for failing to pay the \$25 license fee.³⁸ He then filed a petition for a writ of habeas corpus with the district court.³⁹

Although the court cited *Yick Wo* in passing, it did not find that the statute was racially discriminatory. Rather, the court held that the law was unconstitutional because it was “class” or “partial” legislation that gave similarly situated people, in this case steam and hand laundry owners, different legal rights. The court asked rhetorically: “Is it not apparent that a law which requires of one man conducting a laundry business, employing one or more persons, a license of \$25, and of another man conducting such a business a license of \$10, is subjecting the one to a burden not imposed upon the other?”⁴⁰

The court declared that the law’s discrimination between hand and steam laundries could not be sustained “[u]nless there is something so different in the conducting of a laundry by steam to that of the carrying on that business by any other means.”⁴¹ The court noted that the state did not claim that “the mode of carrying on a laundry by means other than steam is more dangerous to health than a steam laundry, or that it is more conducive to the spread of fire.”⁴² The court also explained that the state did not contend “that the conducting of a laundry by means other than steam involves a greater outlay of capital, or that a greater amount of business is conducted by hand than by steam.”⁴³ Indeed, added the court, “[t]o a man of ordinary observation the reverse would seem to be the fact.”⁴⁴ The court held that the law was unconstitutional, and ordered that Yot Sang be released.⁴⁵ The Supreme Court of the United States reversed this decision on procedural grounds, but the state, recognizing that its law had been declared unconstitutional in federal court, ceased to enforce it.

With the license law unenforceable after

Yot Sang, anti-Chinese forces, led by local labor unions, launched boycotts of Chinese laundries in various cities over the next decade.⁴⁶ In late 1896, the proprietors of three leading steam laundries in Butte, along with local labor unions, launched a boycott of Chinese businesses.⁴⁷ In their literature, the boycott organizers emphasized the Chinese’s purported cultural and racial inferiority, as well as their alleged displacement of female workers.⁴⁸ The boycotters argued that because of the Chinese unemployed white girls could only find jobs as prostitutes, and that “they were drifting towards the hop joints.”⁴⁹ The labor press added that Chinese laundries were “pest houses” and that Chinese laundrymen were “leperous [sic] and mouth-spraying.”⁵⁰

The boycotts ultimately failed,⁵¹ but the Chinese’s foes again turned to legislation to harass the laundrymen. In 1897, Montana passed a new licensing law targeting Chinese laundrymen. The statute required that all persons engaged in the laundry business pay a tax of \$10 per quarter.⁵² Like the earlier statute, this one exempted steam laundries, and hand laundries employing women in which fewer than two women were employed. Once again, then, the statute applied exclusively to Chinese laundrymen.

On October 7, 1908, Thomas Kirkendall, the Treasurer of Lewis and Clark County, demanded that laundryman Quong Wing pay the \$10 quarterly fee. Quong Wing paid under protest, and then filed a complaint in Montana District Court to recover the \$10.⁵³ For reasons apparently related to resentment over Quong Wing’s assimilation into white society, the Chinese establishment in Butte opposed the lawsuit. One Chinese resident wrote:

The Chinese told Quong Wing not to start the lawsuit; they told him he would lose it. But he went ahead and did it anyhow. He listened to some of his “Mission Friends”; they told him the law was unfair. They would help him; the lawyer was a

friend of one of the teachers at the Mission who taught him and the newcomers English. Quong Wing wanted to show how smart he was; he could speak some English and most of us couldn't. Well, he didn't get the support of the merchants in Chinatown.⁵⁴

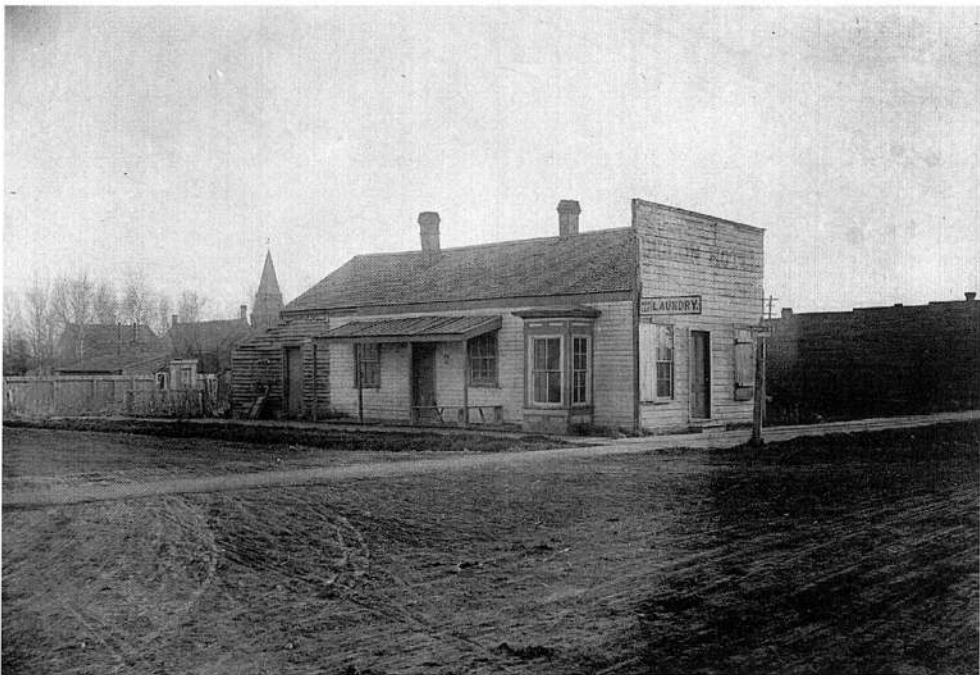
Following the reasoning of the favorable *Yot Sang* opinion, Quong Wing's complaint alleged that the licensing statute was an unconstitutional violation of the Equal Protection Clause of the Constitution because it only applied to hand laundries and not to steam laundries, and only to men.⁵⁵ The district court agreed, and ordered that the \$10 be returned to Quong Wing.⁵⁶

The Montana Supreme Court once again reversed.⁵⁷ The court found that if the statute classified laundries into the separate categories of steam laundries and hand laundries this

was constitutionally permitted because the state legislature "probably had some good reason for exempting steam laundry proprietors."⁵⁸ The court argued in the alternative that the statute did not classify laundries. Rather, the court contended, the legislature simply indulged in its constitutional power to impose a tax on a particular occupation, hand laundries.⁵⁹ Because the statute applied to all male hand laundriers, the law was "uniform and reasonable."⁶⁰

The court then addressed Quong Wing's claim that the license tax was unconstitutional because it did not apply to any women, or groups of two women, engaged in the laundry trade. Although the judges were not able to muster any sympathy for the struggling Chinese laundrymen, they had abundant concern for white female launderers.

The court noted that in every community there are "unfortunate women" who are obliged to take in washing for a living.⁶¹ The court rhapsodized



Several dozen of the nearly 2,000 Chinese immigrants who had settled in Montana by 1870 opened laundries. Running a laundry appealed to impoverished Chinese immigrants because it did not require much knowledge of English or a large capital investment—a shack with a stove and a sufficient water supply usually sufficed. Also, owning a business was a status symbol in the American Chinese community and in the immigrant's home village, to which the laundry owner generally planned to return. Above is the Wah Lee Laundry in Dillon.

sodized: "Some are widows, some have been abandoned, and others are caring for invalid husbands, and all, generally, have small children to support."⁶² According to the court, these women "do not compete with those laundries which are operated for profit, any more than do those who, from necessity or choice, perform the laundry work for one private family."⁶³ The court concluded that the legislature was following "the natural dictates of humanity, and seems to have been actuated by sentiments altogether praiseworthy and commendable."⁶⁴ To further justify its decision, the court quoted liberally from the U.S. Supreme Court's opinion in *Muller v. Oregon*,⁶⁵ which upheld a maximum hours statute that applied only to women in order to protect women from industrial competition with men.⁶⁶

Quong Wing appealed to the U.S. Supreme Court. Quong Wing's attorney never directly raised the issue of race discrimination in his brief, and apparently disclaimed the issue entirely at oral argument.⁶⁷ Instead, relying on the reasoning of *Yot Sang*, the attorney argued that the tax law was unequal class legislation that unreasonably and unconstitutionally discriminated against male-owned hand laundries in favor of steam laundries and women-owned hand laundries.⁶⁸ Montana's brief also generally avoided the race issue, but the state did note that the statute was facially neutral regarding race.⁶⁹

In an opinion authored by Justice Oliver Wendell Holmes, Jr., the Court affirmed the Montana Supreme Court's opinion.⁷⁰ Holmes began by noting that "[t]he case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women."⁷¹ He then held, for the Court, that a "state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry."⁷² Thus, preferring steam to hand laundries was permissible.

Moreover, added Holmes, a state may attempt to lessen burdens on women as the Su-

preme Court permitted with regard to hours of work in *Muller v. Oregon*.⁷³ After all, Holmes continued, "the 14th Amendment does not interfere by creating a fictitious equality where there is a real difference."⁷⁴ Holmes did not address the differences between a maximum hours law, which might directly protect the health of women, and discriminatory taxation, which gives women a benefit unrelated to their purportedly frailer constitutions.

Holmes then specified that the Court's affirmation of the Montana Supreme Court's opinion was without prejudice to the issue of race discrimination, which had not been properly raised.⁷⁵ Holmes stated that if the law was targeted at the Chinese, as it seems to have been by its limited application to male hand laundries, it would be unconstitutional under *Yick Wo*. Holmes wrote:

It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country, while, on the other hand, it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. But this ground of objection was not urged, and rather was disclaimed when it was mentioned from the bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real.⁷⁶

In recent years, some commentators have found Holmes "particularly unsympathetic to ideas of racial equality,"⁷⁷ and less than eager to use the courts in the cause of racial justice.⁷⁸ The fact that Holmes raised the issue of race discrimination *sua sponte* thus presents an interesting puzzle: does Holmes deserve more credit for sensitivity to racial issues, or was the race discrimination issue raised at the behest of one of his colleagues?

Justice Joseph Lamar dissented from



The laundry business was attractive because the Chinese hoped it would not raise the competitive ire of whites. Few white women and even fewer men wanted to work as launderers, a profession considered arduous and unpleasant. These whites working at the laundry room in the Broadwater Hot Springs Hotel in Helena had better working conditions than most launderers.

Holmes' opinion. Lamar argued that the statute was not a valid police power measure, but a revenue measure that made an "arbitrary discrimination. It taxes some and exempts others engaged in identically the same business."⁷⁹ Lamar noted that the license fee was not graduated, and, "[o]n the contrary, it exempts the large business and taxes the small. It exempts the business that is so large as to require the use of steam, and taxes that which is so small that it can be run by hand."⁸⁰ Lamar added that the statute then engaged in further illicit discrimination among the small operators "based on sex. It would be just as competent to tax the property of men and exempt that of women. The individual characteristics of the owner do not furnish a basis on which to make a classification for purposes of taxation."⁸¹

The case was remanded to the state district court, where, following Holmes' suggestion, Quong Wing provided evidence that the tax on male owners of hand laundries affected only Chinese laundrymen. The district court therefore declared that the statute was unconstitutional. The state then once again appealed to the Montana Supreme Court.⁸²

The Court noted its reluctance "to subscribe to the doctrine announced in *Yick Wo v. Hopkins*," but declared that the decision was nevertheless binding upon it.⁸³ Under the authority of *Yick Wo*, and the Holmes' statement in *Quong Wing* that the tax on hand laundries would be void if it only applied to the Chinese, the court affirmed the district court's ruling in favor of the laundryman.⁸⁴

Despite this favorable ruling, the number of Chinese laundries in Montana soon declined precipitously. As the Montana mining boom busted, many workers deserted the state, and the Chinese were no exception. Moreover, most Chinese laundrymen were bachelors, and the United States government had largely cut off Chinese immigration in 1882. When a Chinese laundryman died, there was usually no one to replace him. By 1920, there were fewer than 900 Chinese in Montana.⁸⁵ Between 1905 and 1930, the number of Chinese laundries in Butte, for example, declined from 31 to 9.⁸⁶

Tsukamoto v. Lackman

Unlike the Chinese, who began arriving in the United States in large numbers in the

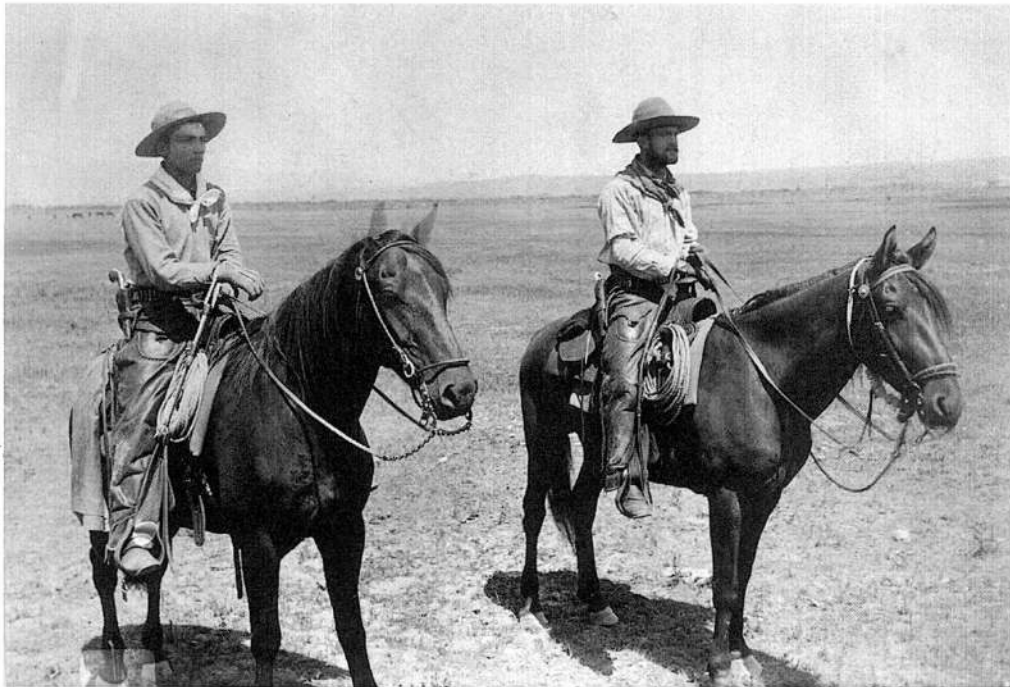
late 1840s, Japanese did not start migrating en masse to the United States until the 1880s.⁸⁷ Like the Chinese, many Japanese, faced with discrimination and violence when they competed with white workers, made their living as entrepreneurs in agriculture, restaurants, and laundries.

Tsukamoto Matsunosuke, a.k.a. George Tsukamoto, was one of the first Japanese to open a laundry in the United States. He also became a reluctant pioneer in the battle for the rights of Japanese residents of the United States. Tsukamoto opened a successful hand laundry in Tiburon, California, in 1892.⁸⁸ In 1899, he decided to start a steam laundry in San Francisco.⁸⁹ At this time, there were dozens of Chinese-owned hand laundries in San Francisco, but all of the steam laundries were owned by whites.

The whites-only Laundry Association of San Francisco threatened to boycott the sup-

ply house that was selling Tsukamoto equipment, but these threats were unavailing.⁹⁰ The Association then persuaded Tsukamoto to agree to charge the same prices as those set by the Association.⁹¹ He proceeded to invest \$6,000 to establish his laundry.⁹²

Tsukamoto still faced barriers to opening his laundry, however. A San Francisco fire ordinance required anyone who sought to operate a steam boiler within the city to acquire a license from the Board of Supervisors. The license could only be granted if the applicant filed with the clerk a certificate signed by the manufacturer or by a competent engineer that the boiler was sound on the date of application for the permit. All boilers, moreover, needed to be constructed, erected and maintained to the satisfaction of the chief engineer and fire wardens of the city.⁹³ Even if those conditions were satisfied, the Board of Supervisors could still deny the license.



A Montana statute promulgated in 1895 required every male engaged in the hand laundry business to pay a license fee of ten dollars per quarter. The law exempted steam laundries and female-operated hand laundries, both of which were owned and operated by whites. When a launderer named Quong Wing protested against paying the fine in 1908, Thomas Kirkendall, the Treasurer of Lewis and Clark County (pictured at right in 1888), took him to court. Wing's case was eventually appealed to the Supreme Court.

On August 5, 1899, Tsukamoto petitioned the Board of Supervisors for a steam boiler license for use in a laundry. He included with his petition a certificate signed by a representative of the manufacturer that the boiler was in "sound and good condition."⁹⁴

Two days later, several residents of the neighborhood in which Tsukamoto sought to operate his laundry presented the Board of Supervisors with a petition requesting that the Board deny a petition made or about to be made by some Japanese for permission to establish a steam laundry and a steam boiler ... as such establishment will not only be an intolerable nuisance from a sanitary standpoint, but will cause an increase of insurance rates, and will materially interfere with the development of the neighborhood.⁹⁵

On August 21, the Committee on Fire Department of the Board of Supervisors reported adversely on Tsukamoto's petition. The committee stated that the granting of the petition "would subject the residents and adjacent property owners to a serious nuisance in the shape of a so-called Japanese laundry, which would be injurious to the comfort of the residents of that section, as well as deteriorate the value of their property." This report was adopted by the Board of Supervisors, and Tsukamoto's petition was denied.⁹⁶

On September 20, Tsukamoto filed a new petition with the Board of Supervisors. This time, he attached a certificate signed by *two* competent boiler inspectors—one from the boiler company and one from Tsukamoto's insurance company—stating that the boiler was in good order. Tsukamoto also filed a certificate from one of the inspectors warranting that the person in charge of operating the boiler was in all respects competent for that job.⁹⁷

At a hearing on Tsukamoto's second application, all of the property owners living within a one block radius of Tsukamoto's property protested against his license application, repeating the claims made in the petition submitted by Tsukamoto's neighbors on August 7.⁹⁸ On October 9, the Fire Department com-

mittee reported to the Board of Supervisors that in its judgment the operation of Tsukamoto's steam boiler would be "detrimental to the property rights" of the neighboring property owners, and that the local residents were entitled to protection from "any occupation or pursuit which requires an engine and boiler in its operation." The Board once again adopted the committee's report, and denied Tsukamoto's petition.⁹⁹

Tsukamoto nevertheless went ahead and operated the steam boiler in his laundry. On October 19, the authorities arrested Tsukamoto for violating the fire ordinance.¹⁰⁰ The police court convicted him on December 8, and sentenced him to pay a fine of twenty dollars or serve a twenty-day jail term.¹⁰¹ Tsukamoto appealed to the California Superior Court, which affirmed the conviction, and explicitly held that the fire ordinance was constitutional.¹⁰²

Tsukamoto then filed a petition for a writ of habeas corpus in the federal circuit, Northern District of California. The named defendant was John Lackman, the sheriff of the city and county of San Francisco. In his petition, Tsukamoto alleged that other people had been granted permits by the Board of Supervisors to erect and maintain a steam boiler on the same block where he sought to operate, that many other permits were granted to people to operate steam boilers elsewhere in the city, and that the refusal of the Board to grant him a permit was "an unjust arbitrary and unreasonable discrimination against [him], ... prompted solely by prejudice" against him because of his Japanese ancestry.¹⁰³ Tsukamoto argued that the fire ordinance, to the extent that it required him to get a permit in order to erect or maintain a steam boiler, was a violation of the Fourteenth Amendment because it deprived him of liberty or property without due process of law, and was a violation of the Equal Protection Clause. He also argued that the ordinance, as applied, violated the treaty between the United States and Japan, which prohibited discrimination against Japanese residents of the United States.¹⁰⁴

The City of San Francisco intervened in the action. The city was represented by the district attorney and by Thomas Riordan, acting as special counsel. It seems extraordinary that the city would hire an expensive private attorney to handle a minor licensing case; the authorities apparently were under great political pressure to keep the Japanese out of the steam laundry business. Riordan often represented local Chinese in litigation against discriminatory laundry laws and other discriminatory legislation. One wonders whether the Chinese surreptitiously supported the city so as to limit competition from Japanese laundries, or whether Riordan was hired simply because of his experience handling laundry cases.

Regardless, the city argued that the Board's refusal to grant Tsukamoto a permit was not due to any unreasonable discrimination against him, but because he sought to operate a steam laundry in an old, wooden building that would be susceptible to fire.¹⁰⁵ The city added that hundreds of whites had been denied permission to erect and maintain steam boilers.¹⁰⁶ Moreover, of the three hundred and fifty laundries in the city, two hundred and fifty were owned by Chinese who did not use steam boilers. Thus, the city was not denying Tsukamoto an opportunity to pursue his livelihood, as it was obviously entirely possible to run a successful laundry without a steam boiler.¹⁰⁷

The city also filed a motion to dismiss Tsukamoto's petition for a writ of habeas corpus for lack of jurisdiction. The city argued that at this point Tsukamoto could only challenge his conviction by appealing to the California Supreme Court.¹⁰⁸ In a short, three-paragraph opinion, the federal district court granted the city's motion to dismiss for lack of jurisdiction. The court did not explain its rationale.¹⁰⁹

Tsukamoto appealed this decision to the Supreme Court of the United States. In his brief, Tsukamoto's attorney argued that the court below erred in dismissing the habeas corpus petition because the California Supreme Court

could not exercise appellate jurisdiction over the decision of the San Francisco superior court. Moreover, even if the court could exercise such jurisdiction, it could not grant Tsukamoto the relief he sought.¹¹⁰ The brief did not explain why either of these assertions was true.

Tsukamoto's attorney also argued that if, as the defendants suggested below, Tsukamoto was to appeal directly to the U.S. Supreme Court from an adverse California Supreme Court ruling, it would be "very doubtful" that the U.S. Supreme Court would reach the issue of whether the ordinance in question "was being used, applied, or enforced unequally or oppressively against him."¹¹¹ The rationale for this argument is not stated. The attorney noted that Tsukamoto's case had exactly the same procedural posture as, and very similar facts to, *Wo Lee v. Hopkins*, a case the Supreme Court decided as a companion case to *Yick Wo v. Hopkins*.¹¹² If the Court exercised jurisdiction in that case, why could it not do so here?

As noted previously, in *Yick Wo* the Supreme Court held that a San Francisco laundry licensing ordinance was unconstitutional because the ordinance was applied only against a certain racial class, Chinese laundrymen. In dictum, the Court also expressed its disapproval of the law because it vested arbitrary authority in the Board of Supervisors to grant or deny a license. Tsukamoto's attorney argued that these rationales rendered the boiler license ordinance unconstitutional as well.¹¹³

The respondents, now represented solely by Riordan, maintained that the lower court did not err in refusing to exercise jurisdiction over Tsukamoto's petition, because the Supreme Court had previously held in several cases that a petitioner should generally take his case to the highest court in his state, and then proceed to the U.S. Supreme Court via writ of error.¹¹⁴ Riordan also vigorously argued that the ordinance was not applied in a discriminatory manner. According to Riordan, the ordinance had been in place for twenty years, and Tsukamoto was "the only person who has alleged or does allege that ... he has been discriminated



As this cartoon suggests, Japanese immigrants were not the only group singled out for abuse by Americans feeling threatened by foreigner workers. In San Francisco, that hostility took the form of a systematic campaign to force Japanese immigrants out of the steam laundry business. This included the city's Board of Supervisors denying them licenses to operate their steam boilers, a practice challenged by Japanese launderer George Tsukamoto under the Equal Protection Clause.

against."¹¹⁵ Meanwhile, Riordan argued, the city had a right under its police power to protect the safety of its citizens from potentially dangerous boilers.¹¹⁶

The case was submitted to the Supreme Court on October 16, 1902. Just four days later, the Court issued a one-sentence ruling, which

stated the following: "Court issue Final order affirmed with costs, on the authority of *Minnesota v. Brundage*, 180 U.S. 499; *Markuson v. Boucher*, 175 U.S. 184, and cases cited." In *Brundage*, the Court had held, consistent with prior rulings, that except in cases of extreme urgency, an applicant for a writ of habeas cor-

pus must exhaust all potential state remedies before the Supreme Court will hear his petition. In *Markuson*, the Court had reiterated its position that the proper way of challenging a state court criminal conviction in the Supreme Court was by a writ of error, not a petition for a writ of habeas corpus.

For unknown reasons, Tsukamoto did not take his case back to the California Supreme Court. Instead, he continued to operate his laundry illegally. He had discovered that while the fire ordinance prohibited the use of steam boilers without a permit, the use of heater boilers up to twelve horse power did not require a permit.¹¹⁷ When an inspector came, Tsukamoto claimed that his steam boiler was actually a heater boiler. Inspections were frequent, and while some inspectors were sympathetic to Tsukamoto or were lackadaisical, others vigorously enforced the law. Tsukamoto was arrested over fifty times in a one and a half year period.¹¹⁸ Usually, his lawyer bailed him out quickly, but once he spent over three weeks in jail.¹¹⁹

Constant harassment by San Francisco authorities put Tsukamoto's laundry in dire financial straits, as he could not afford to pay his employees, all of whom were Japanese.¹²⁰ He appealed to them to work without wages until his legal situation could be resolved. He explained that the outcome of his struggle could effect the rights of all Japanese immigrants to the United States:

If this matter is given up without any effort shown on my part, any others who might want to engage in this type of business would end up in a similar result. I can not bear to see our people lose the rights which we have finally obtained by treaties, just because of an individual's carelessness or not enough efforts put into it. At this time when our business has just started and is not so well equipped, I could not think of any other way but to ask you to give this matter a thought. If I were

to pay out your wages at this time where would I find the money to pay the court expense? If I were to pay the court expense, I would not be able to pay your wages. There is a fund of \$4,000 which I have set aside for this business. I wish to consider this fund as a mutual fund of ours with each one of you having an equal right in it and use it to achieve our goal in this incident to fulfill the desire of the Japanese people.¹²¹

Tsukamoto's employees unanimously agreed to the suspension of wage payments. Six months later, harassment of the laundry decreased substantially, and Tsukamoto was able to pay his employees their wages, and ultimately their back wages as well.¹²² Still, he was arrested an average of every few months for the next decade and a half.¹²³

Other Japanese, discouraged by Tsukamoto's legal problems, opened hand laundries instead of steam laundries. As of 1908, there were eighteen Japanese hand laundries in San Francisco, compared with 102 French-owned laundries, several large white-owned steam laundries, and 102 Chinese laundries.¹²⁴ Despite the small number of Japanese laundries, white laundry owners and workers considered the Japanese a great threat. The number of Japanese laundries had doubled in two years,¹²⁵ and, unlike the Chinese, who had grown leery over the years of inciting white hostility, the Japanese aggressively pursued white laundry owners' customers.¹²⁶

Moreover, white laundry owners and workers knew the Japanese had been very successful in the laundry industry in several Bay Area cities where Japanese were able to acquire permits for steam laundries. White laundry owners in San Francisco feared that if the Japanese managed to obtain the requisite permits in their city, the Japanese would be similarly successful.¹²⁷

In 1908, union laundry workers and white owners of steam laundries formed an "anti-Jap

Laundry League.”¹²⁸ Employers contributed 10 cents per month for each employee on their respective payrolls to the League, while the laundry workers’ and drivers’ unions each contributed \$100.¹²⁹ Later, owners of French laundries also contributed to the anti-Japanese campaign.¹³⁰

The League had two goals: to reduce the number of patrons of Japanese laundries, and to prevent the Japanese laundry owners from operating steam laundries.¹³¹ In pursuit of the first goal, the League hired workers to follow Japanese delivery wagons to their customers, and to follow customers to Japanese laundries. The League then sent letters to these customers to discourage them from patronizing the Japanese laundries, such as the following:

Have you ever given any consideration to the thought that as a patron of a Japanese laundry you are in great measure helping to undermine your own prosperity—that you are helping to deprive women and girls of your race of a chance to earn a respectable living, that you are encouraging and financially aiding a Jap, who has no interests in common with your own, that prosperity for a Jap spells ruin for white [sic] engaged in a similar line of avocation, and that success of Japs in one line of business simply encourages them to branch out along other lines, and that ere long the battle for a living as against oriental competition will have reached you direct?

While we concede your right to patronize whom you choose, we appeal to your sense of fair play by asking you whether for a few cents saved on your laundry bill you can afford by your actions to declare in favor of a Jap and against women and girls of your own race, many of whom are entirely dependent upon their own resources for a living.

The people of our city are becom-

ing aroused to the danger menacing our industrial conditions from this Japanese invasion. Business men are responding to our appeals. Unions are passing laws fining their members, and from many sources we receive the names and addresses of patrons of Jap laundries.

You must surely realize that one can not compete with a Jap and maintain a white man’s standard of living.

Are we asking too much of you, then, in urging you to unite with us in our endeavor to stay the onward march of the Japanese upon so many of the industrial lines?

Will you not cease giving your work to a Jap laundry and thus show by your actions that you indorse [sic] our plea and assist us in our effort to maintain a white man’s standard in a white man’s county?

Believing you will, and inviting you to attend our meetings, held at the above address each Thursday evening, we remain,

Respectfully,

ANTI-JAP LAUNDRY LEAGUE¹³²

Recipients of one letter who continued to patronize Japanese laundries received a second letter along the same lines.¹³³

The League also picketed Japanese laundries,¹³⁴ boycotted supply houses that sold laundry supplies to the Japanese,¹³⁵ and posted large billboards around San Francisco and other cities that read:

**The Jap Laundry Patrons.
Danger!
Yellow Competition
Fostered by the white man’s money,
Is the ammunition that will
Orientalize our city and State
ANTI-JAP LAUNDRY LEAGUE¹³⁶**

The League claimed that it could force the electoral defeat of any San Francisco official who favored granting Japanese the requisite permits to open steam laundries.¹³⁷

In response to the threat from the League, in 1909 several Japanese laundry owners in San Francisco organized the Japanese Laundries of America Association to protect their interests. The association provided financial aid and help in finding employees when needed, and also set the working hours and prices for the Japanese laundries.¹³⁸ To fund these activities, each member paid \$2 per month until his contribution reached \$100.¹³⁹

While white laundry workers were racist, their fear of Japanese competition was not baseless. Since 1900, the Laundry Workers' Union had been working to achieve a significant reduction in its members' hours of labors. In 1907, the union signed a contract with laundry owners establishing a forty-eight hour work week.¹⁴⁰ The work week agreement would only take effect if French- and Japanese-owned laundries adopted the same work week by 1910.¹⁴¹ Not surprisingly, the Japanese refused to comply.¹⁴² Japanese laundry workers received wages similar to white male workers, plus room and board. In return for this higher compensation, they worked ten hours a day six days a week, plus overtime, as opposed to the eight hour work day sought by white workers.¹⁴³

When the French and Japanese did not comply, the union turned to legislation to achieve its goals. A 1912 San Francisco statute prohibited a broad range of laundry-related activities, including washing, ironing, and delivering clothes, between 6:00 p.m. and 7:00 a.m. Chinese laundrymen, who were also negatively affected by the law, unsuccessfully challenged it in state court,¹⁴⁴ and then, relying on *Lochner v. New York*,¹⁴⁵ launched a successful challenge in federal court.¹⁴⁶

Despite hostile legislation, discriminatory enforcement of the boiler rules, and the tactics of the anti-Jap Laundry League, between 1909 and 1921 the number of Japanese-owned laundries in San Francisco increased from nineteen

to 240.¹⁴⁷ By 1921, the laundry industry employed 21 percent of all Japanese workers in San Francisco.¹⁴⁸

Meanwhile, due to pressure from the League, Japanese laundry owners were unable to get boiler permits, so all 240 Japanese-owned laundries were hand laundries—except for Tsukamoto's.¹⁴⁹ He continued to run his steam laundry under false pretenses until 1919. That year, he received notice from the San Francisco Board of Supervisors that the fire regulation had been amended to require that all boilers, including heat boilers, be licensed by the Board of Supervisors.¹⁵⁰ Tsukamoto applied for a license, but was denied.¹⁵¹

Instead of giving up, he purchased a nearby building and established a new steam laundry there. Borrowing a tactic commonly used by Japanese seeking to evade California's alien land law, which prohibited Japanese from owning land,¹⁵² Tsukamoto incorporated under the name of a white person. An attorney friendly to the Japanese took care of the license application, and Tsukamoto was thereafter able to run his steam laundry without fear of official harassment.¹⁵³

Conclusion

While *Yick Wo v. Hopkins* is today considered a great civil rights case, the history described in this article reminds us that the case's actual holding was relatively narrow, requiring a party who sought to challenge a discriminatory law to prove that the law operated only against his racial or ethnic group. After admirable persistence, and years of government discrimination against Chinese laundrymen in Montana, Quong Wing, relying on *Yick Wo*, was able to persuade the courts to overturn Montana's discriminatory legislation based on *Yick Wo*. George Tsukamoto, however, was not able to win a similar battle in San Francisco on behalf of Japanese laundrymen, at least in part because he was not able to prove that only Japanese had been denied boiler licenses. Tsukamoto instead turned to civil disobedience

and artifice to protect his right to run his business.

Despite their disparate fates in the courts, both Quong Wing and George Tsukamoto deserve recognition as civil rights pioneers. While their victories against state-sponsored racism were neither as clear-cut nor as apparent from the **U.S. Reports** as Yick Wo's, each of them brought the United States one step closer to the recognition of equality under the law through their lawsuits and perseverance. The cases they brought should be a part of our collective constitutional memories. Moreover, their struggles reflect the hostility and discrimination faced by thousands of other Chinese and Japanese immigrants to the United States. For that reason, too, their stories deserve to be remembered.

**The author gratefully acknowledges the financial support of the John M. Olin Foundation.*

Endnotes

- ¹ 118 U.S. 356 (1886).
- ² 223 U.S. 59 (1912).
- ³ 187 U.S. 635 (1902).
- ⁴ Charles F. Seward, **Chinese Immigration in its Social and Economical Aspects** 9 (1881).
- ⁵ Rose H. Lee, "Occupational Invasion, Succession, and Accommodation of the Chinese of Butte, Montana" 55 *Am. J. Sociology* 50, 53 (1949).
- ⁶ *Id.*
- ⁷ Ronald M. James et al., "Competition and Coexistence in the Laundry: A View of the Comstock," 25 *Western Hist. Q.* 165, 167 (1994).
- ⁸ *Montana Post*, Feb. 10, 1866, quoted in Robert E. Wynne, **Reaction to the Chinese in the Pacific Northwest and British Columbia 1850-1910**, at 63 (1978).
- ⁹ John R. Wunder, "Law and Chinese in Frontier Montana," *Montana, The Magazine of Western Hist.*, Summer 1980, at 18, 20.
- ¹⁰ Wynne, *supra* note 8.
- ¹¹ Wunder, *supra*, note 9.
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ See Wynne, *supra* note 8.
- ¹⁷ Michele Shover, "Chico Women: Nemesis of a Rural Town's Anti-Chinese Campaigns, 1876-1888," 67 *California Hist. Q.* 228, 235 (1988).
- ¹⁸ Montana Territory, Legislative Assembly, Laws, Memorials and Resolutions of the Territory of Montana, 5th Sess., § 20, at 61 (1869); Montana Territory, Legislative Assembly, Laws, Memorials and Resolutions of the Territory of Montana, 6th Sess., § 16, at 55 (1870).
- ¹⁹ Wynne, *supra* note 8 at 62; "Larry D. Quinn, "Chink Chink Chinaman": The Beginning of Nativism in Montana," 58 *Pacific Northwest Q.* 82, 88 (1967).
- ²⁰ Robert R. Swartout, Jr., "Kwangtung to Big Sky: The Chinese in Montana 1864-1900," 38 **Montana: The Magazine of Western History** 42, 51 n.46 (1988).
- ²¹ Lee, *supra* note 5, at 53.
- ²² Paul A. Frisch, "The 'Gibraltar of Unionism': The Working Class at Butte, Montana, 1878-1906," at 169-170, 174, 176-77 (1992) (Unpublished Ph.D. thesis, U.C.L.A.).
- ²³ Connie Y. Yu, "The Chinese in American Courts," 4 *Bulletin of Concerned Asian Scholars* 22, 27 (1972).
- ²⁴ See *Tibbits v. Ah Tong*, 2 P. 536 (Mont. 1883) (denying right of Chinese immigrant to own mining property); *State v. Owsley*, 42 P. 105 (Mont. 1895) (upholding "poll tax" targeted at Chinese mine workers).
- ²⁵ Lee, *supra* note 5, at 51-53; see also Stacy A. Flaherty, "Boycott in Butte," 37 **Montana: The Magazine of Western Hist.**, 34, 36 (1987) (reporting that there were twenty Chinese laundries in Butte in the 1890s).
- ²⁶ Quoted in Rose Hum Lee, **The Growth and Decline of Chinese Communities in the Rocky Mountain Region** 112 (Arno Press reprint ed. 1978).
- ²⁷ *Id.* at 114.
- ²⁸ State of Montana, **The Codes and Statutes of Montana** 562 (1895) (Mont. Pol. Code § 4079).
- ²⁹ Swartout, *supra* note 20, at 42, 51 n.46.
- ³⁰ Lee, *supra* note 5, at 53. At this time, the white female "home laundries" were numerous. They were gradually absorbed by the steam laundries. *Id.*
- ³¹ *State ex rel. Toi v. French*, 41 P. 1078, 1079 (Mont. 1895).
- ³² *Id.* at 1080.
- ³³ *Id.* at 1080.
- ³⁴ 113 U.S. 703, 710 (1885).
- ³⁵ 44 P. 516 (Mont. 1896).
- ³⁶ *Id.* at 522.
- ³⁷ *In re Yot Sang.*, 75 F. 983 (D. Mont. 1896).
- ³⁸ *Id.* at 983.
- ³⁹ *Id.*
- ⁴⁰ *Id.* at 984.
- ⁴¹ *Id.* at 985.
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ Lee, *supra* note 5, at 53; Flaherty, *supra* note 26, at 34.
- ⁴⁷ Flaherty, *supra* note 26, at 36.
- ⁴⁸ *Id.*

⁴⁹ *Id.* at 38; *see also* Frisch, *supra* note 23, at 159 (noting that a union leader suggested that middle-class white women could alleviate the prostitution problem by patronizing white-owned laundries).

⁵⁰ Flaherty, *supra* note 26.

⁵¹ *Id.* at 37.

⁵² **Laws, Resolutions, and Memorials of the State of Montana, Passed at the Fifth Regular Session of the Legislative Assembly 200 (1897) codified at Rev. Code. Mont. § 2776 (1907).**

⁵³ Record, *Quong Wing v. Kirkendall*, at 2.

⁵⁴ Quoted in Lee, *supra* note 27, at 196.

⁵⁵ Record *supra* note 54, at 2-3.

⁵⁶ *Id.* at 5.

⁵⁷ *Quong Wing v. Kirkendall*, 101 P. 250 (Mont. 1909), *aff'd* without prejudice, 223 U.S. 59 (1912) (affirming the Montana Supreme Court's ruling in favor of defendant, but allowing the plaintiff to raise issues on remand which the plaintiff disclaimed during the appeal).

⁵⁸ *Id.* at 251.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 252.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 252.

⁶⁵ 208 U.S. 412 (1908).

⁶⁶ *Quong Wing*, 101 P. at 252 (quoting *Muller*, 208 U.S. at 421-23).

⁶⁷ *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912) (Holmes, J.) ("[I]t is impossible not to ask whether [the statute] is aimed at the Chinese, which would be a discrimination that the Constitution does not allow But this ground of objection was not urged, and rather was disclaimed when it was mentioned from the bench at argument.").

⁶⁸ *Id.* at 62.

⁶⁹ Brief of the Defendant in Error at 3, *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912).

⁷⁰ *Quong Wing*, 223 U.S. 59 (1912).

⁷¹ *Id.* at 62.

⁷² *Id.*

⁷³ *Quong Wing*, 223 U.S. at 63 (citing *Muller*, 208 U.S. 412).

⁷⁴ *Id.*

⁷⁵ *Id.* at 63-64.

⁷⁶ *Id.* at 63 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

⁷⁷ G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** 335, 341-42 (1993).

⁷⁸ *See, e.g.*, David E. Bernstein, Philip Sober "Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective," 51 *Vand. L. Rev.* 797, 855 (1998).

⁷⁹ *Quong Wing*, 223 U.S. at 64.

⁸⁰ *Id.*

⁸¹ *Id.* at 64-65.

⁸² *Quong Wing v. Kirkendall*, 130 P. 2 (Mont. 1913).

⁸³ *Id.* at 2 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

⁸⁴ *Id.*

⁸⁵ Swartout, *supra* note 20, at 44.

⁸⁶ Lee, *supra* note 5, at 53.

⁸⁷ Roger Daniels, **Asian America** 100 (1988).

⁸⁸ Holographic Autobiography of Tsukamoto Matsunosuke 1 (Seizo Oka trans., Japanese American Historical Archives, Undated); *see also* Memorandum from Oscar F. Hoffman, Community Analysis Section, War Relocation Authority, Central Utah Project, to Dillon S. Myer, Director, War Relocation Authority, *San Francisco and East Bay Cities Laundry Business (West Coast Locality Study)* (April 19, 1945).

⁸⁹ *Id.*

⁹⁰ Alexander Yamato, "Racial Antagonism and the Formation of Segmented Labor Markets: Japanese Americans and their Exclusion from the Work Force," 20 *Humboldt J. Social Relations* 31, 50 (1994).

⁹¹ *Id.*

⁹² Record at 34-35, *Tsukamoto v. Lackman*, 187 U.S. 635 (1902).

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.* at 3-4.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 16.

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.* at 7-8.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 16.

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.* at 17.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.*

¹¹⁰ Opening Brief of Appellant, *Tsukamoto v. Lackman*, at 18.

¹¹¹ *Id.*

¹¹² *Id.* at 19-20.

¹¹³ *Id.* at 23-24.

¹¹⁴ Brief of Respondents, *Tsukamoto v. Lackman*, at 9.

¹¹⁵ *Id.* at 13-14.

¹¹⁶ *Id.* at 20-27.

¹¹⁷ Holographic Autobiography, *supra* note 89, at 2; Shichiro Matsui, "Economic Aspects of the Japanese Situation in California" 60 (unpublished master's thesis, University of California, Berkeley, 1922).

¹¹⁸ Holographic Autobiography, *supra* note 89 at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

- ¹²¹ *Id.*
- ¹²² *Id.* at 2-3.
- ¹²³ *Id.* at 3.
- ¹²⁴ Yamato, *supra* note 91, at 43, 49.
- ¹²⁵ Lillian R. Matthews, "Women in Trade Unions in San Francisco," 3 *U. Cal. Publications in Econ.* 1, 34 (1913).
- ¹²⁶ *Id.* at 36.
- ¹²⁷ Reports of the Immigration Commission, "Immigrants in Industries, Part 25: Japanese and Other Immigrant Races in the Pacific Coast and Rocky Mountain States" 193 (1911).
- ¹²⁸ *Id.*
- ¹²⁹ *Id.* at 193-94.
- ¹³⁰ *Id.* at 194.
- ¹³¹ *Id.*
- ¹³² *Id.* at 195.
- ¹³³ *Id.* at 196.
- ¹³⁴ Robert Edward Lee Knight, **Industrial Relations in the San Francisco Bay Area, 1900-1918**, at 214 (1960).
- ¹³⁵ *Id.*
- ¹³⁶ Immigration Commission, *supra* note 128, at 196.
- ¹³⁷ Knight, *supra* note 135, at 214.
- ¹³⁸ Immigration Commission, *supra* note 128, at 197.
- ¹³⁹ *Id.*
- ¹⁴⁰ Knight, *supra* note 135, at 190.
- ¹⁴¹ *Id.* at 191.
- ¹⁴² The mostly family-run French laundries also generally refused to comply. Yamato, *supra* note 91, at 48.
- ¹⁴³ Matsui, *supra* note 118, at 63-64.
- ¹⁴⁴ *Ex Parte Wong Wing*, 138 P. 695, 695 (Cal. App. 1914).
- ¹⁴⁵ 198 U.S. 45 (1905).
- ¹⁴⁶ *Yee Gee v. City and County of San Francisco*, 235 F. 757 (N.D. Cal. 1916).
- ¹⁴⁷ Yamato, *supra* note 91, at 45-46.
- ¹⁴⁸ *Id.* at 43.
- ¹⁴⁹ *Id.* at 49; Matsui, *supra* note 118, at 61.
- ¹⁵⁰ Holographic Autobiography, *supra* note 89, at 3.
- ¹⁵¹ *Id.*
- ¹⁵² Ronald Takaki, **Strangers from a Different Shore: A History of Asian Americans** 204 (1989).
- ¹⁵³ Holographic Autobiography, *supra* note 89, at 3.

Ohio v. The Bank: An Historical Examination of *Osborn v. The Bank of the United States*

Patricia L. Franz

I. Introduction

On September 17, 1819, approximately six months after the Supreme Court of the United States had declared state taxation of branches of the Bank of the United States unconstitutional in *McCulloch v. Maryland*,¹ agents for the state of Ohio forcefully “collected” over \$100,000 in state taxes from the vault of the Bank’s Chillicothe, Ohio, branch. The culmination of the resulting litigation was the Supreme Court’s decision in *Osborn v. Bank of the United States*.² The constitutional issues presented in the case were 1) whether the Eleventh Amendment³ barred a suit brought by officials of the Bank of the United States against state officers acting in their official capacities⁴; 2) whether the provision in the Bank’s charter allowing it “to sue and be sued . . . in any Circuit Court of the United States” was permissible under Article III, Section 2⁵; and 3) whether Ohio’s law requiring the payment of taxes by the branches of the Bank doing business within the state was contrary to the Constitution and therefore void.⁶

In **The Marshall Court & Cultural Change 1815-1835**, intellectual historian⁷ G. Edward White argues that the significance of *Osborn* lies in the fact that Chief Justice Marshall used the case as an opportunity to fashion another “link in the chain of expanded federal jurisdiction that the Court was forging.”⁸ In his argument White characterizes the genesis of *Osborn* as an attempt by lawyers in Ohio to secure Supreme Court revisitation of the Eleventh Amendment interpretation announced in *Cohens v. Virginia*⁹ and *McCulloch v. Maryland*.¹⁰ While an examination of the opinion and a review of recent secondary legal literature citing *Osborn*¹¹ does not call into question White’s interpretation of the doctrinal significance of the case, a review of the historical accounts of the events leading up to Ohio’s

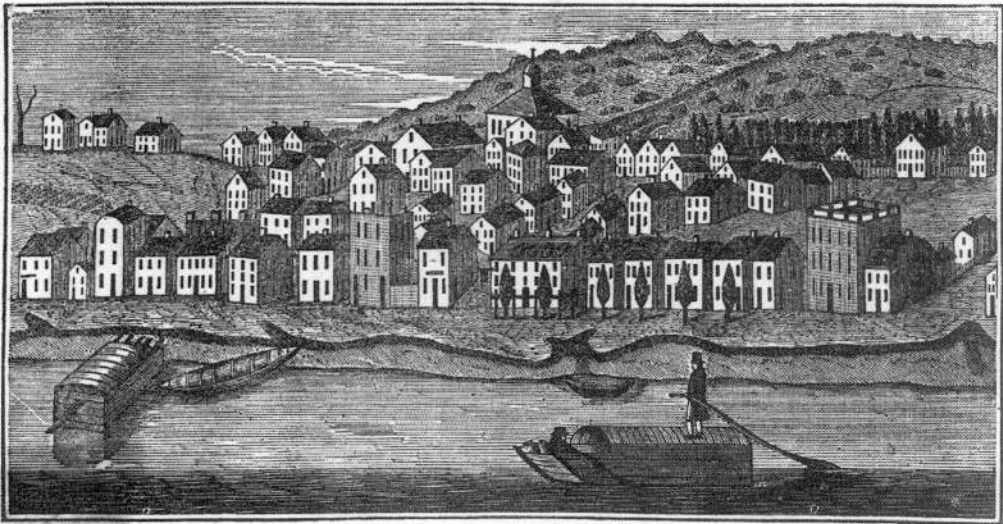
taxation of the Bank points to an alternative motivation for the Ohioans involved.¹²

As historian John A. Garraty reminds us in his essay collection, **Quarrels That Have Shaped The Constitution**, our Supreme Court can expound upon the Constitution only when specific cases (growing out of conflicts between particular parties) are brought before it.¹³ As a result, decisions deemed by scholars to be of constitutional significance often begin not with the actions of political activists seeking to change the course of constitutional jurisprudence, but with people acting out of self-interest, coming into conflict with other such people.¹⁴ It cannot be argued plausibly that the Ohio Legislature that enacted the taxing statute and stood behind the case against the Bank was wholly unconcerned with the constitutional jurisprudence of the day or the ever-increasing power of the federal legislature and judiciary. But it can be argued that in taxing the Bank and pursuing the legal conflict that ensued, the primary concern of state legislators was the negative impact that the Bank was perceived to have had on the state's young

economy. In other words, the primary desire of those opposing the Bank in *Osborn* was not, as White argues, a reassessment of the Eleventh Amendment. The goal was the removal of the Bank from Ohio, or at the very least, the Bank's agreement to play by rules that would put it on an equal footing with the state-chartered banks against which it was competing—and often winning.

II. Economic Conditions in Ohio 1803-1820

The quarrel that became *Osborn v. Bank of the United States* had its roots in the economic instability that plagued Ohio during the years following the War of 1812. Ohio, comprising the portion of the Northwest Territory that lay between Lake Erie and the Ohio River, was recognized as a state by the U.S. Congress on April 15, 1803. Prior to the War of 1812, Ohioans were literally "getting out of the woods."¹⁵ Villages were separated by dense forests and the Allegheny mountains cut off most trade with markets in the East,



The greatest amount of manufacturing and trade in Ohio's formative years took place in the river towns such as Zanesville, Cincinnati, and Marietta, that had transportation links with each other and with more distant trading centers such as Pittsburgh, Louisville, and New Orleans. Each of the eight authorized banks operating in Ohio prior to 1815 were located in towns along the Ohio River or its tributaries. Above is a woodcut of Cincinnati in 1810; the National Bank branch was located on Main Street between 2nd and 3rd streets.

making it difficult to dispose of surplus products and difficult to import merchandise.¹⁶

While most Ohioans were engaged in agriculture, the barriers to the eastern markets encouraged the growth of local manufacturers to serve the local need for goods such as hardwood furniture, pottery and plows. The greatest amount of manufacturing and trade took place in the river towns such as Zanesville, Cincinnati, and Marietta, that had transportation links with each other and with more distant trading centers such as Pittsburgh, Louisville, and New Orleans. Each of the eight authorized banks operating in Ohio prior to 1815 were located in towns along the Ohio River or its tributaries.¹⁷

Banking in early nineteenth century America was very different than banking today. Twentieth century banking relies upon customer deposits as an essential means to extend credit to other customers, and thereby generate income for the institution in the form of interest on loans. In the early nineteenth century, deposits were a minor part of banking operations. The chief source of income for a bank was the issuance of notes that circulated as a form of currency and were theoretically redeemable in specie (gold or silver coin) upon presentation to the bank. With no official circulating currency, each merchant also performed the functions of a bank as a necessary part of trade whenever he advanced goods or cash to customers on credit, or paid out cash to a third party on a customer's written order. Because banking was a common-law right, such "private banking" by merchants or by unchartered ("unauthorized") banks was perfectly legal unless prohibited by statute. In the absence of statutory prohibitions, anyone who could convince others to leave money on deposit or to accept circulating notes could form a bank.¹⁸

The problem with this form of banking, as practiced, stemmed from the small amount of capital in the form of specie available to back the circulating bank notes. R. C. Buley explains in *The Old Northwest*: "the younger a coun-

try or region, the less specie and accumulated and lendable capital it has, and the more interested it becomes in the note-issue function [of banks] which makes possible ... 'easy money.'"¹⁹ While circulating notes were exchanged for goods on the faith that the holder of such a note could, if desired, present the note to the issuing bank for payment in specie, there was often not enough gold or silver in the bank's vaults to actually complete the redemption. It was not uncommon for a bank to run short on specie and announce its suspension of specie payments until further notice. As confidence in a given bank's ability to make its promised redemptions fell, the holders of that bank's notes were forced to exchange the notes for less than face value when making purchases or repaying debt.²⁰ The resulting fluctuation in note values often resulted in situations where a debtor had borrowed from a bank, receiving notes at face value, but was forced to pay back much more than received because of the decreased real value of circulating notes.²¹ The debtor's problems were compounded by the rising prices generated when too much money was chasing too few goods.²²

Unless forced to do so (by law or otherwise), there was, as long as consumer confidence remained relatively high, little incentive for banks to make specie payments. While specie payments were suspended, banks could simply exchange their notes for the notes of private citizens who became debtors, obligated to pay 6% to 10% interest and the principal, whereas the banks were paying no interest or principal. This practice generated healthy dividends for bank stockholders and, of course, economic incentive for banks to delay the resumption of specie payments once suspended.²³

Despite the usual pattern of heightened economic instability in the newer regions of the country, the eight Ohio banks chartered prior to the War of 1812 performed better than many of their eastern counterparts during the war years from 1812 to the end of 1814. Six of these Ohio-chartered banks loaned to the state government the money needed to meet its ob-

ligation to aid the federal government in financing the war effort. And while most of the other banks in the country, except those in New England, were forced to suspend specie payments during the early months of the conflict in response to the severe economic conditions brought on by the war, the Ohio banks were not forced by a lack of capital to suspend specie redemptions until the war's final months.²⁴ Because of the positive performance of its banks during these years, Ohioans were likely to be less inclined than eastern merchants to see a need for a federal bank to stabilize the value of bank notes and to make funds available for government use.

When hostilities finally ended at the close of 1814, both the population and the amount of credit speculation boomed in Ohio.²⁵ While the population of the United States as a whole increased 33% from 1810 to 1820, the population in Ohio grew by approximately 152%, jumping from 230,760 in 1810 to 581,434 by 1820. Much of the increase in Ohio was the result of a large exodus from the Atlantic states where trade restrictions imposed prior to the war, and the British blockage of the coast during the war, had caused a severe economic downturn.²⁶

With the new settlers came a tremendous amount of economic activity. Prices for land, town sites and anything else that the new settlers needed increased rapidly. Rising land prices generated land speculation of "epidemic" proportions. The speculation was fueled by the growing number of note-issuing banks in Ohio and neighboring states and further exacerbated by the credit system adopted by the federal government in its sale of public lands.²⁷

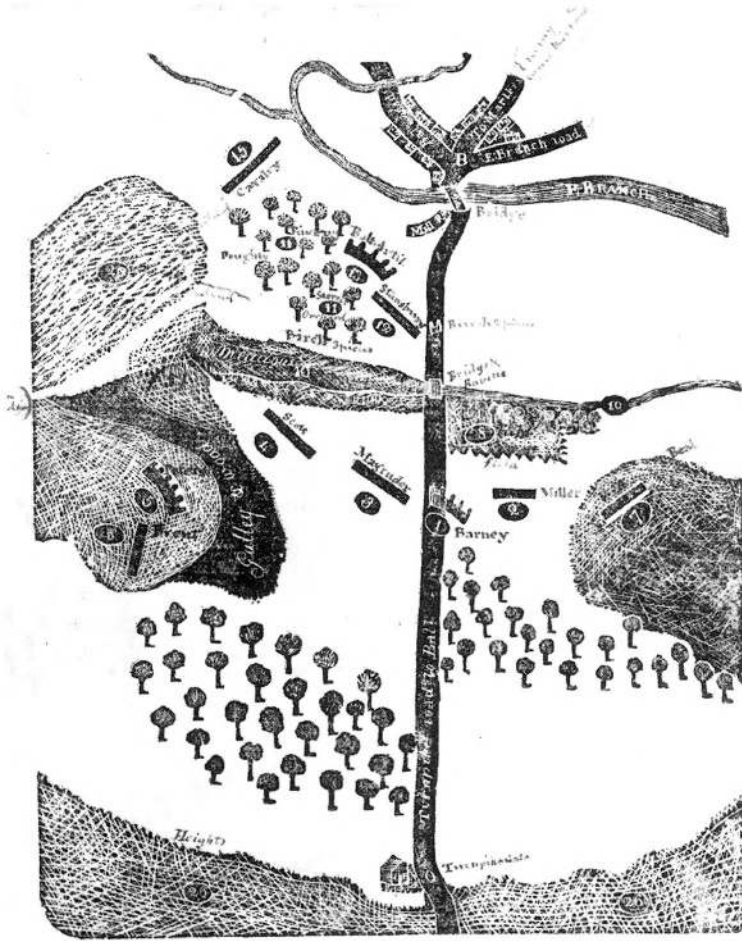
The federal land sale system in Ohio operated out of four district land offices—Cincinnati, Chillicothe, Marietta, and Steubenville. The credit system allowed for the sale of public lands at \$2 per acre on a four-year installment plan at 6% interest, with the interest portions of the payment coming due on the last three payments. With the larger payments on

land purchases not coming due immediately and land prices rising rapidly, speculators purchased large amounts of land with readily available bank loans, planning to sell to new immigrants at a handsome profit before payments came due. By 1820, when the credit features of the land sale system were repealed, 8,848,152 acres of public land had been sold in Ohio for a total of \$17,226,186.95.²⁸

During this post-war boom, banks—both unauthorized and state-chartered—"sprang up like mushrooms" in Ohio and other western states.²⁹ State legislatures chartered many new banks, turning out "whole litters at every session."³⁰ Ohio chartered twenty new banks, Tennessee twelve, and Kentucky forty-six.³¹ These banks were more than willing to provide the new immigrants to the western states (who brought with them little, or no, money) the easy credit that they demanded. The cumulative result was inflation fueled by a flood of depreciated bank notes backed by little or no specie.³²

The Ohio legislature's concern with the impact of banking on its economy was demonstrated just prior to the creation of the second Bank of the United States in late 1816. Alarmed by the number of unauthorized banks within (and without) the state issuing rapidly depreciating paper, the Ohio legislature, passed an act imposing fines upon those individuals acting in Ohio as agents for banks chartered in other states. It also withdrew the protection of the laws from such agencies.³³ Another act passed during that legislative session imposed a fine and a one-year prison sentence for unauthorized issuance of bank notes within the state.³⁴ Unfortunately, these attempts to control the amount of notes flooding the state met with little success.³⁵

In addition to the acts designed to control unauthorized bank notes in the state, Ohio sought to raise revenue (some of which was needed to pay its war debts), without increasing the direct tax burden on individual landholders, by obtaining and holding stock in state-chartered banks.³⁶ Aware that the charters of all but one of the currently authorized banks in



When hostilities in the War of 1812 finally ended at the close of 1814, both the population and the amount of credit speculation boomed in Ohio. While the population of the United States as a whole increased 33% from 1810 to 1820, the population in Ohio more than doubled. Much of the increase in Ohio was the result of a large exodus from the Atlantic states where trade restrictions imposed prior to the war, and the British blockage of the coast during the war, had caused a severe economic downturn. At left is a map of the Battle of Bladensburg, which the British won.

the state would expire in 1818, Governor Thomas Worthington and State Auditor Ralph Osborn developed a plan whereby the state would incorporate as many banks as deemed safe, with the state purchasing one-fifth of the capital stock of each newly incorporated banking entity.³⁷ The state was to make partial payments for the stock for two years all the while receiving full dividends which, rather than being paid to the state, were to be applied to payment for the stock. At the end of two years the net dividends, after reduction for remaining stock payments, could be applied to lower the state's debts. Osborn calculated that under this plan, the state's debt burden could be reduced in ten years without increasing land taxes.³⁸

When he proposed this plan to the legislature, Governor Worthington spoke of the need

to control the participation of banks in wild, speculative schemes and argued that given the strong economic incentive to establish new banks, the state could be assured of increased revenues by investing in bank stock. He also argued that given the extraordinary privileges granted to banks incorporated by the state, it only seemed fair that banks should reciprocate by supporting the state Treasury.³⁹

The legislature responded by passing the laws against unauthorized banking outlined above and by passing the "Bonus Law of Feb. 23, 1816." This bonus law required that each incorporated bank would: 1) have thirteen directors; 2) open its books for inspection by the directors and by agents appointed by the legislature; and 3) obtain capital of \$500,000.00. In addition, each bank incorporated under the new

law was to set aside one share for each twenty-five shares of its capital stock for the state. Dividends were to accumulate until the state owned one-sixth of the stock with the dividends paid directly to the state thereafter. In exchange for these concessions to the state, those existing banking entities that accepted the provisions of the Act by the first Monday of September, 1816, were granted an extension of their charters until 1843 and exemption from all other state taxation.⁴⁰

Of the banks chartered in Ohio prior to 1816, all but the Miami Exporting Company accepted the provisions of the law by the deadline, as did six of the companies with which the state had been battling over unauthorized banking. The legislature chartered eight more banks between the passage of the Bonus Law in 1816 and January, 1818. Of these, five banks accepted the provisions of the Bonus Law. After the Bank of Circleville was incorporated in January, 1818, the legislature did not charter any new banks until 1829.⁴¹

The Formation and Operation of the Second Bank of the United States

At the close of the War of 1812, Congress, still smarting from the federal government's difficulties in trying to finance the war, was concerned about rising prices and the general economic instability. It began to explore the possibility of reviving the Bank of the United States, which had been allowed to die when its charter expired in 1811. The first Bank of the United States had been controversial from its inception; its constitutionality assailed by none other than Secretary of State Thomas Jefferson.⁴² President George Washington had signed the bill incorporating the bank into law only upon the urging of Alexander Hamilton, whose argument on the matter was to be the source of the Supreme Court's "implied powers" language in *McCulloch v. Maryland*.⁴³

The first Bank of the United States remained controversial throughout its twenty-

year existence. It generated ill feelings from state banks, which were forced to compete with the Bank, often to their disadvantage. The public often sided with the state banks against the U.S. Bank upon being told by local bankers that credit was not available because they, the local banks, were being forced by the federal Bank to redeem in specie the bank notes that the federal Bank presented to them. The Bank was also viewed as a tool of the Federalists, who had begun to lose power with the election of Jefferson in 1800 and who, by 1811, were out of favor in many quarters because of what many believed to be a too-favorable attitude toward England. (It was a commonly held belief that a Republican need not bother to apply to the Bank for a loan.) This view of the Bank-Federalist connection was reinforced by the fact that much of the Bank's stock was held by investors in England.⁴⁴

During the War of 1812, the government had been unable to borrow sufficient funds from the state banks (to which it had transferred its public deposits after the demise of the first Bank of the United States) to purchase arms and other needed supplies. After the war, most state banks refused to resume specie payments—a practice resulting in dangerous levels of inflation. Given the condition of the federal Treasury, the inflationary economy and the reluctance of state banks to stabilize the value of their circulating notes, even the Republicans, who had so strongly opposed the first Bank, were in support of a new charter.⁴⁵

Shortly before the end of the war Secretary of the Treasury Alexander Dallas had been instructed by President Madison to outline a plan for the Second Bank of the United States. His recommendations were contained in the bill for the incorporation of the Bank which was presented to Congress in January 1816. The purposes of the new Bank as outlined in the bill were "the restoration of the currency, the maintenance of the general credit, and the accommodation of the internal and foreign trade of the country."⁴⁶ Republican Henry Clay, who had fought against the first Bank and who

would later defend the Bank in *Osborn*, argued in favor of incorporation. Daniel Webster, who also would later argue in support of the Bank in *Osborn*, argued against its charter. When the bill came up for a vote in April 1816, it was enacted by a large majority.⁴⁷

Pursuant to the new Bank's charter, one-fifth of the Bank's directors were to be appointed by the President, with the approval of the Senate. Its home office was to be in Philadelphia.⁴⁸ While the Bank was to function as a depository for federal revenue and as an agency for the transfer and disbursement of federal funds,⁴⁹ the Bank was organized as a private federally chartered corporation, with the federal government owning only one-fifth of its stock.⁵⁰

Subscriptions to the Bank's \$35 million of capital stock were sold in July 1816, in twenty cities. Nearly half of the subscribers were from Baltimore, but the Baltimore shares added up to only \$4 million. Shares purchased in the Bank's home city of Philadelphia totaled \$9 million, \$3 million of which were purchased by businessman Stephen Girard.⁵¹ Girard was a federally appointed director of the Bank for a short period until his displeasure with the perceived dishonesty of some of his fellow directors, whom he considered to be "fly-by-nights," led him to resign.⁵² The location of the Bank's home office in Philadelphia and the ownership of the bank by a relatively small number of private shareholders, a majority of whom lived in the East, were to become two of the many strikes against the Bank in the minds of the public and the legislature in Ohio during the state's struggle with the Bank.

When the Bank was ready to operate in January 1817, and began to establish branches in various cities, groups of Ohio businessmen from Cincinnati and Chillicothe began to compete in an effort to convince the home office in Philadelphia to establish a branch of the Bank in their respective cities.⁵³ According to one account of these events, the actions taken by this group triggered a public debate that revealed an ideological split in Ohio between

business concerns that desired the infusion of capital that a branch would bring to the state, and those who were concerned that the Bank would prove to be ruinous competition for local state banks, a threat to state sovereignty, and a corrupting influence (in the republican sense of influence over debtors) on Ohioans.⁵⁴ Similarly, banking historian Bray Hammond argues that those who opposed the Bank in Ohio and across the country were in two ideologically incompatible camps united only by their dislike of the Bank. These groups were 1) traditional agrarian Republicans who saw all banks (and the debt into which they led their customers) as enemies of the farmer and the common man; and 2) the state bankers and their shareholders who feared that the Bank (with its stated purpose of forcing the resumption of specie payments) would cut dividends or drive state banks out of business altogether.⁵⁵ Hammond notes that the union of these two groups was tenuous at best given that each "thought that it could destroy the other once the big Bank was done for."⁵⁶

In the end, both the Cincinnati and Chillicothe business interests were successful in winning branches of the Bank.⁵⁷ (The Chillicothe group had been aided by the personal lobbying efforts of Governor Worthington, an acquaintance of the Bank's president, who later became a director of the Bank.⁵⁸) The Cincinnati branch was established in March 1817, and the branch in Chillicothe was opened for business in the spring of the following year.⁵⁹

The policies adopted by the leaders of the Second Bank during its initial years of operation did little to win the Bank friends in Ohio or elsewhere. The Bank's first president was William Jones, a Philadelphia-based merchant who had declared bankruptcy in 1815. He had been a member of the House of Representatives, Secretary of the Navy (1813-14) and, most importantly, was highly regarded by President James Madison. Jones was deemed unqualified to head the Bank by powerful contemporaries such as Stephen Girard, the Bank's

Governor Thomas Worthington (right) and State Auditor Ralph Osborn developed a plan whereby Ohio would incorporate as many banks as deemed safe, with the state purchasing one-fifth of the capital stock of each newly incorporated banking entity. When he proposed this plan to the legislature, Governor Worthington spoke of the need to control the participation of banks in wild, speculative schemes and argued that given the strong economic incentive to establish new banks, the state could be assured of increased revenues by investing in bank stock. He also argued that given the extraordinary privileges granted to banks incorporated by the state, it only seemed fair that banks should reciprocate by supporting the state treasury.



single largest private shareholder. Nevertheless, he was elected president by the Bank's directors after having served, at the request of the Madison administration, as the commissioner in charge of initial stock subscriptions.⁶⁰

Despite the original purpose of the Bank to help calm speculation by forcing a resumption of specie payments at state banks, Jones, with the apparent backing of the Treasury Department, adopted lenient policies toward the state banks—many of which owed specie to the Bank for the Treasury deposits that had been taken back by the federal Bank upon its recharter. And the Bank did not enforce even these lenient policies to the fullest extent.⁶¹ The Bank also adopted liberal credit policies, making loans by issuing notes backed by little specie, a practice that fueled, rather than slowed, land speculation and led to continued price inflation.⁶² In Cincinnati and Chillicothe, the Bank's loans totaled \$2,494,000 though the combined banking capital of all banks in the state totaled only \$2,300,000⁶³

Even with its generally lenient policies toward specie redemption on the debt owed for transferred Treasury deposits, the Bank gener-

ated a great deal of opposition from state banks in Ohio and elsewhere. Much of this opposition was the result of the Bank's practice of accepting state bank notes in payment from customers and then on a weekly basis presenting those notes to the issuing bank for redemption in specie.⁶⁴ This practice stemmed from the Bank's compliance with an 1817 congressional resolution mandating that payments owed to the United States be made in specie, Treasury notes, federal bank notes, or state bank notes, that could be redeemed in specie upon demand.⁶⁵ The Bank's demands for specie acted as a check on a note-issuing bank's true solvency, and forced it to keep its income-generating note issues down to a reasonable level in relation to capital. Despite the wisdom of the changed capital to note-issue ratio, the state banks, reacting to decreased profitability, protested that the Bank had no capital of its own and was seeking to accumulate its capital by draining specie from local banks.⁶⁶

Antagonism toward the Bank grew to even greater levels by the fall of 1818 when the booming postwar economy slowed drastically. The index of export staples, an important indi-

cator of activity in the economy, slid from an August level of 169 to 158 by November, while prices fell in the commodities, real estate, and rental properties markets.⁶⁷ At the same time there was a world-wide fall in commodities prices, with export prices from the U.S. falling much more rapidly than prices on imported manufactured goods.⁶⁸ The resultant financial problems at the Bank, where policies had been premised on continued economic growth and consumer confidence, were compounded by the retirement of the United States Louisiana bond issue. Over \$3.5 million of the bond redemptions were owed to foreign bond holders and payment resulted in a drain of specie from the Bank and the country.⁶⁹

Unfortunately, Jones and his directors responded to the slowing economy and the low specie reserves in the Bank's branches with a get-tough credit contraction policy that only made matters worse.⁷⁰ In Ohio, Jones instructed the Cashier at the Cincinnati branch "to demand the reduction of the balances which may be due by the state banks in that place, at the rate of at least 20 per cent. per month, until the whole shall be extinguished...."⁷¹ The Bank also cut back sharply on the amount of credit it was willing to extend both to state banks and to individual borrowers.⁷² The Bank's policy of contraction, combined with the natural, cyclical end of a postwar inflationary period, resulted in a "ruinous" fall in prices and what began as an economic slowdown in 1818 became an all-out financial "crisis" by 1819.⁷³

In addition to its ever more precarious financial condition and growing opposition from state banks, the Bank was also plagued by insider abuses. At the Baltimore branch, Cashier James McCulloch (of *McCulloch v. Maryland*⁷⁴ fame) and George Williams, a director of the Baltimore branch and of the home office in Philadelphia, along with the powerful Baltimore trading firm of S. Smith and Buchanan, skirted the restrictions on the number of shares that any one shareholder could vote—a limit of thirty shares. Their scheme involved the purchase (with money "borrowed" from the

Bank) of four thousand shares of Bank stock, each registered in a different name, with themselves designated to vote the shares as attorneys. (Williams had obtained the names under which the stock was registered in the market for "eleven pence each."⁷⁵) Such practices were so common in Baltimore and Philadelphia that a very small group of speculators in those two cities had de facto control over the Bank soon after its organization.⁷⁶ Apparently not satisfied with control alone, Williams, Smith, Buchanan, and McCulloch "lent" themselves still more. McCulloch's role in the powerful position of Cashier allowed him to arrange advances through loans and overdrafts without adequate security and without proper reporting on the Bank's books. The resulting loss to the Bank was estimated to be \$1.4 million.⁷⁷

Although news of this embezzlement was not made public until May 1819,⁷⁸ rumors of such goings-on and the poor financial condition of the Bank triggered a congressional investigation in October 1818. The report drafted by the congressional committee that been charged with the investigation was highly critical of the Bank. But despite calls by the Bank's critics in Congress for the revocation of its charter, the committee recommended that the Bank be allowed to live, minus its abusive insiders. As a result of the investigation, Jones was forced to resign as President of the Bank in January 1819, and replaced in March of that year by Langdon Cheves, a lawyer from Charleston.⁷⁹

Cheves began his attempted rescue of the Bank by obtaining the resignations of several corporate directors and officers and approximately half of the branch office directors.⁸⁰ Hammond argues that the swift housecleaning at the Bank was motivated in large part by the upcoming Supreme Court arguments in *McCulloch v. Maryland*, which were heard in February and March of 1819: "It was pretty late to be resorting to soap and water, but the Bank was going to come before the Court with its hands as clean as possible."⁸¹

Cheves continued the tight credit policies

that had been put in place shortly before he took office, with disastrous results for the economies of western states where many state banks and individuals were in debt to the Bank as a result of land speculation.⁸² Much of the debt in Ohio was carried by farmers who had given short-term notes⁸³ secured by mortgages on greatly over-valued real estate, the value of which dropped sharply once financial panic set in. Prior to the implementation of the Bank's tight-credit policy, common banking practice had been to renew notes on real estate several times before payment was actually demanded. However, during the credit contraction, when the federal Bank began to press the state banks for payment of their debts to it, the state banks in turn began to call in their notes, resulting in massive foreclosures and increased hatred of the Bank.⁸⁴ At the end of this contraction process, the Bank had come to own huge portions of prime commercial and agricultural real estate in and around Cincinnati—a situation that infuriated the former landowners.⁸⁵

The majority of the local state banks owing balances to the Cincinnati and Chillicothe branches could not make the payments demanded, even after pressing their own debtors to pay. Three Cincinnati banks had been forced to suspend all specie payments in November 1818, and many more state banks followed suit by early 1819.⁸⁶ Banking historian Charles Huntington describes the situation in Ohio and other western states:

While the staples of the western country were at ... [extremely] low prices the people were deeply in debt to the United States Government, to eastern merchants, to the local banks, and to one another. The sum due to the government on account of land purchases, exceeded \$22,000,000 in the later part of 1820. The amount due to the Cincinnati branch of the United States Bank was more than \$2,000,000.... Immense quantities of goods brought into the country by the

merchants had been sold on credit, and the debtors had nothing with which to pay. All the specie of the country made its way east to pay for the goods imported. Immigration had stopped, and money no longer came into the country from that source. The notes of the banks had all depreciated and many of them were practically worthless. An immense amount of bank paper perished, not in the hands of the speculators and those who had been active in its issue, for they had foreseen the ruin and had passed the spurious paper on before the panic came, but in the hands of farmers and mechanics who had given full value for the money. It would no longer be received in payment of debts. Credit was at an end, and universal distress prevailed.⁸⁷

IV. The Bank Tax

Economic distress, as well as the continued circulation in the state of both genuine and counterfeit unauthorized bank notes, prompted an investigation into the condition of banking in the state by a committee of the Ohio House of Representatives during the 1818-1819 session of the legislature.⁸⁸ The committee was headed by Representative Charles Hammond of Belmont County, a lawyer and journalist who would later argue before the Supreme Court in favor of Ohio's right to tax the Bank.⁸⁹

Hammond's attitude toward the Bank was apparently influenced more by his economic interest as a director of a state bank in St. Clairsville, Ohio, than by his Federalist party affiliation.⁹⁰ He had, in 1817, served on a committee of state bankers appointed by the banks of eastern Ohio and western Pennsylvania and Virginia to study the problem of the federal Bank's demand for redemption of state bank notes in specie. As part of his work for this committee, Hammond had written to the Bank's directors in Philadelphia seeking a de-



lay in the forced resumption of specie payments until the summer of 1818, but was only able to secure a delay of a few months until August 1817. Convinced that the eastern directors of the Bank had no understanding of the economic conditions in the West, Hammond and the committee angrily resolved not to attempt any further communication with them.⁹¹

Hammond took his frustration with the Bank to the Ohio legislature in the fall of 1817 where many members, and their constituents, were angered by the intrusion of an out-of-state banking entity that threatened the profitability of tax-paying state banks. Upon Hammond's urging, the legislature appointed a joint committee to study the feasibility of taxing the Ohio branches of the Bank of the United States and appointed Hammond to chair the committee. The members of the House serving on the committee were largely in favor of taking immediate steps to tax the Bank while a majority of the Senate members were opposed. Hammond

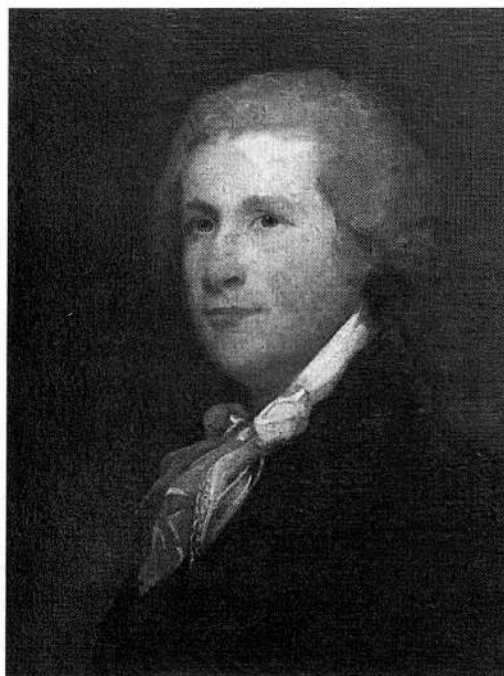
drafted and reported a taxation bill, which passed in the House, but those opposed to the bill were able to delay further votes until the next legislative session.⁹²

By the beginning of the 1818-19 session, economic conditions had begun to deteriorate rapidly and the legislature was much more receptive to Hammond's suggestions for legislative action.⁹³ In his opening message to the legislature, newly elected governor Ethan Allen Brown⁹⁴ discussed banking at length and indicated his support for taxation of the Ohio branches of the Bank:

Since the incorporation of the Bank of the United States, and since the passage of the present law of this state against unauthorized banking companies, that institution has established, without asking leave, two agencies ... whose course of proceeding, the banks loudly complain,



Shortly before the end of the War of 1812 Secretary of the Treasury Alexander Dallas (right) had been instructed by President Madison to outline a plan for the Second Bank of the United States. His recommendations were contained in the bill for the incorporation of the Bank, which was presented to Congress in January 1816. The purposes of the new Bank as outlined in the bill were "the restoration of the currency, the maintenance of the general credit, and the accommodation of the internal and foreign trade of the country." Republican Henry Clay (opposite, upper left), who had fought against the first Bank and who would later defend the Bank in *Osborn*, argued in favor of incorporation. Daniel Webster (opposite, lower right), who also would later argue in support of the Bank in *Osborn*, argued against its charter. When the bill came up for a vote in April, it was enacted by a large majority.



cramps the operations, and diminishes the profits of the latter, as well as impairs the state's revenues arising from these sources But whether the branches remain among us, of right, or by permission, and while the state banks are subjected to the imposition of taxes, or an equivalent, there appears no evident reason why those branches should be exempt. Their exemption would be a partiality, unjust to the local banks.⁹⁵

In February 1819, Hammond's House Banking Committee issued two reports—one in which it blamed the policies of the Bank for the financial troubles of local banks and the other in which it argued that the state had the right to tax the Bank in order to prevent its unfair advantage over state-chartered institutions paying state taxes.⁹⁶ The committee's report led to the enactment, in February 1819, of the "Act to levy and collect a tax from all banks and individuals, and companies, and associations of individuals, that may transact banking business in this state, without being authorized

to do so by the laws thereof."⁹⁷

The new law provided that if the Bank of the United States continued to do business in the state after September 15, 1819, it would be taxed \$50,000 per year per branch. (Every other unauthorized banking entity was threatened with taxation at a rate of \$10,000 per year.) The law called upon the Auditor of State to assess these taxes annually on September 15 and to appoint an agent to collect the tax. To facilitate collection, the law authorized the auditor's agent to search the bank and seize specie or notes, to put officers of the bank to oath or take them to court to force them to disclose the location of funds, and/or to levy on the goods of the Bank or its credit.⁹⁸

The Ohio legislature's belief that the states had the right to tax branches of the Bank was shared by many. By the time Ohio passed its unauthorized banking tax, five other states—Maryland, Tennessee, Georgia, North Carolina, and Kentucky—had passed similar legislation.⁹⁹ That belief was soon challenged, however, by the decision in *McCulloch v. Maryland*, announced by the Court on March 7, 1819, which declared such taxation by the



Subscriptions to the Second Bank of the United States' \$35 million of capital stock were sold in July 1816 in twenty cities. Stephen Girard, a Philadelphia businessman (pictured), purchased \$3 million of the \$9 million total shares bought by investors in his home city. Girard served as a federally appointed director of the Bank for a short period, but resigned because he considered his fellow directors to be dishonest. The Ohio legislature disapproved of the Bank's home office location in Philadelphia and the fact that it was owned by a small number of shareholders, mainly from the East.

states unconstitutional.¹⁰⁰ The public reaction to the decision—which was reprinted in full in several newspapers and commented upon at length—was generally split along regional lines. Most papers in the Northeast were in support of the decision while those in the West and South, especially Virginia, denounced it.¹⁰¹ The reaction in Ohio newspapers was particularly strong, with one editor writing, in part:

This monster of iniquity is to be saddled upon us. The people of the West are to be taxed by an incorporation unknown to our Constitution, and only known to us by its oppressive and vindictive acts, as being the means by which the bread of industry has been taken from the poor and given to the rich, by which our manufactories have been paralyzed, and the introduction of foreign luxuries promoted, by which our precious metals

have been collected and transported from among us, and by which the best of our local banks have been driven to the necessity, either of adding to the ruin and desolation it has produced by calling in their debts, or sacrificing their own credit and reputation by ceasing to redeem their notes on demand.¹⁰²

Of those who were critical of the decision, Bray Hammond argues that underlying the very rational dismay regarding a decision maintaining that the Constitution really meant “yes” when it seemed to say “no,” was a deeper conviction among many that the Court should not have ignored the Bank’s tarnished reputation which had been caused, it seemed, by the moral failings of its leaders.¹⁰³

After the decision in *McCulloch*, Ohio officials were faced with the decision of whether or not to enforce the tax statute that had been enacted little more than a month earlier. Because the legislature was not scheduled to meet again until after September 15, the effective date of the law, there would be no legislative debate on the issue of enforcement unless Governor Brown chose to call a special legislative session.¹⁰⁴ Brown did not call the legislature back to Columbus, but was well aware of the opinions of Ohioans—which were made known to him via newspaper editorials and personal letters throughout the summer of 1819. Many were of the opinion that the *McCulloch* decision should not be treated as binding upon a western state such as Ohio. Given the revelations in May concerning the scandals in the Baltimore branch, it was argued that *McCulloch* had been a case arranged by Maryland (one of the few remaining Federalist strongholds¹⁰⁵), and the so-called “opposing” parties, in order to gain the Supreme Court’s support for the Bank at a time when the institution was in financial trouble and falling out of favor in public opinion as a result of scandalous mismanagement. Because of this collusion, the argument went, Maryland had

conceded, rather than argued, many points upon which Ohio could rely in its argument for allowing state taxation.¹⁰⁶

The Supreme Court's decision in *McCulloch*, announced subsequent to the passage of Ohio's unauthorized bank tax statute, put State Auditor Ralph Osborn in a difficult position. Should he enforce the Ohio statute spelling out his duty to collect a tax from the Bank or should he obey the decision of the Supreme Court?¹⁰⁷

Osborn, a Republican and native of Waterbury Connecticut who migrated to Ohio in 1806, was the third Auditor of State in Ohio, serving eighteen years from 1815 to 1833. Prior to his service as State Auditor, he had served as the first elected Clerk of the Ohio House from 1810 to 1815 and as the first Prosecuting Attorney in Delaware County (north of Columbus) from 1808 to 1810. Subsequent to his tenure as State Auditor, he was elected to a term in the Ohio Senate.¹⁰⁸ Osborn was thirty-nine years old in 1819. Given his career in the new state, he had obviously faced other novel situations. Upon deliberation over the tax issue, Osborn decided that his first duty was to enforce the laws of the state. He shared that opinion with Governor Brown, who sanctioned the enforcement of the tax against the branches of the Bank.¹⁰⁹

Officials at the Bank had apparently received word that Osborn planned to enforce the tax statute. On September 11, Osborn was served with a notice that the Bank was making application for an injunction against collection of the tax.¹¹⁰ On the morning of September 15, the statutory collection day, Osborn was served with a copy of the petition in chancery, which Bank officials had made to Federal Judge Charles Byrd requesting that the court enjoin Osborn from collecting the tax. Along with the petition was a subpoena from the federal court to appear before it in three months to answer to the petition.¹¹¹ Missing from the papers served, however, was a copy of the injunction order issued by Judge Byrd.¹¹² Before taking any further steps to collect the tax, Osborn submitted



Charles Hammond was a member of the Ohio House of Representatives charged in 1818 with heading the committee to investigate the condition of banking in Ohio, in response to the continued circulation of unauthorized bank notes. A lawyer and journalist who had served as director of a state bank in St. Clairsville, Hammond later argued before the Supreme Court in favor of Ohio's right to tax the Bank.

these papers to the Ohio Secretary of State and asked for legal advice. The response from the Secretary of State's office was the written opinion of several lawyers that the papers did not amount to an enforceable injunction.¹¹³

Upon receipt of this opinion, Osborn issued a warrant to John L. Harper for collection of the tax.¹¹⁴ Shortly after noon on September 17, Harper and two assistants entered the Bank branch at Chillicothe seeking to collect the \$100,000 due as taxes from the two Ohio branches of the Bank. Among those present in the branch when Harper entered were President of the Board William Creighton, Jr. and Cashier Abram Claypool.¹¹⁵ In a letter to the Secretary of the Treasury, Claypool reported the ensuing events:

[The warrant of the Auditor was executed] by John L. Harper (late of Philadelphia, deputed for this purpose), accompanied by two others, who without any previous notice whatever suddenly entered the office,

and in a ruffian-like manner jumped over the counter, took and held forcible possession of the vault, while the said Harper in like manner intruded himself behind the counter, and as I was proceeding to turn the others from the vault demanded to know if I was prepared to pay the said tax; to which I answered in the negative and made an ineffectual exertion to obtain possession of the vault, when they were repeatedly forewarned against touching any part of the property, and admonished in the presence of several citizens of said injunction, which was shown and read to them but for which he declared his disregard; and, after another fruitless effort on my part to dispossess them of the vault, proceeded to remove therefrom and from the drawer, a quantity of specie and bank notes, amounting to \$120,425, including \$7,930 in Muskingum Bank notes, the special deposit on account of the Treasury; all which were taken to and received by the cashier of the Bank of Chillicothe.¹¹⁶

The next day, September 18, the money collected was loaded into a wagon and taken fifty miles north to Columbus by the three collectors and an armed guard. The contents of the wagon were turned over to the State Treasurer, Hiram M. Curry, who paid Harper his statutory fee of \$2,000, deposited \$98,000 in the Franklin Bank of Columbus to the credit of the state treasurer's office, and returned the money in excess of \$100,000 (approximately \$20,000) to the Chillicothe branch of the Bank.¹¹⁷

The Litigation

As the tax collectors traveled to Columbus, tax in tow, Osborn was served with an injunction (valid this time) which ordered him not to collect the tax; not to pay it out if collected; and to return any money collected.

Osborn refused to act on the injunction because he considered the matter to be out of his control and in the hands of the state treasurer.¹¹⁸ Only days later, on September 22, Judge Byrd issued an injunction restraining Osborn, Curry, and the Franklin Bank from making any disposition of the monies collected from the Bank. This injunction was followed by a similar order issued by Chief Justice John Marshall on November 23, 1819.¹¹⁹

Meanwhile, John Harper and one of his assistant tax collectors, Thomas Orr, had been arrested pursuant to a suit against them by the Bank for recovery of the collected money. Bail was set at twice the amount collected—an amount Harper and Orr were unable to post. After an action for habeas corpus failed, the two remained in jail until January 1820, when they were released during their circuit court trial upon a determination that the arrest had been technically irregular and therefore illegal.¹²⁰

Also in January 1820, Osborn was served with notice that Bank officials had sought and won from Justice Thomas Todd (sitting on circuit) an order against Osborn and Harper directing them to show cause why an attachment should not issue against them for contempt of court in connection with disregarding the injunction of September 18, 1819.¹²¹ The suit for attachment was argued in the circuit court in September 1820 but was continued until the following September “on account of the important constitutional questions involved.”¹²²

When the case came up again for trial in September 1821, opposing counsel (Henry Clay as lead counsel for the Bank and John Hammond for Osborn and Harper¹²³) agreed that an order would be issued to the state treasurer for the return of the amount of tax collected along with interest on the \$19,830 of specie taken from the vault. They also agreed that the interest sought, along with Harper's \$2,000 collection fee and court costs would be appealed to the Supreme Court.¹²⁴ The circuit court ruled that while the procedure that the bank had used to obtain its injunction against the collection of the tax was technically incor-

rect, it had been sufficient and also held that the State of Ohio had no authority to tax the branches of the Bank within its borders.¹²⁵ The Court also granted a perpetual injunction against any future collection of tax from the Bank under Ohio's tax law.¹²⁶

As the parties had expected, when the order to return the tax was issued to the new state treasurer, Samuel Sullivan, who had succeeded Curry in February 1820, Sullivan refused to comply with the order. His grounds for refusal were that he was duty-bound to follow state law, which required a warrant from the State Auditor prior to any such payment out of the treasury. The court then issued a writ of sequestration against Sullivan's property. Acting under the authority of this writ, Sullivan was placed under nominal arrest by a federal marshal who took Sullivan's keys and used them to enter the vault where the \$98,000 had been held in a trunk, unused and separated from other state funds. The money was then delivered to the court and there turned over to Bank officials.¹²⁷

The arrest of the Treasurer and the attachment of his keys were not the explosive state versus federal battle that one might justifiably imagine. According to Ohio historian William Utter, these events were given "lurid interpretation" by newspaper editors but were actually carried out "without fuss or fanfare."¹²⁸ Likewise, Bogart argues that Sullivan's motive was not to resist court orders, but to take technically correct steps under state law prior to the appeal of the matter to the Supreme Court.¹²⁹

Outside of the courthouse, the taxation of the Bank had become the decisive issue in Ohio's fall election of 1819. Several candidates ran on anti-Bank platforms. One candidate for the State Senate, along with a candidate running for the Ohio House, wrote a satirical piece titled the "Declaration of Independence Against the United States Bank," in which they charged the Bank with "having quartered large bodies of armed brokers among them."¹³⁰ While the public sentiment, which was overwhelmingly anti-Bank, resulted in victories for anti-Bank



John Harper was a graceful orator who was chosen to replace Hammond at the second argument of the *Osborn* case—probably because of his superior oratorical powers and his considerable experience. Harper argued more cases before the Supreme Court between 1800 and 1815 than any other advocate.

candidates in most races, the legislature did not take any action with regard to the Bank during the 1819-1820 session while the issue worked its way through the courts.¹³¹

During the 1820-1821 session of the legislature, State Auditor Osborn submitted a report regarding the collection of the tax from the Bank.¹³² Upon the motion of Representative Hammond, who had rejoined the Assembly after a brief hiatus during the 1819-1820 session,¹³³ Osborn's report was referred to the House Banking Committee, headed by Hammond, and a special investigation into the tax situation commenced. Only a week later the committee, with Hammond as its spokesman, was ready to address the legislature.¹³⁴

The quick turnaround time from the start of the "investigation," and the release of the committee's report,¹³⁵ suggests that the report had been prewritten by Hammond and submitted to the committee, if at all, for brief review only. Hammond appears to have used the opportunity presented by his address to the legislature to test the arguments that would form the core of his argument to the Supreme Court in 1823.¹³⁶ It is at this point, as Representative Hammond was preparing to defend the state's



Newly elected governor Ethan Allen Brown declared his support for taxation of the Ohio branches of the Bank at the beginning of the 1818-1819 session of the state legislature. After he became a U.S. Senator, Brown argued Ohio's case before the Supreme Court in *Osborn v. United States*.

officers before the Court, that the legislature's pronouncements against the Bank took the form of a theoretical states'-rights argument.

The state's position in the matter of the Bank, Hammond's report suggested, should be that while Auditor of State Osborn (and his agent, John Harper) and Treasurer of State Sullivan were the named defendants in the pending lawsuit, they had acted against the Bank in their official capacities, thus rendering the action by the Bank a suit against the state itself. A suit against the state of Ohio by the Bank would amount to a suit against a state by citizens of another state—which was barred by the Eleventh Amendment.¹³⁷ Turning to the opinion in the *McCulloch* case, Hammond criticized its reasoning. While conceding that Congress had the power to charter a bank, he contended that the bank was a *private* corporation and as such it was subject to state taxation just as any other private corporation doing business under a charter that gave no explicit ex-

emption from state taxation.¹³⁸

Hammond's report also challenged the contention that the Supreme Court was the chief interpreter of the Constitution and insisted instead that such power was shared by the states themselves: "The committee are aware of the doctrine that the federal courts are exclusively vested with jurisdiction to declare, in the last resort, the true interpretation of the Constitution of the United States. To this doctrine, in the latitude contended for, they can never give assent."¹³⁹ In support of the existence of state power to interpret the Constitution, the committee cited the Virginia and Kentucky Resolutions of 1798¹⁴⁰ and argued that these had been ratified by the people in the elections of 1800 (which had swept the Federalists out of power).¹⁴¹

The committee put forth eight recommended resolutions, all of which were passed by both houses of the legislature: 1) an affirmation of the Kentucky and Virginia Resolutions;¹⁴² 2) a protestation against the actions of the circuit court in light of the Eleventh Amendment;¹⁴³ 3) an assertion of the right to tax all private corporations doing business within the state;¹⁴⁴ 4) an assertion that the Bank of United States is a private corporation subject to state taxation where its branches are located;¹⁴⁵ 5) a protestation against allowing the political rights of states to be determined by the Supreme Court via cases between individuals who are not the direct parties;¹⁴⁶ 6) a statement that the committee report would be distributed to other states (in order to vindicate Ohio in the eyes of those critical of the manner in which the tax was collected);¹⁴⁷ 7) a statement that the report would also be distributed to the President and to members of Congress;¹⁴⁸ and 8) a statement that bills designed to implement the recommendations of the committee should be prepared and put to a vote.¹⁴⁹

Pursuant to the committee's legislative recommendations, the legislature passed a bill suggesting a compromise with the Bank: the state would refund to the Bank the excess of tax collected over 4% of the Bank's dividends if

the Bank would 1) withdraw its suit against the state officers, and 2) submit to a 4% annual dividend tax *or* close its Ohio branches. Playing off of the argument in the *McCulloch* opinion that the power which created the Bank must be given the power to preserve it,¹⁵⁰ the legislature also passed an act withdrawing the protection and aid of state law from the Bank branches in the state. The act gave the Bank until September 1821 to submit to a 4% tax, leave the state, or rely solely upon federal authority for the preservation of its Ohio branches in the face of fraud, fire, burglary, or other hazards.¹⁵¹ The Bank ignored the legislature's compromise proposals and officially became an "outlaw" in the state in September 1821.¹⁵² While the law withdrawing the state's protection stayed on the books until its repeal five years later, the "outlawing" of the Bank was apparently never carried out.¹⁵³ This lack of enforcement was likely the result of the previously discussed compromise reached by Hammond and counsel for the Bank at the circuit court trial of *Osborn* and Sullivan in the fall of 1821. According to the compromise, the bulk of the money collected as tax had been returned to the Bank with only the \$2,000 that had been used as Harper's collection fee and the claimed interest on the specie that had been held by Ohio at issue before the Supreme Court.

The arguments in *Osborn* were held during two consecutive Terms of the Court. During the 1823 Term Hammond and John Crafts Wright¹⁵⁴ argued for Ohio's position against Henry Clay,¹⁵⁵ Daniel Webster,¹⁵⁶ and John Sergeant,¹⁵⁷ counsel for the Bank.¹⁵⁸ The arguments during this Term focused on the issues of whether the case against *Osborn* and the other state officials was in substance an action against the state of Ohio by citizens of another state and therefore barred from federal court jurisdiction by the Eleventh Amendment, and whether Ohio had the right to tax a federally chartered private banking corporation doing business within the state.¹⁵⁹

After the arguments had been made, the Court decided that the argument made in an-

other pending case, *Bank of the United States v. Planters' Bank*,¹⁶⁰ that the Bank of the United States could not constitutionally be given an across-the-board right to sue in federal courts via a charter provision, had implications for the *Osborn* decision and asked for a reargument in the 1824 Term when the *Planter's Bank* case was slated to be heard.¹⁶¹ At the second argument, Ohio's counsel, Ethan Allen Brown (now a U.S. Senator), John C. Wright, and Robert Goodloe Harper of Maryland,¹⁶² argued that not every suit brought against the Bank "arises under" its federal charter, but may instead "arise under" state law. In that case, the Bank's right to sue in federal court should be limited by the Constitution and the Judiciary Act as would an individual's right in similar circumstances.¹⁶³

VI. The Court's Decision & Public Reaction

As White notes, Ohio's arguments did not fare well before the Court.¹⁶⁴ On the issue of an Eleventh Amendment bar to a suit in federal court against state officers where the interests of the state are at stake, Marshall answered that in order for the Eleventh Amendment to come into play, a state must be a party "named in the record" and not merely a party with an interest in the outcome.¹⁶⁵ On the constitutionality of the provision in the Bank's charter allowing it to "sue and be sued" in federal court (regardless of the nature of the case), Marshall gave a broad reading to the "arising under ... the laws of the United States" language of Article III,¹⁶⁶ and reasoned that the Bank's very existence had been granted by its federal charter, a federal law. Therefore, he held, any case in which the Bank was involved would "arise under" federal law and federal jurisdiction would attach.¹⁶⁷

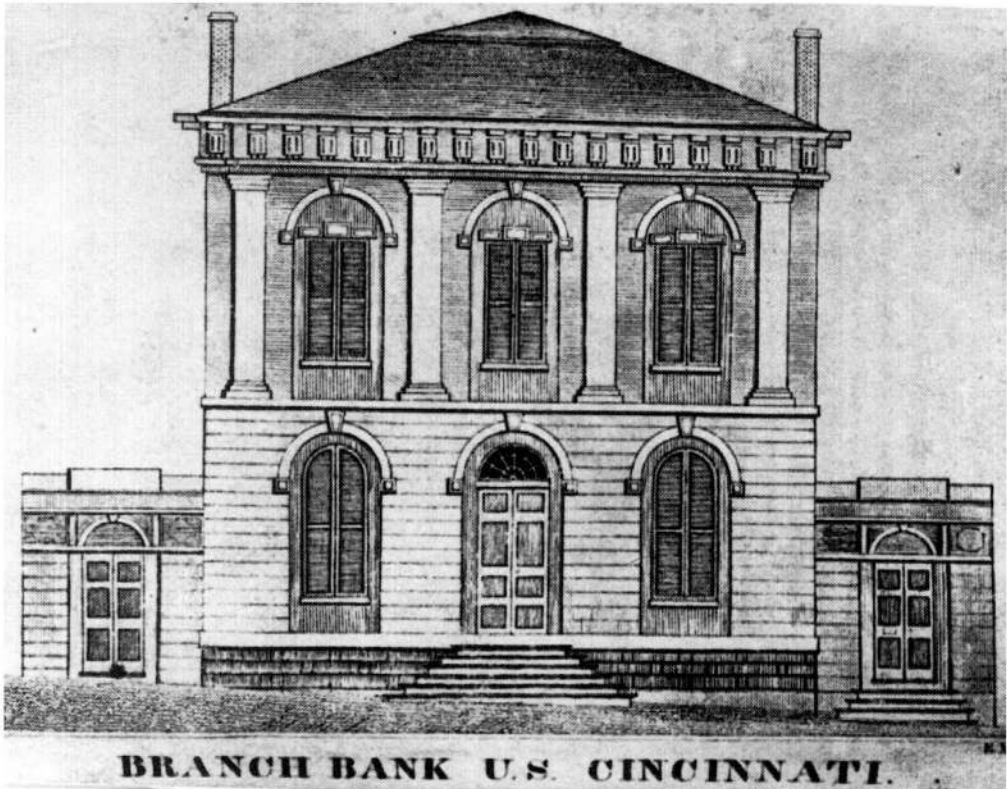
As for Ohio's right to tax the Bank—an issue upon which Henry Clay had refused to argue, "considering it as finally determined by the former decision of the Court, which was supported by irresistible arguments, to which

he could add no farther illustration”¹⁶⁸— Marshall reaffirmed the *McCulloch* characterization of the Bank as a quasi-governmental agency exempted from state taxation because of its necessary role vis-a-vis the federal government.¹⁶⁹ The Ohio law under which Osborn, Harper, and Sullivan had acted to tax the Bank was declared void and Osborn and Harper were ordered to return Harper’s \$2,000 collection fee to the Bank.¹⁷⁰

Ohio did win on the issue of the interest due on the Bank’s specie that had been held by the state. The Court reasoned that because Sullivan had been ordered by the circuit court to hold the money collected in the treasury prior to its return to the Bank in 1821, he should not be held accountable for any interest that accumulated while he was restrained from using the money.¹⁷¹

For White, the “doctrinal” significance of *Osborn* is the broad reading of the Article III Arising Under Clause, which justified federal court jurisdiction over a broad range of “federal questions,” as well as and the very narrow reading of the Eleventh Amendment which invited those wishing to sue a state government in federal court to negate the amendment’s prohibition by simply naming state officials rather than the state itself in the complaint.¹⁷² Indeed, when it is mentioned in current legal literature, *Osborn* is typically cited for the Eleventh Amendment “party of record” doctrine (which was abandoned before the turn of the century in *Ex parte Ayers*¹⁷³) and as the source of “federal question” doctrine.¹⁷⁴

But what was the significance of the Court’s decision for the parties involved? Historical accounts of Ohio’s taxation of the Bank



With the election of Andrew Jackson in 1828, the Bank lost the fight for survival. Jackson, who viewed the Bank as a “tyrannical” institution that “oppressed” the “honest and industrious,” vetoed a bill for recharter in 1832 and removed federal deposits from various state banks. The Bank’s directors consequently began selling off branches, such as this Cincinnati one, to local banks.

report that, in contrast to the intense newspaper coverage and discussion of the conflict when it began, there was little reaction to *Osborn* when the decision was announced on March 19, 1824.¹⁷⁵ Chillicothe's weekly paper, *The Supporter, and Scioto Gazette*, published the entire opinion in three installments beginning on April 8, 1824, but the reprint was unaccompanied by editorial comment, for or against.¹⁷⁶ Even more notably, the *Niles' Register*—a nationally distributed weekly paper with a strongly anti-Bank editorial slant—which had reported extensively on the conflict between Ohio and the Bank from 1819 through 1822, made no mention of the decision in 1824.¹⁷⁷

Bogart argues that the muted reaction was the result of improving economic conditions in Ohio and other western states: "By this time the bad effects of the crisis of 1819 had largely passed away, the necessary liquidation had taken place, and prices were rising again. The attention of the people and the legislature was moreover being absorbed by other topics of even greater interest, namely schools and canals."¹⁷⁸

Hammond, who had argued the case before the circuit court as well as the Supreme Court, had lost a bid for a seat in the House of Representatives in 1822 and shortly thereafter was passed over by the Ohio legislature for a position on the Ohio Supreme Court.¹⁷⁹ According to one biographer, Hammond was, by 1823, "the politically bankrupt exponent of a cause which could no longer capture the public fancy."¹⁸⁰

As for the Bank, it was soon to lose a fight for its life against President Andrew Jackson (elected 1828), who saw the bank as a "tyrannical" institution that "oppressed" the "honest and industrious," and accordingly vetoed a bill for recharter in 1832 and removed federal government deposits to various state banks.¹⁸¹ Once the Bank's directors realized that the battle with Jackson was a losing one, they began to sell off branches to local banks. In 1836, when the charter expired, the home office in Philadelphia

obtained a Pennsylvania charter allowing it to operate as a state bank. During the next two years the Bank suffered severe losses and finally closed its doors in 1840.¹⁸²

VII. Conclusion

The "non-reaction" to the decision in Ohio during a period when the economy appeared to be on the rebound lends strong support to the argument that the primary concern of the legislature, and others involved in the taxation, had been the Bank's impact on the state's economy. For if the Eleventh Amendment had been the primary concern, the decision, with its "party of record" holding—stripping the amendment of much of its protective power—would have drawn howls of protest. That it did not brings us to the real lessons of *Osborn*—that many constitutional cases before the Supreme Court have as their basis the struggles of men and women who may or may not be wedded to the legal arguments made on their behalf. And that if we want to better understand our own reactions to the Court and the very powerful role that it plays in national life, we must view the history of constitutional law not only through the lens of the intellectual historian, concerned with the development of doctrine, but through the eyes of those who have put disputes before the Court and then lived, comfortably or not, with the results.

Endnotes

¹ 17 U.S. (4 Wheat.) 316 (1819).

² 22 U.S. (9 Wheat.) 738 (1824).

³ "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Constitution, Amendment XI.

⁴ See *Osborn*, 22 U.S. (9 Wheat.) at 850-59.

⁵ See *id.* at 817-28. Article III, § 2 states, in relevant part, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ..." U.S. Constitution, Article III, § 2, clause 1.

⁶ See *Osborn*, 22 U.S. (9 Wheat.) at 859-68.

⁷ The term "intellectual historian" is used here to indicate an approach to history that focuses primarily on the development of ideas over time rather than upon historical events.

⁸ G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* at 525 (1991).

⁹ 19 U.S. (6 Wheat.) 264 (1821).

¹⁰ 17 U.S. (4 Wheat.) 316 (1819); See White, *supra* note 8 at 524.

¹¹ A search on the Westlaw secondary legal literature databases found no materials analyzing *Osborn* at length. When the case is mentioned in the literature, it is cited for its Eleventh Amendment "party of record" doctrine (which no longer is good law) or as the original source of the "federal ingredient" test for Article III "arising under" jurisdiction for federal courts. See, e.g., Vicki C. Jackson, "Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of *Ex Parte Young*," 72 *N.Y. U.L. Rev.* 495, 496-97 & n. 13 (1997) (discussing "party of record" doctrine); and Sandra Slack Glover, Comment, "Article III and the Westfall Act: Identifying 'Federal Ingredients,'" 64 *U. Chi. L. Rev.* 925, 933-34 (1997) (discussing the "federal ingredient" test as articulated in *Osborn*).

¹² The conflict between Ohio and the Bank of the United States is discussed in works on the subjects of early Ohio history and banking history. These sources tend to focus on the economic conditions in western states after the War of 1812 and, more specifically, upon the events surrounding the collection of the tax from the Bank branch in Chillicothe. These accounts do not analyze the doctrinal significance of the Supreme Court's decision, but instead seek to explain the concerns that led Ohio to challenge the Supreme Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). One of most thorough accounts is Ernest Bogart's "Taxation of the Second Bank of the United States by Ohio" in the *American Historical Review*. Bogart draws on primary sources, including legislative documents and contemporary news accounts, to argue that Ohio had a strong case for its claims against the Bank and acted reasonably rather than in a rash, revolutionary mode when it chose to tax the Bank. Other treatments of the events take a similar view, that Ohio was not acting in open revolt against the National Government, but was simply attempting to protect the state's economy. General works on Ohio history discussing the taxation of the Bank include Buley's *The Old Northwest: Pioneer Period, 1815-1840* and Utter's *The Frontier State, 1803-1825*. Works more specifically focused on the history of banking in Ohio and the United States that include discussions of the taxation of the Bank include Brown's *The Interrelationship of State and National Policy: The Second Bank of the United States and Ohio, 1803-1860*, Hammond's *Banks*

and Politics in America, from the Revolution to the Civil War, and *The Bank Cases*, and Huntington's *A History of Banking and Currency in Ohio Before the Civil War*. The taxation of the Bank is also treated at length in Triplett's *A Biography of Charles Hammond*.

¹³ John A. Garraty, *Quarrels That Have Shaped The Constitution* 3 (Revised ed. 1987) (1964).

¹⁴ See *id.*

¹⁵ Charles Clifford Huntington, *A History of Banking and Currency in Ohio Before the Civil War* (1915).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See William O. Scroggs, *A Century of Banking Progress* 1-2 (1924).

¹⁹ R. Carlyle Buley, *The Old Northwest: Pioneer Period 1815-1840*, 567.

²⁰ See Huntington, *supra* note 15 at 51-53.

²¹ See White, *supra* note 8 at 632.

²² See Huntington, *supra* note 15 at 51-53.

²³ See *id.* at 54.

²⁴ See *id.* at 39-40.

²⁵ See *id.* at 41.

²⁶ See *id.* During the British blockade of the coast, American goods could only be exported from Georgia, by way of Spanish Florida, and, during the early stages, from New England (which was at first favored by the British because of pro-English political sentiments there). Exports from Virginia fell from \$4,800,000 in 1811 to \$17,581 in 1814, while exports from New York and Philadelphia fell to a similar extent. Imports also dropped to negligible amounts with a corresponding drop in revenue from import duties. See *The Concise Dictionary of American History* 995 (Wayne Andrews, ed., 1962).

²⁷ See Huntington, *supra* note 15 at 42.

²⁸ See *id.* at 42-43.

²⁹ Scroggs, *supra* note 18 at 16.

³⁰ *Id.*

³¹ See Huntington, *supra* note 15 at 43.

³² See *id.*; Scroggs, *supra* note 18 at 16.

³³ See Ernest L. Bogart, "Taxation of Second U.S. Bank by Ohio," 17 *Am. Hist. Rev.* 312, 313 (1912).

³⁴ See Buley, *supra* note 19 at 571 n. 20.

³⁵ See *id.* at 571.

³⁶ See Huntington, *supra* note 15 at 44.

³⁷ See *id.*; Marion A. Brown, *The Interrelationship of State and National Policy: The Second Bank of the United States and Ohio, 1803-1860*, 39 (1989).

³⁸ See Huntington, *supra* note 15 at 44.

³⁹ See *id.* at 44-45.

⁴⁰ See *id.*

⁴¹ See *id.* at 44-45, 48.

⁴² See Noble Foster Hoggson, *Epochs in American Banking* 105 (1929); Scroggs, *supra* note 18 at 17-

18.

⁴³ See Hoggson, *supra* note 42 at 81.

⁴⁴ See Bray Hammond, **Banks and Politics in America From the Revolution to the Civil War** 265 (1957).

⁴⁵ See Hoggson, *supra* note 42 at 84-85.

⁴⁶ See *id.* at 105.

⁴⁷ *Id.* at 106.

⁴⁸ See *id.* at 105-06.

⁴⁹ See Bray Hammond, "The Bank Cases," in **Quarrels That Have Shaped the Constitution** 37, 41 (John A Garry ed., 1987).

⁵⁰ See Walter Buckingham Smith, **Economic Aspects of the Second Bank of the United States** 1 (1953).

⁵¹ See *id.* at 107; Hammond, *supra* note 49 at 41.

⁵² See Hoggson *supra* note 42 at 107.

⁵³ See Hammond, *supra* note 49 at 48; Hammond, *supra* note 44 at 252.

⁵⁴ Brown, *supra* note 37 at 41.

⁵⁵ See *id.* at 40-45.

⁵⁶ See Hammond, *supra* note 49 at 38-39.

⁵⁷ *Id.* at 39.

⁵⁸ See Brown, *supra* note 37 at 42-43, 45.

⁵⁹ See William T. Utter, **The Frontier State 1803-1825, 277-78** (1942). Brown suggests that Worthington later paid the price for his support of the Bank in the form of a lost Senate race in 1818. See Brown, *supra* note 37 at 45.

⁶⁰ Bogart, *supra* note 33 at 314.

⁶¹ See Smith, *supra* note 50 at 99.

⁶² See *id.* at 102-105.

⁶³ See *id.* at 104; Huntington, *supra* note 15 at 61.

⁶⁴ See Bogart, *supra* note 33 at 317.

⁶⁵ See *id.*

⁶⁶ See Hammond, *supra* note 44 at 246.

⁶⁷ See Bogart, *supra* note 33 at 317.

⁶⁸ See Brown, *supra* note 37 at 51-52, 55.

⁶⁹ See Smith, *supra* note 50 at 108.

⁷⁰ See *id.*

⁷¹ See Brown, *supra* note 37 at 55; Smith, *supra* note 50 at 106.

⁷² U.S. House Doc. 92, 15 Cong., 2 sess., p.156 *quoted in* Smith, *supra* note 50 at 108.

⁷³ See Smith, *supra* note 50 at 108.

⁷⁴ See Huntington, *supra* note 15 at 59-65.

⁷⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁷⁶ Hammond, *supra* note 49 at 43.

⁷⁷ See Hammond, *supra* note 49 at 41-43.

⁷⁸ See *id.* at 43.

⁷⁹ See *id.* at 47.

⁸⁰ See *id.* at 43, Hammond, *supra* note 44 at 263.

⁸¹ Hammond, *supra* note 49 at 43-44; Hammond, *supra* note 44 at 258-64.

⁸² Hammond, *supra* note 49 at 44.

⁸³ See Huntington, *supra* note 15 at 62-63.

⁸⁴ The long-term loan, standard today, was not yet in

common use.

⁸⁵ See Huntington, *supra* note 15 at 63.

⁸⁶ See Bogart, *supra* note 33 at 322; Huntington, *supra* note 14 at 94.

⁸⁷ See Huntington, *supra* note 14 at 63-64.

⁸⁸ *Id.* at 71.

⁸⁹ See *id.* at 72.

⁹⁰ See Barbara Jo Triplett, **A Biography of Charles Hammond** 60 (1963). Hammond, a Federalist, was a lawyer and journalist born in Baltimore in 1779. He emigrated to Ohio in 1810 where he became one of the leading members of the bar and a several-term state legislator. After his involvement in the taxation of the Bank and the first argument of *Osborn* before the Supreme Court in 1823, he moved to Cincinnati, Ohio, where he established a law practice and became the first reporter for the Ohio Supreme Court. He was also editor of the *Cincinnati Gazette* from 1825 until his death in 1840, making it one of the most influential newspapers in the western states. See **Concise Dictionary of American Biography** 396 (3rd. ed. 1980).

⁹¹ See Triplett, *supra* note 90 at 56.

⁹² See *id.* at 57.

⁹³ See *id.* at 59.

⁹⁴ See *id.* at 59-60.

⁹⁵ Ethan Allen Brown, a Jeffersonian, was a lawyer and politician born in 1766 in Connecticut, where he served an apprenticeship of the law office of Alexander Hamilton. He established a law practice in Cincinnati, Ohio, in 1804 and was later appointed to a judgeship on the Ohio Supreme Court. He was elected governor in 1818 and 1820 by large majorities. He is described by Utter as "a political economist of first rate ability." His major concern as governor and in latter public life was the economy and what he saw as the improvements needed in canals and other elements of the country's transportation system. See Utter, *supra* note 58 at 312; **Concise Dictionary of American Biography**, *supra* note 90 at 120.

⁹⁶ Ohio House Journal 92, 94 (1818-1819), *quoted in* Bogart, *supra* note 33 at 319.

⁹⁷ See Triplett, *supra* note 90 at 60-61; Huntington, *supra* note 15 at 72.

⁹⁸ XVIII Laws of Ohio 179-82 (Olmstead 1820); See Triplett, *supra* note 90 at 61.

⁹⁹ See Bogart, *supra* note 33 at 319-20.

¹⁰⁰ See *id.* at 320.

¹⁰¹ See *id.* at 323.

¹⁰² See 1 Charles Warren, **The Supreme Court in United States History** 511-526 (1922).

¹⁰³ *Id.* at 527, *quoting Western Herald and Steubenville Gazette*, March 20, 1819.

¹⁰⁴ See Hammond, *supra* note 15 at 46.

¹⁰⁵ See Utter, *supra* note 59 at 304.

¹⁰⁶ See **The Concise Dictionary of American History**, *supra* note 26 at 354. "[E]ven after 1800 there

were Federalist strongholds in the South, despite the predominance of Jeffersonianism. Maryland maintained a staunch Federalist faction for many years...." *Id.*

¹⁰⁷ See Utter, *supra* note 59 at 304.; Warren, *supra* note 102 at 528; Hammond, *supra* note 49 at 47; Hammond, *supra* note 44 at 266-67.

¹⁰⁸ See Bogart, *supra* note 33 at 323.

¹⁰⁹ Telephone interview with Richard Schorr, Administrative Assistant, Office of the Ohio Auditor of State (October 14, 1997).

¹¹⁰ See Bogart, *supra* note 33 at 323 citing Auditor's Report to the Legislature, December 9, 1819, *Ohio House Journal* 38 (1820).

¹¹¹ See Utter, *supra* note 59 at 304.

¹¹² See *id.*

¹¹³ See White, *supra* note 8 at 525.

¹¹⁴ See Bogart, *supra* note 33 at 323. Bogart defends Osborn against earlier historical accounts which portrayed Osborn as acting in defiance of a valid injunction. *Id.* at n.52.

¹¹⁵ See *id.* at 323. Accounts of the tax collection do not provide details concerning who John L. Harper was or his relationship to the State Auditor's office, *i.e.*, whether he was an agent regularly hired by the office or simply engaged for this task. See, *e.g.*, *id.*; Utter, *supra* note 59 at 306; Hammond, *supra* note 44 at 267.

¹¹⁶ See Utter, *supra* note 59 at 305.

¹¹⁷ See Hammond, *supra* note 44 at 267.

¹¹⁸ See Utter, *supra* note 59 at 306; Bogart, *supra* note 33 at 324.

¹¹⁹ See Bogart, *supra* note 33 at 324.

¹²⁰ See *id.* at 324-25.

¹²¹ See *id.* at 324; Huntington, *supra* note 15 at 91-92.

¹²² See Huntington, *supra* note 15 at 92.

¹²³ Bogart, *supra* note 33 at 325.

¹²⁴ See Triplett, *supra* note 90 at 68.

¹²⁵ See *id.*

¹²⁶ See White, *supra* note 8 at 526.

¹²⁷ See Bogart, *supra* note 33 at 325.

¹²⁸ See *id.*; Utter, *supra* note 59 at 308; Huntington, *supra* note 15 at 92.

¹²⁹ Utter, *supra* note 59 at 308.

¹³⁰ See Bogart, *supra* note 33 at 325 & n. 60. Bogart, arguing for the propriety of the actions taken by Sullivan, goes on to say that "[t]he state officials were after all bound by state laws, and were justified in construing their meaning strictly." *Id.* at n.60.

¹³¹ See Huntington, *supra* note 15 at 93.

¹³² See *id.*; Utter, *supra* note 59 at 310.

¹³³ State Auditor's Report of December 5, 1920, 46 *Ohio House Journal* (1821); see Huntington, *supra* note 15 at 94.

¹³⁴ See Triplett, *supra* note 90 at 65 & n. 31.

¹³⁵ See Huntington, *supra* note 15 at 94.

¹³⁶ The report appears in the *Ohio House Journal* 99-132 (1821) and is reprinted in United States Congress, II (Misc.) *American State Papers: Documents, Legislative and Executive, of the Congress of the United States*, 643-54 (1834) as *Right of a State to Tax a Branch of The Bank of the United States*, S. Rep. No. 16-500 (1821) [hereinafter *American State Papers*].

¹³⁷ See Bogart, *supra* note 33 at 327.

¹³⁸ See *id.*

¹³⁹ See *id.* at 328.

¹⁴⁰ *Ohio House Journal* 98-132 (1820-1821) quoted in Huntington, *supra* note 15 at 95.

¹⁴¹ The Virginia and Kentucky Resolutions were documents anonymously drafted by Thomas Jefferson (Kentucky Resolution) and James Madison (Virginia) and adopted by the Virginia and Kentucky legislatures in 1798. A second Resolution was passed in Kentucky in 1799. The Resolutions were drafted in response to the passage of the Alien and Sedition Acts by the Federalist administration, but addressed the broader topic of the nature of the Union. The Resolutions adopted the compact theory of Union and argued that the National Government should not be the final judge of the extent of its own powers. The Resolutions have been used over the years, as they were by the Ohio legislature, to buttress states' rights claims. See **Concise Dictionary of American History**, *supra* note 26 at 986-87.

¹⁴² See Huntington, *supra* note 15 at 95.

¹⁴³ "Resolved by the General Assembly of the State of Ohio, That, in respect to the powers of the Governments of several States that compose the American Union, and the powers of the Federal Government, this General Assembly do recognize and approve the doctrines asserted by the Legislatures of Kentucky and Virginia in their resolutions of November and December, 1798, and January, 1800, and do consider that their principles have been recognized and adopted by a majority of the American people." *American State Papers*, *supra* note 136 at 653.

¹⁴⁴ "Resolved, further, That this General Assembly do protest against the doctrines of the federal circuit court sitting in this State, avowed and maintained in their proceedings against the officers of state upon account of their official acts, as being in direct violation of the eleventh amendment to the constitution of the United States." *American State Papers*, *supra* note 136 at 653.

¹⁴⁵ "Resolved, further, That this General Assembly do assert, and will maintain, by all legal and constitutional means, the right of the States to tax the business and property of any private corporation of trade, incorporated by the Congress of the United States, and located to transact its corporate business within any State." *American State Papers*, *supra* note 136 at 653.

¹⁴⁶ "Resolved, further, That the Bank of the United States

is a private corporation of trade, the capital and business of which may be legally taxed in any State where they may be found.” American State Papers, *supra* note 136 at 653.

¹⁴⁷ “Resolved, further, That this General Assembly do protest against the doctrine that the political rights of the separate States that compose the American Union, and their powers as sovereign States, may be settled and determined in the Supreme Court of the United States, so as to conclude and bind them in cases contrived between individuals, and where they are, no one of them, parties direct.” American State Papers, *supra* note 136 at 654.

¹⁴⁸ “Resolved, further, That the Governor transmit to the Governors of the several States a copy of the foregoing report and resolutions, to be laid before their respective Legislatures, with a request from this General Assembly that the Legislature of each State may express their opinion upon the matters therein contained.” American State Papers, *supra* note 136 at 654.

¹⁴⁹ “Resolved, further, That the Governor transmit a copy of the foregoing report and resolutions to the President of the United States, and to the President of the Senate and Speaker of the House of Representatives of the United States, to be laid before their respective Houses, that the principles upon which this State has, and does proceed, may be distinctly and fairly understood.” American State Papers, *supra* note 136 at 654.

¹⁵⁰ The text of this final Resolution appears in the *Ohio House Journal*, but not in the Senate Report reprinted in *American State Papers*. See Bogart, *supra* note 33 at 327 n. 65.

¹⁵¹ This “power to preserve” argument was echoed by Clay in his argument in *Osborn*: “It is a maxim applicable to the interpretation of a grant of political power, that the authority to create must infer a power effectually to protect, to preserve and to sustain.” *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 809 (1824) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1919)).

¹⁵² See Bogart, *supra* note 33 at 329-30; Huntington, *supra* note 15 at 98.

¹⁵³ See Huntington, *supra* note 15 at 98.

¹⁵⁴ See Bogart, *supra* note 33 at 330.

¹⁵⁵ John Crafts Wright was born in 1783 in Connecticut where he studied law. Also a trained printer, he produced the *Troy Gazette* during his years in Troy, NY. He moved west to Steubenville, in eastern Ohio, where he was admitted to the bar and began his law practice in 1809. In 1817, at the age of forty-four, he was appointed U.S. District Attorney. In 1823, the same year that he argued *Osborn* with Hammond, Wright was elected to the U.S. House of Representatives and served in the 18th-20th Congresses (1823-29). He served as a Justice of the Ohio Supreme Court from

1831-35 and then moved to Cincinnati where he published the *Cincinnati Gazette* for the next thirteen years. He traveled to Washington, D.C., in 1861 as a delegate to the Peace Convention and died there at the age of 77. See *Who Was Who in America: Historical Volume 1607-1896*, at 671 (rev. ed. 1967).

¹⁵⁶ Henry Clay, born 1777 in Hanover County, Virginia, was a lawyer, nationalist politician, and repeated presidential candidate during his long public career. With little formal educational background, he studied law in the office of Attorney-General Robert Brooke for one year (1796) before earning a practice license. He moved to Lexington, Kentucky, the following year and established himself as a leading criminal attorney. Clay entered politics in 1798 with a speech in Lexington against the Sedition Act. He served in the Kentucky legislature from 1803-06 and entered national politics when he went to Washington to fill out the term of another Kentucky Senator. During this session he supported internal improvements. He returned to the Senate in 1809, after serving as Speaker of the Kentucky legislature. During this Term he opposed the recharter of the United States Bank as unconstitutional and dangerous to democratic institutions—a stance he abandoned in 1816 when proposals for recharter were put forth after the War of 1812. Stating a desire to be “an immediate representative of the people,” Clay went to the House and was elected Speaker in 1811 and served until 1821. He was back in the House by 1823, the year *Osborn* was initially argued, and was again Speaker. In Congress, Clay was a persistent advocate of a strong Union and thus supported the Bank, internal improvements, protection of American industries via tariffs on imports, and a strong national defense. (His support for the Bank would lead to several clashes with Andrew Jackson.) Clay made unsuccessful runs for the Presidency in 1824, 1832, and 1844. He served as Secretary of State from 1824-28 and served additional terms in the Senate before his death in 1852. See *Concise Dictionary of American Biography*, *supra* note 90 at 179-80.

¹⁵⁷ Daniel Webster, born in New Hampshire in 1782, was a lawyer and statesman who is described by Warren in *A History of the American Bar* as the “undisputed head” of the federal bar from the time of William Pinkney’s death in 1822 until his own death in 1853. See Warren, *A History of the American Bar*, 367, 408 (1913). He made his reputation as a constitutional lawyer in the Dartmouth College case in 1819 and was counsel for the Bank in *McCulloch*. A Federalist, Webster was first elected to Congress in 1812 and served there until 1816. During that Term he opposed the re-chartering of the U.S. Bank without adequate safeguards for financial stability. He returned to Boston in 1816 where he concentrated on building his law practice and participated in

some of the most famous cases heard by the Marshall Court, including *Cohens v. Virginia*, *Gibbons v. Ogden*, and the two Bank cases. See White, *supra* note 8 at 275. Webster returned to Congress, 1823-27, where he clashed with Henry Clay over the issue of protective tariffs. In 1827 he was elected to his first Senate Term during which he changed his position on the tariff out of support for fabric mill owners in Massachusetts. In the early 1830s Webster joined the nascent Whig party and clashed with Jackson over the latter's attacks on the Bank. Often left in debt by his profligate spending habits, Webster borrowed more than \$111,000 from the Bank during its twilight years when it was operating as a Pennsylvania state bank. When pressed for payment, he used his political clout to win a reduction of the debt and was eventually relieved of the duty to pay when the Bank closed due to financial losses in the early 1840s. See White, *supra* note 8 at 269-70. Webster served further Terms in the Senate and twice as Secretary of State (1840-1843 & 1850-1852) and died shortly after being denied the presidential nomination by the Whig party in 1852. See **Concise Dictionary of American Biography**, *supra* note 90 at 1127-1128.

¹⁵⁸ John Sergeant was for many years the chief advisor to the Bank. Born in Philadelphia, he graduated from Princeton in 1795 and studied law with Jared Ingersoll. He set up practice in Philadelphia where he became a leading member of the bar and a member of an intellectual group led by Nicholas Biddle, President of the Bank from 1823 until its demise. Sergeant served three terms in Congress: 1815-23 as a Federalist, 1827-29 as a National Republican, and 1837-41 as a Whig. In Congress, he was a strong supporter of Clay's "national system" and before the Supreme Court he often argued for national powers. He is described as a strong "forensic legalist, less eloquent than intellectual." **Concise Dictionary of American Biography**, *supra* note 90 at 916.

¹⁵⁹ See *Osborn v. Bank of the United States*, 22 U.S. 738, 793, 801 (1824); Warren, *supra* note 157 at 396. Warren asserts that Henry Clay argued solo in 1823 and was not joined by Webster and Sergeant until the reargument in 1824. This would seem to be supported by the case opinion which only documents arguments for the Bank attributed to Clay at the first argument. See *Osborn*, 22 U.S. at 795. White, however, asserts that Wheaton combined the arguments of Clay, Webster, and Sergeant in his report of the initial argument. See White, *supra* note 8 at 528 n.156.

¹⁶⁰ See *Osborn*, 22 U.S. at 755-65.

¹⁶¹ 9 Wheat. 904 (1824).

¹⁶² See *Osborn*, 22 U.S. at 804; White, *supra* note 8 at 526.

¹⁶³ Harper is described by Warren in **A History of the American Bar** as a "graceful" orator who argued more

cases before the Supreme Court between 1800 and 1815 than any other member of the federal bar. See Warren, *supra* note 157 at 260-61. He was born in Virginia, studied law after his graduation from Princeton in 1785 and set up his law practice in South Carolina. He began his state political career when he won election to the South Carolina legislature in 1795 as a Democratic Republican and, once elected, immediately shifted his political allegiance to the Federalist party. After his marriage to Catherine Carroll, daughter of Charles Carroll, in 1801, Harper moved to Baltimore, Maryland, where he established a successful law practice and was active in civic affairs such as the American Colonization Society which promoted the return of slaves to Africa. (It was Harper who suggested the names Liberia and Monrovia as names for the Society's colony.) Harper died shortly after the reargument of *Osborn*, in 1825, in Baltimore. See **Concise Dictionary of American Biography**, *supra* note 90 at 403. The sources used in this study of *Osborn* do not indicate why Harper replaced Hammond at the second argument of the case. Given that neither Sergeant or Brown were known for their oratorical powers, it may have been that Harper was brought in to deliver previously-developed arguments before the Court.

¹⁶⁴ See *Osborn*, 22 U.S. at 811-816.

¹⁶⁵ See White, *supra* note 8 at 526-28.

¹⁶⁶ See *Osborn*, 22 U.S. at 850-58. "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record." *Id.* at 857. See also White, *supra* note 8 at 527.

¹⁶⁷ See note 5 *supra*.

¹⁶⁸ See *Osborn*, 22 U.S. at 818-28. See also White, *supra* note 8 at 527.

¹⁶⁹ *Osborn*, 22 U.S. at 795.

¹⁷⁰ See *id.* at 859-68. See also White, *supra* note 8 at 527.

¹⁷¹ See *Osborn*, 22 U.S. at 870-71.

¹⁷² See *id.* at 871.

¹⁷³ See White, *supra* note 8 at 527.

¹⁷⁴ See 123 U.S. 443 (1887); R. Kent Newmyer, **The Supreme Court Under Marshall and Taney** 49 (1968).

¹⁷⁵ See note 11 *supra*.

¹⁷⁶ See e.g., Hammond, *supra* note 49 at 52; Bogart, *supra* note 33 at 330-31; Brown, *supra* note 37 at 126.

¹⁷⁷ See *The Supporter*, and *Scioto Gazette*, April 8, 1824 at 1, April 15, 1824 at 1, and April 22, 1824 at 1.

¹⁷⁸ See Niles' Register, XXVI (Mar. 8, 1824 - Aug. 28, 1824). Niles' Register had responded to the decision in *McCulloch* with a three-part protest essay titled "Sovereignty of the States." See *id.* XVI at 41, 103, 145 (1819).

It had also reported extensively on Ohio's taxation of the Bank. Stories relating the various stages of the conflict were run on Oct. 9, 1819, XVII p. 85 (account of the tax collection); Oct. 30, 1819, XVII p. 131 (editorial comment on the tax collection); Dec. 11, 1819, XVII p. 227 (re: the judgement on the writ of *habeas corpus* brought on behalf of John L. Harper and Thomas Orr); Jan. 8, 1820, XVII p. 31 (reprint of State Auditor's Report to the Legislature re: the taxation of the Bank); Jan. 22, 1820, XVII p. 337 (report on the trial and release of Harper and Orr); Feb. 26, 1820, XVII p. 449 (discussion of circuit court case against Osborn and Harper); Sept. 29, 1821, XX p. 75 (reprint of a letter from Charles Hammond to the *Columbus Gazette* summarizing the history of the controversy); Jan. 26, 1822, XXI p. 342 (reprint of the anti-Bank resolutions adopted by the Ohio legislature). Given this extensive coverage it seems all the more strange that the opinion drew no mention in the weeks and months following its announcement. This lends support to Bogart's contention that the attention of Ohio and the country had turned away from the Bank, at least briefly, as the economy improved in 1823-24, and to his argument that Ohio had been motivated "by the economic advantages to be obtained, and not by any *a priori* theories of political relations." Bogart, *supra* note 33 at 327.

¹⁷⁹ Bogart, *supra* note 33 at 330.

¹⁸⁰ See Triplett, *supra* note 90 at 72.

¹⁸¹ Triplett, *supra* note 90 at 71. In that year (1823),

Hammond moved his family from Belmont County in eastern Ohio to Cincinnati where he used his still-good reputation as a lawyer to establish his own law office and also accepted an appointment as the Ohio Supreme Court's first court reporter, publishing the first nine volumes of *Ohio Reports*. See *id.* at 72-75.

¹⁸² See Hammond, *supra* note 44 at 328. Hammond argues that five socio-political forces united in the destruction of the Bank: "The Jacksonians were unconventional and skillful in politics. In their assault on the Bank they united five important elements, which, incongruities notwithstanding, comprised an effective combination. These were Wall Street's jealousy of Chestnut Street [the location of the home office of the Bank], the business man's dislike of the federal Bank's restraint upon bank credit, the politician's resentment at the Bank's interference with state's rights, popular identification of the Bank with the aristocracy of business, and the direction of agrarian antipathy away from banks in general to the federal Bank in particular." *Id.* at 329.

¹⁸³ See Hoggson, *supra* note 42 at 115-16. The Cincinnati branch of the Bank had ceased regular banking business in 1820 because of heavy losses incurred during the panic of 1819. It remained open until 1829 as an agency for the resolution of outstanding debts and the management and resale of the properties it had acquired during its earlier credit contraction. A new banking branch was opened in the city in 1825 with a new local Board of Directors. See Brown, *supra* note 37 at 71-72 & n.50.

Judicial Bookshelf

D. Grier Stephenson, Jr.

Systematic study of the Supreme Court began little more than a century ago as history, law, and political science emerged as professional academic disciplines. The result has been an expanding variety of approaches and methodologies designed to explain both the *what* and the *why* of the Court's decisions. Judicial scholarship continues to explore the contributions of individual Justices, and through them the effects of the Bench and the rest of the political system on each other.

Animated by twentieth-century empiricism, one category of Court scholarship is the judicial process itself—that is, the business, procedure, and impact of courts. It may depict one or more elements of that process as illustrated by a series of cases, or virtually all elements of the process as illustrated by a single case. The latter type is commonly referred to as a “case study” as it portrays judges as actors on the political and legal stage.

Applied to the Supreme Court, case studies have become a major part of the literature only since the late 1950s. In the first edition of one undergraduate textbook on American constitutional law published in 1954, the several hundred entries of “suggested readings” included barely a single one that could fairly be labeled a case study.¹ When one of the first collections of article-length judicial case studies was published in 1963, the co-editors devoted part of the introductory chapter both to

a defense of the value of the case study as a tool in understanding “constitutional politics” and to a description of what a properly designed case study should encompass.

[T]he case must be reconstructed in all its complexity, background, color, conflict, strategic dilemmas, and ramifications. The real parties to disputes and how their disputes arose; the struggles in private and public arenas

that preceded the transfer of the dispute to the courts; ... the strategic and doctrinal battles during the litigation process; the way in which political and private forces affect the litigation as it progresses through the courts; ... the impact of public opinion upon the judiciary in its consideration of cases and its scope of decision; the response of the parties, government, and the public to the judicial rulings ...; the compliance, noncompliance, or modification of judicial rulings by elected and appointed officials; ... — these and a host of other questions must be explored in order to achieve a sophisticated understanding of what the role of the courts is in contemporary America.²

Once novel, judicial case studies have become commonplace. The expectation now is that they treat “all levels of courts and all kinds of law as integral parts of the politics of policy making.”³

Studies of a single constitutional case or group of similar cases are intellectually useful in at least three ways. First, they are descriptive. As analytical narratives, case studies picture all or part of the judicial process at work, from the origins of a controversy to its resolution, including its impact on the larger political system and on future litigation.⁴

Second, case studies are efficient. Since it is not feasible for every case to be examined in great detail, readers make judgments about reality from a much smaller number of close-up encounters, inferring the whole from the part. A single case study illustrates how the judicial process can work; a series of case studies allows conclusions fairly to be drawn about how the judicial process ordinarily does work.

Third, case studies are demonstrative. They may lay bare important, but sometimes overlooked, ingredients in constitutional interpretation. One of these is the Court’s own case selection process: deciding what to decide;

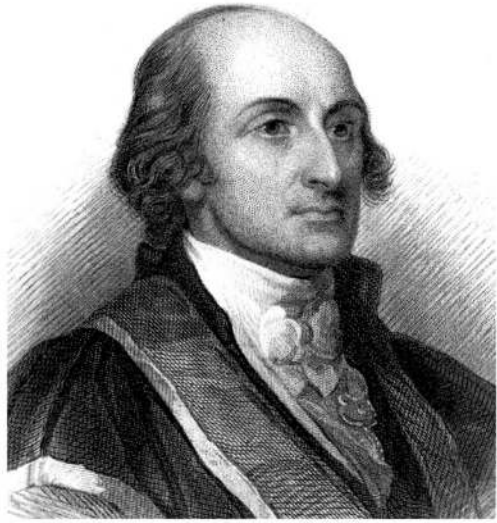
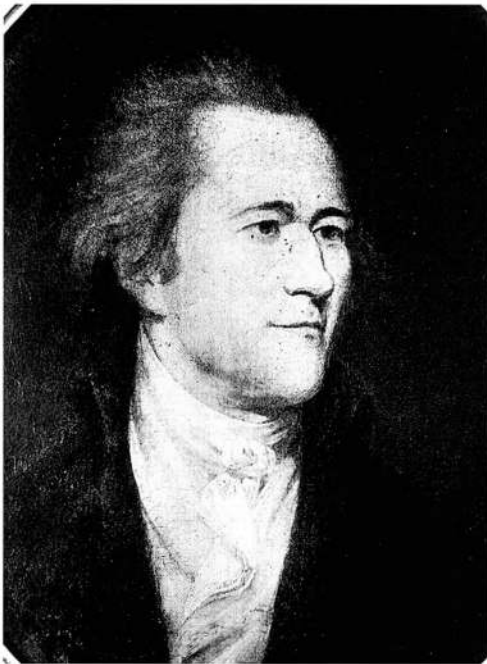
another might be the role of self-interest, of timing, or even of chance. Moreover, because of the particular issues that litigation may pose, the case study can be a window on complex cultural and intellectual forces that ordinarily seem far removed from a courtroom but which may lend the litigation its significance as well as its notoriety. Five recently published volumes reflect the enduring utility of case studies and suggest that this genre of Court literature continues to thrive.

Jay Stewart’s **Most Humble Servants**⁵ is a meticulous monograph that offers a fresh perspective on one of the earliest collective actions by the Supreme Court of the United States. In the summer of 1793, Secretary of State Thomas Jefferson wrote members of the Court on behalf of President George Washington. Uncertainty over the nation’s legal position as a neutral party during a war among several European powers had given rise to prominent “abstract questions” that were “often presented under circumstances which do not give a cognizance of them to the tribunals of the country.” Not sure of its footing on international law (particularly when confronting the outfitting in American ports of French privateers that would prey upon British shipping), embarrassed by the political shenanigans and impertinence of newly accredited French ambassador Edmond Charles Genêt that undercut American neutrality, and desperately wanting to avoid depredations on American soil by the British and Spanish from the north, the west, and the south, the administration was squarely in the thick of its first foreign policy crisis. It needed all the help it could get. Without a foreign policy “establishment” to which to turn, the request made good sense. One draws upon the talent that is available. Yet, though thoroughly respectful and deferential, all Justices but William Cushing (who was absent) signed a letter dated August 8, declining the request.

The Lines of Separation drawn by the Constitution between the three Departments of Government—their

being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to *executive* Departments.⁶

Thus both the Constitution's design and its text prevented the Justices from providing collective counsel outside the context of an actual case, although the author suggests that the exact wording of the response ("the questions alluded to") left open the possibility that different questions at another time might receive an answer. Not only has the Court persisted in steadfastly eschewing advisory opinions,⁷ but, the author contends, so has that "standard interpretation of the Court's unwillingness"⁸ to act in the neutrality crisis. In short, historians and constitutional scholars seem ever since to have accepted the August 8 reply as a com-



Chief Justice John Jay (above) was highly experienced in foreign relations, having served as Secretary for Foreign Affairs for the Congress under the Articles of Confederation from 1784 to 1789. He even negotiated a treaty with England while Chief Justice, to ease residual frictions. As Stewart Jay points out in his new work *Most Humble Servants*, Jay was closely aligned with Alexander Hamilton (below) in believing that Congress should not play a strong role in making foreign policy.

plete explanation of the Court's refusal.

Most Humble Servants contends that there is more to the story. First, there was a long English and a shorter American state tradition that sanctioned advisory opinions.⁹ Second, Justices during the 1790s individually counseled the executive branch on several occasions at its request. Third, the Justices' views notwithstanding, neither constitutional text nor theory *necessarily* precluded advisory opinions. Accordingly, the book develops the thesis that the letter of August 8 "was not an isolated occurrence; rather, it transpired in the midst of a grave political crisis. ... [T]he surrounding political climate and the ideological orientations of key political players, some of whom were on the Court, directly influenced the Justices' decision to decline answering." And that "climate" included an awareness of threats that the national judiciary faced from the rest of the political system. In short, the

constitutional reasoning in the letter was plausible, but not unanswerable. But for particular circumstances—"the tangled political history of the early 1790s"¹⁰—the Justices might have come to the aid of their President and, in so doing, might well have altered the course of Supreme Court history.

The foremost factor underlying the Justices' self-effacing denial seems to be the overt partisanship that manifested itself nationally for the first time in the congressional elections of 1792. Divisions between cabinet members Alexander Hamilton and Thomas Jefferson were beginning to be reflected in voting patterns in Congress and at the polls. Amidst the neutrality crisis of 1793, anti-administration figures (who were being called Republicans) "routinely labeled supporters of a strict neutrality as British sympathizers, who were opposed to the revolutionary principles driving the French cause."¹¹ Institutionally, pro-administration figures (Federalists) maintained that the nation's foreign policy was the sole domain of the executive branch. Republicans insisted on a prominent congressional role. James Madison, for instance, "would not even concede that the President had the authority to recognize foreign governments." Thus, for the Court to have acceded to Washington's request would have undercut the principle that "the leadership in foreign affairs had to be firmly in the control of the executive."¹² Chief Justice Jay not only was highly experienced in foreign relations¹³ but, like other members of the Court, was closely aligned with Hamilton on this point. And there might well have been implications for the future. To have given advice might have established a precedent of routine judicial involvement in the construction of treaties, at the request of either Congress or the President.

More practically, Jay and the other Justices were probably unpersuaded that Genêt and his sympathizers "would be affected by anything the Court said about the treaties."¹⁴ Thus, were the administration's neutrality policy to fail, the Court would have needlessly

expended valuable political capital.¹⁵ Moreover, the Justices were acutely aware of the unpopularity of the federal judiciary in some quarters, as the hostile reaction to *Chisholm v. Georgia*,¹⁶ decided only a few months earlier, had demonstrated. The Justices not only desired reform of the circuit system, and so needed as many friends as they could muster, but wanted to avoid contraction of the federal judicial power. So even if the administration's neutrality policy succeeded, advice would constitute taking sides, and would make the Court the ally of one group and the enemy of the other and an object of contention in elections to come.

Thus, the Justices' awareness of the significance of even embryonic partisanship seems to have been dispositive. Political parties, as the author might have stressed more than he did, lend permanence, power, and consequences to divisions among people. In a system founded on "the consent of the governed," parties were probably inevitable. If political power legitimately belongs to those who win elections, then those desiring power create vehicle to amass votes. Parties both manage and legitimize political combat. So it is one thing for a court to take actions that generate a negative reaction. It is quite another thing, a potentially dangerous thing, when an organization both embraces and fuels that reaction.¹⁷ Ironically, judicial power and stature sometimes rest on a refusal to wield influence, the wisdom of being quick to listen and slow to speak. **Most Humble Servants** makes a strong case that even the earliest Justices possessed a rudimentary understanding of that truth.

The letter of August 8 is noteworthy in part because the Court denied itself influence. Yet the Supreme Court has mattered since 1793 precisely because of the many situations in which the Court has not kept silent. As British political scientist Harold Laski observed a century and a half later, "The respect in which federal courts and, above all, the Supreme Court are held is hardly surpassed by the influence they exert on the life of the United States."¹⁸ Much of the Court's business is different from

the 1793 event in another respect as well. The August letter involved an exchange among only the highest officials of the government. Even though cases in the Supreme Court may present some of the most contentious national issues for resolution, it is the legal claims of ordinary people that frequently provide the raw material of constitutional law.

This point is amply demonstrated by John Johnson's *The Struggle for Student Rights*.¹⁹ His narrative begins in the late fall of 1965 when several "well-scrubbed, thoughtful kids attending public schools in Des Moines, Iowa" attended an anti-war "march on Washington." The experience inspired them to plan a "quiet undertaking": to wear black armbands to school to mourn the casualties of the Vietnam war and to support Senator Robert Kennedy's call for an extension of a Christmas truce which President Lyndon B. Johnson was expected to announce.²⁰ Forewarned, school officials moved to frustrate the plan. When Christopher Eckhardt, Mary Beth Tinker and her brother John, and a few other students nonetheless arrived at their respective schools with armbands in place, they were suspended or otherwise sent home until such time that they agreed to remove them. (Eckhardt and the Tinker siblings—the named parties in the case—returned to school in January 1966. Holiday cheer presumably having interceded, they were allowed to return without penalty, but without their armbands as well.)

The narrative moves from U.S. District Judge Roy Stephenson's ruling for the school district, through an evenly divided *en banc* Eighth Circuit bench, and concludes with the 1969 landmark ruling in *Tinker v. Des Moines Independent Community School District*,²¹ and its impact. Richer in factual detail than in First Amendment theory, the book recounts the making not only of one of the most important free speech cases of the 1960s but of one of only a handful of Supreme Court cases to that time involving the constitutional rights of children in school. The book is another reminder that, at least from the time of Lexington and

Concord onward,²² Americans have excelled at the art of challenging authority and defending what they believe to be their legal rights, in and out of court.

The author draws upon numerous interviews with participants, contemporary newspaper and other periodical accounts, the case record, and the papers of the Justices. There is probably very little that one would want to know about the families involved and *Tinker's* progression through the courts that Johnson has not included. A chronology and bibliographical essay are tucked near the back. The only serious omission is endnotes or footnotes. Their absence here not only makes it difficult for the reader to identify with certainty the wealth of the author's sources but can create confusion as well. For example, Johnson refers at one point to some information gleaned from "Fortas's principal biographer."²³ Who is that? There have been at least two major biographies published about the late Justice, the first by Bruce Allen Murphy²⁴ and the second by Laura Kalman.²⁵ A search of the bibliographical essay finds a mention of Kalman's, but not Murphy's, so one supposes that the reference in the text of the book is to hers. But an endnote would have revealed that fact in an instant, along with the precise location of the passage within Kalman's book.

This defect aside, the book is a useful addition to the literature. Johnson refocuses attention on a decision now three decades old. One learns that the split was five to four when the Court acted on the petition for certiorari on March 4, 1968: Justices Hugo L. Black, John Marshall Harlan, Byron R. White, and Abe Fortas voted to deny review. And both Black and Harlan were the two dissenters when the decision came down on February 24, 1969. However, it was White who pressed Dan Johnston, counsel for the students, with the most intense questioning during oral argument, questions that Johnston later characterized as a "cross-examination" that interfered with the flow of his argument.²⁶ Indeed, the author reports that the transcript reveals nineteen ques-



tions to Johnston from Justice White alone in about three minutes. Yet, despite the perceived hostility, it was White who offered a rationale in Conference that ultimately commanded a majority of the Bench for Johnston's clients. Moreover, it was Justice Fortas who wrote the opinion of the Court siding with Eckhardt and the Tinkers, even though his initial position on certiorari would have left in place the District Court's ruling in favor of the school district.²⁷

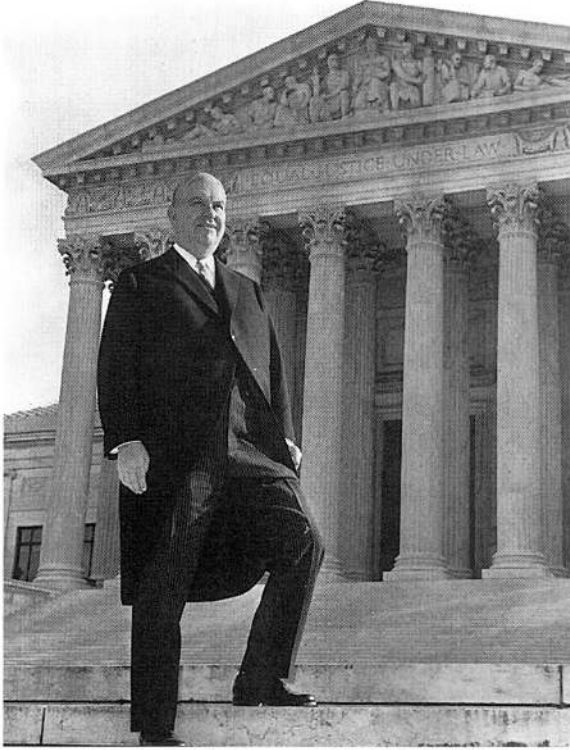
The reader also learns that Chief Justice Earl Warren apparently followed the suggestion of a law clerk to make sure that *Tinker* came down after *United States v. O'Brien*.²⁸

This sequence was significant for development of the First Amendment. Argued January 24 and decided on May 27, 1968, *O'Brien* sustained 7 to 1, against a free speech challenge, a federal statute criminalizing the destruction of one's draft card or registration certificate. According to one account,²⁹ Warren's first draft of the majority opinion merely declared O'Brien's act of burning his draft card in an anti-war protest to be nonverbal communication outside the protection of the First Amendment. Harlan and Brennan, however, were sharply critical. Brennan stressed that the conduct fell under the First Amendment, but that the government's interest in regulating it was "compelling." Warren's revised opinion generally followed Brennan's approach, except that the former rested the outcome on the government's "important or substantial" interest. Thus, nearly the entire Bench agreed to only grudging acknowledgment of any free speech interest in the symbolic action and generously applied a standard favorable to the government's position that allowed its proscription.

Given the sweep of the Court's 7-2 holding in the armband case extending First Amendment protection to the symbolic actions on school premises, the result in *O'Brien* would have been more difficult to justify had *Tinker* come down prior to, or at about the same time as, the draft card case. Similarly, the result in

In support of Senator Robert Kennedy's call for an extension of a Christmas truce in Vietnam, several public school children in Des Moines, Iowa, resolved to wear black armbands to school to mourn the war casualties. The students were suspended, but allowed to return without penalty—and without armbands. John and Mary Beth Tinker became the name parties in a case testing the constitutional rights of children in school.





In his new work, *The Day the Presses Stopped*, David Rudenstine accepts Solicitor General Erwin Griswold's assessment in 1991 that "[i]n hindsight, it is clear to me that no harm was done by publication of the Pentagon Papers." Griswold is pictured arriving at the Court in 1967 to argue his first case since taking over as Solicitor General from Thurgood Marshall, who had been appointed to the Supreme Court.

Tinker would have been more difficult to justify had that case come down with, or soon after, *O'Brien*. As it was, Justice Fortas's opinion in the armband case omitted any reference to *O'Brien*. While he stressed several times the absence of disruption caused by the wearing of armbands—thus indicating that actual or imminent disruption would be sufficient to sustain a ban—the Court had required less of the federal government in *O'Brien*: deemed sufficient were claims that destruction of draft cards would cause administrative havoc in the selective service system. Coming as it did in the following Term (Warren's and Fortas's last), *Tinker* was a bold First Amendment decision. Not only was there no equivocation regarding the "speech" element involved, but the First Amendment's protection reached into even novel surroundings. Although the breadth of *Tinker* has been modified by later decisions,³⁰ as Johnson explains, the core holding still stands insofar as student-sponsored speech is concerned, unencumbered by any smoky residue from *O'Brien*.

Approximately twenty-eight months separated *Tinker* from *New York Times Co. v. United States*,³¹ but the Bench of June 1971 was not the same that had decided the armband case. Warren Earl Burger had replaced Earl Warren in the center chair, and Harry A. Blackmun, who like Burger had been named from a federal appeals court, occupied the seat vacated by Fortas. And it would shortly be an even more different Court, for the opinions that Justices Black and Harlan filed in what quickly came to be called the Pentagon Papers case were the last they wrote.

In several respects, this case of "the purloined documents,"³² as Chief Justice Burger referred to the top-secret Defense Department study dating from the Johnson years on decision-making with respect to Vietnam, still ranks among the Court's most extraordinary. First, the object at issue was gargantuan. The study that *The New York Times* had acquired and from which it later (along with the *Washington Post*) proceeded to publish installments may well have amounted to the largest single unautho-

rized disclosure of classified material in American history. The 7,000 pages included 2.5 million words and were divided among forty-seven volumes which together weighed about sixty pounds. Second, the attempt by the Nixon administration to enjoin further publication was as unprecedented as the occasion itself: for the first time the federal government, on national security grounds, sought a restraint against a newspaper to prevent publication of information. Third, litigation proceeded with frenetic haste. The first installment appeared in the *Times* on Sunday, June 13; the government moved against the newspaper in U.S. District Court in New York on June 15 and shortly against the *Post* in U.S. District Court in Washington, D.C. Action against the *Post* proved unsuccessful, but the Second Circuit enjoined further publication in the *Times* pending the outcome of the government's case. On June 25, the Supreme Court granted expedited review, with oral arguments scheduled the next day. The Court rendered its decision on June 30, with ten opinions issued: a short per curiam opinion announcing the judgment against the government was followed by six concurring and three dissenting opinions.

These rapid-fire events unfold in **The Day the Presses Stopped** by David Rudenstine.³³ The book is carefully researched and thoroughly documented, and benefits from access to previously classified materials and from interviews with participants. The writing is riveting, easily the equal to a good spy thriller. There are the provocative might-have-beens: (1) efforts by Daniel Ellsberg to make the study available to successive members of Congress (who uniformly declined his entreaties);³⁴ (2) a spirited debate at the highest echelons of the *Times* about the propriety of publication that was at sharp variance with its public stance following publication;³⁵ (3) a last-minute breach of the *Times*'s carefully orchestrated security arrangements for the forthcoming publication;³⁶ and (4) President Richard Nixon's initial reaction (that lasted about thirty-six hours, despite his intense dislike of the press)

to "do nothing to interfere with the *Times*'s publication plans and take no action to identify the source of the leak."³⁷ Prospective readers are hereby forewarned: once begun, this book is hard to put down.

Rudenstine presents real-life drama that directly involves two major institutions essential for American democracy, yet not directly accountable to the people: the press and the federal courts. And the story that emerges depicts its participants—from Ellsberg, Henry Kissinger, Robert Mardian, and Erwin Griswold to Arthur Ochs Sulzberger and editors and reporters at the *Times*—grappling in different ways with a tension that besets any democracy: balancing the obvious need of government to withhold some information against the equally obvious need of the people to be informed about what their government does. Without the first, government itself is endangered; without the second, consent of the governed is a sham.

The Day the Presses Stopped is evidence that writing a book can yield a revelation for its author, not just its readers. Rudenstine explains that research on the case markedly altered his perspective of what happened. In 1971 he thought that the "government was merely trying to suppress information that would be politically embarrassing and might undermine support for its war policies." He accepted as true the belief that government lawyers engaged in scare tactics, offering no specific references to demonstrate that continued publication would "seriously harm national security." He accepted the assertion of the *Times* that the documents involved no more than history and the arguments of its counsel that the suits were essentially without constitutional foundation, "nothing more than an effort at brazen and unwarranted censorship."³⁸

While remaining convinced that the Supreme Court's decision had been the correct one, the author came to doubt some of his other premises by the conclusion of the project. True, he accepts Solicitor General Griswold's assessment in 1991 that "[i]n hindsight, it is clear to

me that no harm was done by publication of the Pentagon Papers.”³⁹ (However, it may be overreaching to assert, as the author does, that publication “did not directly or immediately alter the course of the Vietnam War.”⁴⁰ That claim may well be true, but it would be a difficult hypothesis for an author to demonstrate without vastly more extensive and intensive research.) Nonetheless, Rudenstine was convinced by his labors that the Justice Department attorneys, who were key players throughout, genuinely perceived threats to important security interests. Moreover, other than the injunction there was no practical legal remedy available. They recommended action against the newspapers because that was the only way to “gain time to assess the full implications of this massive leak ...,”⁴¹ although one can fairly ask whether more time would not have strengthened the government’s case. That question is surely important when one recalls why they lost: they failed to convince two Justices of evidence of immediate and irreparable harm. Only a pair of Justices stood between a victory for the newspapers and a victory for the government.

Significantly, Rudenstine concludes that “prior judicial decisions did not compel the outcome in the case.” Given the facts, the law, and the not inconsiderable interests at stake, Rudenstine thinks that the decision could respectably have gone either way. Yet the plausibility of a ruling for the government in 1971 is overshadowed by what the decision has meant for the First Amendment. What was debatable in 1971 no longer is. The nature of the government’s burden is no longer in doubt. The threshold that must be met by any administration seeking a prior restraint on national security grounds is now both clear and exceedingly high. Freedom of the press unmistakably allows for journalists, once they are in possession of information, a nearly boundless leeway in determining what part of it is good or bad for national security, as they choose what is or is not fit to print. After all, “the Pentagon Papers did contain some information that could have inflicted some injury ... if disclosed,

which it was not.”⁴²

Students of the First Amendment recall the government’s attempt in 1979 to bar the *Progressive* magazine from publishing “The H-Bomb Secret: How We Got It, Why We’re Telling It.” While the Justice Department obtained a temporary injunction in 1979 from a U.S. District Court against the magazine, the government later abandoned the case⁴³ when similar information appeared in at least one other periodical.⁴⁴ The episode illustrated not only the legal hurdles but the practical difficulties at play in trying to prevent dissemination of material that people want to publish. Moreover, one must now take account of the Internet which has so transformed information technology, multiplying those difficulties many times over. Short of unplugging the entire national telecommunications system, the physical requirements for a prior restraint that works are mind-boggling.

Well beyond what the Pentagon Papers case has meant for American constitutional law, the author believes that the case produced “unintended and unforeseen consequences” for the Nixon administration. Publication and the government’s defeat at the Court contributed to an angry mood in the White House, leading to deployment of the White House “Plumbers” to break into the office of Ellsberg’s psychiatrist, and ultimately to the events of August 1974.⁴⁵

If **The Day the Presses Stopped** involved a clash of titans, Melvin Urofsky’s **Affirmative Action on Trial**⁴⁶ illustrates how the grievances of ordinary men and women can thrust some of the most complex issues into the courtrooms of the land and push the judiciary into a moral minefield. The book is a case study of *Johnson v. Transportation Agency of Santa Clara County*,⁴⁷ a landmark ruling that came down in late March of the first year of the Rehnquist Court. Like Johnson’s volume on the armband case, Urofsky’s is an addition to the series “Landmark Law Cases and American Society,” published by the University Press of Kansas under the editorship of Peter Charles

Diane Joyce beamed after she learned the news in 1987 that the Supreme Court had turned back an attack on an affirmative action policy that benefitted her. Melvin I. Urofsky's recently published book describes this landmark case under Title VII.



Hoffer and N. E. H. Hull. (With Urofsky's book as with Johnson's, editors have apparently disallowed footnotes or endnotes, although here their absence is less of a liability partly because of the list of relevant cases, including citations, attached to the bibliographical essay.⁴⁸ In Johnson's the case names and citations are embedded within the prose of the bibliographical essay itself.) **Affirmative Action on Trial** builds upon **A Conflict of Rights**,⁴⁹ the author's earlier look at *Johnson*.

Unlike most judicial case studies, Urofsky's is not about a constitutional case. *Johnson* involved a challenge under Title VII of the Civil Rights Act of 1964⁵⁰ to an administrative decision to promote Diane Joyce in place of Paul Johnson into the job of road dispatcher in Santa Clara County, California. Having scored second out of seven on an examination, Johnson claimed that the promotion should have been his, because Joyce was ranked fourth. He charged that the county had placed the thumb of gender on the scales. Joyce believed that she had had to jump hurdles just to qualify. To be dispatcher required experi-

ence on a road crew, a job no woman had held in the county. So after working four years on the road crew, she felt that she deserved the dispatcher's job, another post that no woman had ever held. Besides, under county rules the supervisor could choose anyone from among the top seven test finalists.

Johnson was much like an earlier Title VII case, *United Steelworkers v. Weber*,⁵¹ which upheld the legality of an affirmative action plan, agreed to by a union and a corporation, designed to increase the number of African-Americans in craft jobs. In operation, the plan meant choosing blacks with less seniority at the plant over whites with more. For the majority of five, Justice Brennan explained in *Weber* that Title VII did not speak explicitly to the question in the case for the simple reason that discrimination *against* blacks and other minorities was uppermost in the minds of members of Congress who passed the law fifteen years before. Because the statute was enacted for the purpose of helping minorities, "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative

action,”⁵² even though the plan challenged in *Weber*, and the promotion challenged in *Johnson*, seemed to violate the plain words of Title VII.

Johnson was significant because of what it said. At least with respect to Title VII (the challenge in *Johnson* was not based on the Fourteenth Amendment), the Court blessed affirmative action plans established by public, not just private, employers. Although employment in the private sector far exceeds employment in the public sector, the latter totaled nearly seventeen million jobs in the year that *Johnson* came down.⁵³ Moreover, “the Court for the first time included women as a group eligible for affirmative action.”⁵⁴ Lastly, statistics (the “inexorable zero,”⁵⁵ in Justice O’Connor’s words), without proof of discrimination, were sufficient to establish need. Together, *Weber* and *Johnson* show that, even had

the Supreme Court never acquired the power of judicial review, statutory interpretation would nonetheless have allowed the Justices to be active participants in policy-making.

Johnson was also significant because of the fact that it was decided as it was. The ruling in *Weber* had been five to two, with Justices Lewis F. Powell, Jr., and John Paul Stevens not participating. Since 1979, Justices Sandra Day O’Connor and Antonin Scalia had arrived and Justice Potter Stewart and Chief Justice Burger had departed. Dissenting in *Weber* had been the Chief Justice and Justice William H. Rehnquist. Dissenting in *Johnson* were Chief Justice Rehnquist and Justices White (who had been part of the majority in *Weber*) and Scalia. *Johnson* demonstrated that a slightly larger majority supported the direction in which *Weber* had pushed Title VII.

Aside from its thorough account of the origins, development, and resolution of *Johnson*—the Justices and the process come alive in an engaging narrative—**Affirmative Action on Trial** has two additional strengths. First, one would have to go far to find a clearer, more succinct discussion of affirmative action itself. While the author seems to support the Court’s decision upholding the gender-based affirmative action in question, Urofsky’s treatment of affirmative action is balanced. Dealing with a subject that seems to attract extreme positions like a magnet, he avoids the temptation to depict issues and individuals in stark categories of good versus bad or right versus wrong. There are neither heroes nor villains between the book’s covers. Second, the volume is a handy primer on affirmative action policies and case law both before and after *Johnson*. Combined, these allow the reader to place the case in a social and moral context as well as in a legal one.

Among contemporary legal issues, the First Amendment status of flag burning predates affirmative action by about five years. And like affirmative action, flag burning has roiled the political system, even if the controversy over the latter has been more episodic



Gregory Johnson posed for cameras after the Supreme Court in 1989 upheld a Texas appeals court’s ruling that overturned his conviction for torching a U.S. flag. Robert Justin Goldstein has produced a second volume of his history of flag protection and desecration titled *Burning the Flag*.

than the former. Indeed, on three occasions within the past decade Congress has come close to proposing a constitutional amendment, for ratification by the states, for the purpose of reversing two Supreme Court decisions on the subject. *Texas v. Johnson*⁵⁶ for the first time squarely regarded flag burning as constitutionally protected speech, where Johnson had been convicted in state court for desecrating a venerated object. The second, *United States v. Eichman*,⁵⁷ reaffirmed that view and struck down a flag protection act that Congress had enacted in the wake of *Johnson*. Reflecting the strong feelings on both sides, each case was decided by the slimmest of margins, 5 to 4, and by the same configuration of Justices. Muted somewhat today, the din nonetheless persists, demonstrating how decisions that press the proverbial hot buttons in American life can suddenly and deeply entangle the Supreme Court in the political briar patch. Had critics of the Court achieved a constitutional amendment, they would have succeeded where most have failed. Despite the number of contentious decisions rendered by the Court since 1793, the Justices have been overridden only four times—some say six—by constitutional amendment.⁵⁸

Johnson, *Eichman*, and the turmoil that has swirled around them are the subject of Robert Justin Goldstein's *Burning the Flag*.⁵⁹ It is the author's second volume on flag protection and desecration. The first, *Saving "Old Glory"*,⁶⁰ spanned nearly a century, beginning with the initial wave of efforts between 1895 and 1910 to protect the flag from improper treatment and concluding with a brief discussion of the Court's 1989 decision. In between were a wave of activity between 1917 and 1932, when every state enacted bans on flag desecration, and the start of the contemporary era of flag controversy dating from protests over the Vietnam war. It was in 1969, for instance, that the Court first overturned a state conviction for flag desecration. Although this 5-4 decision in *Street v. New York*⁶¹ was grounded on the possibility that Street had been punished for what he said,

rather than for what he did, the per curiam opinion buried in a footnote the very point that later proved dispositive in *Johnson*: because the state's interest in protecting the flag was directly related to expression, such laws would not be judged by the lenient standard the Court had applied in its 1968 draft-card case.⁶² Prior to *Johnson*, the only other cases that generated opinions by the Supreme Court—*Spence v. Washington* and *Smith v. Goguen*⁶³—likewise avoided the larger issue and were both decided 6 to 3 for the claimants on narrow, fact-specific, grounds.⁶⁴

Burning the Flag vividly depicts how merely the immediate post-*Johnson* uproar consumed Congress. By June 1990, Congress had devoted about 100 hours of floor debate to the decision (filling about 400 pages in the *Congressional Record*), in addition to twelve days of committee hearings (yielding about 1,500 pages of printed testimony and documents). When one adds to these numbers the hours of members and staff in meetings, on research, and on constituent and interest group relations, the energy expended is staggering. Combined with "[the] almost five years of litigation in the Texas and federal courts, generating thousands of pages of trial transcripts, court rulings, and legal briefs . . ." the case may well be "one of the most expensive legal disputes of all time."⁶⁵

The chronicle of the controversy that followed *Johnson* is the book's major strength. One sees the role of newspapers, television, and major interest groups (such as the Citizens Flag Alliance⁶⁶ and the American Civil Liberties Union⁶⁷) in shaping public opinion and hence the focus of Congress. The author is effusive in the detail provided; some readers might even find the writing redundant, particularly in the widespread use of successive and similar quotations, and in need of some editorial frugality. Yet, as a resource on the Court and the flag protection imbroglio, the book stands alone.

Commendably, Goldstein alerts the reader at the outset to his own perspective and biases,⁶⁸ although even a casual reader would probably

detect them before finishing the Preface. At one level, the author regards the uproar as “surely one of the greatest examples of ‘much ado about nothing’ in American, if not world, history,” in that the nation “was not overrun by mobs of flag burners in the 1980s.”⁶⁹ At another level, in Goldstein’s view, the flag protection controversy has been a serious test for the First Amendment.

[F]orbidden flag burning as a means of peaceful political protest will surely diminish the flag’s symbolic ability to represent political freedom. . . . [I]f the fundamental principles of democracy can be bent to exclude one object or one subject of discussion, there could be no principled legal barrier to extending such restrictions.⁷⁰

While intense opinions about an issue may lead an author to select a subject and may prove to be precisely the energizing element needed to complete the task, they impose an added responsibility. One must be wary of too easily (and uncritically) accepting the arguments supporting one’s own views, while perhaps discounting too quickly the merit that might reside on the other side. One suspects that a measure of the integrity of the arguments on both sides is the close division in the flag burning cases among Justices ordinarily solicitous of free expression. There is strength in balance, even if it must come at the price of dampened passion. Happily, the wealth of information in **Burning the Flag** more than compensates for any excesses of bias.

Goldstein’s book, like the other volumes surveyed here, demonstrates lessons that may be gleaned from a well written case study. The Supreme Court can ignite as well as extinguish controversies, enthrone as well as dethrone public policies, and hearten as well as confound elected leaders, and the public.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

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UROFSKY, MELVIN I., **Affirmative Action on Trial: Sex Discrimination in *Johnson v. Santa Clara***. (Lawrence: University Press of Kansas, 1997). Pp. xiii, 201.

Endnotes

¹ Alpheus Thomas Mason and William M. Beaney, **American Constitutional Law: Introductory Essays and Selected Cases** (1954). The possible exception (*id.*, p. 28) among the suggested readings was Justice Harold Burton’s essay, “The Cornerstone of Constitutional Law: The Extraordinary Case of *Marbury v. Madison*,” 36 *American Bar Association Journal* 805 (1950).

² C. Herman Pritchett and Alan F. Westin, **The Third Branch of Government: 8 Cases in Constitutional Politics** (1963), pp. 10-11.

³ Martin Shapiro, “Public Law and Judicial Politics,” in Ada W. Finifter, ed., **Political Science: The State of the Discipline**, p. 369 (1993); Shapiro’s reference was specifically to R. Shep Melnick’s **Regulation and the Courts: The Case of the Clean Air Act** (1983), which Shapiro believed had easily met that standard.

⁴ Walter F. Murphy and Joseph Tanenhaus, **The Study of Public Law** (1972), p. 20.

⁵ Stewart Jay, **Most Humble Servants: The Advisory Role of Early Judges** (1997) (hereinafter cited as Jay).

⁶ The letter is reprinted in full in *id.*, 179-180 (emphasis in the original).

⁷ Laurence Tribe, **American Constitutional Law**, 2d ed. (1988), p. 73.

⁸ Jay, p. 2.

⁹ *Id.*, pp. 10-76.

¹⁰ *Id.*, pp. 3, 150.

¹¹ *Id.*, p. 154.

¹² *Id.*, pp. 157, 158.

¹³ John Jay served as Minister to Spain (1780-2), peace commissioner to England (1783), and Secretary of Foreign Affairs for the Congress under the Articles of Confederation (1784-89). His contributions to **The Federalist** (numbers 2, 3, 4, 5, and 64) mainly concerned foreign relations. A year before resigning the chief justiceship, Jay negotiated a treaty with England that bears his name, to ease residual frictions.

¹⁴ *Id.*, p. 159.

¹⁵ *Id.*, p. 166.

¹⁶ 2 U.S. (2 Dallas) 419 (1793).

¹⁷ Donald Grier Stephenson, Jr., **Campaigns and the Court: The U.S. Supreme Court in Presidential Elections** (1999), pp. 4-5, 240.

¹⁸ John W. Johnson, **The Struggle for Student Rights: Tinker v. Des Moines and the 1960s** (1997) (hereinafter cited as Johnson).

¹⁹ John W. Johnson, **The Struggle for Student Rights: Tinker v. Des Moines and the 1960s** (1997) (hereinafter cited as Johnson).

²⁰ *Id.*, p. ix.

²¹ 393 U.S. 503 (1969).

²² David Hackett Fischer, **Paul Revere's Ride** (1994), pp. 163-4.

²³ Johnson, p. 129.

²⁴ Bruce Allan Murphy, **Fortas: The Rise and Ruin of a Supreme Court Justice** (1988).

²⁵ Laura Kalman, **Abe Fortas: A Biography** (1990).

²⁶ Johnson, p. 153.

²⁷ The author suggests that Fortas's vote to deny review in 1968 stemmed from a desire not to embarrass President Johnson, his "friend and patron," who was the target of so many antiwar protests. By the time the case was announced, however, Johnson was no longer president, thus allowing Fortas's civil libertarian predilections to dictate his vote. *Id.*, pp. 129-130. While the explanation is not implausible, the author offers no documentation for the explanation.

²⁸ *Id.*, pp. 128-129; *United States v. O'Brien*, 391 U.S. 367 (1968).

²⁹ Bernard Schwartz, **Super Chief: Earl Warren and His Supreme Court** (1983), p. 684.

³⁰ *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

³¹ 403 U.S. 713 (1971).

³² *Id.*, 749 (Burger, dissenting).

³³ David Rudenstine, **The Day the Presses Stopped: A History of the Pentagon Papers Case** (1996) (hereinafter cited as Rudenstine).

³⁴ *Id.*, pp. 42-7.

³⁵ *Id.*, pp. 48-65.

³⁶ *Id.*, p. 65.

³⁷ *Id.*, p. 67.

³⁸ *Id.*, p. 7.

³⁹ *Id.*, p. 327.

⁴⁰ *Id.*, p. 5.

⁴¹ *Id.*, p. 9.

⁴² *Id.*

⁴³ *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

⁴⁴ Rudenstine, p. 353.

⁴⁵ *Id.*, pp. 342-48.

⁴⁶ Melvin I. Urofsky, **Affirmative Action on Trial: Sex Discrimination in Johnson v. Santa Clara** (1997) (hereinafter cited as Urofsky).

⁴⁷ 480 U.S. 616 (1987).

⁴⁸ Urofsky, p. 189.

⁴⁹ Melvin I. Urofsky, **A Conflict of Rights: The Supreme Court and Affirmative Action** (1991).

⁵⁰ Title VII bans discrimination in hiring and in employment decisions and policies based upon "race, color, religion, sex, or national origin."

⁵¹ 443 U.S. 193 (1979).

⁵² 403 U.S. at 206.

⁵³ Harold W. Stanley and Richard G. Niemi, **Vital Statistics on American Politics**, 2nd ed. (1990), p. 291.

⁵⁴ Urofsky, p. 169.

⁵⁵ 480 U.S. at 657.

⁵⁶ 491 U.S. 397 (1989).

⁵⁷ 496 U.S. 310 (1990).

⁵⁸ The Eleventh Amendment, restricting federal court jurisdiction over the states, overturned *Chisholm v. Georgia* [2 U.S. (2 Dall.) 419 (1793)]. The Fourteenth Amendment, in part granting both national and state citizenship to "all persons" born in the United States, countered the Dred Scott decision [*Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)]. The Sixteenth Amendment, allowing for a national tax on incomes, reversed *Pollock v. Farmers' Loan and Trust Co.* [158 U.S. 601 (1895) (rehearing)]. The Twenty-sixth Amendment, establishing a nationwide voting age of eighteen in state, not just national, elections, set aside *Oregon v. Mitchell* [400 U.S. 112 (1970)]. Arguably, the Court has been reversed two other times by constitutional amendment. In addition to the Eleventh, Fourteenth, Sixteenth, and Twenty-sixth amendments, the Nineteenth Amendment of 1920 reduced to nothing the Court's holding forty-six years before that the Fourteenth Amendment was no bar to state laws that excluded women from the franchise. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). The Twenty-fourth Amendment of 1964 partly displaced the Court's rejection twenty-seven years earlier of a Fourteenth Amendment challenge to poll taxes. *Breedlove v. Suttles*, 302 U.S. 277 (1937). The Twenty-fourth Amendment, however, applies only to elec-

tions for national office. In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), the Court used the Fourteenth Amendment to invalidate poll taxes that were a prerequisite to voting in state elections.

⁵⁹ Robert Justin Goldstein, **Burning the Flag: The Great 1898-1990 American Flag Desecration Controversy** (1996) (hereinafter cited as Goldstein).

⁶⁰ Robert Justin Goldstein, **Saving "Old Glory": The History of the American Flag Desecration Controversy** (1995).

⁶¹ 394 U.S. 576 (1969).

⁶² *Id.*, 414 n8.

⁶³ 418 U.S. 405 (1974); 415 U.S. 566 (1974).

⁶⁴ The Supreme Court's initial encounter with flag protection occurred in *Halter v. Nebraska*, which upheld a state's flag law as a reasonable business regulation after two men had been convicted for marketing "Stars and Stripes" brand beer upon which had been affixed a label bearing the likeness of the American flag. 205 U.S. 34 (1907).

⁶⁵ Goldstein, p. viii.

⁶⁶ *Id.*, p. 375.

⁶⁷ *Id.*, pp. 204-6.

⁶⁸ *Id.*, p. viii.

⁶⁹ *Id.*

⁷⁰ *Id.*, pp. ix, xi.

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